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 CLOSING SUBMISSIONS

** All references are to the Defence Core Bundle unless otherwise stated

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Index

Preface

These closing submissions are intended to replace the written submissions submitted in August. They are divided into five parts:-

Part A contains the introductory summary. It deals first with the political nature of Julian Assange's actions and the 'political opinions' he was putting into action; and then with the history of the case to show its political motivation. It goes on to deal with the violation of the Anglo US Treaty involved in extraditing him for 'political offences'; and the challenges under section 81(a) to the political motivation of the prosecution and under section 81(b), because of the risk of prejudice upon extradition by reason of his 'political opinions' and his foreign nationality.

Part B addresses the fact that Julian Assange's alleged conduct does not constitute any extradition crime; and that the true nature of his conduct has been deliberately and grossly mischaracterised in order to present it as criminal conduct (the *Zakrewski* abuse argument). Part B goes on to address the challenge that the prosecution exposes him to a flagrant denial of his Article 10 rights to freedom of expression; and to a flagrant denial of the requirements of foreseeability and certainty enshrined in Article 7.

Part C deals prospectively with the very real risk, and indeed likelihood, that he will suffer a flagrant denial of justice contrary to Article 6 if tried and sentenced in the United States. It further deals with the Article 3 challenge that arises from the disproportionate sentence and inhuman prison conditions he is likely to face in the United States, arising from the special status he has and his particular mental vulnerability. Finally, it deals with the overall oppressiveness of his extradition by reason of both his mental disorder (section 91), and the long lapse of time since the relevant publications took place (section 82).

Part D deals with the unfairness that arises from the late addition of the Second Superseding Indictment.

Part E contains conclusions on why this extradition request should be refused.

PART A

1. Introduction

1.1. Now that the Court has heard the evidence, it is possible to stand back and emphasize that both the Prosecution and the Extradition Request are extraordinary, unprecedented and politicised in a number of striking ways:-

i. Firstly, Mr Assange's extradition is not being sought for any of those ordinary extradition crimes, such as murder, drug-trafficking or fraud, that are plainly covered by the Treaty. Nor is he being sought for any terrorist offence. Rather his extradition is being sought for the extraordinary crime of espionage, universally recognised as a 'political offence'. And extradition for such political offences is expressly barred under article 4(1) of the Anglo-US Treaty, which is the only legal foundation for the request under international law.

ii. Secondly, the prosecution itself is unprecedented in the United States because it seeks to criminalise obtaining and publishing information relating to 'national security'. That this prosecution was unprecedented was recognised by all the witnesses who addressed the issue from Professor Feldstein to Trevor Timm, from Eric Lewis to Daniel Ellsberg.

iii. Thirdly, the very unusual history of this prosecution points to a clear political motivation for the belated bringing of charges that occurred as long ago as 2010 and 2011, by the Trump administration in 2018. As the Court knows, the events involving Chelsea Manning took place a decade ago. Then there was a decision under the Obama Administration in 2013 that there would be no prosecution; and, in fact, there was no prosecution under the Obama Administration for clear reasons of constitutional principle. But the prosecution was then initiated under express pressure from President Trump, his political appointees, Mike Pompeo and Jeffrey Sessions in 2018, and greatly expanded under Attorney-General Barr in 2019. This was part of a concerted plan by the executive, first to handicap his legal defence through the targeting of his lawyers, and to have him indicted, expelled from the Embassy and extradited; and further to ensure the escalation of the charges against him in the two superseding indictments. That escalation itself was part of an overtly

political agenda to ratchet up the scale of the charges and the pressure on Julian Assange.

iv. Fourthly, the history of this prosecution has been accompanied by a series of extraordinary executive acts undermining the rule of law. This started with the repeated prejudicial denunciations of Julian Assange by President Trump and Mike Pompeo and was followed by criminal activity of unlawful surveillance that is presently under investigation in the Audiencia Nacional, the Spanish High Court[1] which extended even to a conspiracy to assassinate or kidnap Julian Assange, and the active targeting of his lawyers, doctors, and even his new-born son.

v. Finally, there is evidence that Mr Assange's human rights will be threatened upon extradition. The prosecution will be free to call for a grossly disproportionate sentence because of the multiplicity of espionage charges levelled against him. And he will be exposed to the very real risk of detention in inhuman isolation under SAMs both before and after trial. Such detention would be wholly disproportionate given the nature of his conduct, and profoundly dangerous given the nature of his psychological vulnerability. In short, he will be exposed to the risk of arbitrary, disproportionate and unjust treatment in prison because US law allows for and permits indefinite detention in isolation, and in this particular case, the manner that the CIA Director and President have characterised the defendant make extreme isolation under SAMs conditions overwhelmingly likely. And this includes the risk of detention in the draconian and inhumane conditions of ADX Florence Colorado.

Course to be taken in these submissions

1.2. In these submissions, we will first summarise the political context of this case – the political philosophy of WikiLeaks and Julian Assange as champions of transparency and democratic accountability, and the plainly political purposes of the conduct for which he is being indicted, including the exposure of war crimes, torture and rendition (**Section 2**). We then turn to the fact that he was not prosecuted under the

[1] At the time of writing, the German Prosecutor's Office has also opened an investigation into UC Global's activities. See: https://www.computerweekly.com/news/252486923/Former-UC-Global-staff-confirm-Embassy-surveillance-operation-against-Julian-Assange

Obama administration, though Chelsea Manning was; and the reason why a decision was taken not to prosecute him on the basis that there was no proper distinction between his conduct and that of other journalists (**Section 3**). We then move on in **Section 4** to the history of the prosecution under the Trump administration; the highly politicised and hostile approach to Julian Assange; the public denunciations by President Trump, Sessions and Pompeo following publications exposing the US; the decision to prosecute him and bring about his expulsion from the Ecuadorian Embassy through the intervention of Richard Grenell on orders of President Trump himself; and then the decision taken under the political direction of Attorney General Barr to ratchet up the pressure and bring an unjustified and unprecedented indictment containing 17 new counts of 'espionage' – in breach of the Anglo-US Treaty and despite the strong objections of career prosecutors in the Department of Justice. Finally, we turn to the further manipulation of the rule of law in the last minute introduction of the second superseding indictment (**Section 4**). **Section 5** deals with the accompanying abuses of the rule of law. These included the invasion of legal professional privilege, surveillance in the Embassy, and the blatant misuse of the criminal justice system exemplified by the proposed deal tabled by Republican Congressman Rohrabacher on the President's behalf of a pre-emptive pardon in exchange for his disclosure of the source of the DNC emails published by WikiLeaks during the 2016 US elections.

Successive abuse of process challenges

1.3. We next address the three ways in which these proceedings constitute an **abuse of process.**

1.4. **First**, the request seeks extradition for what is a classic '**political offence'**. That is firstly, because Espionage is customarily recognised as a 'pure political offence' and because in any event, and secondly, the allegations here are of classic political conduct, intended to '*influence the policy of the Government*' and/or '*induce it to change its policy'* within the test laid down in ***Cheng Tzu Tsai v Governor of Pentonville Prison*** [1973] AC 931, per Lord Diplock at pg.943 c and 945 e-f. That has now been shown by Professor Rogers, an eminent emeritus professor of Peace Studies at Bradford University. Extradition for a political offence is expressly

prohibited by Article 4(1) of the Anglo-US Extradition Treaty. Therefore, it constitutes an abuse of this Court's process to require this Court to extradite on the basis of the Anglo-US Treaty in circumstances which constitute a clear breach of the Treaty's express provisions **(Section 6).**

1.5. **Second**, the prosecution is being pursued for ulterior political motives and not in good faith. That is shown by the chronology itself, the departure from established practice, the strident denunciations of Assange by Trump administration officials and the evidence given by a Washington DC based journalist, Cassandra Fairbanks, of a pre-concerted plan involving the President himself to expel Julian Assange from the embassy and extradite him to the US. Abuse of that kind justifies a stay of the proceedings in exercise of the jurisdiction recognised in the successive cases of ***R (Bermingham and Others) v Director of the Serious Fraud Office*** [2007] QB 727 and ***R (Government of the USA) v Bow Street Magistrates' Court*** [2007] 1 WLR 1157 ('*Tollman')* **(Section 7).**

1.6. **Third**, the actual request issued by the US **fundamentally misrepresents the facts** in order to bring this case within the bounds of an extradition crime; both by misrepresenting that Julian Assange materially assisted Chelsea Manning in accessing national security information; and then by misrepresenting that there was a reckless disclosure of the names of particular individuals (as alleged in counts 15, 16, 17). That point engages the jurisdiction recognised in the successive cases of ***Castillo v Spain*** [2005] 1 WLR 1043*,* ***Spain v Murua*** [2010] EWHC 2609 (Admin), and ***Zakrzewski v Regional Court in Lodz,*** *Poland* [2013] 1 WLR 324. This is dealt with in Part B.

Successive statutory bars to extradition

1.7. Finally, we then turn to the special protections set out in the Extradition Act 2003 ('the 2003 Act') and the **successive bars to extradition** which are relied upon. We will deal with these in turn.

1.8. **Firstly**, extradition is **barred under section 81a** of the 2003 Act by reason of the political motivation of the request and because it 'is in fact made for the purpose of

prosecuting or punishing him on account of his… political opinions'. The request has been directed at Mr Assange because of the political opinions he holds and that have guided his actions. The nature of those 'political opinions' has now been analysed and explained for the Court by Professors Rogers and Chomsky and by Daniel Ellsberg. They have also shown how and why these opinions brought him into conflict with the Trump administration and the CIA and caused him to be targeted with this prosecution and extradition request. The US did not challenge those witnesses' assertion that Mr Assange has 'political opinions' related to transparency, democratic accountability, opposition to surveillance, opposition to war crimes and human rights abuses. Nor did the prosecution challenge the evidence of Rogers, Ellsberg and Chomsky that these opinions motivated his conduct. All that they dispute is that the prosecution itself was brought because of his political opinions, rather than out of a legitimate concern to punish ordinary crimes. And yet the unprecedented nature of the prosecution, the chronology of the prosecution, the specific designation of Mr Assange as a political actor by this administration, and the fact that it was brought under the Trump Administration in direct response to Mr Assange's perceived political stance overwhelmingly show that it is the case. Assistant United States Attorney Kromberg did not submit himself to cross-examination by the Court and denied the defence the opportunity to challenge his bland and facile assertion that the Department of Justice was not motivated by political reason in the face of overwhelming evidence that, in this case, pressure was placed on career prosecutors by political appointees such as Pompeo, Sessions and Barr **(Section 8).**

1.9. Moreover, we submit that extradition is **barred under section 81b** because it exposes Mr Assange to the real risk of discrimination on grounds of both his 'political opinions' and his foreign nationality at every stage of the criminal justice process in the US (Section 9). The US have already indicated that they may well argue that he is denied the protection of First Amendment because of his status as a foreigner and Australian national (Kromberg's First Declaration, para 71). His trial will be before a jury drawn from a pool that has a high concentration of defence and intelligence employees and ex-employees, contractors, and their relatives (Prince 1, Volume E, Tab 1), in a courthouse just fifteen miles away from the CIA headquarters. Finally, the executive will has wide and virtually unreviewable powers to invoke SAMS

against him and thereby deny him the most fundamental rights of association on the basis of purported national security concerns. These are the very reasons that have already been aggressively advanced by Pompeo as head of the CIA, which identify Julian Assange as a political actor with an agenda to harm the US, and WikiLeaks as an organisation that possesses information, published and unpublished, that could 'harm' US interests. The alleged political motivations attributed to Julian Assange by the administration, and the nature of WikiLeaks' as a publisher of truthful information are what expose him to the overwhelming likelihood of SAMs. Furthermore, the capacity to abuse the power to impose SAMS for discriminatory purposes was recognised in the evidence of Joel Sickler (Sickler, Exhibit 7, p 22).

1.10. **Next,** it is submitted that, **pursuant to section 82, it would be unjust and oppressive to extradite Julian Assange by reason of the lapse of time** since the alleged offences, and the effect that extradition would now have on his family and young children. In the ensuing years after 2011, he has effectively built a new life in this country. Whilst Julian Assange may have feared that he would be persecuted for his political activities and the disclosures he made in 2010 and 2011, that is wholly different from a defendant who has committed an ordinary crime and who simply lives in hope that he will not be prosecuted for it. To that extent the section 82 point overlaps with the Article 7 point, set out below. This is dealt with in **Part C.**

1.11. **Thirdly,** it would further expose him to a **flagrant denial of his Article 10 rights to freedom of expression,** to receive and impart information and to protect his own journalistic sources. It would further **expose him to a violation of Article 7** because it would involve a novel and unforeseeable extension of the law **(Part B).**

1.12. **Fourthly,** extradition is barred under s87 of the 2003 Act because it would expose Julian Assange to a complete denial of his right to a fair trial under Article 6 **(Part C).**

Inhuman treatment and oppression by reason of prison conditions

1.13. **Fifthly,** extradition is barred **because it would expose Julian Assange to inhuman and degrading treatment contrary to Article 3 ECHR**. That is because the US system and the applicable guidelines (explained by Eric Lewis and Tom

Durkin) point towards the potential imposition of a wholly disproportionate sentence, for the conduct alleged in this case, amounting in effect to a life sentence. That is a direct consequence of the prosecutorial decision to charge him with 17 separate counts of espionage and thereby render him potentially liable to a sentence of 175 years. Moreover, there is then quite separately, every likelihood that he will be exposed to detention in conditions of isolation under SAMs pre-trial and indefinite detention under SAMs at ADX Florence post-trial. Both the English High Court and the European Court of Human Rights in the Ahmed litigation have recognised that indefinite detention in isolation in those conditions could breach Article 3. And both the English High Court and the European Court of Human Rights have recognised that the incarceration of mentally ill prisoners in such conditions can amount to inhumanity contrary to Article 3 or oppression (see the case of ***Lauri Love*** and ***Aswat v UK***). This is dealt with in **Part C.**

1.14. **Sixthly**, **extradition should be refused under s91 because it would be unjust and oppressive to extradite Mr Assange by reason of his mental condition** and the high risk of suicide if he is extradited. All the psychiatrists agreed that Julian Assange suffers from clinical depression. All of the psychiatrists, for both the prosecution and the defence, agreed that isolation could seriously worsen such a condition and it is precisely the risk of solitary confinement in a US prison combined with Mr Assange's recognised clinical condition that renders his extradition oppressive; and in addition creates an unacceptably high risk of suicide **(Part C).**

2. JULIAN ASSANGE'S CONDUCT AND HIS POLITICAL OPINIONS

2.1. At the hearing in February 2020, the Court raised the issue of how exactly the defence put the case that Julian Assange's actions were 'intended to bring about a change in government policy' within the test in ***Cheng,*** and to influence the policy of the US. The prosecution also stated that the issue of whether Julian Assange held political opinions within the meaning of section 81(a) would need further study. It is now understood that the prosecution do not dispute that Julian Assange holds political opinions. They merely dispute that these are the reason for the prosecution. But it is clearly fundamental to the case of Julian Assange to emphasise right at the outset that he does hold 'political opinions' within the meaning of section 81(a); that these political opinions did inform his actions in receiving and publishing Chelsea Manning's disclosures; and that it was his intention to bring about a change in government policy and action on a national and global level. Moreover, it is important to stress that the history of this belated prosecution under the Trump administration has been politically motivated at every stage and that it is the political opinions and political actions of Julian Assange that provide the reason for his prosecution in the first place, and the reason for the bringing of the two superseding indictments.

2.2. To start with then, the publications that are the subject of the indictment '*exposed outrageous, even murderous wrongdoing [including] war crimes, torture and atrocities on civilians'* (Feldstein 1, Tab 18, para 4). The significance of the revelations, including those of the rules of engagement were recognised by witness after witness including Professor Rogers, Daniel Ellsberg, Professor Feldstein, and Professor Noam Chomsky, and have been plainly articulated by Julian Assange himself over many years (see Bundle M). Moreover, the witnesses who worked closely with him, such as John Goetz and Nicholas Hager all attested to the fact that they saw the revelations and publications they were engaged on with Julian Assange as part of a political project to promote democratic accountability and expose the way in which war was being waged in Afghanistan and Iraq, and that states were abusing their powers more generally under a cloak of secrecy.

The earlier history of WikiLeaks

2.3. In order to appreciate the political background of the publications and the political opinions of Julian Assange, it is necessary to look backwards briefly.

2.4. WikiLeaks itself, founded in 2006, was dedicated from the start to transparency and democratic accountability, as a means of influencing governmental action and empowering citizens. In 2009, it described itself as:

> *'…a multi-jurisdictional organization to protect internal dissidents, whistle-blowers, journalists and bloggers who face legal or other threats related to publishing. Our primary interest is in exposing oppressive regimes in Asia, the former Soviet bloc, Sub-Saharan Africa and the Middle East, but we are of assistance to people of all nations who wish to reveal unethical behavior in their governments and corporations. We aim for maximum political impact… We believe that transparency in government activities leads to reduced corruption, better government and stronger democracies. All governments can benefit from increased scrutiny by the world community, as well as their own people. We believe this scrutiny requires information.'* (Volume L, Tab 7)

2.5. Of particular relevance to this case is the fact that WikiLeaks became part of a wider movement to criticise and expose US policy, most particularly in the wake of the September 11th 2001 attacks. (The significance of the Afghan and Iraq wars is spelt out by Professor Rogers in his report, see Rogers, Tab 40, pg.7, para 18). Moreover, Professor Rogers referred to the secrecy with which the US conducted its actions: '*...In reality, the security situation [for the United States Government] was far more complex, with major problems evolving right from the start but* ***persistently covered up'*** (Rogers, Tab 40, pgs.6-7, paras 16, 20). WikiLeaks played its part in the worldwide opposition to US actions in the Middle East. It further addressed broader issues arising from improper US influence around the world:

i. In 2012, WikiLeaks published over 100 'classified or otherwise restricted files from the United States Department of Defense covering the rules and procedures for detainees in U.S. military custody', including the Standard Operating Procedures for Guantanamo Bay (Bundle M2, 159-164)

ii. WikiLeaks published a statement in 2015 from a whistle-blower pertaining to safety issues on UK Trident submarines (Bundle M2, 74-81, 85)

iii. That same year, WikiLeaks released classified EU documents that outlined a plan to destroy refugee boats in Libya and the Mediterranean (Bundle M2, 82-84).

iv. In 2016, WikiLeaks published the 'Yemen files' (Bundle M2, 94-98), a collection of over 500 documents from the US embassy in Yemen that 'offer documentary evidence of the US arming, training and funding of Yemeni forces in the years building up to the war'. WikiLeaks also published cables about the war in Yemen (Bundle M2, 88, 101, 117) and regularly criticized the war (Bundle M2, 99- 100, 102-107).

v. WikiLeaks published drafts to four trade agreements including the Transatlantic Trade and Investment Partnership (TTIP). The drafts to these agreements had been kept secret despite their significance, but their contents led to widespread concern once they were revealed (Bundle M2, 357-362, 364-375, 379, 486).

vi. More recently, WikiLeaks published the LinkedIn profiles of Immigration and Customs Enforcement (ICE) personnel, the organisation responsible for enacting President Trump's extremely controversial 'family separation policy' which separated children from their families at the US-Mexico border.

2.6. Across the world, opposition to the US actions in the Middle East developed amongst a range of political actors, including journalists, lawyers, activists and NGOs, all of whom it has been said encountered 'enormous barriers to adequate or reliable information' about possible abuses by the United States (Maurizi, Tab 69, pg.10, para 26). Experts confirmed the necessity of the publication of national security information for exposing abusive conduct, leading to public deliberation on these issues (see for example Jaffer, Tab 22, para 16). Their evidence was not challenged during the hearing.

2.7. Assange and WikiLeaks had published political commentary for a number of years *prior* to the publications which are the subject of the indictment, creating innovative tools to receive information securely in a way which provides sufficient source protection (these methods having later been adopted across mainstream news

media organisations, see Timm at Tr 09.09.20, pg.56, II 21-26). These publications focussed on policy and actions that governments concealed from the electorate (including but by no means limited to the United States) in parallel with an increase in government secrecy in relation to war, torture, rendition, surveillance and corruption. Examples of such pre-2010 publication in evidence include writings on the battle for Fallujah (Bundle M1, 8b, 9n, 9o, Bundle M2, 172, 176), the use of chemical weapons in warfare (Bundle M1, 9e, Bundle M2, 1, 23), Guantanamo Bay (Bundle M1, 9m, M2, 122, 127, 128, 129, 131, 137, 140-141), interrogation of detainees and allegations of torture by ISAF (Bundle M1, 9ll, Bundle M2, 130, 138, 143, 145 – 148).

2.8. Such WikiLeaks publications also exposed the actions of US intelligence agencies, in particular the CIA. This included an article on the intelligence agencies funding of academic institutions in which Julian Assange claimed revealed 'CIA funding for torture research' (Bundle M1, 9d) and the republication in April 2009 of DoJ memos about the legality of torture produced for the CIA (Bundle M2, 145-148).

2.9. WikiLeaks' methods were closely linked to increasingly widespread use of the internet in the early 2000's, both by Governments that began storing data and communicating electronically, and by journalists, human rights defenders, NGO's and activists who could now connect with a global audience. In 2006, Julian Assange wrote that '***to radically shift regime behavior****… [w]e must think beyond those who have gone before us, and* ***discover technological changes that embolden us with ways to act in which our forebears could not****'* (Bundle M1, 1a)*.*

2.10. Participants in the open government movement saw the internet as a crucial tool for increasing transparency and accountability by sharing government data with the public. For example, the Washington DC based Center for Democracy and Technology called for the collaborative use of the internet to remedy ***'government secrecy that runs counter to core democratic values… to access government information so that the public has the means to hold its government accountable, make our families safer, and generally strengthen democracy'***

(Bundle L, Tab F6) through the use of collaboratively editable websites known as 'wikis'[2].

2.11. The WikiLeaks 'Draft: The Most Wanted Leaks of 2009' had a similar aim of compiling a list of the '*concealed documents or recordings most sought after by a country's journalists, activists, historians, lawyers, police, or human rights investigators'*. The draft page sought nominations for specific documents that were '*likely to have political, diplomatic, ethical or historical impact on release'.* Notably, the page merely asked for nominations of politically significant documents. It did not ask for sources to submit the documents themselves and indeed was always a 'draft' page that was never finalised (Bundle L, Tab 2, Tab 4).

2.12. The Electronic Frontier Foundation, a US-based NGO that advocates for civil liberties online, noted the way in which the US indictment mischaracterises:

> *'… the government's indictment, which names this document no less than 14 times and dedicates multiple pages to describing it,* ***never explains the crowd-sourced nature of the Most Wanted Leaks document.***
>
> *It's easy to understand why. The government prosecutors are trying to paint a picture of Assange as a mastermind soliciting leaks, and is charging him with violating computer crime law and the Espionage Act. It doesn't suit their narrative to show Wikileaks as a host for a crowdsourced page where activists, scholars, and government accountability experts from across the globe could safely and anonymously offer their feedback on the transparency failures of their own governments.*
>
> *…It's overly simplistic to describe the Most Wanted Leaks list, as the government does in its indictment, as "ASSANGE's solicitation of classified information made through the Wikileaks website" or a way "to recruit individuals to hack into computers and/or illegally obtain and disclose classified information Wikileaks." This framing excises the role of the untold number of contributors to this page, and lacks an understanding of how modern wikis and distributed projects work."* (Bundle L, Tab D36)

Julian Assange's political opinions

2.13. The essence of Julian Assange's **political opinions** which have provoked this prosecution are summarised in the reports and evidence of Professor Rogers,

[2] See Bundle L, Tab D32, and Bundle L, Tab D36 for a more detailed explanation of the concept of a wiki.

