IN THE WESTMINSTER MAGISTRATES' COURT

B E T W E E N:

GOVERNMENT OF THE UNITED STATES OF AMERICA

Requesting State

v

JULIAN ASSANGE

Defendant

DEFENCE SKELETON ARGUMENT

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Submission 1: Article 7 ECHR

1. Article 7 is not confined to prohibiting the retrospective application of the criminal law, but also establishes the principle of legal certainty: that *'only the law can define a crime'* such that '*an offence must be clearly defined in the law*' and that '*the criminal law must not be extensively construed to an accused's detriment, for instance by analogy*'*:* see ***Kokkinakis v Greece*** (1994) EHRR 387 at §52.

2. This way, article 7 '*imposes qualitative requirements, including those of accessibility and foreseeability*' (***Liivik v Estonia*** (2009) 12157/05 at §93; ***Korbely v Hungary*** (2008) 9174/02 [GC]) at §70).

3. While Article 7 does not prohibit the gradual clarification of rules of criminal liability through judicial interpretation from case to case, '*the resultant development*' must be '*consistent with the essence of the case and could reasonably be foreseen*' (***Vasiliauskas v Lithuania*** (2015) 35343/05 at §55). An individual must be able to '*know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable*' (***S.W. v United Kingdom*** (1995) No. 20166/92 at §35).

4. In ***S.W.*** the ECtHR also explained at §35 that:

> '*...The guarantee enshrined in Article 7 (art. 7), which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 (art. 15) in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment...*'[1]

5. The House of Lords in ***R (Ullah) v Special Adjudicator*** [2004] AC 323 stressed that Article 7 is '*among the first tier of core obligations under the ECtHR. It is absolute and non derogable*' (per Lord Steyn at §45).

<u>Application of Article 7 in the extradition context</u>

6. In ***Ullah,*** Lord Steyn suggested, *obiter*, that where a person is seeking to prevent their enforced removal from the UK on Article 7 grounds, the test is whether their removal would create a real risk of a '*flagrant denial*' of Article 7. In ***Arranz v Spanish Judicial Authority*** [2013]

[1]. See to similar effect ***Liivik*** at §93; ***Vasiliauskas*** at §153; ***Del Río Prada v Spain*** (2013) 42750/09 [GC] at §77.

EWHC 1662 (Admin) Sir John Thomas P stated that there was '*some force in the argument*' that the approach under Article 7 should be the same as the approach under Article 3 (i.e. that an extradition will be unlawful if there are substantial grounds for believing there is a real risk that it would give rise to a violation of Article 7 in the receiving state). He added, however, that '*it must be for the Supreme Court to determine whether it should reconsider the guidance given by Lord Steyn in a case where Article 7 is actually in issue*' (§38).

7. ***Ullah*** is not binding authority for the proposition that the '*flagrant violation'* threshold applies to Article 7 in the extradition context. The observations of Lord Steyn (who was the only member of the Appellate Committee to address Article 7) were *obiter* and unreasoned. Since, like Article 3, Article 7 is within that small class of protections which are both absolute and non-derogable, it follows that the test that applies to possible violations of Article 3 should also apply to threatened violations of Article 7.

8. In any event, even if the '*flagrant violation'* threshold is the applicable test, Mr Assange's extradition to the USA would clearly pass that threshold for the reasons set out below.

<u>Extradition of Mr Assange would involve a real risk of a (flagrant) violation of Article 7</u>

9. There are substantial grounds for believing Mr Assange's extradition to the USA would carry a real risk of an Article 7 violation for the following reasons:

- Key components of the offence under 18 USC §793 (espionage) for which his extradition is sought are so broad, vague and ambiguous that they do not, for that reason alone, meet the minimum standard of accessibility and foreseeability required by Article 7.

- The CFAA is similarly broad, vague and vulnerable to political manipulation.

- Having regard to its statutory wording and the manner in which it has been applied, Mr Assange could not reasonably have foreseen that the acts which he is alleged to have committed would have involved the commission of an offence.

The Espionage Act

History of 18 USC §793

10. The current law is derived from the Espionage Act 1917, the sweeping breadth of which was drawn to catch not just espionage in the traditional sense, but also any individual who by their opposition to US involvement in World War I would '*inject the poison of disloyalty'* into matters of state [Shenkman, tab 4, §§1-13]. Expressly introduced by the then President to be a *'firm hand of stern repression'*, its '*indefinite language'* in fact allowed the Act to be used as a '*vehicle for oppression'* [Shenkman, tab 4, §1].

11. As the ECtHR has acknowledged, *'many laws are inevitably couched in terms which, to a greater or lesser extent are vague'* but article 7 prevents them being based on *'such broad notions and such vague criteria'* that it impinges upon it's *'clarity and the foreseeability of its effects'* (***Liivik*** at §§94 and 101).

12. Even in that earlier iteration, the US law was described by scholars[2] as '*in many respects incomprehensible'* with '*incredible confusion'* surrounding the issue of criminal responsibility for collection, retention and public disclosure of defence secrets [Shenkman, tab 4, §§13, 41].

[2]. Per Columbia University Law professors Harold Edgar and Benno C Schmidt Jr in 1973 [Shenkman, tab 4, §13].

The breadth of the Act was such that even its proponents had to be content to rely upon '*prosecutorial discretion'* to ensure its provisions were not enforced politically [Shenkman, tab 4, §13].

13. The 1950s amendments which established the law in its current form, while expansive in scope, were nonetheless an '*exercise in hopeless imprecision'* with the introduction of §793(d) and (e) representing '*legislative drafting at its scattergun worst where greatest caution should have been exercised'* [Shenkman, tab 4, §18]. The Espionage Act is '*a singularly opaque statute*' (***New York Times Co. v United States,*** 403 U.S. 713, 754 (1971), per Justice Harlan (dissenting)). It is '*incomprehensible if read according to the conventions of legal analysis of text, while paying fair attention to legislative history*'.[3] The legislation is '*vaguely defined*' and gives rise to '*confusion [as] to whom exactly the Espionage Act applies*'.[4]

'National defense'

14. For example, the concept of '*national defense*' in 18 USC §793, a key element of counts 1 and 3-18, is excessively vague. In ***Gorin v United States*** (1941) 312 U.S. 19 (1941) the Supreme Court held that the term is a '*generic concept of broad connotations, relating to the military and naval establishments and the related activities of national preparedness*'.

15. Further, the US statute does not define what constitutes an '*injury*' to the United States or an '*advantage*' to a foreign nation, per §793(b). These terms on their face, encompass harm of any nature, duration or magnitude to the United States and benefit of any nature, duration or magnitude to any other state. They are of particular concern when

[3]. Professor Harold Edgar and Professor Benno. C. Scmidt Jr., *Curtiss-Wright Comes Home: Executive Power and National Security*, 21 Harv. C.R.-C.L.L. Rev 349 (1986).

[4]. Katherine Feuer, *Protecting Government Secrets: A Comparison of the Espionage Act and the Official Secrets Act,* 38 B.C. Int'l & Comp. L. Rev. 91 (2015).

prosecution is directed towards journalists who by the nature of their work publish information '*every day which is 'useful' to all sorts of people'* and which '*may in some instances be harmful, in the sense that government officials are embarrassed or people are stirred to anger'* [Tigar, tab 23, p19].

16. The modern classification system in the United States, established by President Truman in 1951 by way of Executive Order 10290 (now 13526), allows *'the executive, rather than Congress, to decide the scope of the phrase 'national defense information' by determining what information [is] classified'* [Shenkman, tab 4, §20] and to do so '*without regard to whether and to what extent disclosure would aid public deliberation'* [Jaffer, tab 22, §14(a)]. By implication, it also allows the executive to define what information may cause '*injury'* or '*harm'*.

17. If information falls into a set of relatively broad criteria it can be classified '*even if the benefits of disclosure would outweigh the harms',* such that '*decisive weight'* is given to the *'security interest and no weight at all to the interest in informed public deliberation'* [Jaffer, tab 22, §14(a)], and is '*used to conceal mendacity, fraud and deprival of human rights'* [Tigar, tab 23, p10-14].

18. Many studies in the United States have found that the government very often overclassifies information such that '*information whose disclosure could not reasonably expected to cause damage to national security'* is classified [Jaffer, tab 22, §14(b)]. For example all 7,000 pages of the Pentagon Papers published by the New York Times in 1971 were said to be classified. At the time of publication the solicitor general Erwin Griswold claimed publication would cause '*immediate and irreparable harm to the security of the United States'* but admitted 18 years later that he had '*never seen any trace of a threat to national security from the publication'* and the Defense Department official responsible for classification later admitted that the military considered it simply *'too much work'* to go through all the documents so instead classified the

whole lot, including already published newspaper articles [Feldstein 1, tab 18, §6].

19. The problem of over-classification continues and is '*widely acknowledged as rampant to the point of absurdity*' [Feldstein, tab 18, §6] [Chomsky, tab 39, §12] [Tigar, tab 23, p10]. For example the director of the Information Security Oversight Committee testified in 2004 that '*half of all classified information is overclassified'* while the Chairman of the 9/11 Commission said a decade later that three quarters of all the material he reviewed in connection with the Commission '*should never have been classified in the first place'* [Jaffer, tab 22, §14(b)].

20. In practice courts '*almost never question the government's proffered reasons'* for classification in a given case '*even when they believe that the records describe or authorize government conduct that is unlawful'* [Jaffer, tab 22, §14(c)].

21. Thus '*the mere fact of classification is not a reliable indicator that disclosure could reasonably [be] expected to cause'* injury to the interests of the United States [Jaffer, tab 22, §14(b)] or indeed advantage to any foreign nation, per §793(b).

22. Moreover, the scheme of the Espionage Act, in ceding to the executive via Executive Order the ability to define what constitutes material related to '*national defense'*, allows the law to be defined by the '*thousands of government employees [who] have authority to classify materials',* which materials can themselves be read by the '*hundreds of thousands who have routine access to them'* [Tigar, tab 23, p12].

<u>'Relating to' and 'respecting'</u>

23. The excessive breadth and vagueness of the concept of the '*national defense*' is compounded by the breadth and vagueness of the

concepts of information '*respecting*' (§793(a)) and '*relating to*' (§§793(d)-(g)) national defense. In ***United States v Squillacote*** 221 F.3d 542, 576 the US Court of Appeals observed that the provisions of 18 USC §793 '*unfortunately provide no guidance on the question of what kind of information may be considered related to or connected with the national defense*...*The task of defining 'national defense' information thus has been left to the courts'*.

24. The fact that the Espionage Act has survived constitutional challenge for vagueness before the US courts, or that Mr Assange could lodge (and have rejected) a vagueness challenge in the US [Kromberg 1, §§69-71] is no answer to Article 7 – which requires analysis against European standards.

<u>The CFAA</u>

25. The provisions of the CFAA dealing with national defense information are taken directly from the Espionage Act and, save for the additional element of '*unauthorized access to a computer system*', s.1030(a)(1) contains identical language as §793 of the Espionage Act [Shenkman, tab 4, §§38-40]. Necessarily therefore,[5] it '*suffers from similar breadth that enables the Espionage Act's enormous malleability'* [Shenkman, tab 4, §35] including with regards to the application and interpretation of '*national defense', 'injury to the United States'* and *'advantage of any foreign nation'.*

26. It has been described by various pre-eminent legal scholars as '*the most outrageous criminal law you've never heard of*' and the '*worst law in technology'* as well as being so '*extraordinarily broad'* as to be unconstitutionally vague and subject to *'extreme prosecutorial discretion'* [Shenkman, tab 4, §35].

[5]. And even if the suggested application of '*unauthorised access'* to someone who has authorisation, is not, of itself, inherently vague [Kromberg 1, §§169-171].

27. Its most notorious use prior to this case, for the prosecution of co-founder of Reddit Adam Schwartz (who later committed suicide as a result), was accepted by the Justice Department to have arisen in part due to Mr Schwartz's political beliefs which, like those of Mr Assange, *'included advocacy for open information'* [Shenkman, tab 4, §36]. Its use against Mr Assange in this context is no less profoundly troubling.

<u>Prosecution of Leakers was selective and factually unpredictable</u>

28. Testifying in 1979 before the US House of Representatives about the Espionage Act 1917, the CIA's general counsel described the Act as '*so vague and opaque as to be virtually worthless'* to the extent that he could not say with any certainty whether it criminalised those who leak to the press [Shenkman, tab 4, §31].

29. A short time later, the law was controversially applied against Samuel Morison, a leaker of classified naval photos to a magazine ('the Morison case'). The Court of Appeals warned of the *'staggering breadth of the Act'* but was content to rely upon the '*protection'* afforded by the *'political firestorm'* that would ensue if the Act was enforced by a government using it to mask its *'own ineptitude'* – in other words relying political rather than legal safeguards [Shenkman, tab 4, §21]. Press interveners drew the Court's attention to the fact that congress had '*repeatedly rejected proposals to criminalize the mere public disclosure of classified or defense-related information'* [Shenkman, tab 4, §22] yet this was precisely what the broad terms of the Act enabled in the Morison case.

30. The broad and imprecise Act allows '*wide and obvious potential for politically motivated targeting'* which '*threatens a substantial chilling effect'* [Shenkman, tab 4, §23]. It's scope '*allows for extraordinary selectivity in the initiation of prosecutions'* in the context of '*severe double standards'* [Shenkman, tab 4, §§31, 41]. Because the existing

statutory scheme provides a *'near total discretion to the executive branch to prosecute leaks of classified information'*, such leaks are frequently and freely undertaken *by* the executive for its own ends, as acknowledged by former CIA director Stansfield Turner:

> *'...The White House staff tends to leak when doing so might help the President politically. The Pentagon leaks, primarily to sell its programs to Congress and the public. The State Department leaks when its being forced into a policy move that its people dislike. The CIA leaks when some of its people want to influence policy but know that's a role they're not allowed to play openly. The Congress is most likely to leak when the issue has political manifestations domestically...'* [Shenkman, tab 4, §23] [Feldstein, tab 18, §§5, 7].

31. As Professor David Pozen puts it '*key institutional players share overlapping interests in vilifying leakers while maintaining a permissive culture of classified information disclosures'* [Jaffer, tab 22, §10]. And while leakers have been prosecuted selectively, [6] generally senior government officials, *'from whom most leaks probably originate'* have not [Jaffer, tab 22, §§11-12, 17-20].

32. The political discretion inherent in the use of the Act in the prosecution of leakers creates profound uncertainty as to how and in what circumstances it may be applied. It allows '*extraordinary selectivity in the initiation of prosecutions'* and leads to *'severe double standards'* [Schenkman, tab 4, §31]. In reality, the Act is so imprecise and broad, and so selectively applied (by unwritten political rather than legal criteria), as to allow the executive and prosecuting authorities to define what conduct is '*criminal'* under the Act on a case-by-case basis, such that a crime under this act is a matter not of law but of political will and

[6]. The Obama administration increased prosecutions of media sources or leakers, with more prosecutions being initiated '*than under all previous administrations combined'* [Shenkman, tab 4, §23].

design, offending the principle that *'only the law can define a crime'* (***Kokkinakis*** at §52).

<u>Prosecution of Journalists was legally unprecedented</u>

33. The Act, theoretically, is so imprecise as to encompass even the activities of the free press. In the Morison case, press representatives warned that §793(d)(e) were so broadly drafted that '*[i]nvestigative reporting on foreign and defence issues would, in many cases, be a crime'* such that '*[c]orruption, scandal and incompetence in the defense establishment would be protected from scrutiny'* [Shenkman, tab 4, §22]. An authoritative review of the Espionage Act considered its terms to '*pose the greatest threat to the acquisition and publication of defense information by reporters and newspapers'* [Shenkman, tab 4, §18] and that it was '*a loaded gun pointed at newspapers and reporters who publish foreign policy and defense secrets'* [Jaffer, tab 22, §§8-9] [Tigar, tab 23, pp16-17] [Shenkman, tab 4, §29].

34. That was never, however, the statute's purpose. According to James Goodale, counsel to the New York Times in the Pentagon Papers case, '*Congress was quite careful not to use the word 'publish' in the Espionage Act'* instead choosing '*communication not publication'* whereas *'if lawmakers wanted to control publication they had to say so specifically'* [Feldstein 1, tab 18, §8] [See also Tigar, tab 23, p17] [Shenkman, tab 4, §18]. Steps to prosecute the Chicago Tribune in 1942 for publishing a military codebreaking file were thus abandoned due to press freedom concerns [Shenkman, tab 4, §§16, 34]. Likewise when the amendments of 1950 were tabled, Attorney General Tom Clark '*suggested that prosecutorial discretion would safeguard against prosecution of the press'* and the implementing Act expressly preserved the *'freedom of the press'* [Shenkman, tab 4, §§19, 42] [Tigar, tab 23, p17]. The court in the Morison case was at pains to highlight that Morison's conviction related only to his role as a source (leaker) and that '*press organizations…are not being, and probably*

could not be, prosecuted under the espionage statute' [Shenkman, tab 4, §21].

35. One category of persons who have never therefore been the subject of successful prosecution in the US is journalists who publish state secrets [Shenkman, tab 4, §§32, 41-42] [Feldstein, tab 18, §8] [Pollack, tab 19, §22] [Jaffer, tab 22, §§3, 13] [Tigar, tab 23, p16-18] [Timm, tab 65, §§13, 32-35, 41]. '*The Espionage Act had never been used in over a century to prosecute the publication of information by a person other than the leaker...Mr Kromberg does not dispute that the Espionage Act has never been used in this manner before; nor does he explain this departure'* [Lewis 6, tab 70, §§5, 11, 13]. This is a *'230-year-old precedent'* [Feldstein, tab 18, §11] and '*In the US, newspapers have published excerpts of secret or classified documents ever since the nation's founding'* without prosecution, the examples of which are legion [Felstein, tab 18, §5] [Jaffer, tab 22, §16] [L, section D27-D31, D34].

36. In practice, there has always been a *'distinction between leaker and leakee'* which has been '*consistently upheld'* due to government fears of '*running afoul of the free press clause of the First Amendment'* [Feldstein 1, tab 18, §8]. Prior isolated attempts to prosecute reporters for publishing classified information, usually those at odds with the respective administration, have consistently failed on grounds relating either to concerns over press freedoms or due to political expediency [see detailed summary in Shenkman, tab 4, §§33-34 and Feldstein 1, tab 18, §8]. In these '*politically charged cases'* the desire of the government to prosecute journalists always '*foundered on First Amendment grounds and the longstanding precedent that publishing secret records is not a crime'* [Feldstein 1, tab 18, §9].

37. Leaks of the most important national security information to and by the press in the US have been well documented [see Feldstein 1, tab 18, §5]. A detailed study by Columbia University in 2013 found that

'*thousands upon thousands of national security-related leaks to the media'* have occurred; leaking to journalists is a practice that has become '*routinized'* in Washington [Feldstein 1, tab 18, §5]. Despite, or perhaps because of this, no prosecution of a journalist for publishing state secrets has ever proceeded.

38. In 1971, the US Supreme Court held in the Pentagon Papers case (***NY Times Co v United States*** (1971) 403 US 713) that the press (the NY Times and Washington post) could not be prevented from publishing classified information (there a top secret Vietnam War study contradicting President Nixon's public justification for the war, leaked to the press by military analyst Daniel Ellsberg without government authorisation) [Jaffer, tab 22, §23] [Tigar, tab 23, p12-13] [Ellsberg, tab 55, §10].

39. The US Supreme Court expressly re-affirmed in 2001 that publishing state secrets is lawful (per ***Bartnicki v Vopper*** (2001) 532 US 514, 528). '*The right of the press [is to] publish information of great concern obtained from documents [even] stolen by a third party*'. Illegality only arises when the publisher is also involved in the underlying data theft [Jaffer, tab 22, §24].

40. Even the Obama administration, which aggressively pursued leakers in an unprecedented fashion,[7] abandoned attempts to prosecute FOX News reporter James Rosen as a co-conspirator in the case against leaker Stephen Kim [Shenkman, tab 4, §§25-27]. President Obama, discussing the case in the wake of a public outcry, said he was '*troubled by the possibility that leak investigations may chill the investigative journalism that holds government accountable'* and affirmed that '*[j]ournalists should not be at legal risk for doing their jobs'* [Shenkman, tab 4, §26].

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[7]. Samuel Morison was the only person ever convicted under the Espionage Act for leaking to the press in the 20th Century [Jaffer, tab 22, §18].

41. The question was also confronted by the Obama administration during the criminal investigation into Chelsea Manning in 2010 as part of which the question of prosecuting Mr Assange was directly considered [Feldstein 1, tab 18, §9]. Following a three year probe and '*months of internal debate'* the Justice Department decided to '*follow <u>established precedent</u> and not bring charges against Assange or any of the newspapers that published the documents'* [Feldstein 1, tab 18, §9]. The prospective prosecution of Mr Assange gave rise to the so-called '*New York Times problem',* which (as described by former Justice department spokesman Mathew Miller) is that if the Justice Department was not *'going to prosecute journalists for publishing classified information, which the department is not, then there is no way to prosecute Assange'* [Feldstein 1, tab 18, §9] [Shenkman, tab 4, §27] [Timm, tab 65, §36] [Lewis 6, tab 70, §§2-8, 14] [K4-5].

42. Thus the prosecution of Mr Assange, a publisher, '*crosses a new legal frontier'* [Jaffer, tab 22, §21]. It '*sweeps aside Congressional intent, statutory language and repeated government assurances'* [Tigar, tab 23, p18] and '*breaks all legal precedents'* [Feldstein 1, tab 18, §9]. The '*indictment of a publisher for the publication of secrets under the Espionage Act has no precedent in U.S. history'* and in particular, there has been '*no known prior attempt to bring an Espionage Act prosecution against a non-U.S. publisher'* [Shenkman, tab 4, §32].

43. The US reply offers no legal precedent for this indictment [Kromberg 1, §9]. Self-evidently, 40-year old internal DoJ memoranda concerning different legislation, and which are not aimed at the media anyway, is no answer to Article 7 ECHR [Lewis 6, tab 70, §§5, 11]. Neither does the assertion that Mr Assange can make a First Amendment challenge

in the US [Kromberg 1, §§69-70][8] grapple with the Article 7 implications for the absence of any precedent for prosecuting journalists.

44. The attorney for the Reporter's Committee for Freedom of the Press considers the prosecution of Assange to represent a '*profoundly troubling legal theory, one rarely contemplated and never successfully deployed…to punish the pure act of publication of newsworthy government secrets under the nation's spying laws'* [Feldstein 1, tab 18, §9(d)].

Submission 2: Article 10 ECHR (and dual criminality)

45. Freedom of expression is:

> *'…one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to Article 10 (2), it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'. This means, amongst other things, that every 'formality', 'condition' , 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued...'* (***Handyside v United Kingdom*** (1979-80) 1 EHRR 737, §49).

46. Article 10 is a qualified right, but due to its central importance to the proper functioning of democracy there is little scope for restrictions on freedom of expression in connection with political speech or matters of public interest:

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8. Which is untrue in any event: see [Kromberg 1, §71]: '*foreign nationals are not entitled to protections under the First Amendment'*.