Professor Feldstein, Professor Noam Chomsky (Tabs 18, 40, 39 and 6, respectively, and see Tr 09.09.20, pg. 8, ll 2 – 8) and in the evidence of Daniel Ellsberg (Tab 55):-

i. He is a leading proponent of an open society and of freedom of expression.
ii. He is anti-war, anti-surveillance and anti-imperialism.
iii. He is a champion of political transparency as a means of achieving democratic accountability and of the public's right to access information on issues of importance – issues such as political corruption, war crimes, torture and the mistreatment of Guantanamo detainees.
iv. More specifically, he advocates the exposure of crimes against humanity and accountability for such crimes.

2.14. In his speeches, articles and books, Julian Assange has clearly articulated and consistently advocated political positions in line with those beliefs (an extensive number of his publications, speeches, articles and books are at Bundles M, but see particularly, Bundle M, 2b, 2e, 2f, 6a, 10g, 10h, 12b, Bundle M Continuation, 352, 353, 354).

2.15. **Professor Rogers** identified Julian Assange's belief in *'transparency and accountability'* as inevitably bringing him into conflict with the Trump administration (Tr 9.9.20, p9, ll 17 – 18). As he says at para 12 of his report, and adopted in his evidence, '*thus the opinions and views of Mr Assange demonstrated in his words and actions can be seen as very clearly placing him in the crosshairs of dispute with the philosophy of the Trump administration'* (Rogers, Tab 40). He further explained in evidence that Assange has been targeted '*because of…where he is coming from, and also the success of WikiLeaks in bringing many things to public attention'* so that *'from the point of view of the Trump administration, this has considerable dangers to them and I think while generally there are other factors involved in the changes in the Trump administration …* ***that essentially at the root of it is this belief that Assange and what he stands for represents some kind of threat to the normal political endeavour****'* (Tr 9.9.20, pg.8, ll 12 – 18).

2.16. Julian Assange has long been an opponent of unjust wars. He has made many public contributions on this issue (Rogers, Tab 40, pgs.3-4), for instance at a Stop the War rally in 2011 in London, as quoted by Professor Rogers:

> *'We must form our own networks of strength and mutual value, which can challenge those strengths and self-interested values of warmongers in this country and in others, that have formed hand in hand an alliance to take money from the United States… we have revealed [information] showing the everyday squalor and barbarity of war, information such as the individual deaths of over 130,000 people in Iraq, individual deaths that were kept secret by the US military who denied that they have counted the deaths of civilians… I want to tell you what I think is the way that wars come to be and that wars can come undone. … It should lead us also to an understanding because if wars can be started by lies, peace can be started by truth.' (Rogers, Tab 40, pg.4, Bundle M1, 2e),*

2.17. Julian Assange has spoken many times on the abuse of secrecy by governments, and the need to expose concealed acts in order to achieve accountability and justice:

> *'There is a legitimate role for secrecy, and there is a legitimate role for openness. Unfortunately, those who commit abuses against humanity or against the law find abusing legitimate secrecy to conceal their abuse all too easy. People of good conscience have always revealed abuses by ignoring abusive strictures. It is not WikiLeaks that decides to reveal something. It is a whistle-blower or a dissident who decides to reveal it. Our job is to make sure that these individuals are protected, the public is informed and the historical record is not denied.' (*Bundle M, D34)

2.18. In a 2010 speech at the United Nations, Julian Assange criticised the US government's response to WikiLeaks revelations of torture and human rights abuses:

> *'In coming here and presenting to the United Nations on Friday as expert witness on our discoveries in Iraq and Afghanistan, I find myself and our organisation finds itself in the rather unusual issue of being both an expert witness to human rights abuses committed by the United States government in various areas and a victim of some of those abuses ourselves. ….*
>
> *In response to the publication of this material and the material relating to Afghanistan and the assassination actions there and various other abuses, the White House and the Pentagon has taken no publicly revealed means of regress. Their only action to date has been to threaten this organization, to place the alleged military whistle-blower, Bradley Manning, into prison, where he sits now since now in Quantico facing a detention sentence of 52 years. …*
>
> *Torture is outlawed under US law. But the law means nothing if the law is not upheld by a government. And in this case, we are seeing that laws in the*

United States are not being upheld by elements of the US government who are tasked to uphold them. (Bundle M, Section 15, Tab 52)

2.19. In *The WikiLeaks Files: the World According to the US Empire* (Bundle M, Section 6, Tab 6a), Julian Assange described US policy in relation to the International Criminal Court, as '*a rich case study in the use of diplomacy in a concerted effort to undermine and international institutions'* and described the value of analysing the content of individual cables alongside the entire archive*: 'Only by approaching this corpus holistically—over and above the documentation of each individual abuse, each localized atrocity—does the true human cost of empire heave into view."*[3]

2.20. **Daniel Ellsberg** referred to the fact that Julian Assange believes *'in open government and democracy'* and that *'it is essentially impossible…[to question] foreign affairs or military affairs with so little true information being shared with the public'* (Tr 16.9.20, pg.45, ll 14 – 20). Ellsberg explained that he and Julian Assange shared the belief that without transparency *'there was really no effective democracy'* (Tr 16.9.20, pg.45, ll 14 – 20). Once again, he saw the fact that like him, Julian Assange had put these beliefs into action and had '*challenged the legitimacy of the government secrecy system'* as the reason for his prosecution (Tr 16.9.20, pg.68, ll 20 – 21).

2.21. Finally, **John Goetz** stated '*on the basis of my conversations and dealings with Mr Assange I regard his thoughts, ideas and actions to have been consistent with an overall political philosophy of seeking to bring to light the hidden criminal actions of states and in particular (central to the publications with which he is charged) by the exposure of criminal conduct in war to persuade the government concerned to alter the policies and bring war and those particular wars in question and their consequences to an end'* (Goetz 2, Tab 58, para 14).

2.22. Those beliefs and those actions have inevitably brought him into conflict with successive US administrations, but particularly the current US administration which

[3] A chapter from this book, published by Verso, entitled 'US War Crimes Immunity and the International Criminal Court' was republished online in 2018 as the US hostility to the ICC progressed (Bundle M Continuation, Section 11, Tab 108).

explains why his organisation has been denounced as a '*hostile non-stage intelligence service'* and why Julian Assange has been repeatedly identified by the US administration as an anti-American ideologue. This is a significant part of the political motivation for the prosecution. Moreover, the current administration has identified 'public disclosure organisations' and their sources as 'ideologically motivated' and as a 'growing threat' (See Bundle F, 1 - 20). Chief among them is WikiLeaks, who CIA Director, Mike Pompeo, considered an ongoing threat because of its continuing calls for CIA whistle-blowers to leak material to WikiLeaks: '*we have to recognise that we can no longer allow Assange and his colleagues the latitude to use free speech value against us. To give them the space to crush us with misappropriated secrets is a perversion of what our great Constitution stands for. It ends now'* (Bundle K, 10, 12, E, 31). Finally, targeting him for exposing war crimes is part of a wider ideological agenda of the current US administration to punish and deter non-US nationals who seek to expose US war crimes or advocate accountability for them.

2.23. Successive US administrations have identified Julian Assange as a political actor, whose motivations include wanting to influence US policy. For example, in reaction to the Afghan War Diaries, a White House memo told reporters: '*WikiLeaks is not an objective news outlet but rather an organization that opposes US policy in Afghanistan'* (see Tr. 27.02.20, pg.31, l 10). And President Obama's Assistant Secretary of State, PJ Crowley, characterised Julian Assange as an actor with a '*particular political objective'* (Bundle M Continuation, Section 19, 536, para 16).

2.24. Indeed, it is the political character of Julian Assange's conflict with the United States that motivated the government of Ecuador to grant political asylum:

> *'The protection is produced when [...] there is a risk or fear that the protected person may be victim of a political persecution, or could be charged with political offenses'* (Bundle M Continuation, Section 19, 536, pg.22(d)).

2.25. Professor Chomsky puts it like this: - ***'in courageously upholding political beliefs that most profess to share he has performed an enormous service to all those in the world who treasure the values of freedom and democracy and who therefore demand the right to know what their elected representatives are***

doing' (Tab 39, para 14). Julian Assange's **positive impact** on the world is **undeniable**. The **hostility** it has provoked from the Trump administration is **equally undeniable.**

Actions of Julian Assange

2.26. It is against that background that one comes to the actual conduct alleged against Julian Assange. This is dealt with in further detail in Part B below. Suffice it at this stage to summarise as follows: WikiLeaks and Julian Assange received and published evidence exposing war crimes, torture, and atrocities on civilians in the course of the Iraq and Afghan wars and the practice of rendition to black sites for torture and interrogation of detainees. Their novel digital methods supported their political goals. As Nicholas Hager put it in his statement, *'Mr Assange's vision was that the digital age might allow a new kind of whistle-blower and leaking of information that could redress some of the growing imbalance between citizens and governments'* (Hager, Tab 71, para 32).

2.27. The significance of the revelations and the scale of the crimes against humanity which he exposed can be briefly summarised as follows:-

2.28. **The Rules of Engagement** (counts 1, 4, 8, 11, 14) were sought and published to **demonstrate** the significance and illegality of the conduct shown in the 'Collateral Murder' video – see Feldstein 1, Tab 18, para 4; Cockburn, Tab 51, paras 5 – 6. The prosecution have repeatedly tried to suggest that this prosecution has nothing to do with the revelations of the 'Collateral Murder' video because it is politically uncomfortable even for the Trump administration to prosecute Mr Assange for that infamous video. Yet, the Rules of Engagement were received and published as an integral part of the 'Collateral Murder' publication (Bundle M Continuation, B8) precisely so as to demonstrate that the helicopter strike was unlawful and that there had been a cover up by the US military.

2.29. Dean Yates cites Assange's remarks at the launch of the Collateral Murder publication in 2010: *'If those killings were lawful under the rules of engagement, then the rules of engagement are wrong, deeply wrong*'. Yates's evidence relates how '*I*

was devastated at having failed to protect my staff by failing to uncover the Rules of Engagement in the US military before they were shot' and how, '*[w]e had never heard of the Rules of Engagement that [Brigadier General] Brooks cited to justify the initial attack*. (Yates, Tab 67, para 26) and that, upon viewing the full Collateral Murder video in 2010 *'I immediately understood that the US military had lied to us'* (Yates, Tab 67, para 23); '*the US knows how devastating the Collateral Murder video is, how shameful it is to the military – they are fully aware that experts believe that the shooting of the van was a potential war crime*.' (Yates, Tab 67, para 27)

2.30. For these reasons, the Rules of Engagement and the airstrike video publication cannot be separated. Further the exact same conduct was involved in the receipt and publication of both sets of data. The receipt and publication of both could have been brought under the vague and broad provisions of the Espionage Act. It is a matter of political expediency that they have not been.

2.31. **The Guantánamo Detainee Assessment Briefs** (counts 1, 6, 9, 12, 18) **provided evidence** that Guantánamo detainees had been the subject of prior rendition and detention in CIA '*black sites'* before their arrival at Guantánamo and that their detention was arbitrary (Worthington 1, Tab 33, paras 8 and 14). In fact, as Clive Stafford Smith explained, the WikiLeaks revelations served to expose the unfairness and total unreliability of the justifications put forward for the detention of those held in Guantanamo:

> '[*The WikiLeaks disclosures were*] *really important because the world did not know the allegations... they were very useful for different people to analyse the...total drivel...this core group of informants that were being used to justify the continued detention of a number of people... the world had no idea of the sort of unreliability, shall we say kindly, of the evidence being alleged against my clients...[using the WikiLeaks information] Andy Worthington has [been able to] analyse the number of times, for example, certain informants were the main basis for detaining prisoners... And these are people...over the years we have been able to get federal judges to find...to be incredible'* (Stafford-Smith, Tr 8.9.20, xic, pg.8-10).

2.32. As to the **Afghan War Diaries** (counts 1, 15, 16) they **revealed** '*what seemed to be war crimes'* (Goetz 1, Tab 31, para 11) and included, *inter alia*:-

i. The existence of '*black unit'* Task Force 373 operating '*kill or capture lists*' hunting down targets for extra-judicial killings (Feldstein 1, Tab 18, para 4);
ii. The killing of civilians, including women and children;
iii. The role of Pakistan intelligence in arming and training terrorist groups;
iv. The role of the CIA in the conflict, including participation in strikes and night raids.

2.33. Turning to the **Iraq War Diaries** (counts 1, 15, 16), these **exposed** *inter alia*:-

i. Systematic torture of detainees (including women and children) by Iraqi and US forces and a secret order by which the US ignored the abuse and handed detainees over to the Iraqi torture squad;
ii. Helicopter killings, including of insurgents trying to surrender;
iii. Details of 15,000 previously unreported civilian deaths, including those of women and young children, through checkpoint killings, use of contractors, targeted assassinations, drive-by killings, executions; showing that the US Government was hiding the full civilian cost of the Iraq war.
iv. Details of 23,000 previously unreported violent incidents in which Iraqi civilians were killed or their bodies were found. John Sloboda attested to the importance of the revelations to his work with Iraq Body Count, whose work involved the publication on the internet of large databases to track civilian deaths.

2.34. The **Iraq War Diaries attracted worldwide opprobrium** for torture and war crimes committed by or acquiesced to by the US, leading to calls for proper investigations into the conduct of allied troops, as is evidenced by condemnation and calls for investigation by Amnesty International, the UN Special Rapporteur on Torture and the UN Commissioner for Human Rights (see **Part B**).

2.35. As set out in Part 4 above, **the US Diplomatic cables** (counts 1, 3, 7, 10, 13, 17) **exposed** *inter alia* evidence of the following, in addition to the numerous other matters dealt evidenced in Bundles P and M:

i. CIA and US forces involvement in targeted, extra-judicial killings in Pakistan (Stafford-Smith, Tab 64, para 84) (Bundle M2, 56-69);

ii. Deliberate killing of civilians (Bundle M2, 48-54);

iii. The pressure exerted on European countries by US officials not to prosecute CIA personnel suspected of involvement in kidnapping, rendition and torture, which was later cited as evidence in cases before the European Court of Human Rights (El Masri, Tab ; Goetz 2, Tab 58, paras 4-6; 11-12; Maurizi, Tab 68, para 52; Bundle M2, 7b and 7c);

iv. The Yemeni government was holding Yemeni citizens in prison on behalf of the US despite the fact that their own government investigation showed that *'there was no evidence they were involved in terrorist acts'* (Bundle P, C24; Bundle M, 117);

v. The US – at the behest of the CIA – was spying on the UN Secretary-General, UN Security Council members and foreign diplomats at the UN in New York in violation of international law (Bundle P, C35). A cable sent in parallel requested *'the collection of DNA samples, iris scans and computer passwords'* of foreign government officials (Bundle M, 501);

vi. US selective and inconsistent support for certain authoritarian regimes despite their human rights record. For example, cables showed that the US praised and supported the royal family in Bahrain after significant contracts were awarded to US companies. During the brutal crackdown on protesters during the Arab Spring in Bahrain, the US remained silent on Bahrain, despite having made harsh criticism of Iran's response to protesters (see Julian Assange, 'America and its Dictators', *WikiLeaks Files,* (Bundle M, 6a);

vii. The corruption of the Ben Ali regime in Tunisia and the fact that while the US publicly supported the regime, behind closed doors diplomatic cables showed that the US did not support his continued leadership (Bundle P, C99). Amnesty International credited these WikiLeaks publications as having been a 'catalyst' for democratic revolutions in Tunisia and elsewhere around the region, the Arab Spring, and signalled '*a watershed year when activists and journalists used new technology to speak truth to power and, in so doing, pushed for greater respect for human rights…when repressive governments faced the real possibility that their days were numbered*' (M20/554); Julian Assange, 'America and its Dictators', *WikiLeaks Files,* pgs.31-32 (M6/6a). Former editor of the NYTimes, Bill Keller, agreed with Amnesty's assessment of WikiLeaks' contribution to the Arab Spring (M11/53);

viii. The UK had '*put measures in place to protect (US) interests*' by limiting the scope of the Chilcot Inquiry, the independent public inquiry into the UK's involvement in the Iraq War (Bundle P, C26), fuelling further public debate about the US-UK relationship and the UK's past and future involvement in US wars;

ix. The US had systematically sought to undermine the International Criminal Court (ICC) and pressured countries to sign bilateral immunity agreements which would protect US nationals from prosecution before the ICC, imposing sanctions upon countries which refused, and that efforts were taken to keep these immunity agreements secret from the public ((M11/90-91; 114); 'US War Crimes and the ICC', *WikiLeaks Files,* pgs.159-180, (Bundle M, 6a);

x. US war crimes in Iraq, including in a 2016 raid by US troops in which they had killed Iraqi civilians, including an elderly woman and five-month old child, and then called an airstrike to cover up the evidence (Bundle M11/53). This evidence was widely reported as having contributed to the withdrawal of immunity for US troops in Iraq and the withdrawal of the US from Iraq (Rodgers, Tab 40, para 30; M11/53, 54, 91-92);

xi. The State Department had made knowingly false representations to Congress about whether the Colombian government and military had met certain statutory human rights criteria, despite evidence of the killing of civilians (P/C18).

2.36. It is highly significant that the Department of Justice (DoJ) under the Obama administration recognised that it would be both wrong and impolitic to prosecute Julian Assange in respect of his receipt and publication of the materials which led to these revelations. It is equally significant that the DoJ under the Trump administration, for blatantly political reasons, was pressured into reversing the approach of the Obama administration and prosecuting Julian Assange despite the implications of the prosecution for the constitutional protection of the First Amendment, and despite the nature of the revelations. Indeed the prosecution was part of a political drive to punish leakers, intimidate journalists, and assert worldwide US impunity for war crimes, rendition and torture.

THE POLITICALLY MOTIVATED PROSECUTION – SECTIONS 3 – 6

3. Prelude to the present politically motivated prosecution: the earlier decision not to prosecute and the fact of non-prosecution for seven years under the Obama administration

3.1. It is first necessary to emphasise that for seven long years under Obama, no action was taken against Julian Assange and WikiLeaks in respect of their receipt and publication of the so-called 'Manning leaks'. That is essential background to the whole history of the present politically motivated prosecution under the Trump administration. The background facts are more fully set out in the chronology, the Particulars of Abuse and Response on Abuse of Process, which are intended to be read alongside this document (Submissions Bundle, Tabs 8, 5 and 7).

The original conduct

3.2. The studied inaction under the Obama administration is important. Extradition is only now being sought for the receipt and publication of materials provided to WikiLeaks by Chelsea Manning. All the relevant conduct occurred between 2010 and 2011, and was known about at that time. Mr Kromberg effectively recognised this in his second supplemental declaration at paragraph 12 where he refers to public reporting that the Department of Justice was *'investigating Assange for his acts in connection with the Manning disclosures*' and that *'specific concerns of the United States that Assange's publications endangered the lives of innocent informants and sources were well publicised'* in 2010 and 2011. Moreover, the basic allegations in the 17 espionage counts of the present indictment (count 1 and counts 3-18) remain that Mr Assange obtained and published State Department cables, Rules of Engagement, Iraq war logs, and Guantanamo detainee reports; and that this occurred in the years from 2010 to 2011. Yet, **Mr Assange's prosecution** and **the first extradition request** were not begun until December 2017. The superseding indictment upon which the prosecution principally rely was not issued until 23 May 2019. And during the intervening period between 2010-2011 and the criminal complaint in December 2017 there was a well-publicised decision by the Obama administration in 2013 that Mr Assange should not be prosecuted. Moreover the second superseding indictment

which is the basis of the second request is dated 24 June 2020 but, with the exception of charge 2, is still principally focussed on the receipt and publication of materials provided to Wikileaks by Chelsea Manning.

Chelsea Manning's Court Martial

3.3. Chelsea Manning was arrested in 2010. She was convicted in 2013 and sentenced to 35 years in prison (Boyle 1, Tab 5, para 22). At her trial, she explained her motivation for downloading documents and videos which exposed war crimes in Afghanistan and Iraq, and the torture of detainees in Guantanamo (as summarised in the Chronology, see Submissions Bundle, Tab 8, pg.3). In her plea allocution statement to the Court Martial on the 30 July 2013, she made absolutely clear her own political motivation and desire to influence government policy in the actions with which Julian Assange is allegedly associated:-

> *'I believe if the general public, especially the American public, had access to the information… this could spark a domestic debate on the role of the military and our foreign policy, in general as well as it related to Iraq and Afghanistan…the decisions I made to send documents and information to the WLO website were my own decisions and I take full responsibility for my own actions'* (Boyle 1, Tab 5, pg.8, paras 16-18 and 21).

3.4. Her view of WikiLeaks was that it *'seemed to be dedicated to exposing illegal activities and corruption'* (Boyle 1, Tab 5, Exhibit 2, pg.6751), and she believed public access to the information she possessed *'could spark a domestic debate on the role of the military and our foreign policy, in general, as well as it related to Iraq and Afghanistan… [and] might cause society to re-evaluate the need or even the desire to engage in counterterrorism and counterinsurgency operations that ignore the complex dynamics of the people living in the affected environment every day'* (Boyle 1, Tab 5, Exhibit 2, pgs.6757-8). At that time no attempt was made to indict Julian Assange for obtaining or publishing the Manning materials. The prosecution say that Julian Assange encouraged or caused Chelsea Manning to obtain the materials referred to in Counts 2 – 4, 9 – 11, and 12 – 14. But her own account gives the lie to that false claim. And the overtly political purpose of her revelations, together with the unprecedented nature of any prosecution for obtaining those materials from her and publishing them, undoubtedly lay behind the decision of the

Obama administration not to initiate a prosecution in 2013. That was made clear by Professor Rogers in his evidence and supported by the quotes from officials of the DOJ relied upon by him, Eric Lewis, Professor Feldstein and Thomas Durkin.

3.5. As Patrick Cockburn described in his agreed statement, '*The Pentagon put a great deal of effort'* into '*trying to prove that the WikiLeaks disclosures had led directly to the deaths of US agents and informants'* but Brigadier General Robert Carr, head of the task force put together to prove this theory '*later described the extent of the task force's failure, in testimony given at Manning's sentencing hearing'* (Cockburn, Tab 51, para 12).

3.6. Chelsea Manning's sentence was subsequently commuted by President Obama in 2017 so as to allow for her release. By contrast, President Trump condemned her as '*a traitor who should never have been released'* (Boyle 1, Tab 5, para 23) and attacked the very fact of commutation. Unsurprisingly, under the Trump administration, the DoJ then had her subpoenaed to testify against Julian Assange in January 2019. She was then twice incarcerated for contempt and exposed to such inhuman treatment (condemned by the UN Special Rapporteur on Torture) that she '*attempted to take her own life on March 10 2020 after nearly one year in prison'* (See Boyle 2, Tab 49, paras 7 – 12). It is important that this occurred at the Alexandria Detention Center, the very jail to which Julian Assange is destined to go if he is extradited. The stark reality of the Obama administration approach above and that of the incoming Trump administration demonstrates the way in which the new administration adopted a wholly different approach, for manifestly political reasons, to every aspect of this case.

Decision not to prosecute Julian Assange in 2013

3.7. We now know that a decision was made under the Obama administration not to prosecute Julian Assange in 2013 on the very same evidence that was relied on to indict him in 2018. The decision not to prosecute in 2013 was because of what has been described as '**the New York Times problem**', as referred to in the Washington Post article dated 26 November 2013 (Submissions Bundle, Chronology, Tab 8, pg.6). The US prosecutors operating at the time concluded that charging Assange

would have been tantamount to prosecuting any journalist who published information that is alleged to endanger national security, and would thus violate the First Amendment (Feldstein, Tab 18, para 9) (Jaffer, Tab 22, para 21) (Shenkman, Tab 4, para 27) (Lewis 2, Tab 24, para 15).