‘...*In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. Moreover, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries...’* (***Surek v Turkey*** (1999) 23927/94, §61).

47. With regards to the freedom of the press in particular:

‘...The Court therefore considers that, while the primary function of the press in a democracy is to act as a ‘public watchdog’, it has a valuable secondary role in maintaining and making available to the public archives containing news which has previously been reported...’ (***Times Newspapers v United Kingdom*** (2009) 3002/03, §45).

48. The importance of press freedom is such that Article 10 even imposes positive obligations on states including, for example, the protection of journalists against violence:

‘...Genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals. In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is called for throughout the Convention...’ (***Gündem v Turkey*** (2001) 31 EHRR 49, §43-45).

<u>This Case</u>

49. This legally unprecedented prosecution seeks to criminalise the application of ordinary journalistic methods to obtain and publish true (and classified) information of the most obvious and important public interest.

50. Whatever the potential scope of the UK's OSA on its face, it has likewise <u>never</u> been deployed to prosecute much less convict the act of <u>publishing</u> (as opposed to leaking) classified information. The core reason for that is the same as pertains (or did until this unforeseeable indictment) in the USA under First Amendment principles; it is fundamentally inconsistent with (and a flagrant denial of) press freedoms. As in the US, instances of publications of classified information in the UK are legion [L, section D1-D31] but never prosecuted. In this jurisdiction, this prosecution would be (and extradition here facilitates) a flagrant violation of Article 10 ECHR[9] (s.87 of the 2003 Act).

51. The issue also goes to dual criminality: contrary to prosecution skeleton at §§40-43 (and in particular §42), Article 10 ECHR does <u>not</u> operate in this jurisdiction as a defence to an otherwise <u>unlawful</u> act. Instead it renders the act <u>lawful</u> in the first place. Because the OSA would otherwise operate in the space protected by Article 10, ss.2-3 HRA 1998 operate so as to <u>restrict the OSA's operation and scope</u>. So, for example, despite the wide terms of s.12 Terrorism Act 2000, it is <u>lawful</u> (because of the operation of Article 10 ECHR and the HRA) per ***R v Choudary*** [2017] 3 All ER 459 for a person to hold views morally or intellectually supportive of a proscribed terrorist organisation (judgment, §§5, 35); to express intellectual or moral support or approval for (judgment, §§5, 35) or a personal belief in (judgment, §§6,

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[9]. Which is no doubt why the retaliatory arrests described by [Cobain, tab 50, §§33-34] were the subject of no prosecution.

49), a proscribed organisation; and even to invite another to share such a personal opinion or belief about (and supportive of) a proscribed organisation (judgment §§6, 49).

<u>The conduct which the US seeks to criminalise *is* investigative journalism</u>

52. The indictment seeks to criminalise the '*soliciting, receiving and publishing of national defense information',* which '*from a journalistic standpoint'* essentially '*boils down to newsgathering'* [Feldstein, tab 18, §9] [Cockburn, tab 51, §§14-15]. It has '*triggered an outcry from human rights and civil liberties organisations but most of all from journalists – not because of affection for Assange but because, as one wrote 'it characterizes everyday journalistic practices as part of a criminal conspiracy'...'* [Feldstein, tab 18, §9].

53. As Harvard professor emeritus Alan Derschowitz concedes, while he might *'think there's a difference between the New York Times and Assange from a practical point of view…from a constitutional point of view, it's hard to find that difference'* because '*They're both publishing classified, stolen material'* [Feldstein, tab 19, §9]. Mr Assange's activities through WikiLeaks – described variously as '...*data journalism', a 'news agency' in an expanding 'media eco-system', a 'networked fourth estate' and the world's first 'stateless newsroom'...'* [Feldstein, tab 28, §3] – have been manifestly journalistic.

54. The focus of the indictment is *'almost entirely on the kinds of activities that national security journalists engage in routinely and as a necessary part of their work'* including '*cultivating sources, communicating with them confidentially, soliciting information from them, protecting their identities from disclosure, and publishing classified information'* [Jaffer, tab 22, §§3, 25-26] [Timm, tab 65, §§7-31, 41].

55. <u>First</u>, '*soliciting'* classified material. The indictment seeks to cast as criminal the suggestion that Mr Assange '*explicitly solicited…restricted material of political, diplomatic or ethical significance'* and that the WikiLeaks website was designed by Mr Assange to focus on such '*information restricted from public disclosure by law, precisely because of the value of that information'* [Indictment, §2]. It refers to the publication of the '*most wanted list'* of such documents, to the use of an encrypted drop box, and to steps taken by Mr Assange characterised as being '*to encourage Manning to steal classified documents'* such as using the phrase '*ok great'* on an online chat service when she was discussing her attempts to obtain particular documents [Indictment, §§15, 18, 25].

56. As Professor Feldstein comments, these activities are '*not only consistent with standard journalistic practice, they are its lifeblood'* – every investigative journalist has '*solicited sources for confidential or restricted information',* it is a skill taught '*in every journalism school worthy of the name'* and the most prized result of such efforts is '*information with the highest 'value''* [Feldstein, tab 18, §9(a)]. If such activity is criminal, then the *'world's greatest journalists'* have all '*conspired with, and aided and abetted whistleblowing sources'* [Feldstein, tab 18, §9(a)]. '*The government's attempt to draw a distinction between passive and active newsgathering – sanctioning the former and punishing the latter - suggests a profound misunderstanding of how journalism works. Good reporters don't sit around waiting for someone to leak information, they actively solicit it...When I was a reporter, I personally solicited and received confidential or classified information, hundreds of times*' [Feldstein 2, tab 57, §2].

57. The idea underlying the US indictment '*borders on fantasy...[asking for classified evidence] is a common practice for journalists in the US and around the world. If this is a crime, thousands of journalists would be committing crimes on a daily basis*...' [Timm, tab 65, §§11-13]. '*I myself*

have advocated for leaks in cases where the US secrecy system is hiding abuse, corruption, or illegal acts. In 2014, I published an article specifically calling for the leak of the classified version of the Senate Committee report on CIA Torture and tweeted about it, as did others' [Timm, tab 65, §17-23].

58. '*I for one, can confirm that [Guantanamo detainee records, interrogation videos and Rules of Engagement for US forces in Afghanistan and Iraq] were part of a 'most wanted' list for many investigative journalists at the time who were trying to uncover unlawful American conduct after September 11, 2001'* [Goetz, tab 58, §16]. WikiLeaks was '*not the only organisation involved in the development of such a ['most wanted'] list at that time. The Center for Democracy and Technology maintain a similar list and did so in 2009'* [Timm, tab 65, §§27-28]. See generally [L, section F].

59. In fact, it is believed that such lists are funded / supported by the US government itself - in respect of countries or areas where the US itself opposes oppressive regimes and invites / supports organisations obtaining evidence of that.

60. <u>Secondly</u>, the use of measures such as drop boxes to facilitate such leaks. While pioneered by Mr Assange, they are '*now a journalistic staple, employed by leading outlets around the world, including the New York Times'* and the most wanted list differs '*only in degree from the kind of solicitations for information that journalists routinely post on social media sites'* [Feldstein, tab 18, §9(a)]. '*News organisations commonly issue detailed instructions like this'* [Tigar, tab 23, p4] [Ellsberg, tab 55, §29] [Timm, tab 65, §§8-16, 31] See generally [L, section E].

61. <u>Thirdly</u>, measures alleged in the indictment as being designed to '*prevent the discovery of Manning as ASSANGE's source, such as clearing logs and use of a 'cryptophone''* [Indictment, §26]: - are in fact

the '*kind of protection of confidential sources'* which is '*not only standard practice but crucial to the professional and moral responsibility for reporters'* [Feldstein, tab 18, §9(d)] [Timm, tab 65, §31] [Maurizi, tab 69, §§7-9].

62. As the ECtHR has repeatedly stated, '*Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms'* (***Goodwin v United Kingdom*** (1996) 22 EHRR 123, §39).

63. The '*indictment of Mr Assange poses a grave threat to press freedom'* because the '*indictment's implicit but unmistakeable claim is that the activities integral to national security journalism are unprotected...and even criminal'* [Jaffer, tab 22, §3, 25-26].

64. *'...All journalists and news media outlets are information brokers, intermediaries providing information from their sources to the public. 'Media,' the plural of the Latin word 'medium,' means 'middle ground or intermediate.' The news media is an inter-media-ry, 'brokering' information from sources to the public*...' [Feldstein, tab 18, §3]. Not only is the conduct the subject of this indictment '*the essence of journalism'*, WikiLeaks' steps to force the world's disparate media to cooperate together in this publication process (discussed below) was '*a game changing moment in the history of journalism'* [Feldstein, tab 18, §3] [Goetz, tab 31, §28] both '*extraordinary and innovative'* [Gharbia, tab 35, §10].

65. In the context of President Trump's '*open contempt for the freedom of the press'* and his '*Threats…against newspapers, networks, news sources and individual journalists'* which have become '*the norm'* [Feldstein, tab 18, §2], the indictment will (and no doubt is intended to) have a chilling effect on the reporting of national security and beyond. It

is ‘*intended to deter journalism that is vital to American democracy’* and if Mr Assange were to be successfully prosecuted, ‘*it would certainly have that effect’* [Jaffer, tab 22, §4]. Per conservative scholar Gabriel Schoenfield, the ‘*indictment seems to have been tailored in a way that will do a lot of collateral damage, if not the maximum possible amount’* to the freedom of the press [Feldstein, tab 18, §10]. It ‘*portrays standard journalistic tradecraft as nefarious, akin to espionage’* [Feldstein, tab 18, §9].

66. As explained by the director of the Committee to Protect Journalists:

> ‘...*the United States is asserting extra-territorial jurisdiction in a publishing case, a practice usually reserved for terrorism or piracy. Under this rubric, anyone anywhere in the world who published information that the US government deems to be classified could be prosecuted for espionage...’* [Feldstein, tab 18, §10].

67. If the press were to stop publishing official secrets ‘*there could be no adequate diplomatic, military and political reporting of the kind our people take for granted, either abroad or in Washington’* [Jaffer, tab 22, §13]. As Freedom House have observed ‘*President Trump's public stance on press freedom has [already] had a tangible impact on the global landscape’* such that ‘*journalists around the world now have less reasons to believe that Washington will come to their aid if their basic rights are violated’* [Jaffer, tab 22, §28].

68. The prosecution in this case has attempted to draw a distinction (discussed further below in the context of ***Zakrzewski*** abuse) between Mr Assange and other journalists on the basis that his extradition is not sought *‘in respect of any responsible journalistic treatment of the material provided by Chelsea Manning’* [Opening Note, §65]. In reality ‘*if the publisher's entitlement to the First Amendment protection’,* or indeed protection under Article 10, *‘turned on whether the government*

believed the publisher had exercised editorial discretion appropriately, the First Amendment's protection would be unavailable precisely in the cases publishers need it most' [Jaffer, tab 22, §27] [Lewis 6, tab 70, §§11-12]. Unsurprisingly therefore, no authority is cited in support of this bizarre theory.

69. Neither is it a prosecutorial theory that withstands any historical scrutiny, whether here or in the US:

> *'...going back to the 'patriot' printing presses that urged the overthrow of British colonialism in the 1770s...Activist publications have been a staple of American journalism…championing radical causes such as the abolition of slavery, women's suffrage, labor unions, pacifism, socialism and other unpopular movements. Like WikiLeaks, America's editorial activists published unfiltered documents with minimal contextualising…Then and now, they exposed and opposed government authorities. Then and now, they were scorned and vilified…But they were often ahead of their time; for just as yesterday's heresy is tomorrow's orthodoxy, yesterday's radical journalist is tomorrow's distinguished publisher...'* [Feldstein, tab 18, §3].

70. In reality, through the disclosure of irrefutable (truthful) evidence of the most serious human rights abuses perpetrated by US government authorities, Mr Assange and WikiLeaks '*weaponised freedom of expression'* and this prosecution represents the US government's '*response to a perceived assault on their monopoly control of sensitive state information which they see as a prop to their authority'* [Cockburn, §11]. It is an explicit attack on journalism and press freedom. It is unprecedented not only in the US but, more importantly, in this country.

And is protected by Article 10

71. ***R v Shayler*** [2001] 1 WLR 2206 concerned the prosecution of the acts of a state official in leaking classified materials to the press. In that arena, as the House of Lords explained, Article 10 provides latitude to states. But no journalist has ever been prosecuted under the OSA for the act of publishing or obtaining leaked information, undoubtedly because much more stringent considerations apply to the prosecution of journalists, both in terms of the protections of the law and public interest.

72. The Mail on Sunday, for example, was never prosecuted for publishing Shayler's leaks, or paying Shayler for them. The different position that pertains to the press is why, presumably, the House of Lords in ***Shayler*** was at pains to emphasise that '*this appeal calls for decision of no issue directly affecting the media*' (per Lords Bingham and Hutton at §§37, 117) and that the role of the press in publishing such materials could not be '*a ground for criticism'* because '*only a free and unrestrained press can effectively expose deception in government. Its role is to act as the eyes and ears of the people'* (per Lord Hope at §50, citing ***NY Times v US*** (supra)).

73. In ***Tarsasag v Hungary*** (2011) 53 EHRR 3 the ECtHR held at §§26-27 that:

> *'...The court has consistently recognised that the public has a right to receive information of general interest. Its case law in this field has been developed in relation to press freedom which serves to impart information and ideas on such matters. In this connection, the most careful scrutiny on the part of the Court is called for when the measures taken by the national authority are capable of discouraging the participation of the press, one of society's 'watchdogs', in the public debate on matters of*

> *legitimate public concern, even measures which merely make access to information more cumbersome.*
>
> *In view of the interest protected by article 10, the law cannot allow arbitrary restrictions which may become a form of indirect censorship should the authorities create obstacles to the gathering of information. For example, the latter activity is an essential preparatory step in journalism and is an inherent, protected part of press freedom. The function of the press includes the creation of forums for public debate. However, the realisation of this function is not limited to the media or professional journalists. In the present case, the preparation of the forum of public debate was conducted by a non-governmental organisation. The purpose of the applicant's activities can therefore be said to have been an essential element of informed public debate...'*

74. Press whistle-blowing on state illegality is protected: ***Dyuldin & Kislov v Russia*** (2007) 25968/02 at §41: '*very strong reasons are required for justifying restrictions on 'political speech*'.

75. Insofar as journalism involves gathering or soliciting materials, ***Stunt v Associated Newspapers*** [2018] 1 WLR 6060, the Court of Appeal recognised that:

> *'...It is well-established in the jurisprudence of the ECtHR that the gathering of information is an essential preparatory step in journalism and an inherent, protected part of press freedom: Satakunnan Markkinapörssi Oy v Finland 66 EHRR 8*, para 128....' (§94)

76. In ***Szurovecz v Hungary*** (2020) 70 EHRR 21, the ECtHR confirmed that:

> *'...Obstacles created in order to hinder access to information which is of public interest may discourage those working in the media or related fields from pursuing such matters. As a result, they may no longer be able to play their vital role as 'public watchdogs', and their ability to provide accurate and reliable information may be adversely affected...'*

77. The *'gathering of information'* protected, alongside its publication, by Article 10, is precisely what the US government seeks to criminalise. It offends the core notions of Article 10 and is prohibited by s.87. See, for example, ***Girleanu v Romania*** (2019) 68 EHRR 19:

> *'...68. The Court has consistently held that the press exercises a vital role of 'public watchdog' in imparting information on matters of public concern...It is also well established that the gathering of information is an essential preparatory step in journalism and an inherent, protected part of press freedom....*
>
> *70. The Court further observes that the applicant was arrested, investigated and fined for gathering and sharing secret information.*
>
> *71. In previous cases concerning gathering and disclosure by journalists of confidential information or of information concerning national security, the Court has consistently considered that it had been confronted with an interference with the rights protected by Article 10 of the Convention...Moreover, the Court reached a similar conclusion also in cases which, as the present case, concerned the journalistic preparatory work before publication...*

72. In these circumstances, the Court is satisfied that Article 10 of the Convention is applicable in the present case and that the sanctions imposed on the applicant constituted an interference with his right to freedom of expression...'

And in relation to necessity:

'...84...there is little scope under Article 10 § 2 of the Convention for restrictions on freedom of expression in two fields, namely political speech and matters of public interest. Accordingly, a high level of protection of freedom of expression, with the authorities thus having a particularly narrow margin of appreciation, will normally be accorded where the remarks concern a matter of public interest. However, the protection afforded by Article 10 of the Convention to journalists is subject to the proviso that they act in good faith in order to provide accurate and reliable information in accordance with the tenets of responsible journalism. The concept of responsible journalism, as a professional activity which enjoys the protection of Article 10 of the Convention, is not confined to the contents of information which is collected and/or disseminated by journalistic means. That concept also embraces the lawfulness of the conduct of a journalist, and the fact that a journalist has breached the law is a relevant, albeit not decisive, consideration when determining whether he or she has acted responsibly...'

78. Neither can this Court operate on the assumption that the First Amendment will protect Mr Assange's article 10 rights. The US case here is that Mr Assange is beyond the scope of the First Amendment because '*foreign nationals are not entitled to protections under the First Amendment, at least as it concerns national defense information'* [Kromberg 1, §71].

Submission 3: Zakrzewski abuse

<u>Introduction</u>

79. In addition to being a flagrant violation of Article 10 on its face and assuming its truth, the US attempts to suggest that Article 10 should not apply, are in fact marred and undermined by significant and serious (and deliberate) factual misstatement with regard to each of its three central allegations; namely:

- The allegations that Manning's disclosures were causally solicited by the WikiLeaks *'most wanted list'* is flatly contradictory to the evidence given in Manning's court martial and publically available information. Manning's actual transmission of data does not, in fact, correlate to what Assange is alleged to have sought.

- The '*passcode hash'* allegation: As stated above, <u>publishing</u> state secrets has long been held to be lawful by the US Supreme Court. Illegality only arises under US law (per ***Bartnicki v Vopper*** (2001) 532 US 514) when the publisher is also involved in the underlying data theft [Jaffer, tab 22, §§23-24] [Kromberg 1, §7, 71]. Therefore, to move forward with this prosecution, it was necessary for the US to make that factual allegation here [Kromberg 1, §§19]. It was contrived here knowing (but concealing from this Court) that it was flatly contradictory to the evidence given by US government witnesses before the Manning Court Martial.

- The allegations that WikiLeaks '*deliberately put lives at risk'* by deliberately disclosing unredacted materials [Kromberg 1, §§8-9, 20-22, 71] [Kromberg 2, §10], i.e. the '*intentional outing of intelligence sources'*, is also factually inaccurate.

80. All of these assertions, thought by the US to be (but which are not) material to the operation of Article 10 ECHR, are in reality deliberate factual misstatements. That they are is not only indicative of the wider ***Tollman*** [2007] 1 WLR 1157 abuse / political motivation lying behind this request, but actionable in their own right pursuant to ***Zakrzewski*** [2013] 1 WLR 324.

The Law

81. As stated above, it has long been the case that a prosecutor or judge requesting extradition could be held to be abusing the court's process in the ***Tollman*** sense where '*he knew he had no real case'* but continued to seek extradition for another motive and '*accordingly tailored the choice of documents accompanying the request'* (***R (Bermingham) v Director of the SFO*** [2007] QB 727 at §100).

82. The ***Tollman*** jurisdiction requires proof of bad faith. Yet, providing misleading factual allegations to the extradition Court ought to be actionable regardless of motive. Especially where this court is prohibited from looking at defence evidence in its dual criminality assessment (s.137(7A); ***USA v Shlesinger*** [2013] EWHC 2671 (Admin) at §§11-13).

83. So, as ***Shlesinger*** §§12 & 14-22 acknowledges, the courts have developed a parallel, separate, abuse jurisdiction which provides this Court with an inherent safeguard against the provision of particulars (allegations) which, though meeting the technical requirements of the law if true, are simply *'wrong'.* ***Zakrzewski*** §§11-13 enjoins the Court to ask itself, in any case where the contrary is suggested, whether the description of the conduct alleged is *'fair, proper and accurate'*.

84. Although developed under Part 1, the ***Zakrzewski*** principles apply with equal force to Part 2 cases such as this: ***Shlesinger*** at §§14-22.

85. For ***Zakrzewski*** abuse to be engaged, the particulars must be *'wrong or incomplete in some respect which is misleading (though not necessarily intentionally)'* and the true facts '*must be clear and beyond legitimate dispute'* (***Zakrzewksi***, §13).

<u>The first *Zakrzewski* abuse; The 'most wanted list'</u>

86. The WikiLeaks '*most wanted list'* ('the list') [L2] was a public collaboration, a living document edited by the public (in the way that Wikipedia is) [L7 p5] [Timm, tab 65, §§24-30] [L, section D7, D32-36];

87. Nonetheless, as detailed above, the Indictment alleges that Mr Assange, through WikiLeaks, was involved in Manning's '*theft'* of the materials because he encouraged and '*solicited'* illegal provision of classified documents to the website, including through publishing the '*most wanted list'* of disclosures sought [Dwyer §§5-6, 12-16], and that Manning directly responded to these solicitations [Dwyer §§19-21].

88. Manning's evidence was otherwise. She stated that her disclosures were the result of her own actions and decisions. She was hoping to *'spark a domestic debate on the role of the military and …foreign policy, in general, as well as [how] it related to Iraq and Afghanistan'* [Boyle 1, tab 5, §16]. Thus in early 2010 she transferred classified material onto a memory card which she took with her when she left Iraq to go on leave in Maryland, with the intention of releasing it to the press and general public [Boyle 1, tab 5, §17]. She contacted both the *Washington Post* and the *New York Times* but received no real response from them [Boyle 1, tab 5, §17]. So she visited the WikiLeaks website and on 3 February 2010 uploaded the Iraq and Afghan war diaries [Boyle 1, tab 5, §18]. She then uploaded the Iceland cable [First Indictment, §§35-40], and the so-called '*collateral murder'* video, and then she began conversing with a person alleged to be Assange [Boyle

1, tab 5, §§18-20]. According to Manning, none of this was solicited from her [Boyle 1, tab 5, §21].

89. Yet, the Indictment still alleges that all this was all connected to, and '*solicited by'*, the WikiLeaks *'most wanted list'.*

90. The allegation firstly ignores completely the fact that WikiLeaks, and its '*list'*, was not even online at all at the time manning uploaded <u>any</u> of the materials the subject of this prosecution. It was offline completely from at least 28 January [L16], through 16 March 2010, [L17] and to at least 17 May 2010 [L18]. If Manning was '*responding'* to the '*list'*, she must have been doing so from memory.[10]

91. Moreover, even if it had been available to Manning (which it was not):

- The '*list'* was not on WikiLeak's homepage [L5]. Or the submissions page [L/E1]. Neither could the '*list'* be navigated to from within the WikiLeaks site [Mander, H9, p8126-8129].

- There is no evidence that Manning ever searched for or accessed the 'list'.

- There is no evidence that Manning and Assange ever discussed the '*list'*, whether in the March 2010 Jabber chat (below) or otherwise;

- Manning's online 'confession' in 2010 [M2/499] made clear that her decision to disclose to WikiLeaks the materials the subject of this indictment was because she herself determined they showed '*incredible things, awful things…things that belonged in the public domain...things that would have an impact on 6.7 billion people*'

[10]. During her jabber chat with WikiLeaks in March 2010, Manning even referenced the fact that WiliLeaks was offline [jabber chatlogs attached to criminal complaint, 10 March, 21:09:50].

(p11) '*horrifying...its important that it gets out...it might actually change something*' (p14);

- With one exception (the Rules of Engagement addressed below) the '*list*' never requested <u>any</u> of what Manning actually sent to WikiLeaks; and Manning did not in fact send <u>any</u> of what the '*list*' did request (despite having access to it).

92. Thus:

- <u>The Iraq and Afghan War diaries</u> (counts 1, 15, 16):

  - <u>Neither</u> the Sigacts, nor the CIDNE databases, were <u>ever</u> on the '*list*' [L2, 4].[11]

  - They were copied by Manning before 8 January 2010 [H17 p6755] and uploaded to WikiLeaks on 3 February [H17 p6759-60], having previously approached the NY Times and Washington post [H17 p6758-9].

  - Manning explained the strong and obvious public interest in unilaterally wishing to provide these materials to the public [H17 p6755, 6758-9].

  - US involvement in Iraq and Afghanistan was a topic of fierce public debate. For example, the non-release of Iraqi and Afghan detainee photos had been the subject of recent public debate in November 2009 [L40-45]; as had the destruction of detainee CIA interrogation tapes depicting

[11]. [L2] is the '*list*' as archived by the wayback machine on 4 November 2009 (before Manning's first upload: war diaries) and [L4] is the '*list*' as next archived by the wayback machine on May 2010 (after Manning's last upload: cables).

torture techniques [L46-47]. WikiLeaks had published multiple categories of material relevant to the issue [L6].

- As explained more fully below, the Afghan war diaries that Manning revealed showed, for example, the covering up of civilian casualties, hunting down targets for extra-judicial killings; killing of civilians, including women and children. The Iraq war diaries showed, for example, systematic torture of detainees (including women and children) by Iraqi and US forces and secret orders under which US forces ignored the abuse and handed detainees over to Iraqi torture squads.

- The Guantánamo Detainee Assessment Briefs (counts 1, 6, 9, 12, 18):

  - Were also never on the '*list'* [L2, 4].

  - The public debate surrounding Guantánamo will be well known to this Court. It was no less prevalent in 2010. At the time in question, the Congressional report of the inquiry into the treatment of Guantánamo detainees confirming the use of torture techniques including waterboarding etc had been issued in November 2008 [L67]; the Senate had blocked funding for its closure in May 2009 [L60]; Congress was in the process of debating the merits of its closure in November 2009 [L62]; in December 2009 Human Rights Watch had called for release of investigation reports surrounding inmate deaths there [L63-64]; in January 2010 the final report of the Joint Task Force had been released concerning the status of Guantánamo's remaining 240 detainees [L65].

  - As part of that global debate WikiLeaks had published myriad materials concerning Guantánamo [L6]. '*WikiLeaks had a long-standing interest in exposing the abuses in the*

US rendition system and in Guantanamo Bay, and had been doing so since 2007 long before Chelsea Manning had ever been heard of' [Maurizi, tab 69, §25]. For example, the camp's Standard Operating Procedures had been published since 2007 [L24-25], the abovementioned 2008 Senate investigation report since April 2009 [L38]; ongoing special investigations materials revealing torture at the camp since May 2009 [L48]; all of which had been accompanied by detailed journalistic analysis [L26-28, L30-38], which was in turn informing proceedings pending before the US Supreme Court [L29, 32]. See generally [M2/118-149].

- During a search of Joint Task Force information regarding another matter, Manning had come across the DABs [H17 p6772-6].

- As explained more fully below, and as confirmed by WikiLeaks' contemporaneous analysis of them [L49-59], the DABs discovered by Manning were disturbing. They suggested, by reference to the intelligence used to justify their detention, that the US was holding individuals indefinitely that it believed or knew to be innocent [H17 p6776].

- Manning copied them on 5 and 7 March 2010 [H11]. She did this <u>before</u> she offered them to WikiLeaks [Shaver, H9, p7977-7982] [H10] [H11] [Jabber chat logs attached to original criminal complaint].

- Having commenced downloading / downloaded the DABs - because, she maintained, she had seen that WikiLeaks held other, general, Guantánamo materials [H17 p6752] - she asked on the Jabber chat whether WikiLeaks would be interested in them [H17 p6777; Dwyer §31(a)].

    - They were then uploaded on 8 March [H17 p6778].

    - WikiLeaks then engaged in detailed journalistic analysis of the DABs [L49-59], including the fate of the children revealed to be detained there [L55].

    - Other Guantánamo materials were, by contrast, on the '*list'* but were not sent by Manning [L2, p13], including the Intellipedia database [L2 p12].

- The cables (counts 1, 3, 7, 10, 13, 17):

    - No cables were ever on the '*list'* [L2, 4]. Neither was the NetCentric database.

    - Manning had first copied and uploaded the '*Rekyavik'* cable on 15 February 2010 [H17 p6763]. IceSave (Kaupthing) bank had been a topic of global debate, including on WikiLeaks [L6, 15]. The public interest in the cable was obvious [H17 p6762-3]. Manning's upload was unilateral; the '*list'* had never sought Kaupthing materials [L2, 4].

    - The public interest in the content of the remaining cables in Manning's possession, the subject of the indictment, was in her view even more glaring [H17 p6781-3], '*horrifying'* [M2/499, p14]. As explained more fully below, they revealed for instance, US spying on UN diplomats; previously denied US involvement in the conflict in Yemen, including drone strikes; UK training of death squads in Bangladesh; CIA and US forces involvement in targeted, extra-judicial killings in Pakistan; complicity of European states in CIA rendition, and have informed human rights litigation ever since their release. It was Manning who appreciated that the cables contained

'*...all kinds of stuff like everything from the buildup to the Iraq War during Powell, to what the actual content of 'aid packages' is: for instance, PR that the US is sending aid to pakistan includes funding for water/food/clothing… that much is true, it includes that, but the other 85% of it is for F-16 fighters and munitions to aid in the Afghanistan effort, so the US can call in Pakistanis to do aerial bombing instead of americans potentially killing civilians... it affects everybody on earth...world-wide anarchy...breathtaking depth... horrifying… i dont want to be a part of it*' [M2/499, p13-15]. Manning wanted her disclosure to provoke '*worldwide discussion, debates, and reforms. if not… than we're doomed as a species*' [M2/499, p50].

  - Those cables were copied by Manning over 22 March to 9 April 2010 [H17 p6783; Dwyer §36], uploaded on 10 April [H17 p6783] and updated on 3 May 2010 [H17 p6783].

- The Rules of Engagement (counts 1, 4, 8, 11, 14):

  - This is the only category of materials subject to the indictment which might[12] have been on the '*list'* [L2].

  - They were copied by Manning on 15 February 2010 [H17 p6768] and uploaded on 21 February [H17 p6768].[13]

  - Manning explained the strong and obvious public interest in unilaterally wishing to provide these materials to the public [H17 p6764-8]. Her decision to do so was inextricably linked

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12. The '*list'* changed over time. Compare [L2] at 4 November 2009 before Manning's first upload with [L4] at May 2010 after Manning's last upload. The entire '*military and intelligence'* section of the list disappeared at some point during that period. The US government asks this Court to *assume*, without evidence, that the most expansive version of the list [L2] was the version available to Manning.

13. Cf. Dwyer §33.

to her unilateral desire to publicise the '*collateral murder'* video (which showed the footage from an Apache helicopter showing the killing of a dozen innocent people, including two Reuters news staffers [L69]) - in turn fuelled by governmental lies and secrecy surrounding those deaths [H17 p6767][14] - which Manning read in the NY Times; '*it humanized the whole thing… re-sensitized me'* [M2/499, p37]. *'i want people to see the truth'* [M2/499, p50]. The WikiLeaks '*list'* never contained reference to that video.

- To understand and assess the circumstances of the extraordinary video, one had to know the Rules of Engagement for Iraq [L69-70]. WikiLeaks held old versions of the Rules [H17 p6752],[15] so Manning uploaded the versions (2006-2008) current to the time of the video [H17 p6768; L69-71].

- That the '*collateral murder'* video is the plain (but undisclosed) context to the uploading of the Iraq 2006-2008 Rules of Engagement is clearly shown, for example, by the fact that (despite being on the '*list'* and accessible to her) Manning did <u>not</u> upload the <u>2009</u> Iraq Rules of Engagement, or any of the <u>Afghanistan</u> Rules of Engagement;

- No reference at all to that context is disclosed by the extradition request. Instead the request seeks to link the disclosure to a '*list'* which was not even online *at all* at this time. It was offline completely between at least 28 January [L16] and 17 May 2010 [L18].

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14. See. e.g. [L72-74].
15. See [L6 p5] and [L19-21, 23].

93. The evidence summarised above shows that the '*most wanted list'* correlation allegation, upon which it is apparently alleged that Mr Assange was involved in the original '*data theft'*, is completely misleading.

The US response (Kromberg)

94. First, Mr Kromberg suggests that, even though not the author of the list [Kromberg 4, §19], Mr Assange nonetheless used it to solicit classified materials [Kromberg 4, §20], and that Manning was '*responsive'* to those solicitations [Kromberg 2, §12]. Tellingly, all the examples given of Manning's '*responsiveness'* to the list (detainee abuse videos, Guantánamo SoPs, and the 'Open Source Centre' database) are ones where, despite having access to them and knowing that WikiLeaks wanted them, Manning did not supply the materials in question to WikiLeaks. The lack of sensible connection between the '*most wanted'* list and Manning's actual disclosures is plain.

95. Secondly, acknowledging that none of the war diary, Guantánamo or cable materials that were supplied by Manning were ever listed by WikiLeaks [Kromberg 4, §21], it is nonetheless suggested that '*bulk databases'* were listed and that is what Manning provided [Kromberg 2, §13] [Kromberg 4, §§22-23]. Of course, what it omitted from this (new) theory, is that the '*bulk databases'* that the '*most wanted'* list sought were in fact specified by name in the list [2, p12-13], and did not include any of what Manning provided.

96. Following receipt of the defence evidence the 'most wanted' list allegation now appears to have morphed (despite the clear terms of the US charges) into a '*general'* allegation that soliciting '*classified, censored or otherwise restricted material of political, diplomatic or ethical significance*' is criminal [Kromberg 4, §22]. I.e. roaming criminality, untethered to the receipt or publication of the war diaries, Guantánamo briefs, rules of engagement or cables. That, of course, is

not the conduct that underlies the notional UK charges for dual criminality purposes, nor could it.

97. Nor could it possibly survive any meaningful Article 10 ECHR analysis. As detailed above, '*journalists routinely post*' general solicitations such as this [Feldstein, tab 18, §9(a)]. '*News organisations commonly issue detailed instructions like this*' [Tigar, tab 23, p4] [Ellsberg, tab 55, §29] [Timm, tab 65, §§8-16, 31] See generally [L, section E].

98. Thirdly, Mr Kromberg suggests that the '*shortening*' of the list (see [L4]) was done '*after Manning had already supplied troves of responsive classified information to Assange and around the time of Manning's arrest*' [Kromberg 4, §24]. This is the point detailed at §92 (fn.12) above and relates to the disappearance from the '*list*' of its entire '*military and intelligence*' section which contained reference to the Rules of Engagement – the only materials on the list that Manning did supply:

- The evidence is that the Rules of Engagement disappeared from the '*list*' at some unknown point between November 2009 and May 2010. If the US Government is in possession of evidence which suggests when, during that time period, the list was '*shortened*', it has not disclosed it.

- In any event, the defence evidence and submissions proceed on the assumption (despite the absence of any evidence in the request) that the Rules of Engagement were on the '*list*' throughout.[16]

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[16]. And despite the fact that the entire list was offline completely between at least 28 January [L16] and 16 March 2010 [L17].

The second *Zakrzewski* abuse: the 'passcode hash' allegation

99. The request separately alleges that Mr Assange assisted Manning to '*steal'* classified documents by agreeing to help to decrypt a '*passcode hash'* value [Dwyer, §§7, 25-30].

100. The March 2010 Jabber chatlog (in which the 'passcode hash' agreement is said to have been hatched) was provided in the US government's application for provisional arrest. Discussion of the '*hash'* value issue came after 279 messages had already been exchanged, and amounted to just 16 of the total 587 messages that were recovered over a number of days. The messages betray no discussion whatever of the use to which the decrypted hash value might be put, much less any plan to disguise Manning's access to documents or cover her tracks [Eller, tab 17, §63].

101. Moreover, the encrypted hash value which Manning shared was, without the encryption key, '*insufficient to be able to crack the password in the way the government have described'.* Manning did not have the System file, or the relevant portions of the SAM[17] file, to reconstruct the key [Eller, tab 17, §§29-36] [Shaver, H3 p8538]. This would be known to anyone with '*basic technical knowledge'*, yet the person alleged to be Mr Assange did not advise Manning of this nor instruct her of the *'far easier, more reasonable ways to obtain'* the decrypted passcode hash value [Eller, tab 17, §§63-65].

102. Nevertheless, and despite all this, it is baldly alleged in the request that decrypting the passcode hash value was being attempted by Assange and Manning to allow the latter to log onto military computers '*under a username that did not belong to her'* which *'would have made it more difficult for investigators to identify Manning as the source of disclosures'* to WikiLeaks [Dwyer, §29] [Kromberg 1, §168].

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[17]. Security Accounts Manager database [Eller, tab 17, §31].

103. This allegation presents an entirely misleading picture of the available evidence and is directly contradicted by the evidence heard during the Court Martial proceedings. What the US Government conceals is that:

- First, accessing documents by logging in using another 'ftp user' account[18] *'would not have provided her with more access than she already possessed'* [Eller, tab 17, §37]. By March 2010, Manning had already downloaded significant quantities of <u>classified</u> material *from her own computer account* [Eller, tab 17, §§24, 59]. Namely, (a) the Guantánamo Detainee Assessment Briefs, (b) the Iraq and Afghan War diaries, (c) the Iceland cable, (d) rules of engagement and (e) the collateral murder video;

- Secondly, it is impossible for Manning to have downloaded any data '*anonymously'* from the ftpuser account, because:

  - Access to the databases referred to in counts 3, 6, 7, 9, 10, 12 and 18 on the indictment ((Net Centric Diplomacy (cables) and Intelink (Guantánamo briefs)) was not controlled with accounts, or login information *at all*. Rather they were accessible to anyone who, like Manning, had SIPRNet[19] access [Eller, tab 17, §§39-41]; and anyway;

  - The tracking system used to identify computer users of Net Centric and Intelink databases was via IP addresses (not account identities) which '*provided an electronic location for the user'* such that even if Manning *had* logged on using a different user account, this *'would have no effect on tracking'*

18. '*Manning's SIPRNet computers had a local user named FTP user on the account...a user account on the DRGS-A SIPRNet computers and was not attributable to any particular person or user'* [H2, p10999].

19. Secret Internet Protocol Router Network [Eller, tab 17, §6].

- because access to the relevant databases could only be tracked using IP Addresses [Eller, tab 17, §§42-50];

    - Other online databases did require accounts, but these web-accounts have '*nothing to do'* with accounts on the computer that Manning was discussing [Eller, tab 17, §§51-52];

    - Yet other databases (namely Active Directory) did require computer accounts, but those are domain accounts, not the local accounts that Manning was discussing [Eller, tab 17, §§53-55];

    - In short, it is straightforwardly wrong to suggest that gaining access to another local computer account could ever have given Manning '*anonymous access to [any] databases'*. It would have been '*useless'* and '*impossible'* [Eller, tab 17, §§55, 60-61]. This is a matter of '*basic technical knowledge'* [Eller, tab 17, §63].

- Thirdly, and in any event, had Manning wanted to log into a local account other than her own, *'she would have been able to do so without cracking any passwords or hacking anything'* because she *'already had easy access to the accounts of other soldiers'* [Eller, tab 17, §§56-57];

- Fourthly, and resulting, the only documents downloaded by Manning after the hash conversation were the State Department Cables which she already had authorisation to view and must have accessed through her permitted use of the SIPRNet connection [Eller, tab 17, §25]. It would have been '*technically impossible'* for her to have downloaded any of the documents mentioned in the indictment anonymously [Eller, tab 17, §§60-61].

104. All of the foregoing emerges from the evidence called by the Government at Manning's Court Martial, including evidence given by a number of Manning's army colleagues and senior officers. It is information that was known to the US government, yet concealed from this Court (and presumably the Grand Jury which was asked to issue the Indictment).

105. Thus:

- The Guantánamo Detainee Assessment Briefs (counts 1, 6, 9, 12, 18): emanated from US Southern Command [H17 p6775] located on Intelipedia [Eller §41] [Motes, H8 p8734] accessible on the SIPRNet [Eller, §39], using Intelink search engine [Eller §§41, 45-46] [Buchanan, H5 §1] [H10-11]:

    - Manning already had access to, and had uploaded these on 8 March 2010 [Eller §§24, 37, 59; Dwyer §31(d)]; before the '*passcode hash'* conversation on 8-10 March 2010; and

    - Because they were accessible via the SIPRNet it is nonsense to suggest that Manning was contemplating gaining future *anonymous* access to them using a different local computer user account - because SIPRNet and Intelink (a) required no account or login information or password [Eller §§39, 41, 60] [Buchanan, H5 §9] '*at the time, users were not required to have Intelink Passport accounts to use most intelink services, including the SIPRNet internet search and browsing. a SIPRNet Intelink passport account is a username and password*....', (b) were tracked instead via IP addresses not user accounts [Eller §§42-46] [Buchanan, H5 §6-8] [H10-11] and (c) Manning knew this: '*theres god awful*

accountability of IP addresses...impossible to trace much on these field networks' [M2/499, p37];

- The cables (counts 1, 3, 7, 10, 13, 17): were on the NetCentric Diplomacy Portal database [Eller, §39] [H17 p6761], accessible via the SIPRNet [Eller, §39] [H17 p6744-5] by all analysists [H17 p6761, 6781-2] [Capt. Lim, H18 p9885-7]:
    - Manning already had access to the cables, and had uploaded some on 15 February 2010 [Eller §24-25, 37]; before the '*passcode hash'* conversation on 8-10 March 2010; and
    - Because they were accessible via the SIPRNet it is nonsense to suggest that Manning was contemplating gaining future *anonymous* access to them using a different local computer user account - because, access to NetCentric on SIPRNet and Intelink (a) required no account or login information or password [Eller §§39-40, 47-48, 60] [Capt. Lim, H18 p9887], (b) were tracked instead via IP addresses not user accounts [Eller §§42-47] [Buchanan, H5 §6-8] [Janek, H16, §§2, 6] and (c) Manning knew this: '*theres god awful accountability of IP addresses...impossible to trace much on these field networks'* [M2/499, p37].

- The Iraq and Afghan War diaries (counts 1, 15, 16): these are the 'Sigacts' [20] [H17, p6741-3] published on the 'CIDNE' [21] database [H17, p6743], accessible via the SIPRNet network [H17 p6744] open to thousands of military and non-military

[20]. Significant Activity Reports.

[21]. Combined Information Data Network Exchange. In particular on the CIDNE-I (Iraq) and CIDNE-A (Afghanistan) sub-databases.

personnel [H17 p6744],[22] all of whom had unlimited access [H17 p6745] and was navigated using the 'Intelink' search engine [H17 p6745] on computers with individual user profiles [H17 p6747]:

  - Manning already had access to, and had uploaded these on 3 February 2010 [Eller §§24, 37, 59; Dwyer §30]; before the '*passcode hash'* conversation on 8-10 March 2010; and

  - Because they were accessible via the SIPRNet and Intelink it is nonsense to suggest that Manning was contemplating gaining future *anonymous* access to them using a different local computer user account - because SIPRNet and Intelink (a) required no username or password [Eller §41, 60] [Buchanan, H5 §9], (b) were tracked via IP addresses not user accounts [Eller §§42-46] [Buchanan, H5 §6-8] and (c) Manning knew this: '*theres god awful accountability of IP addresses...impossible to trace much on these field networks'* [M2/499, p37].

- The Rules of Engagement (counts 1, 4, 8, 11, 14): These and the video were available on Active Directory within the T-Drive [H17 p6764-7] [M2/499, p37]:

  - Manning already had access to, and had uploaded these on 21 February 2010 [Eller §§24-25, 37, 59]; before the '*passcode hash'* conversation on 8-10 March 2010; and

[22]. In the region of 2½ or 3 million people [Cockburn, tab 51, §13] [Grothoff ex 3, tab 47].

- That database was inaccessible without a domain account invitation [Capt. Cherepko, H8 p8643-4, 8668-9, 8672-3] [Chief Rouillard, H12 p8910-2] [Sargeant Madaras H9 p8041]. Using a different local computer user account would not give access to the T Drive / Active Directory *at all*, let alone anonymous access [Eller §§53-55].

106. On any view, the Court Martial transcripts as revealed by Mr Eller provide evidence that is '*clear and beyond legitimate dispute'* (because it emanates from the US's own files) that the description of the offending is misleading and not '*fair, proper and accurate'.*

107. The evidence summarised above shows that the '*passcode hash'* conspiracy allegation, the purpose of which is alleged to have been to facilitate Manning logging onto military computers '*under a username that did not belong to her'* to *'ma[k]e it more difficult for investigators to identify Manning as the source of disclosures'* to WikiLeaks (indictment §21), is completely misleading.

108. Applying ***Zakrzewski*** §13:

- Eller explains why the allegation is misleading. The statements in the request comprise '*statutory particulars which are wrong or incomplete in some respect which is misleading (though not necessarily intentionally)*';

- The true facts required to correct the error or omission are '*clear and beyond legitimate dispute*' because, as Eller also explains, the sources from which he draws are the Government's own evidence as adduced in the Manning court martial;

- The error or omission is finally '*material to the operation of the statutory scheme*'. Mr Assange's alleged involvement in the underlying theft of the data, i.e the passcode hash allegation, is central to this Court's dual criminality assessment (see prosecution skeleton §76). With the allegation, the prosecution are able to seek to equate Mr Assange to Manning, and other whistle-blowers to whom the UK courts have held that the Official Secrets Act ('OSA') applies. But without this (and the other false allegations discussed below), Mr Assange is (even on the US Government's analysis) a journalist protected by Article 10 ECHR. No precedent, or even academic commentary, exists for applying the OSA to mere publishers of leaked information. It is the everyday stuff of investigative journalism.

The US response (Kromberg)

109. The court will ultimately note that Mr Kromberg's responses take no issue with the *substance* of the defence evidence outlined above.