3.8. Former Department of Justice ('DOJ') spokesman **Matthew Miller** set out the main reason for the decision in 2013: *'If you are not going to prosecute journalists for publishing classified information, which the department is not, then there is no way to prosecute Assange'* (Politico, Bundle K, Tab 4; The Washington Post, Bundle K, Tab 5). The significance of this statement by Miller was highlighted in the 4th statement of Eric Lewis at paragraph 14 (Lewis 4, Tab 70). In the same statement, he emphasised the importance of the fact that Miller made the comment on the record in 2013 with the Washington Post (id) and then issued confirmations in 2016, 2017, 2018 and 2019 that *'the DOJ couldn't indict Assange in the Manning leaks because he was a publisher, not hacker'* (Lewis 4, Tab 70, para 14, Miller's tweet dated 20 October 2016). The later tweets of Matthew Miller which are to like effect are at Volume F(2), Tab 55. The same point is made by Mark Feldstein in his supplemental declaration of 5 July 2020 (Feldstein 2, Tab 57). In his oral evidence, Eric Lewis emphasised that '*Matthew Miller is extremely highly regarded'* (Tr. 14.09.20, pg.8, l 16).

3.9. Two key articles in the Washington Post dated November 2013 and 24 May 2019 (Bundle K, Tabs 5 and 38) were highlighted by the defence witnesses in evidence. These contain a series of reliable quotes from Justice Department officials in a manner that makes it clear that a careful decision was taken in 2013 that no prosecution would then be brought. Eric Lewis gave cogent reasons why the Washington Post Article should be considered reliable. He explained that it was *'written by Sari Horwitz, who has covered the Justice Department for quite a while'* and who has '*won four Pulitzer Prizes'* so is '*very well regarded and knowledgeable'* and clearly *'has sources that are highly important, both named and unnamed, <u>where they say on record that they have all but decided not to prosecute Mr Assange</u> because of the distinction between the person who has access to the government computers and leaks it, like Chelsea Manning, and the publisher'* (Julian Assange) (Tr 14.9.20, pg.7, ll 26 – 34).

3.10. Moreover, both Eric Lewis and Thomas Durkin pointed out that the report in the Washington Post in November 2013 was never corrected. As Thomas Durkin, an immensely experienced lawyer who has worked both for the prosecution and defence stated in evidence, when asked whether the report was reliable, *'not only that, but I did not see any report contradicting it around that time. It is my experience that when things get leaked and the government does not approve of what is being reported, it will see that that gets corrected'* (Tr 15.9.20, pg.70, ll 32 – 34). Eric Lewis made precisely the same point in his evidence (Tr 15.9.20, pg.41, ll 5-9). Thomas Durkin firmly maintained under cross-examination that all the evidence pointed to an actual decision not to prosecute under Obama in 2013:

> '*what appeared to me to have happened is the Obama administration, under Attorney General Holder, made a decision not to charge Mr Assange….It seems very clear to me that the Obama administration made a decision not to prosecute… My guess is that the case was probably declined. That does not mean that they cannot reopen it, but I think that is what happened. They decided not to go ahead. They declined the case. For Donald Trump's political purposes they decided to reinstate the charges. The grand jury was not the one that first charged Mr Assange, it was the US Attorney's Office in a complaint'* (Tr 15.09.20, pg.68, l 27, pg.69, l 5).

3.11. There is more to corroborate Durkin and Lewis' claim that Attorney General Holder made a positive decision not to charge Julian Assange. Eric Holder himself stated in office in 2014 that no journalist would be prosecuted on his watch[4] and he had already made clear in 2013 that *'any journalist who's engaged in true journalistic activities is not going to be prosecuted by this Justice Department…*' (Lewis 3, Tab 25, para 15). Holder clearly did not consider there to be any distinction in principle between Julian Assange and a journalist.

3.12. The prosecution point to the finding of Judge Rothstein that there *was 'an ongoing criminal investigation in 2015'* (See Guardian article of March 2015 at our Bundle K, Tab 7). Yet, the evidence that there was some form of ongoing Justice Department investigation into WikiLeaks in 2015 is too vague to substantiate the claim that there was ever any serious intention to prosecute under the Obama DoJ. That was made

[4] USA Today, '**Holder: 'No reporter is going to go to jail.':** https://eu.usatoday.com/story/news/nation/2014/05/27/holder-reporter-jail/9639641/

clear by each of the defence experts, Lewis, Durkin and Feldstein. Kromberg has given no explanation of the nature of the ongoing investigation and has failed to make any positive assertion that there was any serious prospect of a prosecution for these matters under the Obama administration. There is moreover no evidence of any subpoenas being issued after 2013 in aid of this *'ongoing criminal investigation'*, and the prosecution have never suggested that there was.

3.13. So there was no prosecution under the Obama administration because it was still thought wrong to prosecute the media for either receiving or publishing state secrets from a government official. This point is analysed in detail by Professor Feldstein who also refers to the '*longstanding precedent that publishing secret records is not a crime'* (Tab 18, para 9, pgs.18, 19). As all the First Amendment experts make clear, it is for that reason that no journalist had ever been prosecuted for like conduct in the US despite *'thousands upon thousands of national security leaks to the press'* (Feldstein 1, Tab 18, paras 5, 8-11) (Shenkman, Tab 4, paras 21, 25-27, 32-34, 41-42) (Jaffer, Tab 22, para 21) (Tigar, Tab 23, pgs.16-18). As Mr Durkin stated in evidence, one of the reasons he considered the press reports – that there had been a concerted decision not to prosecute under the Obama administration – to be '*reliable'* was because their position was based on a *'legally sound principle'* and as a result '*it makes sense as to why they would not pursue the case'* (Tr. 15.9.20, pg.72, ll 8-9, re-x).

3.14. Yet the principled and consistent stand taken under the Obama administration was reversed under the present Trump administration from early 2017 onwards. The reason for that lies primarily in the nature of Julian Assange's disclosures to the world and the nature of his political opinions, which inevitably attracted the hostility of the Trump administration and the CIA. It is to the history of the Trump administration's prosecution that we now turn.

4. Prosecution under the Trump Administration

The political agenda of the Trump administration

4.1. The prosecution of Julian Assange, initiated in December 2017, was the result of the conflict between Julian Assange's beliefs and actions and the whole agenda of the incoming administration. That conflict operated on many levels. Historically, and in response to WikiLeaks' publication of the US diplomatic cables, President Trump called for '*the death penalty or something*' for Julian Assange (Bundle E, Tab 10, pgs.3-4). He had also denounced the very fact of Obama's commutation of Manning's sentence, describing her as a '*traitor who should never have been released from prison* (Boyle 1, Tab 5, pg.9, para 23). Then, when he became President, he effectively declared war on journalists and leaks, of which Julian Assange was the most prominent example. He even went on to call for the execution of journalists (Bundle F(2), Tab 47). And on a deeper level, there was the administration's obvious hostility to the very fact of Julian Assange's exposure and condemnation of US war crimes and human rights abuses. Trump's 'America First' policy supporting immunity for US crimes, denouncing the investigations by the ICC of US war crimes in Afghanistan, occurred in harmony with the CIA's motivation for targeting Julian Assange.

4.2. The hostility to Julian Assange was evidenced by the escalating public statements by administration officials condemning Julian Assange from 2017 onwards, the dramatic ratcheting up of the charges against him between December 2017 and the present under pressure from the Trump administration, and the accompanying breaches of the rule of law in the way in which he was subject to surveillance in the Embassy, expelled from the Embassy at the instigation of the US, and then deprived of his own legally privileged documents. But most of all it is demonstrated by the reversal of the principled approach adopted under Obama and the initiation of an unprecedented prosecution for the receipt and publication of documents, where the international publications were plainly in the public interest. To this end, the US prosecution has sought to distort the facts in order to present what is plainly a prosecution for political offences into a prosecution for 'ordinary' crimes, wholly

mischaracterised as unauthorised 'hacking' and the endangerment of lives in order to provide the veneer of a legitimate prosecution (see **Part B**).

4.3. In response to this accusation of politicisation, the prosecution through **Mr Kromberg makes some generalised assertions about the independence of prosecutorial decisions in the US Federal system** and asserts that they are not influenced by political considerations. However the overwhelming evidence is that, under the Trump administration, there has been repeated and unprecedented interference by the President and his political appointees with the normal criminal justice process. This is shown in a number of ways:-

i. Firstly, President Trump and his Attorney Generals, particularly Barr, have developed the alarming and extreme Unitary Executive Theory of presidential power that justifies interference by the President with the criminal justice process at every stage. That is on the basis that 'all prosecutorial discretion rests effectively in the President and it is the President who makes those prosecutorial decisions' and that it is for the Justice Department 'to implement whatever instructions he chooses to give' (Tr 15.09.20, pg.42, ll 12 – 15). This was explained by Eric Lewis in his second statement (Lewis 2, Tab 38, paras 5 – 13); in his fourth statement (Lewis 4, Tab 70, paras 44 – 67); and in his oral evidence at Tr 15.09.20, pg.42, ll 10 – 21). Consonant with that theory, President Trump himself has asserted that he is the 'chief law enforcement officer' of the United States (Bundle F2, Tab 26) and it is a notorious fact that he has repeatedly called for the prosecution of his political enemies. Therefore the political pressure to prosecute Julian Assange is wholly consistent with this theory of executive power.

ii. Secondly, this has resulted in blatant pressure to prosecute for political reasons (as in the Huawei case[5]); and Presidential pressure to abandon prosecutions or ensure the reduction of sentences for allies such as Roger Stone and Michael Flynn (See Lewis 5th declaration at Tab 81, para 4) which deals also with the

[5] The Huawei case, in which President Trump has expressly referred to the possibility of dropping the prosecution in exchange for concessions by the Chinese state on trade (see Reuters report of 22nd August 2020 which references the defence claim in the Canadian proceedings that the extradition request of Huawei Chief Financial Officer Meng Wanzhou is being exploited by President Trump and other senior members of the administration 'as a bargaining chip in a trade dispute'. See also Eric Lewis' 5th statement at para 4).

increasing politicisation of the DOJ under Attorney General Barr and President Trump). And in this case itself there is evidence of pressure being put on prosecutors in the Eastern District of Virginia to bring this prosecution (see the New York Times article of 20th April 2017 referred to in the evidence of Eric Lewis and Durkin at Bundle K, Tab 39).

iii. Thirdly, this novel and unjustified prosecution has prompted protest and resignations by career prosecutors – including protests by the prosecutors in this case at the introduction of the first superseding indictment. This is documented in the Washington Post article of 24th May 2019 (Bundle K, Tab 38). This article was also highlighted in the oral evidence of Eric Lewis, Durkin and Rogers. This is part of a wider pattern of protests and resignations by career prosecutors at the unprecedented flouting of the principle that the DoJ's decisions must be impartial and free from political interference (see, for example the DoJ alumni communications at Bundle F(2) at Tabs 24, 36, 42).

The chronology of this prosecution under the Trump Department of Justice

4.4. To deal first with the President's 'war' on leakers and journalists, the court has heard evidence that in the prelude to this prosecution, President Trump had '*repeatedly referred to the press as 'the opposition party' a*nd the *'enemy of the people'* (Jaffer, Tab 22, paras 4 and 28). He has '*denounced the news media as a whole as 'sick', 'dishonest', 'crazed', 'unpatriotic', 'unhinged' and 'totally corrupt' and attacked them as 'purveyors of 'fake news'*" (Feldstein 1, Tab 18, para 2) (Prince 2, Tab 13).

4.5. In this context, President Trump met with FBI Director James Comey in **February 2017** and agreed that they should be *'putting a head on a pike'* as a message to journalists over leaks and *'putting journalists in jail'* (Feldstein 1, Tab 18, para 9) (Shenkman, Tab 4, para 30). This is not surprising given that WikiLeaks had called for President Trump's tax returns to be leaked prior to his election, and repeated the call within days of his inauguration in January 2017. **Then, as Professor Feldstein showed in his report, President Trump instructed his attorney general to '*investigate 'criminal leaks' of 'fake news' reports that had embarrassed the White House'*** (Feldstein 1, Tab 18, para 9) (Shenkman, Tab 4, para 30). The Trump administration set about systemically punishing whistle-blowers in general, and

'*dramatically escalated the number of criminal investigations into journalistic leaks'* (Feldstein 1, Tab 18, para 2). President Trump's *'use of government power to punish his media critics'* is further identified as a *'deliberate attempt to 'stifle the exercise of the constitutional protections of free speech and the free press'"* such that '*all journalists work under the threat of government retaliation'* (Feldstein 1, Tab 18, para 2). The use of the Espionage Act to achieve this was outlined in Exhibit 19 to the Statement of Trevor Timm (Tab 65).

4.6. In addition, Julian Assange and WikiLeaks clearly **attracted the enmity of the CIA**, at the same time by publishing Vault 7, **'the largest ever publication of confidential documents on the [Central Intelligence] agency**' (Bundle M Continuation, Tab 324) in March 2017. Vault 7 was geared 'to initiate a principled public debate about the 'security, creation, use, proliferation, and democratic control of cyberweapons'', as well as WikiLeaks mission more generally (Bundle M1, 10g). This followed other publications which had angered and exposed the CIA as engaging in unlawful activities around the world. In February 2017, WikiLeaks published a CIA espionage order targeting French presidential candidates and political parties leading up to the 2012 election in France (Bundle M2, 316 - 322). In 2014, WikiLeaks published an internal CIA report about the CIA's assassination program, and manuals that advised CIA agents on how they could infiltrate Schengen areas using a fake identity (Bundle M2, 70 - 73). In 2015, of the then CIA Director, John Brennan's personal emails were published, which included letters discussing how the US government could circumvent laws which prohibited torture (Bundle M2, 166 – 173). In 2015 and 2016 WikiLeaks also revealed that the NSA had been spying on high-level government officials in France, Germany, Italy, Japan, and Brazil, as well as the United Nations and European Union . These publications upset the relations between the US and its allies. In response to the revelations, ambassadors were called in to answer for the US's actions and emergency investigations into NSA spying were started (see for example the Bundestag Inquiry into NSA activities in Germany, Bundle M2, 180 – 184, 186 – 191, 194 – 214, 311 – 313).Significantly, from March 2017, WikiLeaks also campaigned against President

Trump's appointees Mike Pompeo[6] and Jeff Sessions[7], and called for the prosecution of Gina Haspel (who later succeeded Pompeo as head of the CIA, and whom Wikileaks has called a 'CIA torturer').[8]

Julian Assange targeted to make an example of him

4.7. It was against that background that President Trump and his administration then decided in 2017 to target and make an example of Julian Assange. He was an obvious symbol of all that Trump condemned, having brought American war crimes to the attention of the world (Boyle 1, Tab 5, para 11) (Tigar, Tab 23, p8-9). Professor Feldstein puts it in this way: **'*On a worldwide scale [he disclosed] significant governmental duplicity, corruption, and abuse of power that had previously been hidden from the public... [he] exposed outrageous, even murderous wrongdoing, including war crimes, torture and atrocities on civilians*'** (Feldstein 1, Tab 18, pg.7, para 4). As indicated above, the sheer scale and significance of the revelations brought about by Julian Assange and WikiLeaks can scarcely be understated (Feldstein 1, Tab 18, pg.6, para 4).

4.8. Such revelations obviously put him in the sights of the aggressive 'America First' ideologues of the Trump Administration. They targeted him because of his exposure of American war crimes and because of the threat that his revelations and continuing work posed to their geo-political agenda. That was at a time that President Trump had aggressively and publicly asserted the entitlement of the US to resort to torture

[6] See public statements about Mike Pompeo on Twitter :
https://twitter.com/DefendAssange/status/856504469567221761?s=20 and
https://twitter.com/DefendAssange/status/857533958229291008?s=20

[7] See also tweets about Sessions: https://twitter.com/wikileaks/status/818980930488586240?s=20
https://twitter.com/wikileaks/status/829310262159220737?s=20

[8] See: https://twitter.com/wikileaks/status/997221068023697409
A number of other similar tweets criticising Gina Haspel are:
https://twitter.com/wikileaks/status/873598163688574976?s=20
https://twitter.com/wikileaks/status/973551127252922368?s=20
https://twitter.com/wikileaks/status/993859814404120577?s=20
https://twitter.com/wikileaks/status/993862217748631552?s=20
https://twitter.com/wikileaks/status/994466898195689473?s=20
https://twitter.com/wikileaks/status/995890813082259456?s=20
https://twitter.com/wikileaks/status/997219832419487745?s=20
https://twitter.com/wikileaks/status/1028927045059919873?s=20
https://twitter.com/wikileaks/status/1028935143770259456?s=20

and waterboarding in the 'national interest'[9]. Julian Assange's revelations about the CIA had also incurred the wrath of that agency, as evidenced by Pompeo's attacks.

The government's public attacks on Julian Assange in April 2017

4.9. That is why the prosecution of Mr Assange, **based on no new evidence**, was now pursued and advocated by the Trump administration, led by spokesmen such as **Mike Pompeo,** the Kansas Congressman appointed to the position of director of the CIA by Trump in January 2017, and **Attorney General Sessions**.

4.10. The attacks began in April 2017. The history is instructive. On 12 April 2017 Julian Assange published an OpEd in the Washington Post justifying WikiLeaks' recent 'Vault 7' publication of revelations about the extent and dangers of CIA intrusion into the everyday lives of citizens on the basis that: - *'[w]e [WikiLeaks] publish truths regarding overreaches and abuses conducted in secret by the powerful'* (Bundle M, 10g). In direct response to 'Vault 7', on 13 April 2017, **Mike Pompeo**, the new director of the CIA, in his first speech after assuming office, characterised Julian Assange and WikiLeaks as treasonous[10]:

> '*As a policy, we at CIA do not comment on the accuracy of purported intelligence documents posted online [WikiLeaks Vault 7]. In keeping with that policy, I will not specifically comment on the authenticity or provenance of recent disclosures. But the false narratives that increasingly define our public discourse cannot be ignored. There are fictions out there that demean and distort the work and achievements of CIA and of the broader Intelligence Community. And in the absence of a vocal rebuttal, these voices—**ones that proclaim treason to be public advocacy**—gain a gravity they do not deserve. It is time to call these voices out. The men and women of CIA deserve a real defense. ... And that is one of the many reasons why we at CIA find the celebration of entities like WikiLeaks to be both perplexing and deeply troubling.'* (Bundle K, Tab 10)

[9] See Washington Post, 17 February, 2016: https://www.washingtonpost.com/politics/trump-says-torture-works-backs-waterboarding-and-much-worse/2016/02/17/4c9277be-d59c-11e5-b195-2e29a4e13425_story.html

[10] Later in 2017, Mike Pompeo described Chelsea Manning's actions as 'treasonous', when he cancelled an appearance at Harvard University in response to their decision to offer Chelsea Manning a visiting fellowship, and called WikiLeaks 'an enemy of America'. See: https://www.theguardian.com/us-news/2017/sep/15/chelsea-manning-fellowship-cia-head-cancels-harvard-speech-over-offer-to-traitor and https://nationalinterest.org/feature/chelsea-manning-what-was-harvard-thinking-22328

4.11. Pompeo also expressly denounced Julian Assange and WikiLeaks as '*a non-state hostile intelligence agency*', and claimed that Julian Assange, like Snowden, posed '*very real threats to our country'* (Bundle K, Tab 10). In this speech Pompeo went on to accuse Julian Assange of specific criminality (in what the Obama administration had elected not to prosecute as a crime): *'WikiLeaks directed Chelsea Manning in her theft of specific secret information'* in relation to the *'Manning leaks'.* This speech announced the intention to go after Julian Assange: '*We can no longer allow Assange and his colleagues the latitude to use free speech values against us… to give him a space to crush us with misappropriated secrets is a perversion of what our great constitution stands for. It ends now'* (Bundle K, Tab 10).

4.12. This prompted a further response from Julian Assange by way of an editorial in the Washington Post, in which he described Pompeo as having initiated a 'war on free speech' and referred to the 'Pompeo doctrine' in the following terms:

> *'The Pompeo doctrine ensnares all serious and investigative human rights organizations, from ProPublica to Amnesty International to Human Rights Watch. The logic that these organizations, are somehow 'intelligence agencies' would be as absurd as the suggestion that the CIA is a media outlet. Both journalists and intelligence agencies cultivate and protect sources, collect information, write reports, but the similarities end there.'* (Bundle M, 10h)

4.13. On the occasion of his speech on 13 April 2017, Pompeo heralded part of the strategy to be adopted by the prosecution **in respect of the Manning allegations**, stating that Julian Assange *'has no First Amendment freedoms'* because '*he is not a US citizen'* (Bundle K, Tab 11). This further identified the way in which top administration officials had a devised a route to prosecute Julian Assange.

4.14. Standing back, this Court can readily see how a politicised battle had developed, in which Mike Pompeo was locked in a personal confrontation with Julian Assange and was preparing the way for a prosecution that reversed the earlier approach of the Obama administration. In keeping with this new approach, Mike Pompeo contrasted the Trump administration's approach to that of the Obama administration in the following way: ***'We've had administrations before that have been squeamish***

about going after these folks under some concept of this right-to-publish… *I wanted to make sure that I clearly articulated that the intelligence community, and I think the United States government in its entirety, have an obligation.* ***And I'm confident this administration will pursue them with great vigor'***[11] (Bundle K, Tab 12).

4.15. Significantly, there followed the political statement of Attorney General Sessions, **only days later, on 20 April 2017, that the arrest of Julian Assange was now a priority** (See New York Times Article of 20 April 2017, Bundle K, Tab 39). All the experts, and in particular Eric Lewis, see this as a result of pressure being put by Sessions by President Trump and others on prosecutors in the Eastern District of Virginia to outline an array of possible charges.

4.16. The full scale of these denunciations is encapsulated in the report of Professor Feldstein (Tab 18, pg.19), who also highlighted a New York Times article dated 18 November 2018, which reported that Pompeo's speech was intended in part to 'to pressure the Justice Department to intensify its reassessment of Mr. Assange' according to an intelligence officer' (Feldstein, Tab 18, fn 87).

4.17. These public denunciations reveal the political motivation that fuels the prosecution of Mr Assange. These denunciations, in the knowledge of an intention to prosecute, violate the presumption of innocence and prejudice the prospects of a fair trial. And they form the context in which Attorney General **Sessions,** a political appointee with a political agenda, was directly responsible for the criminal complaint in December 2017.

4.18. Thus, as the newspaper report in the New York Times, dated 20 April 2017 (Bundle K, Tab 39) shows, **pressure was then put on prosecutors by the Attorney General** and *'the new leaders of the justice department'* to bring an indictment, even in the face of *'vigorous debate'* from *'career professionals'* who were '*sceptical'* about its legality, and despite open objections from prosecutors directly involved in the case (Feldstein 1, Tab 18, para 9, pg.19). That was the position in April 2017. This is

[11] See Q&A after the speech at Bundle K, Tab 10: https://www.csis.org/analysis/discussion-national-security-cia-director-mike-pompeo

confirmed by the report in the New York Times. It is further confirmed by a subsequent retrospective report in the Washington Post on 24 May 2019, which summarises the history going back to April 2017 (Bundle K, Tab 38). It is significant that CNN reported in April 2017 that '***prosecutors have struggled with whether the Australian is protected from prosecution by the First Amendment, but now believe they have found a path forward***' (see The Guardian article in Bundle K, Tab 11). This demonstrates that it was not new evidence, but pressure to find an arguable basis for prosecution that actually led to the prosecution under the Trump DoJ.

4.19. It is clear that the Trump administration later credited themselves with reversing Obama's approach and taking action where the DoJ under Obama had done nothing, and where Obama had decided to commute Chelsea Manning's sentence. Thus, when Julian Assange's asylum was removed so as to clear the way for this extradition in April 2019, a White House spokesperson, Sarah Sanders, asserted that the Trump administration was '*the only one that's done anything about*' Julian Assange, adding in relation to the commutation of Manning's sentence that, '*we're the only ones that have taken this whole process seriously*' (Bundle K, Tab 40). Sanders' remarks echoed Mike Pompeo's statements two years earlier that the administration would take a new and more vigorous approach to dealing with Julian Assange.

The Criminal Complaint in December 2017

4.20. It is therefore clear that executive pressure from Attorney General Sessions and almost certainly the President himself was directly responsible for the criminal complaint made on 21 December 2017 of computer misuse against Julian Assange. That led to the issue of the provisional warrant. Eric Lewis' view was that '*it was the Attorney General directing top down from his office to the Eastern District of Virginia to be much tougher on leakers, including Mr Assange*' (Tr 14.09.20, pg.9, ll 2 – 10).

4.21. The prosecution was not only novel but it was also selective, since other US-based organisations that published the same materials, such as Cryptome and The Internet Archive, were left untouched. The fact that Cryptome, a New York internet publisher,

has never been prosecuted, and has never received any communication from the US government in relation to taking down the relevant publications, was an agreed fact at the hearing (Young, Tab 68, para. 6, see also Butler, Tab 48). Mr Kromberg has never provided any explanation to justify this selectivity in targeting only Julian Assange and WikiLeaks. But it is entirely consistent with Pompeo's prediction that Julian Assange will be treated by the Trump administration as having no First Amendment protection.

4.22. The timing is also very significant because it coincided with the grant of diplomatic status by the Ecuadorian government. That grant of diplomatic status was of course well-known to the US authorities because US intelligence agencies had access to recordings in the embassy (a point which will be developed further below). By then, prosecution had become a political imperative and they wished to counteract the potential effects of the granting of diplomatic status by Ecuador.

4.23. There followed the initial indictment in March 2018 - for a single offence of conspiracy to commit computer intrusion and computer espionage. But this remained a sealed indictment at that stage as the administration laid its further plans to have him removed from the Embassy before the indictment was publicly unsealed in 2019. No explanation has ever been given by Mr Kromberg for bringing forward this indictment in 2018, nor for the later addition in 2019 of the 17 further charges of espionage.

Surveillance in and subsequent expulsion from the Embassy of Ecuador

4.24. At the same time, there were other developments that indicated the Trump administration's focus on pursuing, indeed persecuting, Julian Assange. Thus his conversations with his lawyers were at this very time being constantly monitored by a private agency, UC Global, acting on the instructions of US intelligence and for their benefit. Moreover, the contents of their electronic devices were unlawfully copied (Goodwin Gill, Tab 25, para. 8).

4.25. The fact of this unlawful surveillance is put beyond doubt by the evidence of Witness 1 (Witness 1, Tab 11) and Witness 2 (Witness 2, Tab 12) and is the subject of an ongoing criminal investigation in Spain. To summarise: on the 24 January 2017 '*once Donald Trump had acceded to the presidency*' a message was sent by David Morales (employee of gambling magnate Sheldon Adelson and main benefactor of the Trump presidential campaign) to a special unit monitoring Assange '*I want you to be alert because I'm informed we are being vetted so everything that is confidential should be encrypted. … Everything relates to the UK issue … the people vetting are our friends in the USA'* (Witness 2, Tab 12, pg.1) As intensification of surveillance progressed, including placing microphones throughout the Embassy in fire extinguishers, '*Morales indicated the purpose … as per the request of the US … was … to record the meetings that Assange has with his visitors, but especially those of his defence attorneys and very specifically, co-ordinator of his legal defence Baltasar Garzón.'* (Witness 2, Tab 12, pg.4) The witness further reported that the employees conducting the surveillance should prioritise '*The meetings of the asylee, especially those in which he was meeting with his lawyers who were priority targets. … as this was required by our US friends'* (Witness 2, Tab 12, pg.4).

4.26. Witness 2 later put on record his knowledge of the fact that '*Morales had received [an] explicit request for information'* and that Morales stated on several occasions that:

> *'these requests came from the US in the form of a list of targets … special attention had to be given to Mr Assange's lawyers. The security personnel had to write detailed profiles of these targets, photographing their documentation, the electronic equipment that had to be left at the entrance at the Embassy and as far as possible the visitors' conversations … listened to. In some cases this involved following them … and carrying out detailed reports of each of the visits'* (Witness 2, Tab 12, pg.5).

Witness 2's evidence is that UC Global were assigned a number of names to be targeted, including several lawyers advising Julian Assange on matters which have now become live issues in these proceedings. On a yet more sinister level, the evidence of Witness 2 is that there were even discussions about adopting *'more extreme measures'* such as kidnapping or poisoning Mr Assange (Witness 2, Tab 12, pg.7, para. 33). It is telling that there has been no denial and no response by Mr Kromberg to these detailed allegations of serious wrongdoing on British soil.

4.27. What then followed was a concerted and sinister effort by the Trump administration to ensure that Julian Assange was expelled from the Ecuadorian embassy by a process of pressuring and bribing Ecuador into expelling him, so as to make him available for extradition (see Particulars of Abuse, Submissions Bundle, Tab 5, paras 43 – 45, Bundle K, 20, 22, 25). Cassandra Fairbanks' unchallenged statement makes clear she was informed by Trump adviser, Arthur Schwartz, at a time when the indictment was under seal and the details of the proposed prosecution were unknown to the public, of the fact that a plan had been agreed at the very highest level from October 2018 onwards, one that included the President, and his close ally, the US Ambassador to Germany, Richard Grenell, referred to as 'Rick' in the transcript exhibited to the statement of Cassandra Fairbanks. The preconcerted plan was to ensure that he was prosecuted for the Chelsea Manning disclosures (Fairbanks, Tab 56, para 9), and that Julian Assange would be expelled from the Embassy to face prosecution (Fairbanks, Tab 56, paras 10-12). Grenell was later appointed by President Trump to Director of National Intelligence. This again shows the extent of direct intervention by the President and his administration in the process of targeting Julian Assange.

4.28. Pursuant to that plan, pressure was later put on Ecuadorian President Moreno to ensure that Julian Assange was expelled from the Embassy (Bundle K, Tabs 15, 20, 22, 24). The whole history of the Trump administration's flagrant denial of Julian Assange's rights and of the sanctity of his asylum there, is fully set out in Part 5 below.

4.29. Julian Assange was finally expelled from the Embassy on 11th April 2019 and arrested. At that point, the initial indictment was unsealed and the DoJ issued a press release alleging a conspiracy with Chelsea Manning to commit computer intrusion (Bundle E, Tab 34). None of the facts alleged in that indictment were new. Yet it was not until April 2019 that Julian Assange was informed of the existence and nature of the allegations against him.

4.30. At the time of his expulsion in April 2019, his privileged legal papers were seized and conveyed to Ecuador from where they were later transferred to the United States (Peirce 2, Tab 21) in circumstances further analysed below.

Superseding indictment

4.31. Then, in May 2019, a dramatically new superseding indictment was brought which now charged Julian Assange with 17 further charges under the Espionage Act. The past history of the misuse of the Espionage Act to prosecute political activists was explained by Carey Shenkman. But resort to the Espionage Act for a publisher was both unprecedented and sinister. The new indictment charged Julian Assange with publication of state secrets in a multi-count indictment that dramatically ratcheted up the scale of the charges, the pressure on him, and the potential penalties. As Eric Lewis shows, Mr Assange faces up to 175 years in prison if he is convicted of all offences charged in the Superseding Indictment (Lewis 1, Tab 3, pg.10, para 36).

4.32. There can be no doubt that **a central decision-maker was Attorney General Barr.** Barr was the leading and profoundly controversial exponent of the right of the President to interfere in and direct the course of criminal justice as set out above. Eric Lewis makes clear in his evidence that the decision would have been taken on the initiative of and with the approval of Barr. As he stated in his evidence: -

> *'The second indictment was going to a whole new place… The second indictment makes clear that the disclosure of information was not a First Amendment issue for the Justice Department and the New York Times problem has been blown out of the water… It also showed that the Justice Department was very serious, was very aggressive in acting upon the statements of other officials and ultimately they were treating this as one of the largest espionage related cases in US history… My view is that adding of 17 separate charges of espionage, with the jeopardy that comes with it [and] the First Amendment implications is that it is a prosecution which reflects the new administration, and Mr Barr knew that he acts at the behest of the President… Mr Barr is simply his hand and that, in my view, is an* ***abuse of fair law enforcement power****'*. He further stated that *'in my view it was a fundamental change to implement the President's agenda with respect to leaks, with respect to national security and with respect to enemies of the people'* (Tr 14.09.20, pg.10, II 31-32).

4.33. **As Mr Lewis further made clear in his oral evidence, and as the press report from the Washington Post of 24 May 2019 confirms, there was no new evidence to justify the introduction of these 17 espionage charges at this time** (Bundle K, Tab 38, pg.3). The Washington Post article further makes clear that two of the prosecutors on the case – James Trump and Daniel Grooms – disagreed with the Espionage charges and that 'the disagreement involved major questions about constitutional rights'. What troubled them was that 'the Justice Department did not have significant evidence or facts beyond what the Obama era officials had when they reviewed the case'. Mr Lewis' comment on this in evidence was as follows:-

> *'You also have the sense that prosecutors have looked at the same evidence for years and determined that such charges were a bad idea. That is what the professional prosecutors thought. That is what the experienced Eastern District of Virginia prosecutor thought and said they did not have significant evidence of facts beyond the number officials had when they reviewed it. So the evidence has not changed, the witnesses have not changed, the First Amendment has not changed, the Espionage Act that had never been used against a publisher had not changed…the only explanation that accords with the fact is that there has been the change of Barr in the highly publicised case that Mr Trump certainly has a significant interest in'* (Tr 14.09.20, pg.44, II 25 – 34 - pg.45, II 1 – 3).

Unprecedented

4.34. This decision to prosecute for the **publication** of state secrets was **unprecedented.** The unprecedented nature of the decision was stressed by witness after witness whose reports are before the Court and whose evidence the court has now heard. The Court is referred to:-

i. The evidence of Trevor Timm who made the point eloquently in evidence that the prosecution served to radically rewrite the First Amendment (Tr 09.09.20, pg.72, II 8 – 12). He showed that it was misleading to suggest that the prosecution was not for publication and in any event that the prosecution for receiving the documents from Chelsea Manning was inextricably bound up with the fact of later publication (Tr 09.09.20, pg.66-7, ll 27-34, 1-4). And that the series of charges related to mere receipt and possession of the Manning materials seek to criminalise national security journalism itself and spell the

end of such public interest journalism. That is because '*it would criminalise the mere act of having this material with you', 'this would criminalise every single reporter who has ever received any document, whether they asked for it or not, from a source that potentially broke the law'* (Tr 09.09.20, pg.54, ll 30 – 34).

ii. Professor Feldstein said the same in his first report at Tab 18, paras 5 and 8 – 11. He repeated this in evidence (Tr 08.09.20, pg.60, II 12 – 16, Tr 08.09.20, pg.70, II 6 - 8)

iii. To like effect was Carey Shenkman (Tab 4, paras 32 and 41 – 42) and Jameel Jaffer (Tab 22, para 21).

4.35. To elaborate on that brief summary, **Trevor Timm** stated in his evidence: - *'My opinion is in line with previous court cases. This case is actually wholly unprecedented. There has never been a publisher that has been charged with a crime for publishing this type of information… the Supreme Court precedent is almost wholly on the side of Mr Assange in this case'.* (Tr 09.09.20, pg.72, II 8 – 12).

4.36. **Professor Feldstein** stated: '*The Indictment breaks all legal precedents. No publisher has ever been prosecuted for disclosing national secrets since the founding of the nation more than two centuries ago...The only previous attempts to do so were highly politicized efforts by presidents seeking to punish their enemies'*, (Feldstein 1, Tab 18, para 10). '*The belated decision to disregard this 230-year-old precedent and charge Assange criminally for espionage was not an evidentiary decision but a political one'* (Feldstein 1, Tab 18, para 11).

4.37. **Jameel Jaffer** characterised the novel nature of the Superseding Indictment in equally troubling terms: '*the government's indictment of a publisher under the Act, however,* ***crosses a new legal frontier'*** (Tab 22, pg.12, para 21).

4.38. Finally, Carey Shenkman put it in this way: 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, para 32).

4.39. 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, para 9(d).

4.40. In response, the US has offered absolutely no legal precedent for this indictment.

The Swedish investigation and the timing of the superseding indictment

4.41. **The timing** of the superseding indictment, the **23 May 2019** is also significant; at that time, the Swedish prosecution had just made two statements. On the **13 May 2019**, they had announced that it was their intention to reopen the investigation of Julian Assange for sexual offences and on **14 May 2019,** they specifically announced that they intended to issue an EAW. (See Defence Reply on Abuse para 54 and the open source materials cited there). The Swedish investigation was only later discontinued in November 2019.

4.42. The full facts are set out in the Defence Reply on Abuse of Process (Submissions Bundle, Tab 7, paras 53 to 54). As made clear there, the coincidence is too great. It leads to the inescapable inference that the US ratcheted up the charges so as to ensure that their extradition request would take precedence over any Swedish request. The actions taken by the US government were not about criminal justice; they represented a manipulation of the system to ensure that the US was able to prevent further WikiLeaks activity, remove Julian Assange from the political arena, and intimidate other journalists and publishers.

The escalation of the case in the first superseding indictment in May 2019

4.43. The first superseding indictment, by adding the 17 new counts of espionage, also intentionally escalated the scale of the case and vastly increased the potential sentence that Julian Assange would face so that the maximum he now faced was not a maximum of 8 years for computer espionage, but in fact 175 years (see Eric Lewis at Tr 14.09.20, pg.10, l 26 – pg.11, l 5, and pg.11, l 33 – pg.12, l 17). This was,

in his words, '*an abuse of … law enforcement power'* (Tr 14.9.20, pg.10, ll 31 - 32*)* and was intended to increase the power the prosecution had at its disposal in dealing with Julian Assange.

The second superseding indictment in June 2020

4.44. The **second superseding indictment** dated 24 June 2020 appears to have come in response to the criticisms of inadequacy in the prosecution case and unexplained delay made at the February 2020 hearing. Thus it artificially manufactures a conspiracy extending beyond 2013 and into 2015 so as to justify prosecution despite the 2013 decision and the long delay under Obama. Furthermore, it seeks to depict Julian Assange as a continuing threat to the US, to link him to Edward Snowden, and to present him as the leader of a wide-ranging conspiracy to gain unauthorised access to government computers. The injustice of adding these further allegations at this stage is the subject of fuller submissions to the Court in **Part B**. But the court will note Eric Lewis' evidence that the additional allegations in the second superseding indictment of conspiracy with a number of other people, and the involvement of 'teenager', were clearly calculated to expose Julian Assange to an increase of sentence by way of upward enhancements or adjustments (See Tr 15.09.220, pg.51, l 8 – pg.53, l 10). This is further evidence of what Eric Lewis described '*an abuse of … law enforcement power'* (Tr 14.9.20, pg.10, ll 31 - 32*)* in this case. And it has caused injustice to Julian Assange in these extradition proceedings. Significantly, the new request based on the second superseding indictment was also authorised by Attorney General Barr.

5. Accompanying abuses of the rule of law

5.1. The means employed in the targeting of Julian Assange further show that he has been made the object of exceptional extra-legal measures; and that this is no ordinary case.

Invasion of legal professional privilege

5.2. First, his lawyers were targeted for surveillance operations and their meetings with Mr Assange were recorded by private security agents acting on behalf of the US whilst he was sheltering in the Ecuadorian Embassy. During this time, his lawyers were under physical surveillance by these agents and the offices of one of his lawyers, Mr Garzon, were broken into. Then, he was evicted from the Embassy after the intervention of the US. Finally, his confidential papers were illegally taken from him at the request of the US (Peirce 2, Tab 21, paras 12(v) and (vi)). Intrusion into Legal Professional Privilege of this nature is universally recognised as the very height of abuse of power; the Court is referred to the decisions of ***Grant*** and ***Warren.***

5.3. The clear evidence of illegal monitoring and intrusion is referenced in detail in the Particulars of Abuse (Submissions Bundle, Tab 5, paras 36 – 39) and in the statement of Witness 2 (Tab 12, pg.7).

5.4. All this points to an agenda that is not confined to a *bona fide* prosecution. It also points to a clear disregard for the rule of law and a gross violation of article 22 of the Vienna Convention on Diplomatic Relations, which guarantees the inviolability of diplomatic premises. And it took place in this country, which is relevant to the question of abuse. The Court is referred to the Reply Submissions on abuse at paras 42 – 43 (Submissions Bundle, Tab 7).

Pressuring Ecuador to expel Julian Assange

5.5. Then, too, steps were taken to ensure that he was expelled from the Ecuadorian embassy by a process of bullying and bribing Ecuador into expelling him, so as to

make him available for extradition (see Particulars of Abuse, Submissions Bundle, Tab 5, paras 43 – 45). The history, which involves Ecuadorian officials, UC Global, and President Trump's inner circle was as follows:

i. 28 June 2018: The White House reports raising the issue of Assange by Vice President Mike Pence with the Ecuadorian President, and '*agreed to remain in close coordination on potential next steps going forward*' (Bundle M, Section 19, Tab 539).

ii. 16 Oct 2018: Letter to President Moreno from the US House of Representatives' Foreign Affairs Committee stated: '*in order to advance on these crucial matters, we must first resolve a significant challenge created by your predecessor, Rafael Correa – the status of Julian Assange… [we are] hopeful about developing warmer relations with your government, but feel that it will be very difficult for the United States to advance our bilateral relationship until Mr. Assange is handed over to the proper authorities.*' (Bundle E, 32)

iii. Oct 2018: An agreement between US Ambassador to Germany, Richard Grenfell and his Ecuadorian counterpart to facilitate Julian Assange's arrest takes place by order of the President (Fairbanks, Tab 56, Exhibit 1).

iv. The evidence of Cassandra Fairbanks shows the sharing of the product of surveillance of Julian Assange in the Embassy with President Trump's inner circle; UC Global director, David Morales, is charged with illegal spying on Julian Assange's lawyers and doctors (See Witness 1, Tab 11, Witness 2, Tab 12, Martinez 1, Tab 2, Martinez 2, Tab 9, Martinez 3, Tab 45, and Fourth Statement of Aitor Martinez dated 1 October 2020). Morales was employed by Sheldon Adelson's organisation, 'Las Vegas Sands', and Adelson is Trump's main benefactor (Prince 4, Tab 72, 54 and above).

Further breach of legal privilege

5.6. After the removal and arrest of Julian Assange, his legally privileged papers were seized and sent to the United States; they have not been returned (Peirce 2, Tab 21, paras 12(v) and (vi)). This again constitutes the most serious breach of one of the most fundamental safeguards known to the common law. The US has declined to respond to or challenge the evidence on this point.

The proposed pardon deal

5.7. Further evidence of the bad faith and abuse of power at the heart of this prosecution is evidenced by the approach to Mr Assange by Republican Congressman Dana Rohrabacher, in August 2017. Mr Rohrabacher visited Julian Assange and discussed a pre-emptive pardon deal in exchange for personal assistance to President Trump in the enquiry then ongoing concerning Russian involvement in the hacking and leaking of the Democratic National Committee emails (Peirce 1, Tab 1, para 28) (Witness 2, Tab 12, para 30) (Peirce 2, Tab 21, para 9).

5.8. The statement of Jennifer Robinson sets out clearly that on 15 August 2017 the visit took place to Mr Assange in the embassy by Mr Rohrabacher and a man called Charles Johnson (known to be closely associated with President Trump); that they told Julian Assange and Jennifer Robinson that President Trump was aware of and approved of them coming to meet with Mr Assange to discuss a proposal for a deal (Robinson, Tab 42, para. 5). And as to the nature of the proposal itself, Jennifer Robinson explains it in this way:-

> '*the proposal put forward by Congressman Rohrabacher was that Mr Assange identify the source for the 2016 election publications in return for some kind of pardon, assurance or agreement which would both benefit President Trump politically and prevent US Indictment and extradition.'* (Tab 42, para 10)

5.9. Rohrabacher has publicly stated in February 2020 that he and Charles Johnson did meet with Julian Assange, and that he did make the proposal about a pardon deal[12]. He denies it was at the direction or with the approval of President Trump and President Trump himself denies everything. But in the immortal words of Mandy Rice Davies: 'Well he would, wouldn't he?'.

5.10. The proposed pardon deal shows that, just as the prosecution was initiated in December 2017 for political purposes, so too the Trump administration had been prepared to use the threat of prosecution as a means of extortion to obtain personal political advantage from Mr Assange. This accords with the way in which the Trump

[12] See Guardian article dated 19 February 2020 citing Rohrabacher's personal blog that day: https://www.theguardian.com/media/2020/feb/19/donald-trump-offered-julian-assange-pardon-russia-hack-wikileaks

administration has manipulated the criminal justice process in a manner that undermines the rule of law (see Lewis 4, Tab 79, paras 44-71).

5.11. This approach has clear parallels with the way in which **President Trump has sought to manipulate the Huawei prosecution** to extract concessions out of China – as set out in Eric Lewis' Fifth Statement dated 25th August 2020 (Tab 81, paras 35 – 36). This further evidences the Trump Administration's preparedness to manipulate the criminal justice system for blatantly political ends.

5.12. **The Trump administration's actions in relation to the International Criminal Court** (ICC) are also set out in Eric Lewis' Fifth Statement (Tab 81, para 14 onwards). From December 2017 onwards the administration has denounced the ICC in a series of public statements for commencing an investigation into US war crimes in Afghanistan. The administration has moved from denunciations of the ICC before the UN General Assembly and NATO headquarters in September and December 2018 to the denial of visas to ICC personnel involved in the investigations of US personnel in March 2019 (Lewis, Tab 81, Exhibit 8) and the threat of financial sanctions '*if the ICC does not change its course*' (See Lewis, Tab 81, paras 17 – 22). Finally, on 11th June 2020, President Trump issued an Executive Order blocking property of ICC individuals based on the '*illegitimate assertions of jurisdiction over personnel of the United States and certain of its allies*' regarding the Afghanistan investigation (Lewis, Tab 81, para 28). Announcing the measures with Secretary of State Pompeo, Attorney General Barr stated:

> **'***those who assist the ICC's politically motivated investigation of American service members and intelligence officers without the United States' consent will* ***suffer serious consequences****.* ***The Department of Justice fully supports these measures*** *and will vigorously enforce the sanctions imposed today under the executive order to the fullest extent of the law'*[13].'

This whole history demonstrates a contempt for the international rule of law and the requirements of the Torture Convention to which the US is party. Prosecuting Julian Assange for revealing war crimes is therefore part of an overall agenda of the administration to deter any foreigners from exposing or investigating war crimes by

[13] https://www.state.gov/secretary-michael-r-pompeo-at-a-press-availability-with-secretary-of-defense-mark-esper-attorney-general-william-barr-and-national-security-advisor-robert-obrien/

the US. It further demonstrates the political nature of this prosecution and the true nature of the political motivation behind it.

6. Abuse by reason of fact that offences are political in nature and extradition for them is therefore barred under the Anglo-US Extradition Treaty

6.1. The prosecution is not just unprecedented and politically motivated. It further involves a fundamental violation of Article 4(1) of the Anglo-US Extradition Treaty which expressly prohibits extradition for 'political offences'. The basic case is set out in the Defendant's Note on Political Offences and in the Defendant's Response on Political Offence (Submissions Bundle, Tabs 2 and 10).

A. Court's jurisdiction to stay the proceedings

6.2. The US submits that, even if the request for espionage offences constitutes a breach of the Treaty, this Court has no power and no jurisdiction to do anything to remedy that potential breach. By contrast, it is our submission that this Court has jurisdiction to stay an extradition request on the grounds of abuse of process where the request is in breach of the terms of the treaty which provides the only legal basis for extradition to take place under international law. (Mr Assange's submissions on jurisdiction are set out in detail in the Defendant's Reply on Political Offence (Submissions, Tab 10, pg.6 – 7, paras 5.1 – 5.3).)

6.3. To extradite Mr Assange in reliance on the very treaty which governs the legality of his extradition whilst disregarding a major protection contained in article 4(1) of that same treaty – namely the protection against extradition for a political offence – would violate the rule of law, and would render any extradition both arbitrary and inconsistent with Article 5 (ECHR).