110. First, Mr Kromberg questions whether ***Bartnicki*** applies to classified information disclosures under the Espionage Act [Kromberg 2, §§10-11], but:

- Of course, whether it emanates from ***Bartnicki*** or not, *some* such rule has prevented this type of prosecution for the past two centuries; and

- This submission has never had anything to do with US law, much less any attempt to operate dual criminality by reference to US law (prosecution skeleton §§22, 157-165).[23] This is a ***Zakrzewski*** submission. The misstatement about which Eller

[23]. Other than to explain why the misrepresentation has been made. It was necessary for the US to aver involvement in the data theft because of the requirements of US law. See above §79.

speaks is '*material to the statutory scheme'* because, under UK law, merely publishing (as opposed to stealing) leaked classified data is not criminal. Were those true facts fed into the dual criminality machinery of s.137, it would not be established.

111. Secondly, Mr Kromberg suggests [Kromberg 4, §§10-17] that it is '...*not alleged that the purpose of the hash-cracking agreement was to gain anonymous access to...any...particular database...Manning needed anonymity not only on the database from which the documents were stolen...but also on the computer with which the documents were stolen (e.g., the SIPRNet computer)*...'. That with respect is obfuscation:

- The only way in which the '*acquisition and transmission of classified, national defense information'* alleged in this case could occur is through its extraction from Government databases (the only place it was) using a SIPRNet computer (the only means of extracting it).

- '*Put another way'*, having anonymous access to a different SIPRNet computer account, other than the one used to extract materials from the databases, could not conceivably further either of the first two of the four stages of the 'conspiracy' alleged by Mr Kromberg, namely (a) '*extract[ing] large amounts of data from the database*', (b) '*mov[ing] the stolen data onto a government computer (here, Manning's SIPRNet computer)*', (c), '*exfiltrating the stolen documents from the government computer to a non-government computer (here, Manning's personal computer)*', and (d) '*ultimately transmit[ting] the stolen documents to the ultimate recipient (here, Assange and WikiLeaks)*'.

- The suggestion (apparently advanced) now appears to be that, using her own SIPRNet account, Manning could access the databases (stage (a)), and download the materials to her SIPRNet computer (stage (b)), but once in possession of the materials, might (for reasons of '*anti-forensics*') then switch to a different, anonymous, account (on the same computer) to '*exfiltrate'* (transfer) the materials from there to her own laptop (stages (c) and (d)). Just how the 'conspiracy' would be rendered undetectable by such conduct is nowhere explained by Mr Kromberg. The original download would still be traceable to Manning.[24]

- And it is striking that every example of the tell-tale '*forensic artifacts'* that Mr Kromberg suggests could have been avoided [Kromberg 4, §§13-14] all relate to stages (a) and (b): Manning's extraction of materials from the databases.

- In sum, as the US Government have alleged throughout, the only possible advantage offered by access to an anonymous local user account to the 'conspiracy' to steal classified materials suggested, could be to access the government databases that are the subject of the indictment. Yet, the US Government is withdrawing that allegation it now seems ('*does not allege that the purpose of the hash-cracking agreement was to gain anonymous access to those particular documents*').

- Instead, the alleged purpose of the 'hash cracking' allegation has now reduced (in light of the defence evidence) to one of '*use for Manning's ongoing theft of [other] classified information generally*' [Kromberg 4, §§11, 17]. I.e. a roaming criminality

[24]. The usage of the additional ftpuser account would only add to the changes of detection. Court martial testimony describes how two people shared each computer, a 12-hour day shift and a 12-hour night shift.

again, untethered from the receipt or publication of the war diaries, Guantánamo briefs, rules of engagement or cables. That, of course, is not the conduct that underlies the notional UK charges for dual criminality purposes, nor could it.

- Nor is it a theory that meets the defence evidence in any event. The evidence shows that it is impossible for Manning to have downloaded any data anonymously from the ftpuser account. Eller's evidence is not merely that Manning could not use the ftpuser account to access the databases the subject of the indictment (those containing the war diaries, Guantánamo briefs, rules of engagement or cables) but that she could not access any data anonymously (and these databases are specific, representative examples of the ways data is accessed in order to show that).

112. The court will lastly note that Mr Kromberg also offers no challenge to the defence evidence adduced to the effect that US evidence also reveals the true use to which this password hash '*cracking*' could actually have been directed (which was also concealed from this Court)[25] [Eller, tab 17, §§8-11], namely installing home videos:

- In addition to the instillation of other unauthorised programs [Eller, tab 17, §§69-72] [Capt. Cherepko, H8 p8642-3] [Sgt. Madaras H9 p8028-42] [Chief Warrant Officer Ehresman H13 p9848-50] [H19 p139-141, 145], unauthorised use of computers for listening to music or watching films was '*commonplace*' amongst Manning and her colleagues [Eller, tab 17, §67-69, 79-82] [multiple US witnesses, H19 p252-3, 269] [Sgt. Madaras, H1 p112, H9 p8034] [Milliman, H8 p9705-6];

[25]. Seemingly on the basis that these issues are said to be '*for a jury*' [Kromberg 1, §172]. The suggestion, apparently, being that the US is intending to present a case contrary to its own evidence next summarised.

- Decrypting of administrator passwords to do that was a '*common occurrence*' [Eller, tab 17, §73-74] [Milliman, H8 p8707, 8711];

- Manning assisted colleagues to do this [Eller, tab 17, §§79-82] [Sgt. Madaras, H9 p8028] [Showman, H15 p7754], and had done so even at the request of her own superior [Capt. Fulton, H19 p142-3, 145, 252];

- Manning had even been openly discussing decrypting the passcode hash with her colleagues [Eller, tab 17, §§77-78] [Stadtler, H13 p9854];

- Mere days before the Jabber conversation on 8-10 March 2010, Manning's computer had been re-imaged (wiped and re-set), and to re-install music and films, the passcode hash thus needed to be bypassed again [Eller, tab 17, §83-88] [Shaver, H20, p130] [Sgt. Madaras, H9 p8040-1].

The third *Zakrzewski* abuse: The alleged recklessness as to sources

113. A further core allegation contained within the Indictment, and the general public statements surrounding this case made by myriad US officials, is that Mr Assange is *'no journalist'* because he published classified materials without redaction, and so it is said '*created a grave and imminent risk [to] the people he named*' [Dwyer §§4, 8] through publication of the War diaries [Dwyer §§39, 41, 44, 45] and the Cables [Dwyer §§36, 39, 42, 44]. The Government's opening note is, accordingly, devoted almost entirely to this issue. But it is also likewise '*wrong'* on a number of levels.

- As detailed above, Mr Assange is a journalist and these publications were '*the essence of journalism*' [Feldstein 1, tab 18, §3] [Jaffer, tab 22, §27] [Tigar, tab 23, p4-9].

- Vague, unsubstantiated and deliberately exaggerated political assertions of '*dire consequences'* of over-classified materials, '*deliberate falsehood[s] that attempt...to exploit judicial and public ignorance and fear*', are a hallmark of Espionage Act prosecutions in the US [Feldstein 1, tab 18, §6] [Jaffer, tab 22, §14] [Tigar, tab 23, p10-14, 18-19].

114. But most importantly for ***Zakrzewski*** purposes, the factual allegation of wilfully reckless data-dumping of classified materials[26] is known to the US Government to be completely and utterly misleading. The truth is that WikiLeaks was in possession of the material referred to in the Indictment for a considerable period before publication and went to extraordinary lengths to publish classified materials in a responsible and redacted manner, and that unredacted publication of the cables in September 2011 was undertaken by third parties unconnected to WikiLeaks (and despite WikiLeaks substantial efforts to prevent it).

115. WikiLeaks held back information while it formed media partnerships with organisations around the world, each one *'selected with care…because of its reputation for high levels of editorial independence and ethical standards'*, and where possible partnering with *'local outfits'* holding the *'specific knowledge'* needed to *'redact information that had a reasonable probability of identifying an individual at risk of either persecution or prosecution'* [Gharbia, tab 35, §§5-6]. For example, WikiLeaks worked with the Guardian, the New York Times, Der Spiegel and the Telegraph [Goetz, tab 31, §6] [Worthington,

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[26]. The US states, at §44 of Kellen Dwyer's affidavit, that *'while Assange and WikiLeaks published some of the cables in redacted form beginning in November 2010, <u>they published over 250,000 in September 2011, in unredacted form</u>, that is, without redacting the names of the human sources'.*

tab 33, §4], as well as local operations '*all around the world'* selected for their local knowledge [Goetz, §25], such as Al-Akhbar Beirut and nawaat.org in Tunisia, which '*were able to assign numerous dedicated staff members who were immediately familiar with the people and places mentioned in the files'* to *'make decisions on what to publish and what to redact'* [Gharbia, tab 35, §§2, 8]. Or SVT, Sweden's public broadcaster [Wahlstrom, tab 66, §§2-8]. Or L'espresso in Italy [Maurizi, tab 69, §§16, 45]. Or the New Zealand Star-Times [Hager, tab 71, §§15-17]. These organisations, often in competition, formed unprecedented alliances in order to *'find constructive ways of managing the data'* to ensure *'its publication in a responsible way'* [§28].

116. Thus:

- The Iraq and Afghan War diaries (counts 1, 15, 16):

  - Were materials assessed by Manning to be historical non-sensitive data [H17 p6742-3]. The evidence of US Government officers at Manning's Court Martial was that these materials did not disclose key human intelligence sources [Chief Warrant Officer Ehresman, H13 p9805-7] [Capt. Lim, H18 p9881-3].

  - WikiLeaks nonetheless took the issue of redaction seriously.[27] The media partners' work on the Afghan diaries to ensure they were vetted to prevent harm [Goetz, tab 31, §§5-17] even included approaching the White House in advance of releasing them, and in July 2010 Wikileaks entered into a dialogue with the White House about the redaction of names [Goetz, tab 31, §§14-15]. On 25 July 2010, WikiLeaks therefore delayed the publication of 15,000 documents identified by the White House, even after media

27. Explaining that it was '*important to protect certain US and ISAF sources*': [P, tab D34].

partners had published their respective stories, to ensure its *'harm minimisation process'* [Goetz, tab 31, §§15-16] [Maurizi, tab 69, §45].

- Redaction of the Iraq War diaries was likewise '*painstakingly approached'* and involved the development of specially devised redaction software [Dardagan, tab 52, §4]. Publication was delayed in August 2010, for harm minimisation processes, despite this bothering some media partners, because Mr Assange *'did not want to rush'* and the WikiLeaks team required more time *'to redact bad stuff'* [Goetz, tab 31, §19]. WikiLeaks '*stood firm by the principle...to ensure that the released information could not cause danger to any persons...showed consistent understanding of and commitment to the...principles of rigour and adherence to responsible publication*' [Dardagan, tab 52, §4]. What was undertaken was *'ultra-protection'* [Overton, tab 62, §12].

- WikiLeaks was even criticised at the time for *'over redaction'* of materials, redacting more than the Government did [Goetz, tab 31, §20]. The over-redaction meant that allied governments could not review their own actions in Iraq: WikiLeaks had to provide the Danish military with a less redacted copy to enable their investigation of possible complicity in US wrongdoing [P, tab E54].

- WikiLeaks ultimately published after the media partners (both Der Speigel and Guardian) first published [Goetz, tab 31, §17] [Worthington, tab 33, §12].

- <u>The Rules of Engagement</u> (counts 1, 4, 8, 11, 14):
    - Are not suggested by the US government to have '*put lives at risk'*.
- <u>The Guantánamo Detainee Assessment Briefs</u> (counts 1, 6, 9, 12, 18):
    - Were old and unclassified [H17 p6777] and are not suggested by the US government to have '*put lives at risk'*.
    - Were also nonetheless the subject of media partnership [Goetz, tab 31, §26] designed to publish '*without risking damage to persons who could not be protected*' [Worthington, tab 33, §3, 11-12];
    - Were first published by the Daily Telegraph not WikiLeaks [Worthington, tab 33, §12].
- <u>The cables</u> (counts 1, 3, 7, 10, 13, 17):
    - Were classified on SIPRNet as '*SIPDis*' (suitable for release to a wide number of individuals), rather than '*No Dis'* [H17 p6781-2), and were mostly unclassified and non-sensitive [H17 p6761, 6782] [Eller, tab 17, §§48-50] [Janek, H16 §3]. Around half were not classified at all, and only 6% (15,652 cables) were classified secret [Grothoff ex 3, tab 47].
    - Nevertheless, the media partner redaction process (outlined above) was robust, lengthy and operated effectively [Goettz, tab 31, §§21-25] [Gharbia, tab 35, §§4-8] [Grothoff 1, tab 37, p2] [Maurizi, tab 69, §§24, 45]. See generally [P, section C1-154]. US State Department even *'participated in the*

redaction process' prior to the publication of State Department cables and WikiLeaks implemented redactions required by the US State Department *'exactly as requested'* [Goetz, tab 31, §22] [Augstein, tab 32, p2] [Grothoff 1, tab 37, §2].

- The US request acknowledges that '*Assange published...the cables in redacted form beginning in November 2010'* [Dwyer §44].

117. The '*reckless'* actions of WikiLeaks the subject of this US prosecution are said instead to be their '*public[cation of] over 250,000 [cables]'* a year later *'in September 2011, in unredacted form*' [Dwyer §§44, 36].

118. The US government knows well (but has withheld from this Court) that the release of un-redacted materials on 1 September 2011 was done by others and came about as a result of *'a series of unforeseeable events'* [Goetz, tab 31, §30-32] outside of the control of Mr Assange or indeed WikiLeaks, and despite Mr Assange's '*strong attempts to prevent'* it [Goetz, tab 31, §31]. The following facts are evidenced before this Court but are in the public domain and known to the US government:

- The material which is the subject of these charges had been held in an encrypted format as a '*ciphertext'*, which could only be accessed with a '*key'* or passphrase which, once the ciphertext had been created, *'never changes'* [Grothoff 1, tab 37, §1]. Encryption of sensitive data online in this way is routine [Grothoff 2, tab 60, §12]. In order to access encrypted data, it would be necessary to know both the location of the cyphertext on the internet and the password key – in the same way that a house key found on the street would not enable a burglary to take place absent the address of the respective house [Grothoff 1, tab 37, p3].

- During late 2010, it had become necessary to '*mirror*' or replicate the cyphertext in numerous locations across the internet as a result of cyberattacks made on the WikiLeaks website [Grothoff 1, tab 37, §§2-4] [tab 47, ex 4-7]. See generally [P, section C2, C169-173, C185-197]. It was well known that this – <u>encrypted</u> – archive was online [Grothoff 2, tab 60, §§4-5].

- Inexplicably [Grothoff 2, tab 60, §13], in February 2011 one of WikiLeaks' media partners (David Leigh of the Guardian) <u>unilaterally</u> published the password key to the cyphertext in a book [Grothoff 1, tab 37, §5] [tab 47, ex 2, p135, 138-9] [P, section C3, C201].

- Because of the mirroring that had taken place, WikiLeaks was unable to remove the file: *'WikiLeaks was not in control of the many mirrors of [the cyphertext] already online'* [Grothoff 1, tab 37, §5]. Neither did WikiLeaks have the power to change the passcode [Grothoff 1, tab 37, §1] [Grothoff 2, tab 60, §11].

- The 'secret' lay dormant for months until 25 August 2011 when Der Freitag reported that it had *'discovered a copy of the full archive 'on the internet' and was able to decrypt it using a passphrase also found 'on the internet'* [Augstein, tab 32] [tab 47, ex 8-9] [P, section C3, C203] which therefore drew *'public attention to David Leigh's information leak'* [Grothoff 1, tab 37, §6].

- Prior to the publication of the article about WikiLeaks in Der Freitag on 25 August 2011, Mr Assange had contacted the paper's editor stating he *'feared for the safety of informants'* if the article was published [Augstein, tab 32, p3] [Peirce 4, tab 36, §12] but the article was published anyway.

- Mr Assange, '*acutely troubled'* by the prospect of unredacted publication [Maurizi, tab 69, §§45-46], then took immediate steps to try to minimise that harm. On 25 August 2011 (the date of the Der Frietag publication), Mr Assange even contacted the US Ambassador in the UK [P, section C3, C221-223], and then the US State Department itself to warn the Secretary of State personally of the potential ability of the public to access the un-redacted cables [Goetz, tab 31, §31] [Peirce 4, tab 36, §11], repeatedly stating that '*this is a very large emergency. The US State Department cables have been accessed by someone else and are about to be all dumped online unredacted. We understand that you have a program to warn people, we want to know...if you can escalate it...people's lives are at risk...I don't understand why you are not seeing the urgency in this. Unless we do something then people's lives are put at risk...'* [transcript, tab 37]. Mr Assange's attempts to warn the US government continued over the following days [Maurizi, tab 69, §49] [P, section C3, C221-227].

- By 31 August 2011, the '*cat was forever out of the bag'*. Spurred by the Der Frietag hint, websites (notably well-known US-based cryptome.org) published the *'specific passphrase and which file it decrypts'* [tab 47, ex 9] [P, section C3, C205-207, 228] and another (mrkva.eu) published *'the first searchable copy of the cables'* [Grothoff 1, tab 37, §7] [Grothoff 2, tab 60, §§7-8] [Goetz, tab 31, §31] [Maurizi, tab 69, §48] [P, section C3, C208-210].

- The following day the decrypted cables were being shared on the internet; e.g. on the Pirate Bay website [Grothoff 1, tab 37, §8] [tab 47, ex 11] [P, section C3, C211-212]. They were now available to anyone able to operate a computer [Grothoff 1, tab 37, §9] [Grothoff 2, tab 60, §6]. The US Government even obtained a copy from Pirate Bay [Grothoff 2, tab 60, §10].

- These *'were unpredicted actions by others that resulted in publication against [Mr Assange's] wishes'* [Goetz, tab 31, §32]. '*Every possible step had been taken for over a year to avoid it'* [Maurizi, tab 69, §48].

119. The actions of WikiLeaks the subject of this US prosecution, namely their *public[cation of] over 250,000 [cables] in September 2011, in unredacted form*' [Dwyer, §44], or the '*intentional outing of intelligence sources'* [Kromberg 1, §§8-9, 20-22] [Kromberg 2, §10] - was, in truth, their re-publication, on 2 September, of the now-public database which had *'already been published by others'* [Grothoff 1, tab 37, §9] [tab 47, ex 12] [Goetz, tab 31, §31] [Maurizi, tab 69, §50].

120. Re-publication of material already in the public domain is not a criminal offence in this jurisdiction, and for the purposes of this Court's dual criminality assessment, because it does not occasion damage, pursuant to the principles in Spycatcher: ***Attorney-General v Guardian Newspapers*** (No 2) [1990] 1 AC 109.

121. Proof that the disclosure is or is likely to be damaging is a necessary ingredient of the OSAs in the UK:[28] unlike under US law [Jaffer, tab 22, §6] [Dwyer]. [29]

The US response (Kromberg)

122. Taking the points Mr Kromberg makes in chronological order:

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[28]. It is only abrogated, by s.1(1)(2) OSA 1989 for prosecutions of members of the intelligence and security services (such as Mr Shayler was). For all other crown servants, proof of damage is a constituent element of all OSA offences under s.1(3) etc. See ***Shayler*** (supra) per Lord Bingham at §§12-13, 18. That is to say damage '*beyond the damage inherent in disclosure by a former member of these services'* (§36).

[29]. Under US law there is no requirement even to show intention to cause damage [Shenkman, tab 4, §§23, 28-29] [Jaffer, tab 22, §7], reason to believe that damage may be caused is sufficient [Dwyer].

123. First, November 2010 – August 2011: Mr Kromberg suggests that Mr Assange was personally reluctant to engage in any harm minimisation (redaction) processes at all [Kromberg 4, §31], but does not dispute that he did initiate such processes, and that the resulting cables released from November 2010 to August 2011 were properly and responsibly redacted. The complex processes Mr Assange put in place to avoid harm being caused by publication were '*careful and responsible*' [Hager, tab 71, §16]. '*It was a cautious process*' [Maurizi, tab 69, §45].

124. The related suggestion that Mr Assange's redaction '*efforts*' extended only to those whose names were successfully redacted by that process [Kromberg 4, §33], i.e. he made no '*efforts*' at all to protect the names of persons which were revealed, is simply inconsistent with the evidence.

125. Secondly, February 2011: Mr Kromberg next seeks to suggest that Mr Assange was somehow '*responsible*' for the Guardian's publication of the password to the unredacted cable database because he '*originally disseminat[ed] the file with the unredacted cables that [the media partners] accessed*' [Kromberg 4, §37].

126. Encryption of sensitive data online[30] in this way is routine [Grothoff 2, tab 60, §12]. '*Keeping passwords private is very basic*' [Maurizi, tab 69, §§22-23]. The media partnerships were formed upon the basis of '*clearly stipulated security procedures and guidelines for handling and publishing the material…securely*' [Gharbia, tab 35, §5] [Maurizi, tab 69, §§17-22], which were according to Goetz '*more extreme measures taken*' than he had *'ever observed as a journalist'* to *'secure the data'* [Goetz, tab 31, §13]. WikiLeaks pioneered methods for secure

[30]. Here, the encrypted copy of the cables was additionally buried in an obscurely-named directory amongst thousands of past (already public) WikiLeaks publications.

communications which have *'become the norm amongst investigative journalists'* [Goetz, tab 31, §28].

127. Thirdly, and relatedly, Mr Kromberg cites David Leigh's assertions about whether he (Leigh) is to '*blame'* for what occurred [Kromberg 4, §39]. Whatever the value of those self-serving statements (for which Mr Kromberg expressly declines to vouch), the Court is reminded that neither Mr Leigh, nor Mr Kromberg, actually dispute the facts and events described by Prof. Grothoff which led to the publication of the unredacted cables.

128. In any event, Mr Leigh's protestations are patently nonsense and show extreme misunderstanding of the technical issues involved. There is no such thing as a '*temporary'* encryption key.[31] Once set, an encryption key *'never changes'* [Grothoff 1, tab 37, §1].

129. Fourthly, August 2011: Mr Kromberg cites the release of 133,887 cables by WikiLeaks during the last week of August (before the entire unredacted database was made public by Cryptome, PirateBay etc) [Kromberg 4, §38]. What Mr Kromberg fails to mention is that these were the unclassified portion of the cables [P, section C3, C233-234].

130. On 26 August 2011, speaking to a lawyer from the US State Department (about the feared spread of the unredacted classified cables and asking for help in stopping/slowing it down), Mr Assange explained this recent WikiLeaks publication of unclassified cables (being released he said in attempts to stop others from posting the full set of documents online immediately):

> *'...we have in the past 24 hours released a some 100,000 unclassified cables as an attempt to head off the incentives for others to release the entire archive, but I believe that*

[31]. His own book refers to a '*temporary website'*, not a '*temporary password'*.

nonetheless while we may have delayed things a little by doing that they will do so unless attempts are made to stop them. We have already engaged in some legal attempts to get them to stop but I think that it will not be enough... We have been trying to suck the oxygen out of the market demand by releasing all the unclassified cables' [P, section C3, C227].[32]

'...*WikiLeaks has not released the names of any 'informants'. The material is unclassified and previously released by mainstream media*...' [P, section C3, C233].

131. 133,887 is the exact number of <u>un</u>classified cables in the total WikiLeaks archive [P, section C3, C234].[33]

132. It is ultimately telling that Mr Kromberg declines to '*vouch for the accuracy*' of media articles he cites[34] which suggests that some of these cables were classified (and disclosed sources): if WikiLeaks *had* released cables before September 2011 containing names of sources, Mr Kromberg *would* know that.