6.4. Moreover it is contrary to the rule of law and Article 5 ECHR to detain an individual in breach of the requirements of public international law: see ***R v Mullen*** [2000] QB 520 (Abuse Authorities, Tab 7, pg.535E). This accords with the general principle that any deprivation of liberty is arbitrary when it occurs in a manner that is incompatible with a state's international legal obligations. (See Jared Genser The Working Group

on Arbitrary Detention ('WGAD') at page 5 and Deliberation Number 9 of the WGAD Concerning the Definition and Scope of Arbitrary Deprivation of Liberty Under International Law.)

6.5. The prosecution rely on the decision in ***R (Norris) v Secretary State for the Home Department*** [2006] 3 All E.R. 1011 and on the terms of the 2003 Act for the submission that this court must disregard express provisions of the Anglo US extradition treaty. However the decision in ***Norris*** is readily distinguishable from the circumstances of this case for the following reasons:-

v. Firstly, the context in ***Norris*** was completely different. It concerned a challenge to the designation by the Secretary of State under section 84(7) of the US as a Part 2 requesting state that did not need to provide a prima facie case, even though such a requirement was retained in the 1972 Treaty. In that case there was express provision in the 2003 Act for the Secretary of State to remove the requirement of a prima facie case. Here, by contrast, there is no express provision in the 2003 Act to dispense with the requirement not to extradite for a political offence where the treaty continues to require it. Moreover here the Court is concerned with a fundamental human rights protection, in the context of a treaty that retains the protection.

vi. Secondly, the decision in ***Norris*** did not relate to a protection contained in a treaty that post-dated the 2003 Act as is the case here, but to the 1972 Anglo US Treaty which pre-dated the 2003 Act.

vii. Thirdly, there was no reliance in the ***Norris*** case on the abuse jurisdiction. This is fundamental since Julian Assange primarily invokes the abuse jurisdiction to resist extradition for what are undoubtedly 'political offences'. All the leading textbooks and authorities recognise espionage to be a primary or pure political offence; and there can be little doubt that the CFAA offence here is also a pure political offence.

B. The Substantive Protection

Article 4(1) applies because espionage is a pure political offence

6.6. Julian Assange is protected from extradition because espionage is a **'pure political offence'**, and article 4(1) expressly protects from extradition for political offences. In this connection we summarise Julian Assange's position as follows.

6.7. The Court is referred to the Defendant's Note on Political Offence (Submissions Bundle, Tab 2, paras 2.4 – 2.9). The numerous cases cited there, including ***R v Governor of Brixton Prison, ex parte Kolczynski*** [1955] 1 QB 540, ***Minister for Immigration and Multicultural Affairs v Singh*** [2002] HCA and ***Dutton v O'Shane*** [2003] FCAFC 195, all identify espionage as a 'pure political offence' in the same category as treason, sabotage and sedition. So too do all the leading academic commentators, including Shearer, Extradition in International Law, 151 (1971) and Bassiouni, International Extradition 512 (3rd ed). Thus there is a great weight of academic and juridical authority to support the proposition that the offence of espionage with which Mr Assange has been charged, is itself well recognised as a pure 'political offence', and thus comes within the category of offences exempted from extradition under Article 4.

6.8. Secondly, as a matter of substance and logic, the allegations against Mr Assange relate to pure political offences. That is because his alleged conduct satisfies the established test of conduct directed against '*the apparatus of the state'* (See ***Schtraks v Government of Israel*** [1964] AC 556 at p588, and ***T v Immigration Officer*** [1996] AC 742 at p716D). As shown in the Defendant's note on political offence, the indictment itself is framed to allege conduct whose objective was 'to obtain receive and disclose national defence information' and the repeated refrain is that the mens rea of Julian Assange was that 'he had reason to believe that the information was to be used to the injury of the United States or the advantage of any foreign nation'. The indictment further refers to the 'shared philosophy of Julian Assange and Manning' and their 'mission' to disclose information to the public. This necessarily is conduct directed against the existing apparatus of the state for political purposes. In this sense too, the allegations are of a 'pure political offence'. This is

dealt with in more detail in the Defendant's Note on Political Offence (Submissions Bundle, Tab 2, pgs.6 – 13, paras 3.1 – 3.12).

The prosecution's reply that pure political offences are not covered by the Treaty

6.9. The prosecution submit that the treaty is not directed at pure political offences, but only at **'relative'** political offences (i.e. ordinary crimes committed for political motives). However, their reasoning simply focuses on the fact that most of the caselaw decided in the Anglo-American context prior to the 2003 treaty deals with relative political offences. That is because the conduct alleged that was analysed in those cases could not qualify as pure political offences such as treason, espionage and sedition. But, in all the decided caselaw referred to by the prosecution, it was a basic premise that 'pure political offences' such as treason or espionage were to be regarded as political in character for the purposes of the statutory exemption that operated in the UK in respect of political offences. See for example ***Schtraks*** and ***Cheng***. There was no suggestion that such offences were not covered by the Act and Treaty.

In any event, a 'relative' political offence

6.10. In any event the conduct alleged against Mr Assange plainly qualifies as a 'political offence' of a relative nature by reason of the alleged and avowed intentions of Julian Assange. In the successive cases of ***Kolczynski*** [1965] 1 QB 540, ***Schtraks*** [1964] AC 556 and ***Cheng*** [1973] AC 931, the Courts have widened the concept of a 'political offence' to include any ordinary criminal offence which has a plain political purpose and intention. Such acts need no longer necessarily involve a rebellion or revolution for the overthrow of the government. It suffices to satisfy the relevant test that the intention of the defendant be:-

i. *'to compel a government to change its policy*' and '*it would be enough if they were trying to make the government concede some measure of freedom but not attempting to supplant it*' (per Lord Reid at pgs.583 and 584);
ii. or '*to promote a political cause and not just some ordinary criminal purpose*' (per Lord Reid at pg.583);

iii. or to '*influence the policy of the Government of the United States*' (per Lord Diplock in ***Cheng*** at pg.943 c) or '*to induce it to change its policy*', or if '*the only purpose sought to be achieved by the offender in committing it were to change the government of the state in which it was committed, or to induce the government to change its policy*' (per Lord Diplock at pgs.945 e-f).

For a fuller analysis of this test, the Court is referred to part 4 of the Defendant's Note on Political Offence (Submissions Bundle, Tab 2, pgs.13 – 20, paras 4.1 – 4.15). Applying that test, it is plain that Mr Assange's actions were precisely intended to '**promote a political cause'** and to '**induce the government to change its policy'** since his objectives were to expose and to end the wars in Afghanistan and Iraq, the human rights abuses in Guantanamo and the practice of recourse to black sites, rendition and other secretive perpetration of human rights abuses. He not only sought to pursue the objectives of transparency and democratic accountability, but to induce a change of governmental policy at the global level. The Court will note that the evidence suggests that his actions were not only designed to end the wars but had some real impact in bringing about the end of US military action in Iraq and Afghanistan (see Rogers, Tr 09.09.20, pg.5, ll 26 – 32).

Prosecution's claim that conduct does not qualify as a 'relative' political offence

6.11. The prosecution claim that Mr Assange's conduct does not even qualify as constituting a 'relative' political offence. But the test for treating an offence as a 'political offence' in the relative sense includes actions taken to effect an alteration in governmental policy. Applying that test, it is clear from the acts taken by Julian Assange and the evidence of Ellsberg, Rogers and Goetz, summarised in part 3 above, that Julian Assange's actions were precisely intended to *'have an effect on US government policy and its alteration'* (Ellsberg, Tab 55, para 24). Indeed it is obvious that the exposure of detainee abuse in Guantanamo and of war crimes in Afghanistan and the Iraq war was politically motivated and designed to induce a change in government policy. Indeed Professor Rogers' evidence was that it did have that effect (Tr 9.9.20, pg.5, ll 26-32). The prosecution attempts to divorce the alleged disclosure of the names of sources of information from the context in which it itself alleges the disclosure occurred, which would include both Julian Assange's

wider intentions and those of Chelsea Manning analysed above. But the whole point of the 'political offence' protection is that the Court should look at the overall political context and at the broader intention of the defendant that lies behind his alleged criminal conduct. Judged by that standard the alleged conduct of Julian Assange plainly qualifies as a political offence, both in the ordinary sense, and when judged by the specific test developed by the Court in cases like ***Cheng*** and others.

Conclusion that extradition for these 'political offences' should be refused

6.12. For all these reasons, it is submitted:-

i. There is jurisdiction in the Court to stay these proceedings on the basis that extradition for political offences is an abuse of process, given that it would violate the express terms of the Anglo-US extradition treaty.

ii. The offences of espionage alleged against Mr Assange in count 1 and in counts 3-18 of the second superseding indictment undoubtedly constitute pure political offences, in accordance with all the accepted tests laid down in the academic authorities and the case law, the Treaty does extend to protect against extradition for pure political offences.

iii. In any event, the conduct alleged against Mr Assange and indeed the motives expressly imputed to him, self-evidently confirm that his alleged offences qualify as 'relative' political offences because the alleged conduct was clearly intended to *'effect a change in government policy',* per ***Cheng*** pgs.945E- F, and to have a political effect on a global level.

7. <u>Abuse of process by reason of bad faith and abuse of power</u>

7.1. The particulars of abuse relied on are set out in the Defendant's Particulars of Abuse and in the Defendant's Response on Abuse of Process (Submissions bundle, Tabs 5 and 7).

7.2. The Court is respectfully referred to the summary at paragraph 87 of the Defendant's Particulars of Abuse, which is repeated below for ease of reference (Submissions Bundle, Tab 5):

i. The prosecution and extradition request were initiated and influenced by ulterior, extraneous considerations rather than purely criminal justice reasons (Lewis 3, Tab 38, paras 18, 23-30, 3738) (Feldstein 1, Tab 18, pgs.23-24) (Jaffer, Tab 22, paras 27-28) (Tigar, Tab 23).

ii. The prosecution and extradition request were pursued for political reasons and have been accompanied by prejudicial denunciations of Mr Assange by senior political figures in breach of the rule of law and the presumption of innocence – see ***Allenet de Ribemont v France*** (1996) 22 EHRR 582.

iii. The superseding indictment, with its additional allegations of Espionage, was introduced for ulterior and improper purposes so as to trump the competing criminal allegations in Sweden, make a political example of Julian Assange and expose him to massive further pressure. Since it forms the basis of the extradition request it infects the requests with bad faith and abuse.

iv. The prosecution and the extradition request are for 'political offences'. To seek extradition for 'political offences' violates the express provisions of article 4(1) of the Anglo-US Treaty 2007 which prohibits extradition for political offences.

v. There have been a series of deliberate violations of Mr Assange's right to legal professional privilege by agents of the US acting in this country. These constitute an affront to justice and a violation of the principles of comity that the courts of this country cannot ignore and justify the staying of the extradition request in their own right.

vi. The course of conduct which led to his facing extradition additionally involved a violation of the sanctity of the asylum, both diplomatic and political, that Ecuador had granted him in this country, and a denial of the protections accorded to embassies in international law. That also justifies the staying of these extradition proceedings.

vii. That is to say nothing of the further abuse by reason of the bringing of the second superseding indictment and a further extradition request based on it at the last minute in such a way as to deprive Julian Assange of all real opportunity to respond to it in these proceedings.

viii. The whole history from the resurrection of allegations which date as far back as 2010 and which were deliberately not pursued at the time of Chelsea

Manning's trial in 2013, to the addition of the new extradition request in August of this year engage the s82 bar on oppression and injustice by reason of passage of time. They also speak loudly of bad faith and abuse of process.

7.3. The Court is invited to rule that these allegations are capable of amounting abuse and that they call for a response. The prosecution have failed to provide such a response. In particular, and by way of example only:-

i. The prosecution have failed totally to explain the reason for the long delay between 2010 and 2017 in bringing the prosecution.

ii. The prosecution have not dealt with the allegation that the first superseding indictment was introduced for ulterior and improper purposes. Nor have they justified the introduction of the second superseding indictment and the new extradition request at the last minute.

iii. There has been no response to the allegations of wholly improper political denunciation by administration officials in the prelude to the prosecution.

iv. As to the allegations of the deliberate violation of the Mr Assange's right to legal professional privilege by agents of the US, the US has failed totally to respond to or deny these allegations.

Statutory Bars

8. Prosecution for political opinions and section 81(a)

8.1. In Section 2 above, we have addressed the political opinions of Julian Assange, and the political motivation for his actions. In Sections 3 and 4 we have summarised the history showing that a political decision was taken by the Trump administration to reverse the Obama DoJ's approach and to prosecute Julian Assange primarily because of his political stance and the Trump administration's hostility to his views. Standing back now, the evidence is overwhelming that this case has all the hallmarks of a politically motivated prosecution for the following reasons:-

i. The prosecution initiated at the end of 2017 constitutes **a complete reversal** of the decision taken under the Obama administration in 2013 not to prosecute him. The reason for that earlier decision under President Obama not to prosecute him was that to do so would constitute a violation of the First Amendment of the American Constitution. Moreover, the Obama DoJ clearly considered that there was no evidence to justify a prosecution in any event.

ii. It is **unprecedented** to indict a publisher of official secrets under the Espionage Act. And the selection of the Espionage Act as the means of prosecution is itself a politically loaded prosecutorial decision, as set out above.

iii. The prosecution of Julian Assange was the culmination of an escalating **conflict with Julian Assange** by the Trump administration. That conflict occurred in the overall context of their **war on journalists and whistle-blowers** and their assertion of the US right to immunity from the investigation and exposure of human rights abuses perpetrated by their agencies.

iv. It was preceded and accompanied by **public denunciations** of Julian Assange by senior figures in the Trump administration including Mike Pompeo and Attorney General Sessions set out from Section 4.7 above.

v. As the analysis in Section 2 – 4 above shows, Julian Assange's views on political transparency and democratic accountability, and his agenda of exposing the human costs of the conflicts in Afghanistan and Iraq and the war crimes committed there brought him into conflict with the Trump administration in ways which led directly to the administration's decision to bring charges against him despite the previous decision not to do so and despite the obvious difficulties of manufacturing charges to criminalise his conduct.

vi. Finally, **the means adopted** to monitor and target Julian Assange and to strip him of his protections in the Ecuadorian Embassy were **the actions of a lawless state** bent on adopting any means necessary to 'bring him down'. Even if it meant violating public international law. Even if it meant violating legal professional privilege and the sanctity of the Embassy's protection. Even if it meant plotting to kidnap or poison him. It is highly significant that the Spanish Court is itself now investigating the extraordinary and unlawful behaviour of UC Global towards him, and has taken evidence from Julian Assange himself.

The test under Section 81(a)

8.2. For the purposes of section 81(a), it is necessary to show, on the balance of probabilities, that the motivation behind the prosecution and the extradition request is primarily or predominantly to punish and deter the defendant for his political opinions. It is not necessary that this be the **only** motivation (see ***Cabal*** and the fuller analysis in Part B). As ***Cabal v United Mexican States*** [2001] FCA 427 shows at para 215, it is not even necessary that there should be no *prima facie* evidence to support an allegation of criminality. But the weaker or more suspect the legal and evidential case of the prosecution, the stronger the argument that the defendant is entitled to section 81(a) protection: this is demonstrated in the first instance Russian decisions in cases such as ***Maklay and Makarov*** and ***Maruyev and Chernysheva****,* analysed further below. Moreover, it is clear that the concept of 'political opinions' must be given a broad definition that is wide enough to cover '*the manifestation of an opposition which challenges* governmental authority' (See ***Suarez*** at para. 30 and see the fuller analysis in Part B, section 14 below). It is also telling that he has not been prosecuted for what could legitimately be regarded as common crimes but rather for the offence of espionage which has for two centuries been recognised as a political offence, as set out in Section 6 above.

8.3. The essence of his **political opinions** which have provoked this prosecution are summarised in the reports and evidence of Professor Feldstein, Professor Rogers, and Daniel Ellsberg summarised above and in the statement of Professor Noam Chomsky (Tabs 18, 40, 39 and 55 respectively) and in Section 2 above.

The legal test for 'political opinions'

8.4. The Court will be aware of the legal authorities on this issue. The key question is whether the request and the underlying prosecution is in fact brought because of the defendant's 'political opinions' and the requesting states rather than out of a proper and legitimate concern to punish the requested person for ordinary criminal conduct. A broad approach has to be adopted when applying the test to the concept of political opinions, per ***Re Asliturk*** [2002] EWHC 2326 (Abuse Authorities, Tab 11,

paras 25 – 26). Julian Assange's ideological positions are clearly encompassed in the correct and broad approach.

8.5. Moreover, cases such as ***Emilia Gomez v SSHD*** [2000] INLR 549 show that the concept of 'political opinions' extends to the 'political opinions' imputed to the individual citizen by the state which prosecutes him (Political Offence Authorities, Tab 43). For that reason the characterisation of Julian Assange and WikiLeaks as a *'non-state hostile intelligence agency'* by Mr Pompeo makes clear that he has been targeted for his imputed political opinions. So too does the whole manner in which his conduct is characterised in the indictment show that he is being cast as someone committed to damaging the interests of the US. The expert reports on this issue further show that Julian Assange has been targeted because of the political position imputed to him by the Trump administration – as an enemy of America who must be brought down.

8.6. There can be no doubt that opposition to and exposure of abuses of governmental authority can qualify as protected political opinions. Thus in ***Suarez*** [2002] 1 WLR 2663, the Court of Appeal held at paras 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.*
>
> *…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…

8.7. **In the current global context, it is obviously outdated to confine the concept of 'political opinion', and indeed the concept of a 'political offence', to conduct manifesting adherence to a particular political party within a nation state, or to the context of an internal political struggle within such a state**. An individual who exposes wholescale abuse and war crimes by a state, and thereby attracts prosecution for the very act of such exposure, is entitled to the protection of section 81(a) and also to the protection of Article 4 of the Treaty (referred to in Part 4 above). Had Mr Assange been exposing the war crimes or crimes against humanity committed by a state such as the Russian Federation, there can be no doubt that his prosecution for such revelations would be regarded as both a political offence and an impermissible prosecution motivated by a desire to punish him for his political opinions.

The prosecution reply that these are ordinary crimes

8.8. The Prosecution do not appear to dispute that Julian Assange has 'political opinions' which motivated his conduct. They simply seek to present the case on the basis that he is being prosecuted for ordinary criminal conduct which they seek to characterise as 'hacking' and the exposure to danger of individuals whose names were published. This misleading claim is fully exposed in the analysis of ***Zakrzewski*** abuse set out in Part B. To summarise briefly, there is no case of computer intrusion by Julian Assange; and there is no criminal case that can be based on the allegation that he failed to take sufficient steps to redact the names contained within the WikiLeaks publications. The **tenuousness and controversial nature of the allegations of criminal conduct** which found both the US indictments, and the extradition request is a powerful additional reason for finding that the extradition request is politically motivated for the purposes of section 81(a). A constant theme in the Russian extradition cases where the courts found in favour of the Requested Person on section 81(a) grounds was that the allegation of criminal conduct was itself suspect, novel or tendentious (see, for example ***Russian Federation v Maklay and Makarov***

(2009) at paras 11 – 14, 20, ***Russian Federation v Maruyev and Chernysheva*** (18 March 2005) at pgs.3 and 5).

8.9. The defence has further relied on the whole history of this case as evidence of political motivation – the long inaction under the Obama regime, the reversal of the earlier decision not to prosecute under the Trump administration, the improper escalation of the charges under Attorney General Barr, and the belated introduction of the second superseding indictment (see Section 3 above). In reply, the prosecution submit that there was no earlier decision not to prosecute and that the experts are wrong to base any opinions on that assertion. Their position is undermined by the following:

i. They do not explain in any way the long delay in prosecution between 2010 and 2017. That is despite the fact that Mr Kromberg expressly asserts that the evidence of harm was available in 2010 and 2011.

ii. The prosecution do not expressly contradict the assertion that a decision was taken in 2013 under the Obama administration not to prosecute then.

iii. The prosecution provide no explanation of the decision-making process, despite the fact that memoranda would clearly exist recording the various decisions taken. This point was eloquently made by both Eric Lewis and Thomas Durkin in their evidence.

iv. Fourthly, the prosecution do not even deny the fact that there were express protests and resignations by career prosecutors involved in the case when the first superseding indictment with new allegations of espionage was brought in 2019.

v. The prosecution have come up with no explanation for the late prosecution in 2017, the introduction of the First Superseding Indictment 2019, and the Second Superseding Indictment at the last minute in August 2020. Gordon Kromberg has provided the court with no specific analysis of these successive developments in this case. The defence witnesses Eric Lewis and Tom Durkin explained that there was simply nothing to prevent him explaining to this Court why there had been no prosecution until 2018, why the Superseding Indictment was introduced with 17 new Espionage charges in 2019 and why the Second

Superseding Indictment, with its new allegations, was introduced at the last minute. That remains the case.

vi. Finally, the prosecution have not answered the expert evidence of political motivation from Professor Rogers, Daniel Ellsberg, Professor Feldstein, Eric Lewis and Thomas Durkin by any independent evidence of their own. Nor have they submitted Mr Kromberg, who is the only witness deployed by the prosecution to rebut the allegation of political motivation, to have his claims tested in cross-examination.

Conclusion on Section 81(a)

8.10. The evidence all points to a politically motivated prosecution targeted at Julian Assange because of his perceived threat to the 'America First' agenda of the Trump administration, his publication of leaked materials in the public interest, his free speech agenda and his revelation of war crimes and crimes against humanity. The chronology of the case itself, the reversal of the Obama administration's approach, the novel and unprecedented legal basis of the prosecution and the misleading nature of the evidential case presented, all together point to a politically motivated prosecution for all these reasons, Mr Assange invokes the protection of section 81(a).

9. Prejudice in his treatment at trial, sentencing and subsequent detention by reason of political opinions and his status as a foreigner

9.1. Turning to section 81(b), the test is the less exacting and solely prospective test of whether there is a 'real risk' or a 'reasonable chance' that Julian Assange will be prejudiced or discriminated against at his trial, at the sentencing stage, or in the manner of his subsequent imprisonment by reason of his 'political opinions' and/or his 'foreign' status. The 'real risk' test will be well known to the Court. But it has been repeatedly stated in many cases since the decision in ***Fernandez v Government of Singapore*** [1981] 1 WLR 987 at 994, most recently in ***Adamescu v Romania*** [2020] EWHC 2709 (Admin), para 67. The same broad test of 'political opinions' applies under section 81(b) as under section 81 (a).

9.2. It is submitted that there is a 'real risk' of both prejudice and discrimination on grounds of political opinions and foreign nationality for the following reasons:-

i. Mr Assange has been publicly denounced by the most high-ranking public officials, including the President, the Secretary of State and the Attorney General because of his political opinions. Those overtly intemperate denunciations have irretrievably prejudiced the presumption of innocence and his prospects of a fair trial. Specifically, Mr Pompeo has denounced Julian Assange and WikiLeaks as being part of a new threat that '*has as its motive the destruction of America',* and expressed his confidence that *'this administration will pursue them with great vigour'* (Bundle K, Tab 10 and Feldstein 1, Tab 18, footnote 7). That is highly relevant to section 81(b) and the enduring risk of prejudice.

ii. Furthermore, the US are taking the position **that he has no First Amendment rights as a foreigner.** That is clear from the statement of Mr **Pompeo** reported in the Guardian on 21 April 2017 that '*Julian Assange has no First Amendment Freedoms'* because *'he is not a US citizen'* (see Bundle K, Tab 11). Indeed the prosecution attorney Mr Kromberg indicates an intention to argue that *'foreign nationals are not entitled to protections under the First Amendment'* (Prosecution Bundle, Tab 2, para 71). By contrast, no US nationals involved in the receipt and publication of the Manning materials have been prosecuted. This demonstrates that he is the victim of discrimination on grounds of nationality and faces prejudice in the US as a consequence of his foreign status in his trial.

iii. Mr Assange's **political status** which is a direct result of his political opinions will also result in him being held in especially harsh prison conditions. He is likely to be held under the excessively restrictive regime of SAMs both pre-trial and post-trial. That is established by the evidence of the US lawyers Eric Lewis and Lindsay Lewis and by the unequivocal evidence of Maureen Baird, summarised in part C below. **US Attorney Kromberg** himself accepts the real possibility that Mr Assange will be put under SAMs and administrative segregation because of his notoriety (Prosecution Bundle, Tab 2, para 84). This point is further developed in part C below.

iv. The intelligence agencies, including the CIA, will have considerable influence on his fate, as for example on the decision of whether Julian Assange is the subject of SAMs. In this context it is relevant that the CIA has already indicated its intention, through its former chief, Mike Pompeo, '***to become a much more vicious agency***[14]' under the Trump administration and clearly will not change overnight under any new administration (see also Bundle E, Tab 31).

v. Finally, Julian Assange's trial, sentence and any subsequent detention will all take place in the context of a criminal justice system that lends itself to political manipulation in cases such as this, as set out more fully in part 4 above. And all this at a time when recent history has actually shown the capacity of the US criminal justice system to be manipulated for political purposes at the behest of the executive or the CIA (again, as set out more fully at part 4 above). All the points made in support of his likely exposure to a flagrant denial of justice are also relevant to support his case under section 81b, since the likely injustices identified in relation to article 6 in section C, are the direct result of his political opinions and political notoriety.

[14] See: https://www.truthdig.com/articles/mike-pompeo-trump-cia-will-much-vicious-agency/

PART B

10. Article 7 ECHR

10.1. 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 para 52.

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

10.3. In ***S.W. v United Kingdom*** [1995] No. 20166/92 the ECtHR also explained at para 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...*'[15]

10.4. 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 para 45).

Application of Article 7 in the extradition context

10.5. 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

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

removal would create a real risk of a '*flagrant denial*' of Article 7. In ***Arranz v Spanish Judicial Authority*** [2013] 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*' (para 38).

10.6. ***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.

10.7. 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.

Extradition of Mr Assange would involve a real risk of a (flagrant) violation of Article 7

10.8. 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:

i. Accessibility: Key components of the offence under 18 USC s.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.
ii. Accessibility: The CFAA is similarly broad, vague and vulnerable to political manipulation.

iii. Foreseeability: 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.

Article 7 ECHR and accessibility

History of 18 USC s.793

10.9. 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, paras 1-13). Expressly introduced by the then President to be a *'firm hand of stern repression'*, its '*indefinite language'* allowed the Act to be used as a '*vehicle for oppression'* (Shenkman, Tab 4, para 1 / Tr 17.9.20, xic, pgs.27-28). In short, it is legislation *designed* to be catch-all (Shenkman, Tr 17.9.20, xic, pg.28).

10.10. 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 paras 94 and 101).

10.11. Even in that earlier iteration, s.793 was described by scholars[16] 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, paras 13, 41 / Tr 17.9.20, xic, pg.28). 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, para 13 / Tr 17.9.20, xic, pg.29).

[16].Per Columbia University Law professors Harold Edgar and Benno C Schmidt Jr in 1973 [Shenkman, Tab 4, para 13].

10.12. 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 s.793(d) and (e) representing '*legislative drafting at its scattergun worst where greatest caution should have been exercised'* (Shenkman, Tab 4, para 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). It is '*incomprehensible if read according to the conventions of legal analysis of text, while paying fair attention to legislative history*'.[17] The legislation is '*vaguely defined*' and gives rise to '*confusion [as] to whom exactly the Espionage Act applies*'.[18]

Subjective and unprincipled classification

10.13. For example, 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, para 20 / Tr 18.9.20, xx, pg.48) and to do so '*without regard to whether and to what extent disclosure would aid public deliberation'* (Jaffer, Tab 22, para 14(a) - agreed s.9). 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, para 14(a) - agreed s.9).

10.14. 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 government employees who have authority to classify materials. '*It is the executive that determines the scope of classification or the type of information and whether a prosecution has been ultimately brought*' (Shenkman, Tr 18.9.20, xx, pg.48). US law provides that the classified status is admissible in evidence, and also provides that a defendant *'may not challenge in court'* the classified status (Tigar, Tab 23, pg.10 - agreed s.9).

[17]. 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).
[18]. Katherine Feuer, *Protecting Government Secrets: A Comparison of the Espionage Act and the Official Secrets Act,* 38 B.C. Int'l & Compg. L. Rev. 91 (2015).

10.15. 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, para 14(b) - agreed s.9). 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, para 6 / Tr 8.9.20, xic, pgs.35-36). '*The Assistant Attorney General in the Bush administration (inaudible) our national security wrote that: 'The principal concern in the classifiers is not national security but government embarrassment.' And so often we find that national security is used as a shield to hide incompetence, misconduct and even political endeavours'* (Feldstein, Tr 8.9.20, xic, pgs.35-36)

10.16. The problem of over-classification continues and is '*widely acknowledged as rampant to the point of absurdity*' (Feldstein, Tab 18, para 6 / Tr 8.9.20, xic, pgs.35-36) (Chomsky, Tab 39, para 12 – agreed s.9). 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, para 14(b) - agreed s.9). '*Beyond torture, beyond assassination, beyond all these awful things, the single most damaging thing to the United States has been our over-classification of material by saying it is a threat to our national security. This has harmed us more than anything else... I will tell you just a brief anecdote...[I took a statement from] a British national in Guantanamo Bay, Moazzam Begg...about how he had been tortured...every single page [of that statement] was classified under the theory that [public knowledge that the US had been] torturing him was a threat to*

national security...over-classification where we classify evidence of torture is just profoundly wrong' (Stafford-Smith, Tr 8.9.20, xx, pgs.22-23).

10.17. 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, para 14(b) - agreed s.9) or indeed advantage to any foreign nation, per s.793(b). Yet, again, because US law provides that the classified status is admissible in evidence, and also provides that a defendant *'may not challenge in court'* the classified status (Tigar, Tab 23, pg.10 - agreed s.9), the executive defines what information may cause '*injury'* or '*harm'*.

The CFAA – computer espionage

10.18. 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 s.793 of the Espionage Act (Shenkman, Tab 4, paras 38-40). Necessarily therefore,[19] it '*suffers from similar breadth that enables the Espionage Act's enormous malleability'* (Shenkman, Tab 4, para 35) including with regards to the application and interpretation of *'injury to the United States'* and *'advantage of any foreign nation'.*

10.19. 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, para 35).

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

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

US precedents on breadth do not assist

10.21. All defence witnesses to whom this issue was put accepted that the Act has survived various 'vagueness' challenges over the years (by reference to the *mens rea* requirements of the Act which are often said to mitigate against its inherent vagueness). But all witnesses told this Court that vagueness is situation-specific, and because the Act has never been applied to the press before, no existing authority assists with whether its operation *in that context* would be held constitutional (or, for the purposes of this hearing, satisfies Article 7 ECHR's standard of legal certainty / accessibility):

i. '*There is vagueness as applied and vagueness in terms of the statute...when you are looking at the Espionage Act which has never been enforced in 100 years and there has never been a successful prosecution and you are looking at it as applying*' (Lewis, Tr 15.9.20, xx, pg.23).

ii. As Mr Shenkman put it '*there have been numerous failed statements, challenges, yes, but there is a reason for that because of the context of those challenges....these arguments have been...taken and briefed in the context of government employees typically... [those are] very different than the case at hand with very different legal and also policy and constitutional concerns'* (Shenkman, Tr 18.9.20, xx, pg.44).

iii. '*The issue is that all the cases that are interpreting the issue have been interpreting kind of close to the centre. If you imagine a, imagine a circle, on the centre of a circle is the government insider and if you get further away from that circle...the same legal standards are very cumbersomely applied to all these different categories and there has not been a test case to actually reveal these problems [implicated by such cases]...we are in cases that are looking at the inner categories, government insiders. The furthest away it has ever gotten is in the Rosen case in which there is mention of oral transmission to an intermediary rather than any interaction with the press and any public interest in terms that are located in the First Amendment concerns that are implicated by that'* (Shenkman, Tr 18.9.20, xx, pg.47 / re-x, p65).

Article 7 ECHR and foreseeability

10.22. 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.*** at para 35). 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 para 55).

Foreseeability: Prosecution of *Leakers* was selective and *factually* unpredictable

10.23. 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 (even) criminalised those who leak <u>to</u> the press (Shenkman, Tab 4, para 31).

10.24. A short time later, in 1988 the law was controversially applied against Samuel Morison, a leaker of classified naval photos to a magazine (***US v Morison*** [1988] 844 F.2d 1057). 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, para 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, para 22) yet this was precisely what the broad terms of the Act enabled in the ***Morison*** case.

10.25. The broad and imprecise Act allows '*wide and obvious potential for politically motivated targeting'* which '*threatens a substantial chilling effect*' (Shenkman, Tab 4, para 23 / Tr 18.9.20, xx, pg.48). It's scope '*allows for extraordinary selectivity in the initiation of prosecutions'* in the context of '*severe double standards'* (Shenkman,

Tab 4, paras 31, 41). '*I am talking about the application of this long and political and selective application of it...I am talking about the chilling effect...That is all due to the breadth and the ability to mount investigations under this law'* (Shenkman, Tr 18.9.20, xx, pg.48). 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, para 23) (Feldstein, Tab 18, paras 5, 7).

10.26. 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, para 10 - agreed s.9). 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, para 5). As Prof. Feldstein told this court, unchallenged, the practice in the US of classified information being leaked to the press:

> *'...happens with abandon... there are so many of them: thousands upon thousands according to one academic study. It is routine. Every government study in the last 60 years has said that it is widespread, you know, and it means they shed light on decision-making by the government and inform the public policy, but they also expose government deceit, corruption, illegality, abuse of power... And they go back to the George Washington presidency...'* (Tr 7.9.20, xic, pg.44).

10.27. And while leakers have been prosecuted, albeit selectively,[20] generally senior government officials, *'from whom most leaks probably originate'* have not (Jaffer, Tab 22, paras 11-12, 17-20 - agreed s.9).

10.28. 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'* (Shenkman, Tab 4, para 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 design, offending the principle that *'only the law can define a crime'* (***Kokkinakis*** at para 52).

Foreseeability: Prosecution of *Journalists* was *legally* unprecedented and unforeseeable

10.29. The practice of obtaining and publishing by the press of leaks of the most important classified national security information in the US have been regularly documented (see Feldstein 1, Tab 18, para 5). There even exist reporters in Washington who have made careers out of receiving and publishing leaked classified information; '*Pulitzer prize winners, some of the most respected journalists in the nation...They use [leaks of classified information] to inform the public...on a daily basis*' (Feldstein, Tr 7.9.20, xic, pgs.44-45 – unchallenged).

10.30. '*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, para 5) (Jaffer, Tab 22, para 16 - agreed s.9). '*There is a rich history of reporters of all stripes from major newspapers all over the country reporting on sensitive national security of foreign policy issues, which the government considers classified'* (Timm, Tr 9.9.20, xic pg.52 – unchallenged). '*There are national security leaks into the newspapers every day and they are not*

[20]. The Obama administration increased prosecutions of media sources or leakers, with more prosecutions being initiated '*than under all previous administrations combined'* (Shenkman, Tab 4, para 23).

prosecuted' (Lewis, Tr 15.9.20, xx, pg.28). Such publications, never prosecuted, have brought to light, for example, Bush administration torture policies, unlawful NSA surveillance practices, and Obama administration armed drone extra-judicial killings (Jaffer, Tab 22, para 16 - agreed s.9).

10.31. Max Frankel famously wrote in the Pentagon Papers case that '...*Without the use of secrets there could be no adequate diplomatic, military, political reporting of any kind, the kind that people take for granted, either abroad or in Washington, and there could be no mature system of communication between the government and the people...*'. According to Mt Timm, executive director of the Freedom of the Press Foundation, '*this was written more than 40 years ago but could not be truer today'* (Timm, Tr 9.9.20, xic, pgs.52-53). As investigative journalist Mr Hager put it, '*we need classified information. It is essential if we are going to allow journalism to perform its role of informing the public, enabling democratic adequate decision making and deterring wrongdoing...there are simply no realistic and effective alternatives'* (Hager, Tr 18.9.20, xic, pg.5 – unchallenged).

10.32. Despite, or perhaps because of this, no prosecution of a journalist for obtaining or publishing state secrets has ever occurred. '...*Because the First Amendment protects the free press and it is vital that the press expose rather than ignore...not because journalists are somehow privileged but because the citizenry has a right to know what is going on*...' (Feldstein, Tr 7.9.20, xic, pg.45).

10.33. The prosecution of Mr Assange '*crosses a new legal frontier'* (Jaffer, Tab 22, para 21 - agreed s.9). It '*breaks all legal precedents'* (Feldstein 1, Tab 18, para 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, para 32 / Tr 17.9.20, xic, pg.29).

10.34. 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, para 9(d)).

The Act

10.35. Of course, the Espionage Act, theoretically on its face, is so imprecise as to encompass even the activities of the free press (Shenkman, Tr 17.9.20, xic, pg.29 / 18.9.20, xx, pg.40). In ***Morison*** discussed below, press representatives warned that s.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, para 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, para 18) and that it was '*a loaded gun pointed at newspapers and reporters who publish foreign policy and defense secrets'* (Jaffer, Tab 22, paras 8-9 - agreed s.9) (Shenkman, Tab 4, para 29).

10.36. That was never, according to unchallenged evidence this Court heard, however, the statute's purpose or intent:

10.37. When enacting the Espionage Act, Congress expressly rejected provisions and powers to censor the press (Shenkman, Tr 17.9.20, xic, pg.28). '*There is a lot of legislative history that indicates that section 793 was never intended to apply to publishers of information. That is clear from the censorship provisions that were rejected that the Wilson administration proposed in the law'* (Shenkman, Tr 18.9.20, pg.49).

10.38. '*Early drafts of [s.793 of] the Act...were rejected by Congress that considered permitting publication'* (Shenkman, Tr 18.9.20, xx, pg.49).

10.39. Moreover, '*Congress was quite careful not to use the word 'publish' in [s.793 of] the Espionage Act'* instead choosing '*communication not publication'* whereas *'if lawmakers wanted to control publication [by the press] they had to say so*

specifically' (Feldstein 1, Tab 18, para 8) (Shenkman, Tab 4, para 18 / Tr 18.9.20, xx, pg.49). For example, '*another provision of the Espionage Act, section 798, specifically refers to publication as one of the criminalised forms of conduct'* (Shenkman, Tr 18.9.20, xx, pg.49). '*It was never intended to apply to publication, which [was a point made by] one of the Supreme Court justices in the Pentagon Papers decision'* (Shenkman, Tr 18.9.20, xx, pg.51).

10.40. When the Act was amended in 1950, the implementing ('McCarran') Act expressly provided that '*nothing in the Act shall infringe upon the freedom of the press*', and Attorney General Tom Clark '*suggested that prosecutorial discretion would safeguard against prosecution of the press'* contrary to these words (Shenkman, Tab 4, paras 19, 42 / Tr 17.9.20, xic, pg.31).

Practice

10.41. This court heard unchallenged evidence that one category of persons who have never therefore been the subject of prosecution in the US is journalists who obtain and publish state secrets (Shenkman, Tab 4, paras 32, 41-42 / Tr 18.9.20, xx, pg.41) (Feldstein, Tab 18, para 8 / Tr 7.9.20, xic, pgs.45-46) (Lewis, Tr 15.9.20, xx, pg.21) (Jaffer, Tab 22, paras 3, 13 - agreed s.9) (Timm, Tab 65, paras 13, 32-35, 41 / Tr 9.9.20, xx, pg.72). '*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 4, Tab 70, paras 5, 11, 13). This is a '*230-year-old precedent'* (Feldstein, Tab 18, para 11). According to counsel for the Government *'we can agree, I do not think it is contentious...that there has not actually been a prosecution'* (Tr 18.9.20, pg.54).

10.42. 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, para 8 / Tr 7.9.20, xic, pgs.45-46).

10.43. There have been prior isolated political *threats* to prosecute reporters for publishing classified information, usually those at odds with the respective administration, but all these have consistently failed on grounds relating either to concerns over press freedoms. The examples over the years are set out at (Shenkman, Tab 4, paras 33-34 and Feldstein 1, Tab 18, para 8 and Timm exhibit 19). Three such threats involved the convening of Grand Juries; and in all three cases the Grand Jury declined to indict. The remainder simply involved political threats which were never carried beyond the stage of politically-driven investigation (Shenkman, Tr 17.9.20, xic, pgs.29-31 / xx, pgs.53-54).[21] Mr Timm explained, by reference to these examples, that over '*the past half-century...various administrations have either threatened to use the Espionage Act against reporters, or attempted to do so...but in each and every case the government ultimately concluded, or was forced to conclude, that such a prosecution would be unconstitutional'* (Timm, Tr 9.9.20, xic, pgs.53-54 – unchallenged).

10.44. Various witnesses also drew this Court's attention to the obviously political context of all of those attempts / threats: '*those are actually very telling about demonstrating both how rare it is for this to even be considered, but also how even in those instances there were extraordinarily political efforts to punish presidential enemies*' (Feldstein, Tr 7.9.20, xic, pg.46 – unchallenged). These were all '*very high level political decisions. In each of these cases they involved the President of the United States and the Attorney General*' (Shenkman, Tr 17.9.20, xic, pgs.29-31). Their '*common theme has been [threats] against press outlets that are in political opposition to the sitting administration, or that are revealing misconduct, or are revealing policies contrary to the ones that the sitting administration wishes to pursue'* (Shenkman, Tr 18.9.20, re-x, pg.65).

10.45. '*The reasons [for none of these threats ever having been carried through] were ultimately First Amendment concerns'* (Shenkman, Tr 17.9.20, xic, pg.31). As Mr

[21].Although, as Mr Shenkman observed, the mere threats nonetheless served their political purpose: '*the press in the 1980s was extraordinarily nervous as shown in the fact that resulted in stories being held off for months. In the cases of The Chicago Tribune and Beacon Press, they devoted significant resources to their legal defence and, particularly, Beacon, they nearly went bankrupt. Even the presence of these investigations has deleterious effects on their ability to gather news and the propensity of other publishers to risk - to risk reporting on the same matters. So it has had a significant chilling effect... the records in the Nixon tapes show that these investigations were actually used to send a message...successful prosecutions is not all you need to limit freedom of press'* (Shenkman, Tr 18.9.20, xx, pgs.53-54).

Shenkman pithily put it: *'but there is also the US Constitution'* (Tr 18.9.20, xx, pg.40). 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, para 9).

10.46. Thus, no Grand Jury had ever returned an indictment such as this (Feldstein, Tr 7.9.20, xic, pgs.45-46 – unchallenged).

Case law

10.47. That '*unbroken line of practice of non-prosecution'* reflects and confirms the '*clear'* general thrust of the principles underlying centuries of First Amendment jurisprudence in '*related cases'* (Lewis, Tr 15.9.20, xx, pg.28).

10.48. The authorities had in fact occasionally touched (albeit obiter) upon the legality of the issue.

10.49. 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, para 23 - agreed s.9) (Ellsberg, Tab 55, para 10). Whilst some members of the court commented (obiter) on the theoretical possibility of prosecution of the press under the Espionage Act, none suggested that such a prosecution would be *permissible* under the First Amendment (Lewis, Tr 15.9.20, xx, pg.27). The issue was not before, and not argued before, the court (Shenkman, tr 17.9.20, xic, pgs.31-32 / 18.9.20, xx, pgs.41, 43).

10.50. As Mr Shenkman told this Court (Tr 17.9.20, xic, pg.32), in ***Morison*** in 1988, the Court of Appeals (4th Circuit) 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'* (per Wilkinson J at para 79). '*Investigative reporting is a critical component of the First*

Amendment's goal of accountability in government. To stifle it might leave the public interest prey to the manifold abuses of unexamined power. It is far from clear, however, that an affirmance here would ever lead to that...I question whether the spectre...is in any sense real...the political firestorm that would follow prosecution of one who exposed an administration's own ineptitude would make such prosecutions a rare and unrealistic prospect' (per Wilkinson J at para 95). '*It is important to emphasize what is not before us today. This prosecution was not an attempt to apply the espionage statute to the press for either the receipt or publication of classified materials*' (per Wilkinson J at para 97). '*The parties and amici have presented to us the broader implications of this case...that an affirmance here presents a vital threat to newsgathering and the democratic process. On the other side of the argument lies the commonsense observation that those in government have their own motives, political and otherwise, that ensure the continuing availability of press sources. 'The relationship of many informants to the press is a symbiotic one.' Branzburg, 408 U.S. at 694, 92 S.Ct. at 2663. Problems of source identification and the increased security risks involved in discovery and trial make proceedings against press sources difficult...What Justice Potter Stewart once said in an address to the Yale Law School has meaning here: So far as the Constitution goes, the autonomous press may publish what it knows, and may seek to learn what it can'* (per Wilkinson J at paras 98-100).

10.51. Russell J concurred at para 106 and added expressly that '*Judge Wilkinson expresses the view that...these statutes can properly be applied to press leakers (whether venally or patriotically or however motivated) without threatening the vital newsgathering functions of the press. He supports this with a convincing discussion of the practical dynamics of the developed relationship between press and government officials to bolster his estimate that this use of the statute will not significantly inhibit needed investigative reporting about the workings of government in matters of national defense and security...By concurring in his opinion, I accept that general estimate, which I consider to be the critical judicial determination forced by the first amendment arguments advanced in this case*...' (paras 109-110).

The position in 2010/2011

10.52. In 2010-2011, the relevant time under consideration, it was wholly unforeseeable that such an indictment could or would be issued against a member of the press for obtaining, receiving or publishing leaked classified information (Feldstein, Tr 8.9.20, re-x, pgs.62-63). Mr Timm concurred: When asked '*if I had come to you in 2009 and said, 'I am planning to do something like this [solicit a whistle-blower to leak classified information unlawfully]. Am I at risk of criminal prosecution?' What would you have told me?*'. Mr Timm said '*I would have said that you know, that is protected speech under the First Amendment'* (Timm, Tr 9.9.20, xic, pg.58).

10.53. Mr Shenkman also concurred. When asked '*would there be anything to indicate to me, as a member of the press in 2010, that publishing classified information would be liable to end up in an indictment against me under the Espionage Act?*', he replied '*this type of publication is routine in the US media...given the amount of time that has passed since cases like the Pentagon Papers and cases like Morrison, there is a customary practice that the Justice Department would not use the Espionage Act to indict the press or publication or for activities (inaudible) sources*' (Tr 17.9.20, xic, pg.33). In cross-examination he reiterated '*did I anticipate ever that there would be an indictment that looked like this? No. I never thought based on history we would see something like this. I think a lot of scholars absolutely surprised. It is truly extraordinary, I mean this extent of the use of the Espionage Act'* (Tr 17.9.20, xx, pg.53). '*I think it was completely unforeseeable'* (Shenkman, Tr 18.9.20, re-x, pg.65).

10.54. WikiLeaks had, after all, published classified US government documents before 2010 and the US government was aware of these publications. One of these was other versions of the Rules of Engagement.

The US position

10.55. The US reply evidence offers no factual or legal precedent for this indictment (Kromberg 1, para 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 the First Amendment analysis, let alone Article 7 ECHR (Lewis 4, Tab 70,

paras 5, 11). Neither does the assertion that Mr Assange can make a First Amendment challenge in the US (Kromberg 1, paras 69-70), if indeed he can,[22] grapple with the Article 7 implications for the absence of any precedent for prosecuting journalists.