133. <u>Fifthly</u>, concerning the 31 August / 1 September unredacted release, Mr Kromberg re-asserts the US's unspecific and unsubstantiated allegations of the creation of a <u>risk</u> of possible '*harm*' to unspecified

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32. Note also [P, section C3, C217] '...*Over the past week, we have published over 130,000 cables, mostly unclassified. The cables have lead to hundreds of important news stories around the world. All were unclassified with the exception of the Australian, Swedish collections, and a few others, which were scheduled by our partners'*. This is a reflection of the fact that, alongside the mass release of unclassified cables (about which Mr Kromberg speaks), the media partners were continuing their ongoing professional release of <u>redacted</u> classified cables. <u>Those</u> classified cables, as had been the case since November 2010, were released <u>only</u> after the local professional media partners responsible had determined (and re-checked) what (or whether) redaction was necessary and were thus marked as '*suitable for safe publication'*. Moreover, the timing of this release, following that determination, was dictated by the local media partners [Wahlstrom, tab 66, §§9-13]. For a sample of these cables, see [P, section C1, C50, 56, 65, 70, 78, 82, 92, 96, 107, 115, 118, 134, 139, 144].

33. See [P, section C1, C157] for verification. And also [P, section C3, C235-244] for verification of the individual embassy figures.

34. Which themselves emanate from a CIA source, Ken Dilanian [P, section C3, C229-232].

persons [Kromberg 1, §§25-35, 39, 44, 49, 55, 60-64],[35] often by no more than a recounting of prevailing human rights situations in various countries [Kromberg 1, §§40-59]. Mr Kromberg suggests for example that, even if '*key'* sources were not named by the disclosures, some sources nonetheless were [Kromberg 4, §§26-29].

134. The US, of course, has a long history of making deliberately vague and exaggerated assertions of potential '*harm'* posed by publication of classified materials, which invariably transpire to be overwrought and untrue [Feldstein, tab 18, §6 and the examples there cited].

135. This case is no different. No *actual* harm occurred:

- The Iraq and Afghan War diaries (counts 1, 15, 16):
    - The US government wrongfully accused WikiLeaks of publishing 300 names, which it claimed, '*could be endangered'* [Q2]. However, it was later shown that assessment was wrong: they had discovered the 300 names in their own copy of their documents. They had, of course, been redacted by WikiLeaks and had not been published [Q3-4].
    - '*...An often-repeated charge of the US government regarding the release of the Iraq War Logs is that this could have endangered lives, including of Iraqi as well as US citizens, by exposing their identities or role. However, according to reliable reporting on the matter, the US government has never been able to demonstrate that a single individual has been significantly harmed by the release of these data. This is not least because the War Logs were highly redacted prior*

[35]. So general to be impossible to investigate, particularly with the passage of time [Peirce 4, tab 36, §§16-18].

to their release by Wikileaks, ensuring that information that could identify and possibly endanger the living was not available...' [Dardagan, tab 52, §3].

- '...*I run the largest explosive violence monitor in the world, in the last decade I have found no evidence whatsoever that the Iraq war logs or the reporting of the Iraq war logs caused anyone any harm*...' [Overton, tab 62, §13].

- The Senate Committee on Armed Services reported at the time that '*the review to date has not revealed any sensitive intelligence sources and methods compromised by this disclosure'* [Q5].

- The cables (counts 1, 3, 7, 10, 13, 17):

  - Led to physical harm to no-one [Gharbia, tab 35, §9]. See also [P, section C3, C220] in which an Associated Press review *'finds no threatened WikiLeaks sources*';

  - This may explain why, '*early attempts to discredit'* Mr Assange, '*trying to prove the WikiLeaks disclosures had led directly to the deaths of US agents and informants'* ultimately failed and it was accepted that no such evidence had been found by the Information Review Task Force, despite *'120 counterintelligence officers'* being assigned to seeking it [Cockburn, §12-13]. The same was acknowledged by its chair, Brigadier General Carr, at Manning's sentencing hearing [Cockburn, §12].

136. Ultimately, however, even if Mr Kromberg's suggested harm *had* materialised (which it did not), that with respect misses the point entirely. On the evidence before the court, WikiLeaks did not create that harm (or the risk of it). It was created by the actions of those others

who first released the materials in unredacted form. This is not a '*defence theory...for the United States courts to resolve'* [Kromberg 4, §§35-37], it is, as explained above, a dual criminality issue.

137. Tellingly, none of those who did actually reveal the unredacted cables, including those based in the US such as cryptome have been prosecuted [Grothoff 1, tab 37, §9] [tab 47, ex 9, p9]. The unredacted cables hosted by those US-based sites are *still* hosted there [Grothoff 1, tab 47, ex 14] and the US has never requested their removal [Young, tab 68].

Conclusion

138. It is neither permissible nor lawful to mischaracterise conduct or offences: ***Castillo v Spain*** [2005] 1 WLR 1043. Those principles were approved under the 2003 Act in ***Spain v Murua*** [2010] EWHC 2609 (Admin), and have been confirmed (although re-categorised as abuse of process rather than validity) by the Supreme Court in ***Zakrzewski v The Regional Court in Lodz, Poland*** [2013] 1 WLR 324 per Lord Sumption at §§8-13.[36]

139. This is a paradigm example of ***Zakrzewski*** abuse. It is, pursuant to ***Zakrzewski***, neither permissible nor lawful to mis-describe lawful conduct (say, re-publication of publicly available material) as unlawful conduct when it is not.

140. The misstatements here are material (indeed, central) to the operation of the statutory scheme. As matters presently stand, the '*conduct'* by which the Court must undertake, e.g. the dual criminality assessment

[36]. For the avoidance of doubt, the same consequences also flow from Article 5 ECHR; a Requesting State which causes a misleading arrest warrant to be executed in another country is liable under Article 5 for that unlawful detention abroad; see, for example, ***Stephens v. Malta (No. 1)*** (2010) 50 EHRR 7 at §52; ***Toliono v San Marino & Italy*** (2012) App. No. 44853/10 at §56.

under s.137(3) is, per s.137(7A),[37] the conduct as described in the request. The ***Zakrzewski*** jurisdiction enables this court to ascertain the true facts, and to feed those true facts into the dual criminality machinery of s.137. When done here, no offending emerges for any of three alternative reasons:

- The '*Most Wanted List'* is the stuff of everyday journalism, was not compiled by WikiLeaks and was not, in any event, referable to that which Manning supplied to them;

- The '*passcode hash'* chapter concerned streaming videos at Forward Operating Base Hammer, not some technically impossible '*plot'* to steal data to which the '*conspirators'* already had access;

- The '*public[cation of] over 250,000 [cables] in September 2011, in unredacted form*' was the re-publication of publicly available data, acts which are entirely lawful pursuant to ***Attorney-General v Guardian Newspapers***. It is striking that those that *did* publish these materials in the way alleged have not been prosecuted.

141. This is not, and is not to be confused with, an enquiry into evidential sufficiency. In ***Castillo***, Lord Thomas held, at §25, that:

> *'...It is in my view very important that a state requesting extradition from the UK fairly and properly describes the conduct alleged, as the accuracy and fairness of the description plays such an important role in the decisions that have to be made by the Secretary of State and the Court in the UK. Scrutiny of the description of the conduct alleged to constitute the offence alleged, whereas here a question is raised about its accuracy, is*

[37]. And ***Shlessinger***.

not an enquiry into evidential sufficiency; the court is not concerned to assess the quality or sufficiency of the evidence in support of the conduct alleged, but it is concerned, if materials are put before it which call into question the accuracy and fairness of the description, to see if the description of the conduct alleged is fair and accurate...'

142. Neither is bad faith required; ***Murua*** (at §59) and ***Zakrzewski*** (at §13). Of course, more generally this Court is invited to conclude that the misstatements are deliberate, calculated and evidence of the malign purposes behind this request.[38] But bad faith is not legally necessary, and is irrelevant, to the existence of ***Zakrzewski*** abuse.

Submission 4: Dual criminality: Disclosing criminality and gross human rights violations

143. The publications the subject of this extradition request disclosed US involvement in criminal activity, and specifically torture and war crimes. They sit at the very apex of public-interest disclosures. The prohibition against torture is a peremptory norm of international law. War crimes and rendition are grave breaches of international law and a profound affront to the international legal order. They are also notoriously difficult to detect and expose because of the secrecy that surrounds them. '*WikiLeaks...exposed outrageous, even murderous wrongdoing [including] war crimes, torture and atrocities on civilians'* [Feldstein, tab 18, §4]. The subject matter of the publications is currently the subject of criminal investigation of the CIA before the International Criminal Court.

[38]. Moreover, and separately, the failure of the US government to inform this Court of the true facts (most notably those surrounding the David Leigh password publication) is significant for the case more broadly. The requirements of the duty of candour, insofar as it applies to facts and materials known to the US rather than the CPS, has recently been reiterated in ***Bartulis*** [2019] EWHC 3504 (Admin) at §§133 & 135. On no sensible view was that duty complied with here. Whether as an abuse in its own right (per ***Saifi v India*** [2001] 1 WLR 1134 at §64; ***Knowles*** [2007] 1 WLR 47; ***Raissi*** [2008] QB 836), or as a reason for not acting upon the IJA's evidence (per ***Shmatko v Russia*** [2018] EWHC 3534 (Admin) at §55), the lack of candour demonstrated in this case is significant.

The cables (counts 1, 3, 7, 10, 13, 17)

144. The cables revealed, *inter alia*,:

- Evidence of CIA and US forces involvement in targeted, extra-judicial killings in Pakistan [Stafford-Smith, tab 64, §84] [M2/56-69];
- Evidence of US rendition flights [Overton, §14];
- Deliberate killing of civilians [M2/48-54];
- Evidence of CIA '*black sites*' where detainees were subject to torture [Overton, §14];
- Evidence of the US government-ordered spying on UN diplomats [Feldstein, tab 18, §4] [M2/section 13];
- Proof of previously denied US involvement in the conflict in Yemen, including drone strikes [M2/36-52, 94-113, 117];
- Evidence of the UK training death squads in Bangladesh [M2/35].

145. Evidence, for example, revealed by WikiLeaks regarding US government drone killings in Pakistan '*contributed to [subsequent] court findings that US drone strikes are criminal offences and that criminal proceedings should be initiated against senior US officials involved in such strikes*' [Stafford-Smith, tab 64, §84, 91]. The Peshawar High Court ruled, *inter alia*, that the drone strikes carried out by the CIA and US authorities were a *'blatant violation of basic human rights'* including '*a blatant breach of the absolute right to life'* and *'a war crime'* [Stafford-Smith, tab 64, §91]. Moreover, and as a result, '*the drone strikes, which were in their hundreds and causing*

many…innocent deaths, stopped very rapidly' such that '*there were none reported…in 2019'* [Stafford-Smith §93]. WikiLeaks had '*put a stop to a massive human rights abuse'* [Stafford-Smith, tab 64, §§92-93].

146. Amnesty International has reported that the cables confirmed human rights violations that they had publicly raised before, including about complicity of European states in CIA rendition and US drone strikes in Yemen [Q6].

147. The importance of the cables in revealing crime is evident, for example, from the damning judgment of the Grand Chamber of the ECtHR in ***El Masri v Macedonia*** (2013) EHRR 25 concerning Macedonia's co-operation in the US rendition program, whereby '*agents of the respondent State had arrested [el-Masri], held him incommunicado, questioned and ill-treated him, and handed him over at Skopje Airport to agents of the US Central Intelligence Agency (CIA) who had transferred him, on a special CIA-operated flight, to a CIA-run secret detention facility in Afghanistan, where he had been ill-treated for over four months'* (judgment, §3). Evidence of the crimes committed by the US and its allies against Mr El-Masri included:

> *'...WikiLeaks cables...in which the US diplomatic missions in the respondent State, Germany and Spain had reported to the US Secretary of State about the applicant's case and/or the alleged CIA flights and the investigations in Germany and Spain (cable 06SKOPJE105, issued on 2 February 2006; cable 06SKOPJE118, issued on 6 February 2006; cable 07BERLIN242, issued on 6 February 2006; cable 06MADRID1490, issued on 9 June 2006; and cable 06MADRID3104, issued on 28 December 2006). These cables were released by WikiLeaks (described by the BBC on 7 December 2010 as 'a whistle-blowing website') in 2010...'* (judgment, §77).

148. The ECtHR found that Mr El-Masri had been, inter alia, '*handcuffed and blindfolded...beaten severely by several disguised men dressed in black. He was stripped and sodomised with an object. He was placed in an adult nappy and dressed in a dark blue short-sleeved tracksuit. Shackled and hooded, and subjected to total sensory deprivation, the applicant was forcibly marched to a CIA aircraft (a Boeing 737 with the tail number N313P), which was surrounded by Macedonian security agents who formed a cordon around the plane. When on the plane, he was thrown to the floor, chained down and forcibly tranquillised. While in that position, the applicant was flown to Kabul (Afghanistan) via Baghdad (Iraq)...'* (judgment, §205). The WikiLeaks disclosures helped detail the most degrading and appalling torture of an entirely innocent man, in the face of determined invocation by the US and European governments of '*state secrets'* in order to '*obstruct the search for truth'* (judgment §§191-192).

149. Of course, separately from the predicate war crimes, attempts by the US government to obtain impunity for its war crimes is a separate, egregious, violation of international law. WikiLeaks cables also evidenced the lengths the US government subsequently went to block investigation in Mr El-Masri's and other cases. They revealed '*pressure from the US government [brought upon the German government] not to seek extradition of the rendition team'* and that the US government had *'interfered to block judicial investigation in Germany and similarly intervened in Spain'* where his rendition flight had travelled from [El-Masri, tab 53, §§26-28] [Goetz 2, tab 58, §§4, 10] [Stafford-Smith, tab 64, §95] [M2/89-93]. As Mr el-Masri himself describes:

> '...*At each stage of my raising my predicament, governments, both my own and those who played a direct part, have sought to discredit my account and in a number of different ways attempted to silence me. But, at each juncture it has been journalists and investigators informed by WikiLeaks documents*

that have been able, through their painstaking and diligent work, to corroborate my story and restore credibility to my account...' [El-Masri, tab 53, §34].

150. Likewise, in Italy, the only country in the world to investigate and convict CIA agents for extraordinary rendition (in that case Abu Omar who was snatched from the streets of Milan), the cables revealed direct evidence of '*secret and relentless pressures exerted by US diplomacy, which pressured the highest echelons of the Italian governments for years'* to prevent '*the extradition of [the] 26 US nationals convicted'* and appears to have resulted in pardons being issued to them by various administrations [Maurizi, tab 69, §§28-42].

151. The cables similarly demonstrated US interference with other rendition investigations in Spain and Poland [Stafford-Smith, tab 64, §§95-96].

The Rules of Engagement (counts 1, 4, 8, 11, 14)

152. As detailed above, but purposefully excised by the extradition request [Kromberg 1, §21], the release of the 2006-2008 versions of the US Iraq Rules of Engagement, was integral to the release to the public of the '*collateral murder video'* [Hager, tab 71, §§21-23] [P, section B6-8].[39]

153. The US army helicopter video footage from Iraq in 2007 is as '*disturbing'* now as it was in 2010 [Felstein, tab 18, §4] [Boyle, tab 5, §11] [Yates, tab 67] [P, section B7]. It shows '*the killing of 11 people by a US helicopter in Baghdad'* on 12 July 2007, a full version of which the US government had refused to release, instead issuing flat denials of wrongdoing, such that at the time it was '*impossible to prove that all those who died were unarmed civilians'* including two Reuters journalists, despite compelling witness evidence [Cockburn, tab 51,

[39]. [M2/501].

§§5-6]. The video released by WikiLeaks revealed that the helicopter pilots in fact '*exchanged banter about the slaughter in the street below',* continued to shoot the wounded victims, including one (thought to be Reuters assistant Saeed Chmagh) as he crawled for help, and expressed callous flippancy when informed they had just killed civilians and wounded children [Cockburn, tab 51, §8]. It is a video which '*still has to power to shock'* but which, at the time, disclosed acute criminality which the US government sought to actively cover up and which '*could never have been established'* through more traditional journalistic efforts [Cockburn, §§8, 6].

154. In efforts to conceal the truth of this war crime, the US military shortly after the incident had '*choreographed'* extracts from the footage to create *'a certain impression',* and '*cheated'* and '*lied to'* the world's press about the truth of the matter [Yates, tab 67, §23]. The US had also cited the Rules of Engagement '*to justify the initial attack'* [Yates, tab 67, §12]. The Rules of Engagement are '*designed to forestall commission of war crimes'* such as this [Tigar, tab 23, p9].

155. '*What was depicted in [the video released by WikiLeaks] deserved the term murder, a war crime'* [Ellsberg, tab 55, §28] [Yates, tab 67, §27] [Maurizi, tab 69, §10]. The release of the video was '*picked up by thousands of news organisations worldwide, sparking global outrage and condemnation'* [Yates, tab 67, §28] [P, section B9-17]. '*It would be hard to overstate how important it was...[it] demonstrated...actions were unlawful both under international law and the US military's own Rules of Engagement'* [Hager, tab 71, §23]. Mr Assange was invited to speak to the European Parliament on the issue [Maurizi, tab 69, §11].

The Guantánamo Detainee Assessment Briefs (counts 1, 6, 9, 12, 18)

156. These documents provided evidence that Guantánamo detainees had been the subject of prior rendition and detention in CIA '*black sites'*

before their arrival at Guantánamo [Worthington, tab 31, §§8, 14],[40] for example:[41]

- Mohammed Farik Bin Amin was seized in Thailand in June 2003 (when CIA Director Gina Haspel was chief of the secret CIA prison in Thailand) and transferred to Guantánamo Bay on 4 September 2006;

- Saifullah Paracha, a Pakistani national, was seized in Bangkok on 8 July 2003 as arranged for by the FBI, and held in CIA custody in Afghanistan;

- Abu bakr Muhammad boulghiti (Abu Yassir al-Jaza'iri) was transferred from a CIA secret detention centre to (likely) Algeria in around 2006;

- Walid Muhammad Shahir al-Qadasi was transferred by Afghan authorities to US custody before being transferred to CIA custody in the '*Dark Prison'* in Kabul;

- Ahmed Muhammed haza al-darbi was transferred from Azerbaijan to Bagram prison before being transferred to Guantánamo Bay;

- Hail Aziz Ahmed al-Maythali was captured on 11 September 2002, by Pakistani forces, and held for approximately one month before being transferred to US custody;

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40. I.e. Many of the people held and tortured at Guantánamo Bay had not been arrested '*on the battlefield'*, but had in fact '*had been turned over to the US [from Pakistan] not because they were guilty of crimes, but because the US was offering substantial bounties for exclusively Muslim men'* and they were in fact '*totally innocent of anything that could remotely be deemed a crime'* [Stafford-Smith, tab 64, §§9, 42].

41. [P, tab A1-10]. See also [Q7].

- Abdul al-Rahim Ghulam Rabbani remained in Kabul for seven months and was then moved to another prison (which reports indicate was a CIA black site) before being transferred to US Forces custody;[42]

- Mohammed Ahmed Ghulam Rabbani was subject to the same treatment [Stafford-Smith, tab 64, §§54-57];

- Omar Muhammad Ali al-Rammah (Zakaria al-Baidany) a Yemeni national, was reportedly seized by Georgian Security Forces in the Pankisi Gorge in Georgia in early 2002, sold to US forces, and held in CIA detention in the Dark Prison among other facilities in Afghanistan before being transferred to Guantánamo Bay on 9 May 2003;

- Aminullah baryalai Tukhi, an Afghan national, was captured in Iran and transferred to CIA custody in Afghanistan before being renditioned to Guantánamo Bay.

157. As discussed further below, the ICC is currently investigating:

> *'...War crimes by members of the United States ('US') armed forces on the territory of Afghanistan, and by members of the US Central Intelligence Agency ('CIA') in secret detention facilities in Afghanistan and on the territory of other States Parties to the Rome Statute, principally in the period of 2003-2004...'* [Q10]

158. The Detainee Assessment Briefs also documented the nature of the evidence relied upon by the US the '*justify*' the detentions, including the repeated use of information and informants known to be unreliable or to have been tortured, and in some cases the detention of persons known to be innocent [Feldstein, tab 18, §4] [P, section A1-11], even

42. See also [Q8].

on the '*best face that the US Government could put'* [Stafford-Smith, tab 64, §§25-41].

159. The use of evidence obtained by torture, and arbitrary detention of this nature are international crimes '*of colossal proportions'* [Worthington, tab 33, §9].

<u>The Iraq and Afghan War diaries (counts 1, 15, 16)</u>

160. The Afghan war diaries [P, section D] revealed '*what seemed to be war crimes'* [Goetz, tab 31, §11] and included, *inter alia*:

- The existence of '*black unit'* Task Force 373 operating '*kill or capture lists*' hunting down targets for extra-judicial killings [Feldstein, tab 18, §4] Goetz, tab 31, §11] [Hager, tab 71, §21] [P, section D, D15, D25];

- killing of civilians, including women and children [P, section D];

- The role of Pakistan intelligence in arming and training terrorist groups [P, tab D4];

- The role of the CIA in the conflict, including participation in strikes and night raids [Hager, tab 71, §21] [P, tab D13].

161. The Iraq material [P, section E] covers the six-year period from 1 January 2004 (just months after the 2003 invasion) to 31 December 2009, exposing numerous cases of torture and abuse of Iraqi prisoners by Iraqi police and soldiers, as well as proof of the US government's involvement in the deaths and maiming of more than 200,000 people in Iraq. Key revelations include:

- Systematic torture of detainees (including women and children) by Iraqi and US forces [Feldstein, tab 18, §4] and a secret order by which the US ignored the abuse and handed detainees over to the Iraqi torture squad [Overton, tab 62, §§8-10, 14, 16] [P, section E, E1, 8, 11-14, 22, 25, 29, 33, 44, 51];

- Helicopter killings, including of insurgents trying to surrender [P, section E, E3-4, 18, 35, 57];

- Details of 15,000 previously unreported civilian deaths [Feldstein, tab 18, §4] [Dardagan, tab 52, §2] [Overton, tab 62, §§8-10] [Hager, tab 71, §21] [P, section E, E2, 6-7, 9-10, 19-21], including through checkpoint killings [Cockburn, tab 51, §3] [P, section E, E23, 39, 45], use of contractors [P, section E, E16, 31, 41-42], targeted assassinations, drive-by killings, executions [P, tabs E47, E52]; showing that the US Government was hiding the full civilian cost of the Iraq war [Feldstein, tab 18, §4]. '*Protection of civilians is the universally accepted precondition of lawful armed conflict, and the deliberate targeting of civilians is a war crime*' [Dardagan, tab 52, §2].

- Details of 23,000 previously unreported violent incidents in which Iraqi civilians were killed or their bodies were found [Dardagan, tab 52, §2].

162. The Iraq war diaries attracted worldwide opprobrium for torture and war crimes committed by or acquiesced in by the US, leading to calls for proper investigations into the conduct of allied troops:

- Amnesty International condemned the US declaring they had committed '*a serious breach of international law when they handed over thousands of detainees to Iraqi security forces who, they*

clearly knew, were responsible for widespread and systematic torture' [P, tab E8].

- Nick Clegg, then Deputy Prime Minister, expressed his support for an investigation into the '*allegations of killings, torture and abuse'* in the documents, having stated, *'We can bemoan how these leaks occurred, but I think the nature of the allegations made are extraordinarily serious'* [P, section E, E50];

- Danish Prime Minister, Lars Rasmussen promised that '*all allegations according to which Danish soldiers may have knowingly handed over detainees in Iraq to mistreatment at the hands of local authorities are regarded as very serious'* [P, tab E49]. In response, an investigation by the Danish military was ordered by the then minister of defence [P, tab E34];

- The UN Special Rapporteur on Torture, Manfred Nowak called on the Obama administration to investigate the torture claims contained in Iraq war diaries [P, tab E52];

- UN High Commissioner for Human Rights, Navi Pillay, also said that '*the US and Iraq should investigate claims of abuse contained in files published on the WikiLeaks website'* [P, section E, E52-53].

163. The Iraq war diaries enabled journalists to '*demonstrate that hundreds of civilians had been killed by US troops…and that hundreds of civilians had been murdered and tortured by the Iraq military* [Overton, §§8-10]. Furthermore the information revealed that '*the US authorities had failed to investigate hundreds of abuse, torture, rape and murder by Iraqi police and soldiers'* whose conduct '*appeared systematic and customarily unpunished'* [Overton, §9]. Indeed the documents revealed a '*formal policy'* that '*reports of systemic abuses including executions by Iraqi soldiers'* were '*being ignored, recorded as 'No investigation is*

necessary'...' [Overton, §10]. Abuses directly by US and UK troops were also recorded in the logs [Overton, §§9-10].

164. This was '*an accessible substantive body of evidence which showed that harm (namely murder, torture, war crimes and crimes against humanity) was created and carried out by the US and the Iraqi military...The work in which I and the Bureau of Investigative Journalism was engaged with Julian Assange was to disseminate an enormous amount of evidence, in the most effective way, frequently involving state actions of the most serious criminality. We were awarded an Amnesty International Media Award for our work...*' [Overton, tab 62, §§14, 16]. It is '*very obvious'* that what was revealed was '*evidence of the most appalling of crimes, categorised as such by the entire international community*' [Overton, tab 62, §22].

165. Speaking at the UN in Geneva following the publication of the war diaries, Mr Assange called on the US to investigate alleged abuses by US troops in Afghanistan and Iraq as evidenced in the material published by WikiLeaks [Rogers, tab 40, §C(iii)].

These matters would render Mr Assange's actions lawful as a matter of UK law

166. There is an extensive body of international materials concerning the '*right to the truth*' regarding serious human rights violations. The public has a right to know about the existence of such violations and states have a concomitant duty not to conceal them: see e.g. ***El-Masri v Macedonia*** (2013) 57 EHRR 23 at §§191-193; ***Al Nashiri v Romania*** (2019) 68 EHRR 3 at §641; UN Commission on Human Rights' (OHCHR) Resolution 2005/66 on the '*Right to the truth*';[43] UN Human Rights Council Resolution 21/7 on the '*Right to the truth*' (27

[43]. Available at: https://www.refworld.org/docid/45377c7d0.html

September 2012);[44] UN General Assembly Resolution 68/165 on the '*Right to the truth*' (21 January 2014);[45] UN Economic and Social Council '*set of principles for the protection and promotion of human rights through action to combat impunity*'.[46]

167. The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, for example, published in 2013 *Framework Principles for securing the accountability of public officials for gross or systematic human rights violations committed in the context of State counter-terrorism initiatives*.[47] This explains that:

> *'The Right to Truth in International Human Rights Law*
>
> *23. The principles of international law that govern accountability for such violations have two complimentary dimensions. Put affirmatively, international law nowadays protects the legal right of the victim and of the public to know the truth. The right to truth entitles the victim, his or her relatives, and the public at large to seek and obtain all relevant information concerning the commission of the alleged violation, including the identity of the perpetrator(s), the fate and whereabouts of the victim and, where appropriate, the process by which the alleged violation was officially authorised....*
>
> *24. The victim's right to truth has been expressly recognised in a number of international instruments negotiated under the auspices of the United Nations. Article 24(2) of the UN*

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44. https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G12/173/61/PDF/G1217361.pdf
45. https://documents-dds-ny.un.org/doc/UNDOC/GEN/N13/449/35/PDF/N1344935.pdf
46. https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf
47. https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-52_en.pdf

Convention on the Protection of All Persons from Enforced Disappearances...[§24 of] The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the General Assembly on 16 December 2005...The Human Rights Council has similarly recognised 'the importance of respecting and ensuring the right to truth so as to contribute to ending impunity' . Statements to the same effect have been made by many of the UN's independent human rights mechanisms including the High Commissioner for Human Rights, the Committee Against Torture, and various Special Procedures mandate-holders.

25. The Inter-American Commission and Court of Human Rights have developed jurisprudence on the right to truth which is cast as a right jointly vested in the victim, his or her next-of-kin, and the whole of civil society. In one of its earliest decisions on the subject the Commission observed that '[e]very society has the inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent repetition of such acts in the future. In Myrna Mack Chang v Guatemala the Court held that 'the next of kin of the victims and society as a whole must be informed of everything that has happened in connection with the said violations.'

26. The right to truth has been recognised by the African Commission on Human and Peoples' Rights as an aspect of the right to an effective remedy for a violation of the African Convention. In its Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, the Commission held that the right to an effective remedy includes 'access to

the factual information concerning the violations'. Most recently and, for present purposes, most relevantly, the right to truth was expressly recognised by the European Court of Human Rights in connection with the former CIA programme of secret detention, 'enhanced interrogation' and rendition, in the judgment of its Grand Chamber in El-Masri v Macedonia....'

168. In September 2013, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression published a report[48] which reiterated amongst other things that: *'Elucidating past and present human rights violations often requires the disclosure of information held by a multitude of State entities. Ultimately, ensuring access to information is a first step in the promotion of justice and reparation'* (§5). To this end, '*International human rights bodies and mechanisms have recognized and developed the right to truth as a distinct right*' (§15). The right to truth '*is closely associated with the right to access information*', which '*is an essential element of the right to freedom of expression*' (§§17-18). In this regard: '*A particular dimension of the right to seek and receive information concerns access to information on human rights violations. Such access often determines the level of enjoyment of other rights, is a right in itself and, as such, has been addressed by a number of human rights instruments and documents. It has also been the object of decisions and reports from various human rights mechanisms and bodies'* (§21). Ultimately:

> *'...there is an overriding public interest in disclosure of information regarding gross violations of human rights or serious violations of international humanitarian law, including crimes under international law, and systematic or widespread violations of the rights to personal liberty and security. Such information*

48 https://documents-dds-ny.un.org/doc/UNDOC/GEN/N13/464/76/PDF/N1346476.pdf

may not be withheld on national security grounds in any circumstances...' (§66)

'...under no circumstances, may journalists, members of the media or members of civil society who have access to and distribute classified information on alleged violation of human rights be subjected to subsequent punishment...' (§69)

'...*Individuals should be protected from any...sanctions for releasing information on wrongdoing, including the commission of a criminal offence or the failure to comply with a legal obligation. Special protection should be provided for those who release information concerning human rights violations*...' (§77).

'...*Given that the enjoyment of human rights also implies responsibilities, and is based on the principles of universality, equality and interdependence, there is a shared responsibility in denouncing human rights violations whenever they occur. Such responsibility is of greater importance in the case of public officials. Therefore, the disclosure in good faith of relevant information relating to human rights violations should be accorded protection from liability*...' (§93)

'...*Government officials who release confidential information concerning violations of the law, wrongdoing by public bodies, grave cases of corruption, a serious threat to health, safety or the environment, or a violation of human rights or humanitarian law (i.e. whistle-blowers) should, if they act in good faith be protected against legal, administrative or employment-related sanctions. Other individuals, including journalists, other media personnel and civil society representatives, who receive, possess or disseminate classified information because they believe that it is in the public interest, should not be subject to*

liability unless they place persons in an imminent situation of serious harm....' (§107).

169. UK law – and in particular UK criminal law concerning the Official Secrets Acts - recognises and gives effect to these core principles.[49] The disclosure of otherwise secret evidence of war crimes or gross human rights violations is '*necessary'* to avoid imminent peril of danger to life or serious injury of those that are the subject of it. It is '*necessary'* to expose and prosecute criminality which sits at the very apex of the international legal order. That is why, for example, the Statute of Rome (and the UK's ICC Act 2001) contains protections for those, like Mr Assange, who reveal evidence of crimes within the jurisdiction of the ICC.

170. Were Mr Assange to be tried in England and Wales, for any offences arising under the Official Secrets Acts ('OSA'), it would therefore be incumbent, as a matter of substantive UK law, on the prosecution to prove, to the criminal standard of proof, that Mr Assange's disclosures were not the result of duress of circumstance or necessity: see ***R v Shayler*** [2001] 1 WLR 2206, CA: '*unless and until Parliament provides otherwise, the defence of duress…is generally available in relation to all substantive crimes, except murder, attempted murder, and some*

[49]. These are principles which are given effect by UK domestic law more broadly. For example, the principles lie at the heart of the '*iniquity'* rule in the civil law of contempt. The courts have always refused to uphold the right to confidence when to do so would be to cover up wrongdoing on the basis that a man cannot be made '*the confidant of a crime or a fraud'*: see ***Gartside v Outram*** (1857) 26 L.J.Ch. 113, 114, per Sir William Page Wood V.-C. In ***Lion Laboratories Ltd. v Evans*** [1985] Q.B. 526, Griffiths LJ said at p550 '*...the so-called iniquity rule evolved because in most cases where the facts justified a publication in breach of confidence, it was because the plaintiff had behaved so disgracefully or criminally that it was judged in the public interest that this behaviour should be exposed...*'. Likewise in the law of LPP: '*communications made in furtherance of an iniquitous purpose negate the necessary condition of confidentiality*' (***JSC BTA Bank v Ablyazov*** [2014] EWHC 2788 (Comm) at §76). The principles can likewise be seen in play under the Freedom of Information Act 2000 '*If the information would reveal evidence of misconduct, illegality or gross immorality (such as misfeasance, maladministration or negligence) then this will carry significant public interest weight in favour of disclosure*' (ICO guidelines, https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf , §84) and in the defences provided by s.170 of the Data Protection Act 2018.

forms of treason' (§70).[50] Lord Woolf CJ confirmed that:

> *'…the defence…[is] available when a defendant commits an otherwise criminal act to avoid an imminent peril of danger to life or serious injury to himself or towards somebody for whom he reasonably regards himself as being responsible. That person may not be ascertained and may not be identifiable. However, if it is not possible to name the individuals beforehand, it has at least to be possible to describe the individuals by reference to the action which is threatened would be taken which would make them victims absent avoiding action being taken by the defendant. The defendant has responsibility for them because he is placed in a position where he is required to make a choice whether to take or not to take the action which it is said will avoid them being injured. Thus if the threat is to explode a bomb in a building if defendant does not accede to what is demanded the defendant owes responsibility to those who would be in the building if the bomb exploded...'* (§63)

171. The Court was satisfied that there was no '*need to extend the list offences to which [the defence of necessity] does not apply'* to include the OSA 1989 and there was '*no insuperable difficulty to the prosecution disproving the defence if it is raised…by a defendant'* (***Shayler,*** §68).

172. Thus, when consideration was given in 2004 to the prosecution of GCHQ translator Katherine Gun, who leaked materials to the press regarding UK involvement in spying on members of the UN to help secure a UN resolution supporting the invasion of Iraq, the Crown

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[50]. This aspect of the Court of Appeal's decision was not overturned by the the House of Lords (***R v Shayler*** [2003] 1 AC 247). Lord Bingham stated at §17 that with regards to the defence of necessity: '*I should not for my part be taken to accept all that the Court of Appeal said on these difficult topics, but in my opinion it is unnecessary to explore them in this case'*.

accepted that '*necessity'* was not only available to Ms Gun, it operated to prevent her prosecution. In a statement issued by the DPP on 26 February 2004, offering no evidence, it was said that:

> *'...There was in this case a clear prima facie breach of Section 1 of the official Secrets act 1989. The evidential deficiency related to the prosecution's inability within the current statutory framework to disprove the defence of necessity to be raised on the particular facts of this case...'* [Q9].

<u>None of this is relevant under US law</u>

173. Contrary to the position in England and Wales, the US offences with which Mr Assange has been charged contain nothing approaching a prosecutorial requirement to disprove (or indeed any judicial consideration at all of) necessity. No such defence is to be found within the statute and the US government does not suggest such a defence exists.

174. Authoritative commentators on the Espionage Act have lamented the absence of any '*justification defense…permitting a jury to either balance the information's significance against its importance for public understanding and debate, or to consider possible dereliction of duty by the employee's superiors'* [Shenkman, tab 4, §13]. The Espionage Act is in fact '*indifferent to the defendant's motives and indifferent to whether the harms caused by disclosure were outweighed by the value of the information to the public'* [Jaffer, tab 22, §7].

175. The Computer Intrusion offence (Count 2) is no different.

176. There are numerous examples of defendants (leakers) in Espionage Act cases being denied even the opportunity to explain their reasons for leaking or the US government seeking to supress evidence of the same:

- Daniel Ellsberg, who leaked the Pentagon Papers and thereby brought out '*a radical change of understanding*' of the war in Vietnam and caused a '*reverse*' of US policies in Vietnam, considered his actions *'to be essential, and the actions of a patriot'* [Ellsberg, tab 55, §§14, 25]. However, his trial judge expressly denied him the opportunity to even explain his reasons for doing so, ruling his evidence on the topic '*irrelevant*' [Ellsberg, tab 55, §§12, 32]. Mr Ellsberg's lawyer objected on the basis that he '*had never heard of a case where a defendant was not permitted to tell the jury why he did what he did',* to which the judge hearing the case responded '*Well you're hearing one now'* [Ellsberg, tab 55, §32];

- In the trial of John Kiriakou, who leaked details of torture perpetrated by the CIA, it was considered *'irrelevant'* that he acted out of his '*moral and ethical problem with torture'* [Shenkman, tab 4, §23];

- In the prosecution of Thomas Drake, who leaked information about the dubious legal practices in the National Security Agency, the US government took the position that '*a defendant's intent or belief about information relating to the national defense, or intent or belief about the proposed use of that information, is irrelevant under the statute'* [Shenkman, tab 4, §23];

- At her military trial, Chelsea Manning and her lawyer were prevented by the judge from being able to '*argue her intent, the lack of damage to the US, overclassification of cables or the benefits of the leaks'* until after she was convicted [Ellsberg, tab 55, §33];

177. '*[T]he lack of proportionality or public interest defense available under the Act [means] Defendants have no opportunity to argue that disclosures of information subject to the Espionage Act can be*

mitigated at all by intent to serve the public interest. This is true even where the underlying information exposes corruption, abuses, or even violations of international law or war crimes...' [Shenkman, tab 4, §28].

The result for these proceedings

178. The US Government must prove, to the criminal standard,[51] that the conduct it alleges amounts to extradition offences, as defined in s.137 of the Act.

179. That requires satisfying this Court that the elements of the notionally equivalent England and Wales offences are present in the conduct described, including the *mens rea* (by inference if necessary: ***Zak v Regional Court of Bydoszcz, Poland*** [2008] AC 920, §§15-17).

180. Where however, '*alleged offence in the requesting state lacks an ingredient essential for identifying any criminality under English law'* (here proof of the absence of necessity)*,* the missing ingredient which must be proved in UK law must be factually established by the US Government to the satisfaction of this Court, and done so to the following standard:

> '...*the facts set out in the [request] must not merely enable the inference to be drawn that the Defendant did the acts alleged with the necessary mens rea. They must be such as to impel the inference that he did so; it must be the only reasonable inference to be drawn from the facts alleged. Otherwise, a Defendant could be convicted on a basis which did not constitute an offence under the law of England and Wales, and thus did not satisfy the dual criminality requirement...*' (***Assange v Swedish Prosecution Authority*** [2011] EWHC 2849 (Admin) per Sir John Thomas P at §57).

[51]. Section 206 of the Act. See eg. ***M v Italy*** [2018] EWHC 1808 (Admin), §46.

181. In other words, where '*the offence in the foreign state does not include an element…essential to establishing criminal liability'* in the UK, that element may only be inferred '*provided that it is an inevitable corollary of, or necessarily implied from, the conduct that will have to be established in that foreign jurisdiction'* to ensure a person is not *'convicted in a foreign court for something which would not be an offence in this jurisdiction'* (***Cleveland v Government of the United States of America*** [2019] 1 WLR 4392 at §59).

182. As summarised above, Mr Assange's conduct involved the exposure of war crimes of the highest order, including the torture and killing of innocent civilians, which actions the US Government at the time had gone to great lengths to disguise. Some of those war crimes are currently under investigation by the ICC. The materials he revealed have been of international importance in shifting US government policy away from the use of rendition and torture. They have proven necessary to prevent both *'danger to life'* and *'serious injury'.* They have enabled courts and tribunals around the world to bring justice to those affected. Mr Assange's actions helped changed a culture of impunity for torture and war crimes, and even contributed the ending of war.

183. To find dual criminality, this Court must be satisfied that the above is not correct, to the standard that there can be no *possible* argument that it is.

184. The reason for this exacting standard is made clear by the high Court in ***Assange*** and ***Cleveland***; if extradited, no US court will consider necessity as part of its determination of guilt or innocence at all. The risk faced by this Court is that Mr Assange will be convicted (and here sentenced to the rest of his natural life) for conduct which was, or may have been, necessary (and therefore lawful as a matter of UK law). The ***Assange / Cleveland*** principles exist to ensure that cannot

happen. This Court is the *only* court that will (and can) ever consider the substantive issue of necessity. Extradition can only therefore occur where this Court has actively considered the merits of the issue (which will not be litigated hereafter by any other court) and is satisfied, beyond all doubt, that it *cannot possibly* avail on the facts.

Submission 5: Section 81(a): Disclosing criminality

185. Under the 2003 Act, and in any event, the crime that WikiLeaks made public also renders their conduct '*political'* within the meaning of s.81(a).

Opposing state criminality is a political act/opinion at law under s.81(a)

186. Where a state is involved in criminal activity, as the US is here, opposition to state criminal acts is, at law, a '*political'* action. In ***Vassiliev v Minister of Citizenship and Information*** (Federal Court of Canada, 4 July 1997), Muldoon J stated:

> '…*The facts as found by the CRDD show that in this case criminal activity permeates State action. Opposition to criminal acts becomes opposition to State authorities. On these facts it is clear that there is no distinction between the anti-criminal and ideological/political aspects of the claimant's fear of persecution. One would never deny that refusing to vote because an election is rigged is a political opinion. Why should Mr. Vassiliev's refusal to participate in a corrupt system be any different? His is an equally valid expression of political opinion…*'[52]

[52]. Likewise in ***Demchuk v Minister of Citizenship and Immigration*** (1999) 174 FTR 293: where the Ukrainian applicant resisted extortion of a company / overtures to become involved in theft. The principles in ***Vassiliev*** applied '*especially if one accepts his contention that criminal corruption permeates the Ukrainian apparatus to a great extent'* (§20).

187. These concepts are likewise embedded in the case law of England and Wales, and constitute imputed[53] political opinions. In ***Suarez*** [2002] 1 WLR 2663, the Court of Appeal held at §29-30 that:

> *'…When dealing with the motivation of a persecutor, it has to be appreciated that he may have more than one motive. However, so long as an applicant can establish that one of the motives of his persecutor is a Convention ground and that the applicant's reasonable fear relates to persecution on that ground, that will be sufficient.* [54]
>
> *…Thus, if the maker of a complaint relating to the criminal conduct of another is persecuted because that complaint is perceived as an expression or manifestation of an opinion which challenges governmental authority, then that may in appropriate circumstances amount to an imputed political opinion for the purposes of the Convention. That is made clear in the Colombian context in Gomez at 560 para 22. Although, in the case of Gomez, the acts of persecution of the appellant were those of non-state actors, namely members of the armed opposition group FARC, the decision contains an illuminating discussion, replete with reference to authority, of the problems associated with the notion of imputed political opinion in a society where the borderlines between the political and non-political have been distorted so that it is difficult to draw a distinction between governmental authority on the one hand and criminal activity on the other…In such cases, the political nature*

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53. ***Gomez v SSHD*** [2000] INLR 549 at §73; ***RT (Zimbabwe) v SSHD*** [2013] 1 AC 1 at §§53-55.
54. This is recognised globally. For example, in ***Cabal v United Mexican States*** [2001] FCA 427, the Federal Court of Australia determined (having regard to a materially similar bar to extradition) that in assessing whether an extradition request has been made on account of extraneous considerations, the correct approach is to assume that there is in fact *prima facie* evidence of guilt. This follows from the principle that it is not necessary to show that political persecution is the prosecutor's *only* motivation; it is sufficient if political reasons constitute only *part* of his motivation (see §215 et seq).

of an applicant's actions or of the opinions which may be imputed to him in the light of such actions must be judged in the context of the conditions prevailing in his country of origin. Thus, what may in a relatively stable society be a valid distinction between a crime committed for the purposes of revenge, intimidation or the furtherance of some other personal interest on the one hand, and a political crime of repression on the other, may not hold good in a society where violence and repression are routinely used to stifle political opinion or any challenge to established authority: see paras (42)-(45) of Gomez…'

Whistle-blowing on state illegality is likewise a direct political act/opinion in law

188. The case law on the interpretation of the Refugee Convention also makes it clear that *a person who exposes criminality in a state in which criminality is endemic*, is expressing a direct political opinion for Refugee Convention purposes. A challenge to the criminality (or even corruption) in such a state is inherently political as it is a challenge to the way in which the organisation of that society operates. Professor Hathaway notes, in the 'Law of Refugee Status' (1991) (p154), that:

> '…*Essentially any action which is perceived to be a challenge to governmental authority is therefore appropriately considered to be the expression of a political opinion*…'

189. Thus the Federal Court of Australia in ***Voitenko v Minister for Immigration and Multicultural Affairs*** [1999] FCA 428, Hill J stated at §32-23:

> *'…The exposure of corruption itself is an act, not a belief. However it can be the outward manifestation of a belief. That belief can be political, that is to say a person who is opposed to corruption may be prepared to expose it, even if so to do may*

bring consequences, although the act may be in disregard of those consequences. If the corruption is itself directed from the highest levels of society or endemic in the political fabric of society such that it either enjoys political protection, or the government of that society is unable to afford protection to those who campaign against it, the risk of persecution can be said to be for reasons of political opinion. Whether that is the case in Russia is a matter for the Tribunal, not for this Court….