10.56. However, despite not appearing in its served evidence, the first instance 2006 District Court opinion of DJ Ellis in ***US v Stephen Rosen*** [2006] 455 Supp 2d 602 was put to some (but not all) witnesses as some sort of precedent or authority for this indictment. It is not:

i. Rosen (and his co-defendant Weissman) were <u>not</u> members of the press. They were intermediaries (lobbyists) acting for a whistle-blower (Franklin), who passed classified materials from Franklin <u>to</u> the press. The case '*concerned an oral transition to an intermediary. It did not involve the media at all'* (Shenkman, Tr 18.9.20, xx, pgs.42-43). The '*facts were completely distinct...information forwarded to the press...rather the publication and then to the public*' (Shenkman, Tr 18.9.20, re-x, pg.64);
ii. Accordingly, anything said so far as the position of the press were concerned by the judge in their prosecution was *obiter* ('*that was not the issue before the court*' (Shenkman Tr 18.9.20, xx, pg.42-43);
iii. By a first instance judge: '*a court of first instance...there is no court below'* (Shenkman, 18.9.20, re-x, pg.63);
iv. Who amalgamated third party intermediaries (such as Rosen) and the press into a single category of persons for consideration. '*This type of analysis [insofar as it concerns the press] is not occurring in [such] a vacuum, it is subject to the First Amendment'* (Shenkman, Tr 18.9.20, xx, pg.42);
v. Even Rosen / Weissman's prosecution as intermediaries to a leaker was ultimately abandoned (Shenkman, Tr 18.9.20, xx, p43 / re-x, pg.64);
vi. The opinion is '*not precedential*' (Shenkman, Tr 18.9.20, xx, pg.43); even a District Court would be '*welcome to disagree'* (Shenkman, Tr 18.9.20, re-x, pg.64);

[22].Mr Kromberg himself undermines the suggestion in any event: see (Kromberg 1, para 71): '*foreign nationals are not entitled to protections under the First Amendment*'.

vii. The notion that Mr Assange ought to have been on notice, from that first instance *obiter* opinion, that (contrary to the clear statutory intent, observations from the Court of Appeals in ***Morison***, and a century of practice) his actions potentially placed him at risk of indictment under the Espionage Act, is ludicrous. It was a notion roundly rejected by every witness to whom ***Rosen*** was put;[23] and

viii. Any competent lawyer to whom Mr Assange might have turned in 2010/2011 to ask the effect of ***Rosen***, would have immediately also observed that the press, who did receive the classified information from Rosen and publish it, were <u>not</u> prosecuted in that case (Shenkman, Tr 18.9.20, re-x, pg.64).

<u>Practice after 2011</u>

10.57. Although strictly irrelevant to the Article 7 analysis (which asks whether this indictment was legally foreseeable to Mr Assange <u>in 2010/2011</u>), later prosecutorial practice only serves to reinforce the position. As discussed elsewhere in these submissions, the question was also confronted by during the criminal investigation into Chelsea Manning as part of which the question of prosecuting Mr Assange was directly considered and not undertaken (Timm, Tr 9.9.20, xic, pg.53 – unchallenged).

10.58. Even the Obama administration, which aggressively pursued <u>leakers</u> in an unprecedented fashion in the 21st century,[24] likewise declined to attempt to prosecute FOX News reporter James Rosen as a co-conspirator in the case against leaker Stephen Kim (Shenkman, Tab 4, paras 25-27 / Tr 17.9.20, xic, pgs.33-34). President Obama, discussing the case in the wake of a public outcry ('*firestorm'*) at the mere suggestion in an affidavit in the Kim case that Rosen was an unindicted co-conspirator, 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, para 26 / Tr 17.9.20, xic, pg.34).

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[23]. ***Rosen*** was not, for example, put to Prof. Feldstein or Mr Timm. The distinct impression given was that the US team discovered ***Rosen*** mid-way through the Extradition Hearing and were themselves unaware of it before: hardly consistent with the notion that ***Rosen*** constituted clear or obvious warning to Assange in 2010/2011 that the press could be prosecuted.

[24]. Samuel Morison was the only person ever convicted under the Espionage Act for leaking to the press in the 20th Century – and was ultimately pardoned (Jaffer, Tab 22, para 18 - agreed s.9).

10.59. Likewise, and as discussed further below, Cryptome and other websites that published the unredacted cables (ahead of WikiLeaks, as discussed below) were never prosecuted (Grothoff 1, Tab 37, para 9 / Tr 21.9.20, xic, pgs.11-12) (Tab 47, ex 9, pg.9). The unredacted cables hosted by those US-based sites are *still* hosted there (Grothoff 1, Tab 47, ex 14) and Crytome confirms that the US has never requested their removal (Young, Tab 68 - agreed s.9).

11. Article 10 ECHR (and dual criminality)

11.1. 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, para 49).

11.2. 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:

> '...*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, para 61).

11.3. 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, para 45).

11.4. 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, paras 43-45).

This Case

11.5. As stated above, 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.

11.6. Whatever the potential scope of the UK's OSA on its face, it has likewise never been deployed to prosecute much less convict the act of obtaining or publishing (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 obtaining and publication of classified information by the UK press are legion but never prosecuted. In this jurisdiction, this prosecution would be (and extradition here facilitates) a flagrant violation of Article 10 ECHR (s.87 of the 2003 Act).

11.7. The issue also goes to dual criminality: contrary to submissions previously advanced by the Government, Article 10 ECHR does not operate in this jurisdiction as a defence to an otherwise unlawful act. Instead it renders the act lawful 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 restrict the OSA's operation and scope. So, for example, despite the wide terms of s.12 Terrorism Act 2000, it is lawful (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, paras 5, 35); to express intellectual or moral support or approval for (judgment, paras 5, 35) or a personal belief in (judgment, paras 6, 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 paras 6, 49).

The conduct which the US seeks to criminalise *is* investigative journalism

11.8. 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, para 9) (Cockburn, Tab 51, paras 14-15 - agreed s.9). 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, para 9).

11.9. As Harvard professor emeritus Alan Dershowitz 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, para 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, para 3) – have been manifestly journalistic.

11.10. 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, paras 3, 25-26 - agreed s.9) (Timm, Tab 65, paras 7-31, 41).

11.11. 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, paras 3, 25-26 - agreed s.9).

11.12. 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, para 3) (Goetz, tab 31, para 28 / Tr 16.9.20, xic, pg.4 – unchallenged).

11.13. 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, para 10). It '*portrays standard journalistic tradecraft as nefarious, akin to espionage'* (Feldstein, Tab 18, para 9).

11.14. 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, para 13 - agreed s.9).

The US reply

11.15. In the absence of any sensible precedent for this prosecution, and in the face of clear statements of statutory intent, and consistent prosecutorial practice over 230 years, the US response has been to attempt to suggest to witnesses that this case is '*different'* – for the purposes of the First Amendment and Article 10 ECHR – because it is here alleged that:

i. Assange conspired with or assisted Manning in her (illegal) activity of leaking; or

ii. Assange engaged in separate criminal activity (per ***Bartnicki v Vopper*** (2001) 532 US 514, 528) in attempting to crack a '*passcode hash'* with Manning; or

iii. WikiLeaks and Assange '*deliberately put lives at risk'* by disclosing unredacted materials, which it is said takes this case outside the protections of the First Amendment; or if all that fails

iv. 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, para 71).[25]

11.16. Every witness this Court heard rejected every one of those theories. They are unsound and unprincipled as a matter of US law. More importantly, they are either unsound and/or irrelevant to this Court's Article 10 / s.87 analysis.

11.17. Taking each in turn (and <u>assuming</u> for present purposes that the allegations are or may be true).

Complicit in the whisteblower's crime

<u>Wrong under the First Amendment</u>

11.18. The present 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, para 2). It refers to the publication of the '*draft most wanted list'* (of sought-after nominations for a list) of such documents, and to various steps allegedly taken by Mr Assange characterised as being '*to encourage Manning to steal classified documents'* such as providing a confidential dropbox, or using the phrase '*ok great'* on an online chat service when she was discussing her attempts to obtain particular documents (Indictment, paras 15, 18, 25).

[25].Something which senior government officials have also asserted (Lewis, Tr 14.9.20, xic, pg.9).

11.19. In short, the theory of liability underpinning the indictment is that it is unlawful for Mr Assange to '*ask, encourage, aid or abet a serving soldier to break the law by disclosing classified information'* (Tr 8.9.20, pg.51). Every witness to whom this theory was put told this Court that it represented a completely misconceived view of the First Amendment.

11.20. '*The right of the press [is to] publish information of great concern obtained from documents stolen by a third party*' (per ***Bartnicki v Vopper*** (2001) 532 US 514, 528). According to the Supreme Court, illegality only arises (and the protection of the First Amendment ends) when the publisher is involved in criminal activity in connection with the underlying data theft (Jaffer, Tab 22, para 24 - agreed s.9). In that way, '*journalists are not above the law*' (Feldstein, Tr 8.9.20, xx, pg.51). That means, according to the clear evidence this Court has heard, criminal activity separate from the act of whistle-blowing. i.e. the commission of a criminal act such as burglary or theft (Feldstein, Tr 8.9.20, xic, pgs.51-52 / re-x, pg.64) (Lewis, Tr 15.9.20, xx, pg.29), or illegal wire-tapping (as in ***Bartnicki***).

11.21. *Non sequitur*, as every witness explained, that soliciting, encouraging, even helping, whistle-blowers in the act of whistle-blowing is outwith the protection of the First Amendment (i.e. unlawful) (Feldstein, Tr 8.9.20, xx, pg.53). To reason that, because the whistle-blower herself commits an Espionage Act offence by leaking classified information to the press, anyone (including the press) who encourages, facilitates, solicits that act is legally liable as a conspirator in that crime (leaking to the press), is a theory of criminality liability without foundation or precedent:

i. It is '*not at all'* how the First Amendment operates: '*absolutely not, no'* according to prof. Feldstein (Tr 8.9.20, re-x, pgs.61-62).

ii. Mr Timm confirmed that it is '*absolutely not'* a coherent view or theory of how the criminal law works. It would, he said, criminalise '*news gathering'*. Journalists '*are often talking with sources, potentially asking them for documents. Once they get documents, they are asking for clarification and potentially more information. This is not out of the ordinary at all. In fact, it is*

standard practice when we are talking about how journalists operate...many of the counts in the [Assange] indictment essentially would criminalise this behaviour, but it would not just criminalise this behaviour. It would criminalise the mere act of having this material with you, the charges that relate to 793(c) of the Espionage Act...so, this would criminalise every single reporter who has ever received any document, whether they asked for it or not, from a source that potentially broke the law' (Timm, Tr 9.9.20, xic, pg.54).

iii. Mr Timm added that '*this is almost a consensus opinion among First Amendment experts, media law lawyers, anybody who has studied the issue extensively. It is why virtually every newspaper in the United States has vehemently condemned the charges before the court today as a potential clear and present danger to press freedoms in the United States. Many of these papers I might add have partially criticised Mr Assange and WikiLeaks in the past, but they nevertheless see the extreme dangers in the case that a journalist would face if this case was to go forward*' (Timm, Tr 9.9.20, xic, pg.55).

iv. Mr Timm told this Court that routine journalistic behaviours that would be criminal under the Government's novel theory of liability, include soliciting classified information from whistle-blowers, and providing them with tools to do so, such as dropbox facilities. '*This is common journalist practice...On each of [over 80] news organisations' websites, they have instructions for how sources can submit information in to them...You can look at, for example, icij.org, an international consortium for investigating journalists...which famously published the Panama Papers investigation which was based off of a leak from an unidentified source, by an organisation that is very well respected around the world. They are explicitly saying on their page, 'Leak to us."* (Timm, Tr 9.9.20, xic, pgs.56-58). Mr Timm provides multiple examples of such routine journalistic activity (Timm exhibits 2 & 4-11). '*News organisations have even taken out advertisements targeting potential whistle-blowers...even billboards'* (Timm, Tr 9.9.20, xic, pg.57).

v. When asked specifically about the WikiLeaks 'draft most wanted list' and '*positively asking people for classified information, is that something that is criminal?'* Mr Timm replied '*No...this is firmly entrenched in the free speech 30 rights of anybody in the US'* (Timm, Tr 9.9.20, xic, pg.58). It is something Mr

Timm has done himself (Timm, Tr 9.9.20, xic, pgs.58-60) (Timm exhibits 12-14). '*That is often what journalists do'* (Timm, Tr 9.9.20, xic, pg.60).

vi. Mr Timm was asked whether, when he personally solicited classified information from whistle-blowers, '*was it ever suggested to you then or since that that is criminal activity on your part?'.* He answered '*No, absolutely not. I mean, this is First Amendment protected speech and again, this is not just my opinion it is the consensus opinion of virtually every person and lawyer or 6 media lawyer in the country...this indictment is clearly unconstitutional. WikiLeaks, just like anybody else, has First Amendment rights. That is to say that we would like to receive documents that potentially show corruption or abuse or illegality, just like every newspaper in the United States does. And if this were to go forward it would potentially criminalise all of those other news organisations'* (Timm Tr 9.9.20, xic, pg.60).

11.22. Mr Timm was not challenged on any of this in cross examination; but he did reiterate that '*everybody is and should be fearful of this case... there were many other reporters who were saying 'send this information to me in person' foremost, that potentially would lead to them being criminally liable if this case went forward. And there is a urgent need in the media community to prevent that from happening'* (Timm, Tr 9.9.20, xx, pg.62). Assisting or soliciting or encouraging a whistle-blower to disclose classified information is '*certainly not'* criminal under the First Amendment. '*Speaking with sources, asking them for clarification, even asking them for more documents, is behaviour that journalists engage in on a daily basis and it would be incredibly unprecedented and dangerous for this practice to be criminalised'* (Timm, Tr 9.9.20, re-x, pgs.80-81).

i. Likewise, Mr Lewis. When asked whether it was correct that '*third parties are not allowed to help government employees break the law in obtaining classified information to leak*', Mr Lewis categorically said '*no'* and explained that '*if a journalist is working with a source, how is that source to provide information for the relevance of publication and also to protect that source, that's core journalist activity and in that sense every national security reporter from Bob Woodward could be'* prosecuted (Lewis, Tr 15.9.20, xx, pg.29). The

theory is a straightforward '*overstatement'* of the law (Lewis, Tr 15.9.20, xx, pg.29).

ii. Mr Shenkman volunteered the same analysis: '*I think the important thing to keep in mind about Bartnicki and I think it is quite relevant here, is whether or not the alleged criminal conduct is linked to the act of news gathering and a part of that process and part of effectively [source] protection, obtaining of information etcetera, so I think it is really important...there are certain allegations that are inextricably tied to the news gathering process and some of them entail things like [source] protection....[suggestions that Bartnicki attaches to that] over-simplifies'* (Tr 17.9.20, xx, pg.56). '*Bartnicki tells us...that the press cannot engage in separate criminal activity to obtain classified information...[Bartnicki does not suggest that] engaging in news gathering practices to assist a government employee liberate classified information...would be criminal conduct'* (Shenkman, Tr 18.9.20, re-x, pg.62).

11.23. Well known examples, which would have been the subject of prosecution had the theory been correct, have never been prosecuted, are legion. For example, in the Pentagon Papers case itself, New York Times '*worked closely with [the whistle-blower, Ellsberg] to get the documents in the first place... Clearly, the Times played a very active, not passive, role in that case. As in most journalistic endeavours that is what journalists do... the New York Times even physically copied the report for Mr Ellsberg'* (Feldstein, Tr 8.9.20, re-x, pg.63). Some newspapers even pay whistle-blowers money, yet never have been charged (Feldstein, Tr 8.9.20, re-x, pgs.63-64).

11.24. Further still, as Mr Shenkman confirmed, it is a flawed theory of liability which has in fact repeatedly been rejected over the years. For example, it underpinned the 1945 'Amerasia' threat to utilise the Espionage Act against the press; and was explicitly rejected by the Grand Jury in that case '*due to First Amendment implications and the history is clear on that*' (Shenkman, Tr 17.9.20, xic, pg.30 / 18.9.20, xx, pgs.54-56). '*It is a theory that is sometimes pedalled but has it [n]ever, before this case, produced an indictment...and one of the key reasons for that are the First Amendment concerns and the impact on news gathering*' (Shenkman, Tr 18.9.20, re-x, pgs.62-63).

11.25. All this history is why:

i. As Professor Feldstein stressed (Tr 8.9.20, re-x, pgs.62-63), these '*routine'* activities (encouraging and actively assisting whistle-blowers to leak) 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, para 9(a)). If such activity is criminal, then the *'world's greatest journalists'* have all '*conspired with, and aided and abetted whistle-blowing sources'* (Feldstein, Tab 18, para 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, para 2). In evidence, Prof. Feldstein said '*soliciting information, gathering information [is a] standard thing that all journalists do, the standing operating procedure, and we teach it in journalism schools, we have conferences, and, you know, the things that we discussed are in newsbeats, they are all sort of routinized and the ideas is to share tips, show how to acquire secret documents, secret information, and so that is actually standard. So, too, is asking our sources for evidence, for documents to back up what they say, and in working with them to find documents, directing them in a manner of speaking as to what it is we need as proof, 1 making suggestions of what they should look for and try to find out for us... my entire career virtually was soliciting secret information and records'* (Tr 8.9.20, xic, pgs.34-35- unchallenged).

ii. As Mr Timm wrote, 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, paras 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, paras 17-23).

iii. So far as the 'draft most wanted list' is concerned, Mr Goetz wrote: '*I for one, can confirm that [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, para 16 – unchallenged). WikiLeaks was '*not the only organisation involved in the development of such a ['draft most wanted'] list at that time. The Center for Democracy and Technology maintain a similar list and did so in 2009'* (Timm, Tab 65, paras 27-28) (Timm exhibit 16). See generally (L, section F).

11.26. Ultimately, this Court can assess the whole issue for itself by reference to the detailed discussion of it in ***Levine, Siegel and Bead*** (2011) NYLS Law review (Timm exhibit 3): '*I would encourage the court to read this paper in full. I believe it is actually the best explanation that I have read in detail of (inaudible) law in the United States and how it affects the press. This paper makes the assuringly important point...that many journalists who the public has known well for many years likely would have been found in violation of the law if this idea that they can conspire with a source to break a law was actually in effect. So, for example, the two most famous reporters in the US history, Bob Woodward and Carl Bernstein, could have all been charged in the wake of persistently asking and receiving information from the FBI Deputy Director, Mark Felt, better known as 'Deep Throat' during the Watergate investigation. There are many more examples'*, including the potential criminalisation of Pulitzer Prize-winning investigative journalism (Timm, Tr 9.9.20, xic, pgs.55-56 / xx, pg.77). The article examines in detail the established jurisprudence which holds:

i. That extremely broad constitutional protection is provided by the First Amendment to truthful information about matters of public significance (pg.1017);

ii. The First Amendment protection does not vary according to the identity of the publisher, or whether the publisher profited from the publication (pg.1019);

iii. Actual knowledge of the whistle-blower's unlawful conduct on the part of the publisher does not remove the protection of the First Amendment (pg.1024);

iv. Following ***Bartnicki***, the lower courts have explored the extent to which a publisher's *positive interaction* with a source who unlawfully acquires information can be said to implicate the publisher itself in illegal conduct that might provide a constitutional basis for civil or criminal liability (pg.1025); and all of the authorities consistently hold that it does not (pgs.1025-1026);

v. '*These decisions reflect the reality that the press routinely seeks out information from a variety of sources, many of whom may be held to have violated a statute, a private contract, or some other legal or ethical duty either in obtaining the information or by disclosing it to the press. The courts have nevertheless concluded that, when the press induces sources to disclose what they know about newsworthy matters, it is protected by the First Amendment when it proceeds to publish such information, regardless of the legality of its source's actions'* (pg.1026);

vi. This is qualitatively and legally different from '*the rare circumstance [envisaged in **Bartnicki**] where [journalists] directly committed an unlawful physical act, such as removing a piece of debris from the wreckage of a sabotaged aircraft, 'stealing documents,' or engaging in 'private wiretapping''* (pg.1030).

vii. '*A different constitutional rule—one that would permit the imposition of criminal liability on the press when it can broadly be said to have 'induced' or 'conspired' with a source to secure newsworthy information for publication—would fundamentally alter public discourse. If, for example, the press could be prosecuted for 'aiding and abetting' violations of the Privacy Act, it would appear that the Washington Post, Bob Woodward, and Carl Bernstein could all have been charged in the wake of their persistent solicitation and receipt of information from FBI Deputy Director Mark Felt ['deep throat'] about the FBI's then-ongoing investigation of specific, identified persons implicated in the Watergate investigation who had not yet been indicted. Similarly, it would appear that the San Francisco Chronicle could have been charged with aiding and abetting a violation of Federal Rule of Criminal Procedure 6(e) when a criminal defense lawyer agreed to provide the Chronicle with details of grand jury testimony given by some of the most prominent athletes in professional sports as part of a Pulitzer-Prize winning series of articles...and criminal liability could*

apparently have been imposed on the Wall Street Journal for its solicitation and receipt of internal Enron documents from confidential sources' (pg.1034).

11.27. The authors conclude that the jurisprudence clearly shows that '*The application of [criminal] statutes to the press, whether directly or through laws imposing secondary liability, can survive First Amendment scrutiny only if construed to require that (1) the press conduct at issue be unrelated to communicative acts involving the transmission of information, or (2) the* defendant *evince some bad-faith purpose other than and beyond the intent to obtain information for the purpose of reporting it to the public. Absent such limitations, it appears there is a substantial argument that any prosecution of the press for violating such a criminal statute, for aiding and abetting a violation of such a statute, or for conspiring with a source to violate such a statute - based on the contention that the press had 'induced' or 'conspired' with a third party to engage in unlawful activity - would violate the First Amendment. As the Supreme Court has recognized on several occasions, a broad range of press conduct that involves 'soliciting, inquiring, requesting and persuading' sources 'to engage in the unauthorized and unlawful disclosure of information' is protected by the Constitution*' (pg.1036).

11.28. According to Mr Timm, it is '*the crux of the entire law review article about how it is a journalist's job to not just publish information but to gather the news or engage in news gathering which courts for decades have talked about in the United States*' (Timm, Tr 9.9.20, re-x, pg.81).

11.29. It might ultimately therefore be thought unsurprising that this allegation – of conspiracy in the act of leaking – was never levelled against Manning.

Wrong under Article 10 ECHR

11.30. Unsurprisingly, the (globally lawful) practice of cultivating, encouraging, soliciting and actively assisting whistle-blowers is not confined to the US. New Zealand investigative journalist Hager told the Court that the notion or suggestion that such conduct is criminal '*is based on a fundamental misunderstanding of the work that*

someone like me does...that is not the way that it works. In fact, it is a regular business of me and my colleagues around the world as we fulfil out the role of society that we not only actively work with our sources, we go out and find our sources. We encourage our sources to produce evidence that will back up the things that they are telling us and sometimes that evidence might be a page of paper and sometimes it might be a memory stick, a USB drive...sources are whistle-blowers who actually produce the important information which helps to change the world and play our role in maintaining democratic societies as stuff where we work with people who in most cases are breaking the law when they help us and we have to talk through with them how can they look after themselves' (Hager, Tr 18.9.20, xx, pg.12).

11.31. Most importantly, for the purpose of these proceedings, criminalisation of the active *'gathering of information'* from a law-breaking whistle-blower also offends the core notions of Article 10 within the Council of Europe.

11.32. In ***Tarsasag v Hungary*** (2011) 53 EHRR 3 the ECtHR held at paras 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...'*

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

11.34. Insofar as that protected 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....' (para 94)

11.35. In ***Szurovecz v Hungary*** (2020) 70 EHRR 21, the ECtHR recently 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...'

11.36. 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...'*

11.37. This all explains why ***R v Shayler*** [2001] 1 WLR 2206 concerned only 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 obtaining or receiving or publishing 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.

11.38. The Mail on Sunday, for example, was never prosecuted for obtaining or publishing Shayler's leaks, despite having obtained them from him by paying him to leak them to the newspaper. 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 paras 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 para 50). Notably, the House of Lords cited the US Supreme Court's Pentagon Papers ruling in support of these propositions..

The passcode hash

Wrong under the First Amendment

11.39. Next, the US suggests that the 'passcode hash' allegation is such an example of ***Bartnicki***-prohibited separate criminality.

11.40. Prof. Feldstein agreed – correctly – with the suggestion put to him that '*a journalist [is not] entitled to hack into computers to get newsworthy material'* (Tr 8.9.20, xx, pgs.52-53 / re-x, pg.64).