It is not necessary in this case to attempt a comprehensive definition of what constitutes 'political opinion' within the meaning of the Convention. It clearly is not limited to party politics in the sense that expression is understood in a parliamentary democracy. It is probably narrower than the usage of the word in connection with the science of politics, where it may extend to almost every aspect of society. It suffices here to say that the holding of an opinion inconsistent with that held by the government of a country explicitly by reference to views contained in a political platform or implicitly by reference to acts (which where corruption is involved, either demonstrate that the government itself is corrupt or condones corruption) reflective of an unstated political agenda, will be the holding of a political opinion. With respect, I agree with the view expressed by Davies J in Minister for Immigration & Ethnic Affairs v Y [1998] FCA (unreported, 15 May 1998, No. 515 of 98) that views antithetical to instrumentalities of government such as the Armed Forces, security institutions and the police can constitute political opinions for the purposes of the Convention. Whether they do so will depend upon the facts of the particular case…'

190. In the USA see e.g. ***Grava v Immigration and Naturalization Service*** (2000) 205 f.3d 1177 (USCA, 9th Cir., March 7) at p2:

> '…*When the alleged corruption is inextricably intertwined with governmental operation, the exposure and prosecution of such an abuse of public trust is necessarily political*…'

191. The principle applies even where the state in question disavows the criminality revealed: see ***Klinko v Canada (Minster of Citizenship and Immigration)*** [2000] 3 FCR 327, where, in 1995 Mr Klinko and five other Ukrainian businessmen filed a formal complaint with the regional governing authority about widespread corruption among government officials. Thereafter, the Klinkos suffered retaliation, on the basis of which the family sought refuge in Canada. The court answered the following question in the affirmative (p1) '*Does the making of a public complaint about widespread corrupt conduct by customs and police officials to a regional governing authority, and thereafter, the complainant suffering persecution on this account, when the corrupt conduct is not officially sanctioned, condoned or supported by the state, constitute an expression of political opinion as that term is understood in the definition of Convention refugee?..'* The court held that '*political opinion'* covers all instances where the political opinion attracted persecution, even including those where the government officially agreed with that opinion (§24-31).

Submission 6: Serving the public interest and article 10 again

192. Revelation of US involvement in gross international crime and considerations of necessity aside, the broader public interest in WikiLeaks' disclosures was nonetheless profound [M4-6].

193. WiliLeaks was founded a few years after Bush administration had launched its 'war on terror' in the Middle East, at a time when public information about engagements in Iraq and Afghanistan bore little resemblance to the situation on the ground [Rogers, tab 40, §§C(i), 25-26]. Material released by WikiLeaks in 2010 enabled the general public to gain '*for the first time…[a] proper appreciation of the number of the civilians who had been killed in Iraq',* enabled '*true assessment'* of Government '*misleading'* claims to the contrary, and '*brought about in significant part'* a '*shift in public knowledge'* regarding the reality of the situation in Iraq and Afghanistan [Rogers, tab 40, §§30-31].

194. As Mr Assange explained at a Stop the War Coalition Rally on 8 August 2011, WikiLeaks had exposed '*the everyday squalor and barbarity of war, information such as the individual deaths of over 130,000 people in Iraq...which were kept secret by the US Military'* [Rogers, tab 40, §C(vii)]. Mr Assange's motivation was manifest: '*if wars can be started by lies, peace can be started by truth'* [Rogers, tab 40, §C(vii)]; to '*bring transparency to government actions which required to be exposed for the public to understand them and to achieve alteration'* of government policy [Ellsberg, tab 55, §24]. His public anti-war stance and actions have '*constituted an important part of public debate and knowledge on the subject of war and in particular the subject of the Afghan and Iraq wars'* [Ellsberg, tab 55, §24]. In the context of the latter, the American public '*needed urgently to know what was being done routinely in their name, and there was no other way for them to learn of it than by unauthorized disclosure'* [Ellsberg, tab 55, §28].

195. Daniel Ellsberg draws obvious parallels between the revelations he brought about in the leaking of the Pentagon Papers and their impact upon the approach to the Vietnam war, with the WikiLeaks

exposures.[55] He considers the latter to be '*the most important truthful revelations of hidden criminal state behaviour*' in US history, '*revealing as they do the reality of the consequences of war*' which is itself '*imperative to bring about any alteration of US government policy*' [Ellsberg, tab 55, §23].

196. The WikiLeaks disclosures were '*of unparalleled importance*' due to their potential to '*change the state policy and change the course of the war*' in '*an even more desperately needed and more significant manner*' than previous much smaller leaks, such as the accidental release of the Abu Ghraib torture photographs [Maurizi, tab 69, §§26-27]. WikiLeaks materials '*was exactly the sort of information that citizens need and news organisations willingly publish to inform citizens about what their governments are doing. These archives are of the highest public interest; some of the most important material I have ever used*' [Hager, tab 71, §19].

197. Much of the information disclosed by WikiLeaks was '*frequently no secret to Iraqis or Afghans or foreign journalists who all knew very well about who had been killed and by whom*' but its value lay in the fact that such incidents could not otherwise have been proven '*in the face of official US silence or denial*' [Cockburn, tab 51, §7].

198. Evidence of the kind of human rights abuses that were exposed by Mr Assange via WikiLeaks is in the usual course *'extraordinarily difficult to obtain from within governments with disciplined intelligence agencies and civil services'*, not least because of the risk to government employees of prosecution from legislation like the OSA: ordinarily the process of proving grave human rights abuses is '*painstaking and slow',* if it is possible at all [Cobain, tab 50, §§12-25] [Tigar, tab 23, p8] [Stafford-Smith, tab 64]. Even where journalists are able to get hold of such evidence, they then often receive misleading or untruthful

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[55]. See also [Hager, tab 71, §32] who draws a similar parallel with the Pentagon Papers.

responses to it from government officials, as well as facing harassment and intimidation in order to try and prevent publication [Cobain, tab 50, §§26-38]. Particularly in the US '*government attacks on journalists, leakers and those journalists who worked with them, has since the earliest days of Afghan conflict, appeared to have a strong chilling effect'* leading to '*a dearth of individuals from inside government, willing to 'go on record' to evidence U.S. violations* [Stafford-Smith, tab 64, §83]. The power and value of the WikiLeaks disclosures about Iraq and Afghanistan can scarcely be understated, and are of '*key importance'* to *'evidence war crimes and human rights violations by the US and its allies'* [Stafford-Smith, tab 64, §83].

199. WikiLeaks '*exposed the way the US, as the world's sole super power, really conducted its wars'* by way of both '*devastating revelations'* as well as secrets which were '*not particularly significant or indeed secret'* but which journalists would not otherwise have been able to prove [Cockburn, tab 51, §11]. Prior to this '*no proper understanding of the conduct of the wars in Afghanistan and Iraq had been possible'* because '*full and accurate information had been suppressed'* and it is only by '*the widest dissemination of undeniable shocking truths'* that governments can '*be persuaded to change direction'* [Overton, tab 61, §6]. Assange '*exposed on a worldwide scale significant governmental duplicity, corruption, and abuse of power that had previously been hidden from the public*' [Feldstein, tab 18, §4].

200. The Iraq war diaries contained details of '*casualties of the Iraq War not previously known, and not subsequently made public by any other means'* such that they provide what remains today '*the only source of information regarding many thousands of violent civilian deaths in Iraq between 2004 and 2009'* [Dardagan, tab 52, §§2-3]. The information was important, not just to families and loved ones of the dead, but also because '*protection of civilians is the universally accepted pre-condition of lawful armed conflict'* and the data could assist '*actors in conflict who have a duty to devise better means to protect civilians from*

the ravages of war' [Dardagan, tab 52, §2]. The data was used as the principle source of information on civilian deaths in the Chilcott Inquiry in 2016 as well as increasing public awareness of civilian deaths in Iraq '*to an extent that no other single event since has been able to do'* [Dardagan, tab 52, §§1-2]. For example John Kerry, then Chairman of the Senate Foreign Relations Committee, called expressly for a re-think of US policy in light of them:

> *'...However illegally these documents came to light, they raise serious questions about the reality of America's policy toward Pakistan and Afghanistan. Those policies are at a critical stage and these documents may very well underscore the stakes and make the calibrations needed to get the policy right more urgent...'* [P, tab D42].

201. The truthful information revealed '*surrounding the waging of war and the actions taken by states, could not be of greater importance'* such that '*the political roadmap of the 21st Century both worldwide and domestically within the US and the UK has been to a large extent contoured by the debate on these very issues'* which would have been prevented by the regular '*concealment of evidence'* due to the '*unwillingness of governments…to inform their respective electorates what was done in their name'* [Overton, tab 61, §15].

202. WikiLeaks publications, in fact, played '*a part in bringing a formal end to US military involvement in Iraq'* by evidencing '*in an irrefutable way particular criminal acts on the part of US military'* which had been *'deliberately covered up'* [Rogers, tab 40, §30].

203. Amnesty International credited WikiLeaks with sparking the Arab Spring via these releases [M2/544-545],[56] including as a catalyst for the

[56]. Which, in turn, revealed further US involvement in rendition and torture: [Cobain, tab 50, §§20-25].

Tunisian revolution [Feldstein, tab 18, §4] [M2/504]. This analysis is supported by media partners in Tunisia, who emphasise the importance and impact of the leaks, stating that the WikiLeaks publications contributed to destabilising the repressive and autocratic regime of Ben Ali [Gharbia, tab 35, §9].

204. The documents have been, and continue to be, used by mainstream media organisations in their reporting. See example of BBC report about the assassination of Benazir Bhutto using the cables [Goetz 1, tab 31, §29] [Gharbia, tab 35, §10]. They continue to be used by national courts providing redress for the myriad human rights abuses they revealed: e.g the Supreme Court in ***Bancoult (No 3)*** [2018] 1 WLR 793 [M7a] (the Chagos Islands case) [Maurizi, tab 69, §52]. See generally [M2/section 18].

205. A small example of the public interest value of the WikiLeaks disclosures, and a stark reminder of the personal value of what WikiLeaks was taking steps to redress, is recounted by Khalid El-Masri [tab 53] whose '*quest for accountability*' for his grossly unlawful rendition and torture by the US *'ha[d] been characterised by passivity and avoidance'* and '*attacks…intimidation and slurs'* on his character, such that his '*very sense of reality ha[d] been chipped away, questioned and undermined by powerful states seeking only to protect themselves from being held to account'* [El-Masri, tab 53, §22]. What WikiLeaks disclosed was the behind-the-scenes intra-state bullying and pressure in which the US had been engaged to prevent its officials (and the CIA in particular) being brought to account (or justice) for their crimes [El-Masri, tab 53, §§15-16, 19, 26-28] [Goetz 2, tab 58, §§4, 10-12].

206. The ECtHR spoke in Mr El-Masri's case of the *'great importance'* of the '*right to the truth'* not only *'for the applicant and his family, but also for other victims of similar crimes and the general public, who had the right*

to know what had happened' (***El-Masri*** (supra) [M7b] at §191). The ECtHR made similar observations in ***Al Nashiri*** (supra) [M7c] at §641.

207. For his disclosures in the public interest, Mr Assange was awarded, *inter alia*, the Sydney peace Medal, the Walkley Award for Most Outstanding Contribution for Journalism (Australia's Pulitzer), and has been nominated, year-on-year, for the Nobel peace prize [Rogers, tab 40, §C(v)-(vi)].

<u>US law is not article 10 compliant</u>

208. As stated above, US law provides no power for any US court to consider any sort of 'public interest' justification [Shenkman, tab 4, §§13, 18, 23, 28, 31, 41] [Pollack, tab 19, §22] [Jaffer, tab 22, §7].

209. Neither, of course, at first sight does the OSA (per ***Shayler***) - assuming for these purposes that Mr Assange's actions in publishing can (contrary to the submissions detailed above) be properly assimilated with those of the leaker (Manning) at all.

210. But the <u>reason</u> that the OSAs operate that way (for the leaker) is because they provide other, article 10-compliant and judicially controlled, mechanisms by which disclosures in the public interest can be facilitated. As Lord Bingham said in ***Shayler*** even in respect of the act of leaking by a public official:

> *'...it is plain that <u>a sweeping, blanket ban, permitting of no exceptions, would be inconsistent with the general right guaranteed by article 10(1) and would not survive the rigorous and particular scrutiny required to give effect to article 10(2)</u>. The crux of this case is whether the safeguards built into the OSA 1989 are sufficient to ensure that unlawfulness and irregularity can be reported to those with the power and duty to take effective action, that the power to withhold authorisation to*

publish is not abused and that proper disclosures are not stifled...' (§36)

211. Lord Hope likewise emphasised that the restriction on disclosure under the OSA 1989 '*is certainly not a blanket restriction*' and various '*opportunities...for disclosure*' exist under the statute (§§63-66). Those cumulative safeguards were described by Lords Bingham, Hope and Hutton and include:

- First, Manning could make disclosure under s.7(3)(a) to the staff counsellor, the Attorney-General, Director of Public Prosecutions, Commissioner of the Metropolitan Police, Home Secretary, Foreign Secretary, Secretary of State for Northern Ireland or Scotland, the Prime Minister, the Secretary to the Cabinet, the Joint Intelligence Committee or the parliamentary Intelligence and Security Committee. She may also make disclosure to the staff of the Comptroller and Auditor General, the National Audit Office and the Parliamentary Commissioner for Administration (§27, 64, 103-106).

- Secondly, she may also '*seek official authorisation to make disclosure to a wider audience*' under s.7(3)(b) (§§29-30, 66, 107).

- Thirdly, if authorisation is refused, the state official then '*is entitled to seek judicial review of the decision to refuse*'. In deciding any such application, the court would have to '*bear in mind the importance to the Convention right of free expression*' and '*the need for any restriction to be necessary to achieve one or more of the ends specified in article 10(2), to be responsive to a pressing social need and to be no more restrictive than is necessary to achieve that end*' (§31) in the context of a '*rigorous and intrusive review'* (§33, 72-79, 107-111).

- Fourthly, the requirement under s. 9 OSA 1989 for the Attorney-General's consent to any prosecution under the Act is a 'further safeguard'. In this regard, the A-G '*will not give his consent to prosecution unless he judges prosecution to be in the public interest'*. The consent requirement is '*a safeguard against ill-judged or ill-founded or improperly motivated or unnecessary prosecutions'* (§35).

212. The ability to judicially review any decision to refuse permission to disclose material provides a particularly important protection because it means that the Courts, in applying Article 10, have ultimate oversight of the approach of the executive to ensure it is not applying a *'routine or mechanical process'* and is *'undertaken bearing in mind the importance attached to the right of free expression and the need for any restriction to be necessary, responsive to a pressing social need and proportionate'* (§30). Lord Bingham considered that in their totality, these cumulative measures, '*properly applied'*, do *'provide sufficient and effective safeguards'* of Article 10 rights.

213. It is equally plain from ***Shayler*** that without these safeguards, the OSA criminalisation of disclosure of classified information for public interest reasons would not be compliant with Article 10. See Lord Bingham at §§21-23, 27; Lord Hope at §§40-45, 69, 80-86.

214. These legal safeguards for disclosure of classified information in the public interest stand in complete contradistinction to the Espionage Act in the US. The law under which Mr Assange would be prosecuted if extradited (and which this Court is bound by s.87 to consider against Article 10) contains none of the safeguards necessary to ensure Article 10 compliance. In short, had these events occurred in the UK, Mr Assange would never have been in the position of receipt of classified information because Manning would have had other (article 10-compliant) avenues open to her to serve the public interest.

215. The Espionage Act also does not require the permission of the Attorney General or someone in a similar position to permit a prosecution, so as to prevent them from being '*improperly motivated'*. On the contrary, the '*existing statutory scheme grants a near-total discretion to the executive branch to prosecute leaks of classified information'* [Schenkman, tab 4, §23].

216. Indeed, early sponsors of the Espionage Act in its first iteration, acknowledged '*prosecutorial discretion'* to be its sole safety valve against misuse [Schenkman, tab 4, §§13 and 21]. That feeble safeguard has, predictably, not even proved robust enough to prevent '*historic attempts to prosecute publishers'* whose subsequent abandonment demonstrates them to have been either '*ill-judged… ill-founded or improperly motivated*' [Schenkman, tab 4, §34].

217. Lord Hope, like Lord Bingham, placed central importance on the requirement that the antecedent '*official authorisation system'* for permitting disclosures of classified materials in the public interest *'must be effective, if the restrictions are not to be regarded as arbitrary and as having impaired the fundamental right to an extent that is more than necessary*' (§71). While the absence of any definition of the process of official authorisation in the OSA 1989 was considered by Lord Hope to be '*a serious defect*', he considered this to be cured by the existence of '*An effective system of judicial review [which] can provide the guarantees that appear to be lacking in the statute*' (§§71-72).

218. None of that exists (or existed for Manning) under the US law. Unlike in the UK where refusals to authorise disclosure of information can be comprehensively reviewed, before a court, '*US law provides that the accused may not challenge in court the classified status of documents and information.'* [Tigar, tab 4, p10].

Submission 7: The ICC and this prosecution

219. As set out in detail above, the WikiLeaks disclosures provide irrefutable evidence of, *inter alia*, illegal rendition, torture, black site CIA prisons across Europe. War crimes such as those revealed by the WikiLeaks are the primary subject matter of the ICC.

220. The Court has also seen above the extraordinary (and blatantly unlawful) steps (revealed by cables) of the US over the years since 2003 to secure impunity for its state actors involved in this serious criminality (in particular the CIA involvement in renditions and torture) from judicial accountability. Even in the face of extant <u>arrest warrants</u> issued by Germany [El-Masri, tab 53, §§26-28] [Goetz 2, tab 58, §§4, 10-12], and by Italy [Maurizi, tab 69, §28-42], the US managed to subvert the international legal order to secure impunity [Stafford-Smith, tab 64, §§95-96] [Overton, tab 62, §14] [M2/114, 151-158].

221. It is now tolerably clear that the pursuit of Mr Assange from 2017 onwards is, or is in part, a continuation of those US Government's long-standing efforts to preserve the impunity of US state officials involved in the crimes that WikiLeaks helped reveal.

222. On 20 November 2017, ICC Prosecutor Bensouda submitted to the pre-trial chamber a request[57] to open a formal investigation against the US in respect of the war crimes committed by US troops, and by the CIA, in Afghanistan and elsewhere in connection with the '*war on terror'* in Afghanistan [Lewis 5, tab 81, §13] [Lewis 5, exhibit 3, p2-4, 9-10] and brought to light by *inter alia* the WikiLeaks disclosures [Lewis 5, tab 81, §9].

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[57]. Above, §157.

223. WikiLeaks' materials, and Mr Assange, could be expected to play a significant role in any ICC investigation [Lewis 5, tab 81, §16]. For example, (a) the Prosecutor's public redacted investigation request relies upon the '*CIA cables*' reviewed by the US Senate Select Committee on Intelligence [Q11, p155], (b) Likewise, Mr el-Masri's complaint to the ICC, for example, relies upon the ECtHR judgment in his case, and the WikiLeaks cables the ECtHR relied upon [el-Masri, tab 53, §43]. (c) The ICC investigation also names Abdul al-Rahim Ghulam Rabbani [Stafford-Smith, tab 64, §59], confirmed by WikiLeaks cables to have been subject to rendition and torture (above, §156).

224. The criminal complaint against Mr Assange (and application for his provisional arrest under the 2003 Act) materialised[58] days after the prosecutor's investigation request, in December 2017. It is a reasonable inference that the events were linked [Lewis 5, tab 81, §§9, 16].

Torture and war crimes

225. It ought not need re-stating that, first, torture is banned by international law and that no derogation is permitted, even in times of armed conflict or terrorist attacks. This is a *jus cogens* prohibition under customary and treaty law, specifically the UN Convention Against Torture ('CAT'), the International Covenant on Civil and Political Rights ('ICCPR') and common Article 3 of the 1949 Geneva Conventions.[59] As a *jus cogens* prohibition, no State may enter into agreements for contracting around it, given the fundamental values for which it stands.

58. And, on the evidence the Court has, behind-the-scenes efforts to persuade Ecuador to end his asylum began [M2/539].

59. The US is States Party to the CAT (1994), ICCPR (1992) and 1949 Geneva Conventions (1955).

226. Second, under articles 5-8 of the CAT, all States have an obligation to criminalise, investigate, prosecute and punish torture wherever it occurs. Similarly, under the Rome Statute, torture amounts to a war crime or crime against humanity,[60] and '*it is the duty of every State to exercise criminal jurisdiction over those responsible for international crimes'*.[61] There is no discretion to address the breach otherwise.[62]

227. Third, failure by States to initiate a prompt criminal investigation into allegations of torture, is itself a *de facto* denial of the rights under the CAT and the ICCPR, as well as customary international law.[63] Failure by States to do so eviscerates the prohibition against torture, and itself violates Article 3 ECHR.[64] Further, as stated by the UN High Commissioner for Human Rights and the Human Rights Council, it is a denial of the related rights to seek truth and accountability in the face of gross and systematic violations of human rights, available to victims and society in the face of institutional policies enabling their occurrence.[65]

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60. Rome Statute, Arts. 7, 8.

61. Rome Statute, Preamble.

62. CAT, Arts. 4-8; Rome Statute (2002), Arts. 7(1)(f), 8(2)(c); ICTY, ***The Prosecutor v Tadic***, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, §§128-142.

63. CAT, Arts. 12, 14; see also Committee Against Torture, General Comment, no. 3: Implementation of Article 14 by State Parties, paras. 17, 25 (2012) (the right to redress encompasses concepts of an effective remedy and reparation. It further entails entails restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition); ICCPR, Arts. 2 (3), 7; see also Human Rights Committee, General Comment, no. 7, para. 1 (1982); General Comment no. 20, para. 14 (1992); General Comment no. 31, para. 15 (2004).

64. See ECtHR, ***Aksoy v Turkey***, §98 (1996); ECtHR, ***Assenov v Bulgaria,*** §102 (1998). See also ECtHR, ***Labita v Italy,*** §131 (2000); ***Ilban v Turkey*** [GC] (no 22277/93) ECHR 2000-VII, §§89-93; IACtHR, ***Bueno-Alves v Argentina*** (2007) Series C No. 164, §§88-90 and 108.

65. See, e.g., Report of the UN Office of the High Commissioner for Human Rights on the Right to Truth, E/CN.4/2006/91 (8 February 2006); Human Rights Commission and Human Rights Council (resolution 2005/66 of 20 April 2005 of the Commission; decision 2/105, 27 November 2006; resolutions 9/11, 18 September 2008, and 12/12, 1 October 2009 of the Council). See also Yasmin Naqvi, The Right to Truth in International Law, International Review of the Red Cross, No. 862, 2006.

Background: US strives for impunity for War Crimes

228. The US government has long sought to evade the jurisdiction of the International Criminal Court ('ICC') for war crimes committed by, *inter alia*, the CIA. While the US participated in Rome Statute negotiations, and signed the Statute in December 2000, in the wake of events of 11 September 2001, and the US's actions subsequent to it, President Bush informed the UN Secretary General that '*the US did not intend to ratify the Rome Statute or recognize obligations under it'* [Lewis 5, tab 81, §8] [Lewis 5, exhibit 3, p4]. The US then put in place bi-lateral Article 98 agreements[66] with over 100 ICC states to ensure other states would not '*arrest or turn over US personnel to face ICC prosecution'* [Lewis 5, tab 81, §8] [Lewis 5, exhibit 3, p4, 8].[67]

229. The US then passed legislation in 2002 which actively prevented US cooperation with the ICC, and a further amendments in 2004 which threatened cuts in aid to foreign states that would not sign Article 98 agreements; aid cuts were in fact implemented against 7 ICC states and two intergovernmental programmes [Lewis 5, tab 81, §8] [Lewis 5, exhibit 3, p8].

230. In November 2016, after a decade-long preliminary investigation, the ICC announced that there would soon be decision taken on whether to investigate the US for war crimes in Afghanistan. The US responded by saying it was not '*warranted or appropriate'* given the US's own *'robust system of accountability'* [Lewis 5, tab 81, §12] [Lewis 5, exhibit 3, p4, 9].

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66. In short, agreements under Article 98 of the Rome statute are agreements whereby third states agree not to surrender US personnel to the ICC.

67. Many of the backdoor diplomatic efforts to procure Article 98 agreements - and obtain impunity for American operatives - were themselves revealed by the Wikileaks cables, and as one cable described, consisted of '*a carrot and stick approach'* being taken by the US '*to help those countries that sign Article 98 agreements and cut aid to those that do not*' [M2/108, p4-10]. The cables reveal '*sustained pressure'*, '*bullying'* and countries unwilling to put them before their own Parliament because of the US's increasingly notorious conduct in Iraq, with Parliaments then being bypassed [ibid].

231. As is clear from e.g. the judgment of the ECtHR in ***El-Masri***, quite the opposite is true; it being impossible to bring cases against US agents in the US due to the government's reliance upon secrecy, which US Courts have upheld: §§63, 191 [see el-Masri, tab 53, §§36-38] [Goetz 2, tab 58, §8].[68] The recent June 2020 decision of the Inter-American Commission on Human Rights' on admissibility, regarding the rendition and torture of four petitioners,[69] found that:

> *' …there are insurmountable obstacles within the U.S. legal system for adjudicating any cases related to the 9/11 terrorist attacks. All 9/11 related lawsuits that arose from the U.S. 'rendition' program were immediately dismissed on grounds of national security, state secrets or governmental immunity, before the merits of the respective case were ever considered. As a result, alleged victims of these most serious of alleged abuses have not been able to seek redress within the U.S. judicial system...the record is clear that no effective remedy is available to the Petitioners in the U.S...'* [F2/40, §23].

232. '*Even though the individual perpetrator of the crime was clearly identifiable, no one, including those individuals, has been prosecuted by his own nation state, namely the US'* [Overton, tab 62, §22] [Lewis 5, tab 81, §§12, 40]. Presidential clemency (and condonement) has been issued in every case in which prosecutions (of junior personal) have been attempted or contemplated for other isolated acts of criminality in Afghanistan [Lewis 5, tab 81, §§40-41].

233. The ICC, a court of last resort, has jurisdiction over war crimes and crimes against humanity committed on the territories of ICC members states (which include Afghanistan and the Eastern European countries

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[68]. See also generally [M2/108].

[69]. Including two UK residents.

which hosted the CIA '*black sites*') and will act when national authorities do not genuinely pursue cases [Lewis 5, tab 81, §10].

234. As stated above, in November 2017, ICC Prosecutor Bensouda submitted to the pre-trial chamber a request to open the formal investigation against the US military and CIA. What followed was an '*unprecedented string of attacks and threats on the bona fides and legitimacy of the ICC'* [Lewis 5, tab 81, §14].

235. By the time of a speech given by John Bolton (who had become National Security Advisor in the interim) on 10 September 2018, the US's preparedness to use '*any means necessary'* to prevent the ICC was being stated in open:

> *'...[The] United States will use any means necessary to protect our citizens and those of our allies from unjust prosecution by this illegitimate court'…If the court comes after us, Israel or other US allies, we will not sit quietly...'* [Lewis 5, tab 81, §15] [Lewis 5, exhibit 3, p11].

236. In the same speech Mr Bolton enumerated '*steps'* that the US would take, including a promise to *'take note'* of cooperation by other states with the ICC when considering aid and military assistance. Also, '...*We will respond against <u>the ICC and its personnel</u> to the extent permitted by US law. We will ban <u>[ICC] judges and prosecutors</u> from entering the United States',* and '*sanction their funds in the US financial system'* and even*'<u>prosecute them in the US criminal system</u>'. 'We will do the same for any company or state that assists an ICC investigation of Americans*' [Lewis 5, tab 81, §15] [Lewis 5, exhibit 3, p12]. Press Secretary Sarah Sanders explicitly acknowledged that Mr Bolton's remarks had been made because the ICC '*told us they were on the verge of making a decision and we're letting them know our position ahead of them making that decision'* [Lewis 5, exhibit 3, p12] [Lewis 5, exhibit 5].

237. What, of course, was let slip there was the US Government's preparedness to use (abuse) the US criminal justice system to '*prosecute'* ICC personnel (and even judges) in order to preserve its impunity from the ICC's judicial oversight.

238. On 25 September 2018, President Trump gave a speech to the UN General Assembly at which he stated the US considered that the ICC had '*no jurisdiction, no legitimacy and no authority'* and he would never '*surrender America's sovereignty to an unelected, unaccountable, global bureaucracy'* but rather '*embrace the doctrine of* patriotism' to defend America from '*global governance',* as well as *'other, new forms of coercion and domination'* [Lewis 5, tab 81, §17] [Lewis 5, exhibit 6].

239. Mr Bolton made a further speech in November 2018:

> '...*The ICC is an illegitimate, unaccountable, and unconstitutional foreign bureaucracy that has the audacity to consider asserting jurisdiction over American and Israeli citizens...The Court claims jurisdiction for ambiguously defined crimes in order to intimidate leaders in both countries, who strive to defend their nations from myriad threats every single day…First, the global governance apostles go after Israel. Then they come for United States. It is fully apparent the ICC wants U.S. and Israeli leaders to think twice before taking action to protect their people from terrorism and threats...'* [Lewis 5, tab 81, §18] [Lewis 5, exhibit 3, p13] [F2/4-6].

240. Secretary of State Mike Pompeo in a 4 December 2018 speech to NATO, stated that the US would *'take real action to stop rogue international courts...from trampling on our sovereignty…and all our freedoms...We will take all necessary steps to protect our people...from unjust prosecution...'* [Lewis 5, tab 81, §18] [Lewis 5, exhibit 3, p13] [Lewis 5, exhibit 7].

241. On 15 March 2019, Mr Pompeo, announced that visas would be denied to all ICC staff investigating US personnel and their allies in Afghanistan, specifically stating that the US would be *'prepared to take additional steps, including economic sanctions, if the ICC does not change its course'* [Lewis 5, tab 81, §20]. '*His remarks were timed as 'part of a continued effort to convince the ICC to change course with its potential investigation and potential prosecution of Americans for their activities and our allies' activities in Afghanistan, trying to stop them, trying to prevent them from taking actions'* [Lewis 5, exhibit 3, p14] [Lewis 5, exhibit 8-9] [M2/115].

242. The US then did revoke the ICC prosecutor's visa [Lewis 5, tab 81, §19] [Lewis 5, exhibit 3, p14] [F2/31].

243. Two weeks later, on 19 April 2019, the ICC did change its course. Despite finding a reasonable basis to believe that '*members of the US armed forces and the CIA committed the war crimes of torture and cruel treatment, outrages upon personal dignity, and rape and other forms of sexual violence pursuant to a policy approved by the US authorities'* and finding that these incidents fall within the subject matter jurisdiction of the Court as a war crime, the ICC Pre-trial Chamber nonetheless refused the Prosecutor's request to open an investigation as '*not in the interests of justice'* [Lewis 5, tab 81, §22] [Lewis 5, exhibit 3, p2, 14] [F2/28].[70]

244. However, on 5 March 2020 this decision was reversed, and an investigation authorised, by the ICC Appeals Chamber [Lewis 5, tab 81, §26] [Lewis 5, exhibit 12] [F2/28] [F2/53].[71]

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70. https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF
71. https://www.icc-cpi.int/CourtRecords/CR2020_00828.PDF

245. In the wake of that decision, the threats made by the US quickly materialised. First, on 17 March 2020, Mr Pompeo (then director of the CIA, one of the subjects of the ICC investigation) issued thinly veiled threats to specific ICC staff members, whom he explicitly named:

> *'...Turning to the ICC, a so-called court which is revealing itself to be a nakedly political body: As I said the last time I stood before you, we oppose any effort by the ICC to exercise jurisdiction over U.S. personnel. We will not tolerate its inappropriate and unjust attempts to investigate or prosecute Americans. When our personnel are accused of a crime, they face justice in our country.*
>
> *It has recently come to my attention that the chef de cabinet to the prosecutor, Sam Shoamanesh, and the head of jurisdiction, complementarity, and cooperation division, Phakiso Mochochoko, are helping drive ICC prosecutor Fatou Bensouda's effort to use this court to investigate Americans. I'm examining this information now and considering what the United States' next steps ought to be with respect to these individuals and all those who are putting Americans at risk.*
>
> *We want to identify those responsible for this partisan investigation and their family members who may want to travel to the United States or engage in activity that's inconsistent with making sure we protect Americans.*
>
> *This court, the ICC, is an embarrassment. It's exposing and – we are exposing and confronting its abuses, and this is a true example of American leadership to ensure that multilateral institutions actually perform the missions for which they were designed...'* [F2/30, p4] [F2/31].

246. On 11 June 2020, President Trump issued an executive order asserting that the attempt by the ICC to *'investigate, arrest, detain, or prosecute any United States personnel without the consent of the United States…constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States'*. The order imposes economic sanctions against anyone who engages in or assists in any way the ICC investigation[72] and blocking entry of those same people into the US, as well as ICC staff, their agents and their families [Lewis 5, tab 81, §28] [Lewis 5, exhibit 13] [F2/43] [Stafford-Smith, tab 62, §60]. It reflects a regime previously reserved for *'terrorist groups, dictators and human rights abusers',* turning it instead onto *'international lawyers and human rights defenders'* [Lewis 5, tab 81, §33]

247. In short, the US is prepared to go to any lengths (including misusing its own criminal justice system) to suppress those able and prepared to try to bring its war crimes to account and protect those accused of them. Mr Assange was one of those persons. The timings of the US actions in this case, when set against the parallel progression of the ICC investigations that Mr Assange helped bring about, are no coincidence.

248. Neither should the notion that '*any means necessary'* may, in the mouth of the US government, include bad faith prosecution, shock this Court. (a) It is what the US specifically threatened against the ICC staff and judiciary. And (b) it is obviously redolent of the US reaction to the release of the Pentagon Papers, in which the attempted prosecution of the leaker that followed was dismissed as '*offend[ing] a sense of justice'* following revelation of White House-ordered plots (involving the '*White House plumbers'* a covert White House Special Investigations Unit later to be responsible for 'Watergate') to '*destroy [Ellsberg] in the press'*, to steal his medical records, and to attempt to influence the

72. Which will include, for example, victims such as Mr el-Masri who submit complaints to the ICC and lawyers who represent them [Goetz 2, tab 58, §7].

judge by offering him directorship of the FBI [Tigar, tab 23, p13], and (it later emerged) to '*incapacitate [Ellsberg] totally'*, and to break his legs [Ellsberg, tab 55, §§31, 33].

Improper motives and these proceedings

249. Extradition courts enjoy an implied abuse jurisdiction so as to protect the integrity of the regime:

> *'…The implication arises from the express provisions of the statutory regime which it is his responsibility to administer. It is justified by the imperative that the regime's integrity must not be usurped…'* (***Bermingham*** at §97);[73]
>
> '...*It is the good faith of the requesting authorities which is at issue because it is their request coupled with their perverted intent and purpose which constitutes the abuse. If the authorities of the requesting state seek the extradition of someone for a collateral purpose, or when they know that the trial cannot succeed, they abuse the extradition processes of the requested state*...' (***Symeou v Public Prosecutor's Office at the Court of Appeals, Greece*** [2009] 1 WLR 2384 at §33)

250. Thus the requesting state:

> '...*must act in good faith. Thus if he knew he had no real case, but was pressing the extradition request for some collateral motive and accordingly tailored the choice of documents accompanying the request, there might be a good submission of abuse of process*..' (***Bermingham*** at §100).[74]

73. See also ***Kashamu*** at §§32-34; ***Symeou*** at §§6-9, 33-34, 40; ***Atanasova-Kalaidzhieva*** at §36; ***Belbin*** at §§43-44.

74. See also ***Symeou*** at §§6-9, 33-34, 40; ***Atanasova-Kalaidzhieva*** at §36; ***Belbin*** at §§43-44.

251. Bad faith also, and separately, renders extradition '*arbitrary'* pursuant to Article 5.1(f) ECHR (***R v Governor of Brockhill Prison, ex parte Evans (No. 2)*** [2001] 2 AC 19, HL; ***R (Kashamu) v Governor of Brixton Prison*** [2002] 2 WLR 907 at §§12-13, 32-34).

Submission 8: The new allegations and the scope of counts 1 and 2

Background

252. On 24 June 2020 the US issued a press release signalling that the indictment has been superseded, again. This third iteration of the indictment adds a series of additional factual allegations, unrelated to the Manning allegations, concerning allegations of general encouragement / solicitations to persons to steal (hack) *inter alia* US classified information. See primarily new §§4-6 and 35-92. The defence (not the prosecution) immediately brought this development to the attention of the Court.

253. On 2 July 2020, the US served the new indictment on the defence (but not the Court) and indicated that it was considering how to proceed. On xy 2020, the US served the new indictment on the Court.

254. On 12 August 2020, the US issued a fresh extradition request (dated 17 July 2020) founded upon the new indictment. The US proposes to invite this Court, on 7 September 2020, to order Mr Assange's discharge in respect of the existing proceedings whereupon the US will re-arrest him on the fresh request.

255. Despite requests, the US have offered no explanation for the absence of these allegations from the first (or even second) indictment, where the allegations date from 2009 and could have been (and were being – see below) prosecuted at any time in the last decade, including prior to

emergence of the Swedish proceedings. Neither has there even been explanation for why, in the context of these proceedings extant since April 2019, these materials arrive a year and half after their commencement, 6 months after opening submissions, and days prior to the (third listing) of the evidential EH.

The charges

256. The defence's initial understanding that was, save for the re-numbering of counts 2 and 18, the charges contained in the indictment are essentially unchanged: compare new §103 with old §46. None make any reference to the fresh factual allegations, (or 'teenager' or 'NATO Country-1' or 'Anonymous' or 'Laurelai' or 'Gnosis' or 'Kayla' or 'AntiSec' or 'LulzSec' or 'Sabu' or 'Topiary' or Jeremy Hammond or Edward Snowden etc). The only substantive alternation to the charges appeared to be the widened time period of counts 1 and 2 (2011 becomes 2015).

257. So far as it seemed to the defence, all charges remained tethered to the existing Manning allegations. That is to say that the new factual allegations were '*background narrative*' (***Norris v USA*** [2009] 1 AC 920 at §91), not charged conduct in their own right. Put otherwise, it appeared that any US conviction under the new indictment would still be dependent upon proof of the Manning allegations and that, absent proof of the Manning allegations the new additional conduct could not sustain, of itself, conviction.

258. On 13 August 2020, the US served a Note stating that '...*The Second Superseding Indictment continues to charge Mr Assange with 18 counts. It does not add or remove any counts. It continues to charge Mr Assange for the same offences arising from his illegal acts in obtaining, conspiring and attempting to obtain, and disseminating classified national defence information from Ms Manning. It differs in that it alleges additional general allegations...*' (§2).

259. On 14 August 2020, the US told this Court that it was largely in agreement (with the defence understanding) that the Second Superseding Indictment does not set out additional charges, save for charge 2 in relation to which it was said *'the members of the conspiracy are extended'.*

260. Self-evidently, the defence are not in a position to respond to these fresh factual allegations in the (inexplicably small) time afforded by their (inexplicably) late service. But, being narrative background, and balancing the effects of adjournment (continued custody for a mentally vulnerable defendant), the defence have acquiesced to the continuance of these proceedings in September.

261. Immediately after the defence communicated that decision to the Court on 21 August 2020, the US served its revised Opening Note, with an 'addendum' which seeks to explain the new indictment. Now it is said:

> '...*This Second Superseding Indictment does not add or remove any counts against the defendant...The same offences are charged, but as a matter of fairness to the defendant, the Second Superseding Indictment includes further particulars of the alleged crimes so the defendant knows what he has to meet*...' (§2)

But

> '...*Contrary to the submission of the defence...the addendum particulars in the Second Superseding Indictment are not mere narrative...These particulars constitute the conduct upon which this court is entitled, and indeed must now, determine that an extradition offence is made out under sections 78 and 137 of the 2003 Act*...' (§8)

262. The new conduct is thus not '*background narrative'*. It is put before the Court, it appears, as a potential stand-alone basis of criminality under both count 1 (insofar as LulzSec etc targeted US government classified information) and count 2 (previously count 18: the Computer Fraud and Abuse Act (CFAA) charge) (in relation it seems to the 'hacking' of any other computers, anywhere in the world). Close reading of Mr Kromberg's fifth affidavit (served on 12 August 2020) at §§11, 87, 90-91 confirms the same.

263. That is a(nother) very significant development. The US position is apparently that, this Court should now sanction extradition on a basis that would enable a US court to convict Mr Assange <u>potentially solely</u> on count 1 or 2 on the basis of fresh roving, generalised incitement allegations – untethered from the Manning allegations - which it has served, without explanation, at the 11th hour.

264. It ought to be obvious that such a course would be fundamentally unfair and unjust without the defendant being able to address that.

265. This development comes at a time when the US knows that Mr Assange is in custody, without access to legal visits for the past five months, with access to materials only via post (he has yet to receive the revised Opening Note).

266. To be able to address these new allegations, and the circumstances that surround them, would require the defence to seek adjournment of these proceedings for very many months. That is, equally obviously, manifestly unfair whilst Mr Assange remains in custody.

<u>The fresh allegations</u>

267. Even in the extremely limited time afforded to investigate these matters, it is apparent that there are genuine issues concerning the *bona fides* of the US presentation. Amongst other disturbing features that are not

revealed by the new indictment, are that these matters, and persons now claimed to be '*co-conspirators'* of Mr Assange, have been the subject of trials in the UK and US a decade ago:

- 'Sabu' (Hector Xavier Monsegur's) status as an FBI informant (indictment, §61) was the result of a plea deal whereby he escaped prosecution (for hacking, drugs, firearms, theft, fraud).

- The US request also fails to disclose that, in 2012, based on 'Sabu's cooperation, 'Topiary' (Jake Davis) and 'Kalya' (Ryan Ackroyd) were prosecuted in connection with their alleged involvement with LulzSec, before Southwark Crown Court. The UK prosecution involved over 45,000 pages of materials. Sabu was a named co-conspirator. That prosecution encompassed alleged criminality in the UK and the US. Despite competing US indictments being issued during the currency of the UK case, the UK case continued and was concluded in 2013 by guilty pleas. In short, if it had merit, Mr Assange could and should have been prosecuted for this additional conduct years ago, alongside his so-called 'conspirators', and that prosecution would have occurred in the UK. The forum bar is obviously engaged.

- Jeremy Hammond was prosecuted a decade ago in the US as a member of 'Anonymous' allegedly involved in an attack on Stratfor. In 2013, he received the maximum 10-year sentence under the CFAA, despite his plea. In October 2019, i.e. during the currency of these extradition proceedings, Hammond was summoned before the Virginia district grand jury investigating Mr Assange. Like Manning, Hammond was held in contempt of court by Judge Anthony Trenga after refusing to testify. He was released in March 2020 after the conclusion of the grand jury. The parallels with Manning's treatment are obvious.

- 'Teenager' was well known to the US at the time of the first request. He is 'Iceland1' referred to at §48 of the June 2019 Dwyer affidavit, and in respect of whom the US then counsels '*caution*'. He is the individual referred to at [Pearce 2, tab 21, §14] and is (and is known to the US to have been) convicted in Iceland of fraud, theft and impersonation of Julian Assange (including selling WikiLeaks material without authorisation and stealing LPP materials from him and providing the same to the US). The Icelandic Interior Minister of the time is reported to have ordered a number of FBI prosecutors - who had arrived in Iceland to investigate the 'teenager's' claims - to leave Iceland. The Interior Minister made statements at the time and has made statements since that he believed the investigation was in order to '*frame Assange*'.

<u>The course the court should take</u>

268. Had these fresh factual allegations been adduced by the US, in the normal way, as part of an RFFI (or supplemental affidavit), at this stage of the case, without justification for its late emergence, it is respectfully anticipated that this Court would have had no hesitation in excluding such evidence on case management grounds.

269. Adducing it under the mechanism of a fresh indictment does not (contrary to the suggestion at §8 of the prosecution's 'addendum' to its revised Opening Note)[75] tie this Court's hands or constrain its powers.

270. This Court always has power to '*excise*' conduct from the scope of an accusation extradition request, and to restrict its own consideration of any request to a narrower subset of conduct (and to order extradition, or not, based upon that narrow subset of conduct): ***Osunta v Public***

[75]. Section 137(7A) requires the Court to not look at conduct *outside* the request in its dual criminality assessment. *Non sequitur* that it restricts the court's power to excise or ignore conduct *within* the request.

Prosecutor's Office, Düsseldorf [2008] QB 785 at §§22-29 (conduct in the UK excised from the court's consideration of an EAW, and extradition order, in order for the remainder to satisfy dual criminality). See also, e.g. ***Troka v Government of Albania*** [2020] EWHC 408 (Admin) at §35. Neither is the Court's power to '*excise'* limited to the consideration of dual criminality (***Zada v The Deputy Public Prosecutor of the Court of Trento, Italy*** [2017] EWHC 513 (Admin) at §67 regarding the power to excise aspects of conduct that offended double jeopardy).

271. The power to excise conduct from a request is an longstanding one (see the 'temporal excision' undertaken in ***R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3)*** [2000] 1 AC 147 at pp229-240) and one which was approved by the House of Lords in ***Dabas v High Court of Justice in Madrid, Spain*** [2007] 2 AC 31 per Lord Hope at §51:

> '...*it would be open to the judge in such circumstances to ask that the scope of the warrant be limited to a period that would enable the test of double criminality to be satisfied. If this is not practicable, it would be open to him to make this clear in the order that he issues when answering the question in section 10(2) in the affirmative. The exercise that was undertaken by your Lordships in Ex p Pinochet Ugarte (No 3) [2000] 1 AC 147, 229–240, shows how far it was possible to go under the pre-existing procedure to avoid the result of having to order the person's discharge in a case where part of the conduct relied on took place during a period when the double criminality test was not satisfied. It can be assumed that the Part 1 procedure was intended to be at least as adaptable in that respect as that which it has replaced*...'

Edward Fitzgerald QC
Mark Summers QC
Ben Cooper QC
Florence Iveson

25 August 2020