11.41. But the premise of the question put misses the point. As both Mr Timm and Mr Shenkman told this Court, the answer to this issue '*depends on the purpose'* of the

activity in question (Shenkman, Tr 17.9.20, xx, pgs.57-58). For this theory, it is therefore crucial that the Court understands the alleged purpose of the 'passcode hash' allegation. That is expressly addressed by Kromberg 4 at paras 10-15. Mr Kromberg says at para 11 that:

> '*...the United States has not alleged that the purpose of the hash-cracking agreement was to gain anonymous access to the Net Centric Diplomacy database or, for that matter, any other particular database. Instead. Count 18 of the Superseding Indictment generally alleged that the 'primary purpose of the conspiracy was to facilitate Manning's acquisition and transmission of classified information related to the national defense of the United States so that WikiLeaks could publicly disseminate the information on its website.' The Superseding Indictment further asserted that 'had ASSANGE and Manning successfully cracked [the password hash], Manning may have been able to log onto computers under a username that did not belong to her' and '[s]uch a measure would have made it more difficult for investigators to identify Manning as the source of disclosures of classified information'*...'

and proceeds at para 12 to explain how it is alleged that:

> *'Each step in this process can leave behind forensic artefacts on the computers or computer accounts used to accomplish the crime. Therefore, the ability to use a computer or a computer account not easily attributable to Manning could be a valuable form of anti-forensics. Put another way, Manning needed anonymity not only on the database from which the documents were stolen (e.g., the Net Centric Diplomacy database), but also on the computer with which the documents were stolen (e.g., the SIPRNet computer). The hash-cracking agreement, at a minimum, could have furthered the latter goal'*

and at para 14:

> *'If Assange had successfully cracked the password hash to the FTP account, however, Manning could have used that account for the theft and Army investigators might have missed such forensic artefacts or, even if they found them, might not have been able to attribute them to Manning'.*

11.42. On that basis, all witness were pellucidly clear; protecting whistle-blowers (such as Manning) from detection is activity which is protected by the First Amendment:

i. Mr Timm said '*even the government is not alleging that Manning and Assange were conspiring to break a password to steal more documents, as far as I*

understand it. The only alleged motive was to potentially keep Miss Manning more anonymous, and in general journalists are often attempting to keep our sources anonymous. That is why they use encrypted messaging applications and that is why they often made promises to sources to keep them confidential so that they can do their job' (Timm, Tr 9.9.20, xx, pg.69 / re-x, pgs.82-83).

ii. Likewise, according to prof. Feldstein, once directed to Kromberg 4, told this Court that '*trying to help protect your source as a journalist is an obligation....we use all kinds of techniques to try to help them, you know, from pay phones, to anonymity to code words, encryption, removing fingerprints, digital or otherwise, from documents that might reveal them, misdirecting suspicion. These are all things that I have done'* (Feldstein, Tr 8.9.20, xic, pg.35). '*Protecting sources, as I mentioned, is considered a moral obligation...Journalists, if you will, inspire sources every day. They work with their sources, they cajole their sources, they direct them to what information they need. They will send them back sometimes to get more information if the information they have is not sufficient. So if that becomes criminalised, if that becomes conspiring, then most of what journalists do, investigative journalists on national securities, would be criminal'* (Feldstein, Tr 8.9.20, re-x, pgs.64-66).

iii. So too Mr Shenkman: '*the important thing to keep in mind about Bartnicki and I think it is quite relevant here, is whether or not the alleged criminal conduct is linked to the act of news gathering and a part of that process and part of effectively [source] protection...there are certain allegations [here] that are inextricably tied to the news gathering process and some of them entail things like [source] protection...the full indictment...is not just about accessing government database...there are certainly many other elements and some of those have components that are on the exercise of freedom of speech and the first amendment...that is the whole point of everything I have been saying'* (Tr 17.9.20, xx, pgs.56-58).

11.43. The passcode hash' allegation thus stands in the same position as other 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, para 26): - all of which are 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, para 9(d)) (Timm, Tab 65, para 31) (Maurizi, Tab 69, paras 7-9 - agreed s.9). Just as the use drop boxes to protect whisleblowers' anonymity are '*a journalistic staple, employed by leading outlets around the world, including the New York Times'* and are '*the kind of solicitations for information that journalists routinely post on social media sites'* (Feldstein, Tab 18, para 9(a)). '*News organisations commonly issue detailed instructions like this'* (Tigar, Tab 23, pg.5 - agreed s.9) (Ellsberg, Tab 55, para 29 – unchallenged) (Timm, Tab 65, paras 8-16, 31) See generally (L, section E).

Wrong under Article 10 ECHR

11.44. The scheme of the ECHR is exactly the same. In ***Girleanu v Romania*** (2019) 68 EHRR 19, the ECtHR held:

> *'...84...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...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...'*

11.45. So far as concerns allegations of breaching the law in order to protect the whistle-blower's anonymity as a '*not decisive consideration',* 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, para 39). It is inconceivable that the ECtHR would regard (and there exists no authority that)

law-breaching undertaken in order to protect the whistle-blower's anonymity as capable of taking journalistic actions outside the protection of Article 10.

Unredacted names

Wrong under the First Amendment

11.46. The prosecution in this case has finally attempted to draw a distinction 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'.* Assuming again for the purposes of argument the allegations to be true, 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, or in a way that others agree with, the First Amendment's protection would be unavailable precisely in the cases publishers need it most (Lewis 4, Tab 70, paras 11-12). Unsurprisingly therefore, no authority is cited in support of this bizarre theory.

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

i. *'...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, para 3).

ii. '*Nobody needs, you know, the New York Times to issue them a press pass to act as a journalist or to receive First Amendment rights. This goes all the way back to the country's founding with famous pamphleteers who were writing anonymously. Whether or not anyone considers Julian Assange a journalist is beside the point. He*

was engaging in journalistic behaviour, he was acting as a publisher, and that is the right of everybody' (Timm, Tr 9.9.20, xx, pgs.62-63).

iii. For example, Beacon Press '*was the publishing arm of the Unitarian Universalist Association. These were often not mainstream news outlets at all. They were often outlets that had political views that were perceived to be contrary to the administration or that were exposing either secrets or policies that were - that were deemed - that were deemed in opposition to prevailing policies'* – but Grand Juries declined to indict on First Amendment grounds (Shenkman, Tr 18.9.20, xx, pg.54).

11.48. Various witnesses confirmed that they would not personally have published informant's names in the exercise of their professional judgment (Feldstein, Tr 8.9.20, xx, p54-56) (Timm, Tr 9.9.20, xx, pg.73) (Hager, Tr 18.9.20, xx, pg.13), or would regard the striking of the balance between that and revealing torture as '*horrifyingly difficult*' (Stafford-Smith, Tr 8.9.20, pg.25). But that, as those same witnesses repeatedly pointed out, is not the point so far as *legality* is concerned. The point is that First Amendment does not prohibit it (or, more accurately, where such conduct is to be criminalised, US law specifically provides for that, such as in the case of outing intelligence officers under the Intelligence Identities Protection Act) (Feldstein, Tr 8.9.20, re-x, pg.66).

11.49. There are numerous examples of such conduct having occurred in the US, without suggestion of criminality or prosecution (see, e.g. Bundle L, Tabs D28-31, 34).

11.50. As Mr Timm explained:

i. '*You know, with respect, to me the idea of a responsible journalist, or who is or who is not a responsible journalist, is entirely different than what is legal and what is illegal conduct, and in this case, you know, no court has ever said that the publication of names in this matter would be potentially illegal. And, in fact, Congress debated this very issue after WikiLeaks published information in 2010 there was a proposed bill called the SHIELD Act introduced by Senator Joe Lieberman at the time, which was aimed at specifically making it a crime to publish so-called human intelligence. That bill failed to pass and so that tells me*

two things. Number one, this was not illegal to begin with in the eyes of Congress, and that Congress decided that it was not worth making it illegal then as well, and so the idea whether I agree or disagree, or whether I would have published particular names I think is beside the point. The point is whether this is illegal or not and in my mind, and in the mind of many First Amendment scholars, this conduct is protected by the First Amendment' (Timm, Tr 9.9.20, xx, pg.70).

ii. '*I am not saying that WikiLeaks had perfect editorial judgment, just like I have never said that the Guardian or the New York Times has had perfect editorial judgment. Sometimes newspapers make mistakes, but that does not mean that differences of opinion of editorial judgment means that something should be illegal...The question before us is not, you know, do we agree with Julian Assange's decision to publish these names? The decision is whether or not this is illegal, and it is my opinion, as it is the opinion of many, many other First Amendment scholars and media lawyers, that this publication was not illegal, and that the indictment to try to make it illegal would potentially criminalise a lot of other publications that news media members do every day. And I should mention that all of the newspapers...have also issued statements vociferously condemning this prosecution. They have all stated that this prosecution, even if it includes charges involving these people's names, or these sources' names, is a direct threat to press freedom and they themselves are worried about the liability they have because of it*' (Timm, Tr 9.9.20, xx, pg.71).

iii. *'The First Amendment has never been in the United States a balancing act between harm and benefit. The First Amendment sometimes allows for odious speech, for speech that is unpopular and, you know, frankly it is possible that in some cases, in some types of speech, some harm might result, but in the United States, you know, our people have made the determination [through the First Amendment] that...for journalists to cover matters of public opinion, or a public import, makes it vital that they are protected from prosecution'* (Timm, Tr 9.9.20, xx, pg.72).

iv. *'I did not say that I thought it was right to publish these names, or that I agreed with the decision, I said merely that it would be unconstitutional for Mr Assange to be prosecuted under the Espionage Act for this act*' (Timm, Tr 9.9.20, xx, pg.73).

v. Likewise, Mr Shenkman: *The First Amendment does not make any such distinction'* (Shenkman, Tr 18.9.20, xx, pg.55). Even for press outlets in the business of publishing 'top secret' materials (Shenkman, Tr 18.9.20, re-x, pg.60).

11.51. The witnesses are undoubtedly correct. ***Levine, Siegel and Bead*** (2011) NYLS Law Review (Timm exhibit 3) expressly confirms (at pg.1020) that '*The Supreme Court has expressly disavowed any test of whether particular 'speech' falls within the protections of the First Amendment that is premised on ad hoc determinations of its 'value' in comparison with the 'harm' it is alleged to have perpetrated. Instead, the Court has constructed a handful of narrow, precisely defined categories of expression that are not protected by the First Amendment at all, including obscenity, defamation, and 'fighting words,' and has rejected the notion that constitutional analysis of otherwise protected expression should depend on judicial assessment of its comparative worth. As the Ninth Circuit has explained: [T]he first amendment is as close to an absolute as we have in our jurisprudence: Speech shielded by the amendment's protective wing must remain inviolate regardless of its inherent worth. The distaste we may feel as individuals toward the content or message of protected expression cannot, of course, detain us from discharging our duty as guardians of the Constitut*ion' (pg.1020).

11.52. Mr Timm told this Court '*I would encourage the court to take a look at' that'* ***Levine, Siegel and Bead***, which demonstrates that attempts to criminalise the publishing of names of human sources '*would be a radical [re-write] of the First Amendment'* (Timm, Tr 9.9.20, re-x, pg.84).[26]

11.53. And, in any event, as multiple witnesses also observed:

i. It is only the 'publishing' charges (counts 15-17) that are restricted to documents containing informants' names. All other charges would criminalise the obtaining and receiving, by a journalist, of classified materials, including (potentially exclusively) those that did <u>not</u> reveal names. '*He is not only charged with 15, 16,*

[26]. Mr Ellsberg confirmed, for example, that the Pentagon Papers deliberately revealed the identity of a clandestine CIA officer (Ellsberg, tr 16.9.20, xx, pgs.53-54 / re-x, pg.67), yet no member of the press were prosecuted.

and 17, there are you know, 15 or 20 other counts... that involve holding, retaining other documents as well ' (Ellsberg, Tr 16.9.20, xx, pg.50 / re-x, pg.66). '*That is why I probably look slightly puzzled when I see that it is said that they were not part of the charges'* (Hager, Tr 18.9.20, re-x, pg.20). As Mr Timm made clear when the issue was put to him '*The other charges relate all to documents...[these other charges are] essentially saying that by merely possessing these documents that Julian Assange was committing a crime and if Julian Assange is committing a crime by possessing those documents so is any other journalist who possesses the same documents or similar...So the [suggestion that only publications containing names are being prosecuted] is a very warped issue and it worries me and any First Amendment scholars greatly, which would actually be a rewriting of First Amendment law*' (Timm, Tr 9.9.20, xx, pgs.66-67). The breadth of the other charges '*are as worrying or more worrying*' from a First Amendment perspective and '*criminalise common journalistic practice, whether you believe Julian Assange is a journalist or not*' (Timm, Tr 9.9.20, xx, pg.67). *'I do not think it is an exaggeration to say that this would criminalise national security journalism in the US'* (Timm, Tr 9.9.20, re-x, pgs.85-86).

ii. And, as Mr Stafford-Smith also observed, it would be '*very wrong'* to assume that the prosecution of even counts 15-17 will in reality be constrained to documents containing names (Stafford-Smith, Tr 8.9.20, xx, pgs.16-20, 25 / re-x, pgs.28-29).

Wrong under Article 10 ECHR

11.54. As stated above, in ***Girleanu v Romania*** (2019) 68 EHRR 19, the ECtHr held:

> *'...84...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...'*

11.55. By definition, the WikiLeaks disclosures were '*accurate and reliable information*'. No authority is provided or cited which places any <u>other</u> restriction on the scope of operation of Article 10 by the ECtHR jurisprudence by reference to *<u>'the tenets of responsible journalism'</u>*. That is presumably why instances of obtaining and publications of names by the UK press in the UK are legion (see Bundle L, Tabs section D1-D31).

First Amendment and foreigners

11.56. The notion that US criminal *jurisdiction* attaches to foreign conduct such as in play here, but the *First Amendment* does not likewise attach, is a surprising one, to put it mildly. Yet it is one not only advocated by Mr Kromberg. As stated above, it is the view of the DoJ, including Secretary of State Mike Pompeo who has asserted that Mr Assange '*has no First Amendment freedoms*' because '*he is not a US citizen'* (Bundle K, Tab 11). Thus it is that '*prosecutors [had struggled with whether the Australian is protected from prosecution by the First Amendment, but now believe they have found a path forward*' (Bundle K, Tab 11). Neither is it a spurious or speculative theory: it has recently been upheld by the US Supreme Court (see ***USAID v Alliance for Open Society*** (2020) 140 SC 2082).

<u>Wrong under Article 10 ECHR</u>

Whatever the scope of application of the First Amendment, Article 10 is <u>not</u> nationality specific (and no suggestion to the contrary is or can be advanced by the Government). So, even if the First Amendment *were* inapplicable to Mr Assange in this case as the US Government suggests, then all the <u>more</u> reason for this Court to act under s.87. No US court will, apparently, enforce or protect Article 10's principles in this case. That would be a paradigm flagrant denial of Article 10. It is an especially significant breach where the conduct in question was undertaken from *within* the sphere of protection of the Council of Europe (i.e. the UK). Extradition in these circumstances will not only retroactively nullify the lawful exercise of those Article 10 rights within the Council of Europe, but will be on terms that envisage that the US court will consider it against no similar protections. It is akin to sending an ***ex parte***

Bennett [1994] 1 AC 42-type kidnapping abuse case to the US for prospective trial under ***United States v Alvarez-Machain*** (1992) 504 US 655 principles.

Finally

11.57. Assuming (contrary to the Government's stated position) that the First Amendment *will* be considered at all by any prospective trial judge, then:

i. This Court should conclude, on the compelling evidence it has heard, that the First Amendment will prevent this prosecution. That conclusion would be the surest indicator that Article 10 is likewise engaged.

ii. If, on the other hand, this Court cannot form a sure view about how the First Amendment will operate in this case, then s.87 nonetheless compels it to form a sure view about Article 10. Again, the ECtHR and UK case law on that is all one way. Most importantly, the Government's First Amendment analysis and assertions (even if accepted or not rejected) cannot replace this Court's obligations to consider Article 10 under s.87. No question, for example, of presumed-ECHR-compliance in America arises.

12. Zakrzewski abuse

Introduction

12.1. In fact, the abovementioned US efforts to suggest that the First Amendment / 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:

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

ii. The '*passcode hash'* allegation: As stated above, it was necessary, per ***Bartnicki***, for the US to make that factual allegation here (Kromberg 1, para 19). But it was contrived here knowing (yet concealing from this Court) that it was flatly contradictory to the evidence given by US government witnesses before the Manning Court Martial.

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

12.2. All of these assertions, thought by the US to be (but which for the reasons detailed above are not) material to the operation of Article 10 ECHR, are in reality deliberate factual misstatements. That knowingly false allegations are brought is not only indicative of the wider ***Tollman*** abuse / political motivation lying behind this request, but actionable in their own right pursuant to ***Zakrzewski***.

The Law

12.3. 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'* (***Bermingham*** at para 100).

12.4. 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 paras 11-13).

12.5. So, as ***Shlesinger*** paras 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*** paras 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'*.

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

12.7. 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***, para 13).

The first *Zakrzewski* abuse; The 'draft most wanted list'

12.8. The WikiLeaks '*draft most wanted list'* ('the list') (Bundle L, Tab 2) was a public collaboration, a living document edited by the public (in the way that Wikipedia is) (Bundle L, Tab 7 pg.5) (Timm, Tab 65, paras 24-30 / Tr 9.9.20, xic, pg.58 – unchallenged) (Timm exhibits 15, 17) (Bundle L, Tab 2) (L, section D7, D32-33, D35-36). That evidence was not challenged.

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

12.10. 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, para 16 – agreed s.9). 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, para 17 – agreed s.9). She contacted both the *Washington Post* and the *New York Times* but received no real response from them (Boyle 1, Tab 5, para 17 – agreed s.9). So she visited the WikiLeaks website and on

3 February 2010 uploaded the Iraq and Afghan war diaries (Boyle 1, Tab 5, para 18 – agreed s.9). She then uploaded the Iceland cable (First Indictment, paras 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, paras 18-20 – agreed s.9). According to Manning, none of this was solicited from her (Boyle 1, Tab 5, para 21 – agreed s.9).

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

12.12. The allegation firstly ignores completely the fact that WikiLeaks, and its '*draft 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 (Bundle L, Tab 16), through 16 March 2010, (Bundle L, Tab 17) and to at least 17 May 2010 (Bundle L, Tab 18). If Manning was '*responding'* to the '*list'*, she must have been doing so from memory.[27]

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

i. The '*draft list'* was not linked to from the WikiLeaks submission page (Bundle L, Tab E1). There were no links to the list manually added to any other page on the WikiLeaks website (Bundle L, Tab 5). Nor could the '*list'* be navigated to from within the WikiLeaks site (Mander, H9, pgs.8126-8129).

ii. There is no suggestion that Manning ever searched for or accessed the '*list'*.

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

iv. Manning's online 'confession' in 2010 (Bundle M2, Tab 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*' (pg.11) '*horrifying...its important that it gets out...it might actually change something*' (pg.14);

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

v. 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).

12.14. Thus:

i. <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'* (Bundle L, Tabs 2, 4).[28]

- They were copied by Manning before 8 January 2010 (H17 pg.6755) and uploaded to WikiLeaks on 3 February (H17 pgs.6759-60), having previously approached the NY Times and Washington post (H17 pgs.6758-9).

- Manning explained the strong and obvious public interest in unilaterally wishing to provide these materials to the public (H17 pgs.6755, 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 (Bundle L, Tabs 40-45); as had the destruction of detainee CIA interrogation tapes depicting torture techniques (Bundle L, Tabs 46-47). WikiLeaks had published multiple categories of material relevant to the issue (Bundle L, Tab 6) (M Continuation, 11).

- 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,

[28]. (Bundle L, Tab 2) is the '*list'* as archived by the wayback machine on 4 November 2009 (before Manning's first upload: war diaries) and (Bundle L, Tab 4) is the '*list'* as next archived by the wayback machine on May 2010 (after Manning's last upload: cables).

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.

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

- Were also not on the '*list'* (Bundle L, Tabs 2, 4).

- The public debate surrounding Guantánamo will be well known to this Court. It was no less prevalent in 2010 (see Bundle M, Tab 12). 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 (Bundle L, Tab 67); the Senate had blocked funding for its closure in May 2009 (Bundle L, tab 60); Congress was in the process of debating the merits of its closure in November 2009 (Bundle L, Tab 62); in December 2009 Human Rights Watch had called for release of investigation reports surrounding inmate deaths there (Bundle L, Tabs 63-64); in January 2010 the final report of the Joint Task Force had been released concerning the status of Guantánamo's remaining 240 detainees (Bundle L, Tab 65).

- As part of that global debate WikiLeaks had published myriad materials concerning Guantánamo (Bundle L, Tabs 6, 40-48) (Bundle M, Tab 12). '*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, para 25 - agreed s.9). For example, the camp's Standard Operating Procedures had been published since 2007 (Bundle L, Tabs 24-25), the abovementioned 2008 Senate investigation report since April 2009 (Bundle L, Tab 38); ongoing special investigations materials revealing torture at the camp since May 2009 (Bundle L, Tab 48); all of which had been accompanied by detailed journalistic analysis (Bundle L, Tabs 26-28, 30-38), which was in turn informing proceedings pending before the

US Supreme Court (Bundle L, Tabs 29, 32). See generally (Bundle M2, Tabs 118-149).

- During a search of Joint Task Force information regarding another matter, Manning had come across the DABs (H17 pgs.6772-6).

- As explained more fully below, and as confirmed by WikiLeaks' contemporaneous analysis of them (Bundle L, Tabs 49-59), 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 pgs.6776).

- Manning copied them on 5 and 7 March 2010 (H10, 11). She did this before she offered them to WikiLeaks (Shaver, H9, pgs.7977-7982) (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 pg.6752) - Manning asked on the Jabber chat whether WikiLeaks would be interested in them (H17 pg.6777; Dwyer para 31(a)).[29]

- They were then uploaded on 8 March (H17 pg.6778).

- WikiLeaks then engaged in detailed journalistic analysis of the DABs (Bundle , Tabs L49-59), including the fate of the children revealed to be detained there (Bundle L, Tab 55).

[29]. To compound the ***Zakrzewski*** abuse, even this issue is addressed in a misleading way in the Criminal Complaint, at paras 57 – 65. The Criminal Complaint suggests that Manning downloaded the DABs *in response to* the Jabber chat with Mr Assange but in fact, it is clear from the prosecution evidence at Manning's Court Martial (H10, 11) she had begun to download the DABs *before* the conversation took place.

- Other Guantánamo materials were, by contrast, on the '*list'* but were not sent by Manning (Bundle L, Tab 2, pg.13), despite having access to them including the Intellipedia database (Bundle L, Tab 2 pg.12).

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

o No cables were ever on the '*list'* (Bundle L, Tabs 2, 4). Neither was the NetCentric database.

o 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 (Bundle L, Tabs 6, 15). The public interest in the cable was obvious (H17 pgs.6762-3). Manning's upload was unilateral; the '*list'* had never sought Kaupthing materials (Bundle L, Tabs 2, 4). As with all else, it is normal for sources to send documents to journalists that have covered similar issues before and, in the process, to be influenced by past stories written by those journalists.

o 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 pgs.6781-3), '*horrifying'* (Bundle M2, Tab 499, pg.14). 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' (Bundle M2, Tab 499, pgs.13-15). Manning wanted her disclosure to provoke '*worldwide discussion, debates, and reforms. If not… than we're doomed as a species*' (Bundle M2, Tab 499, pg.50).

- Those cables were copied by Manning over 22 March to 9 April 2010 (H17 pg.6783; Dwyer para 36), uploaded on 10 April (H17 pg.6783) and updated on 3 May 2010 (H17 pg.6783).

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

- This is the only category of materials subject to the indictment which might[30] have been on the '*list'* (Bundle L, Tab 2).

- Manning explained the strong and obvious public interest in unilaterally wishing to provide these materials to the public (H17 pgs.6764-8). Her decision to do so was inextricably linked 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 (Bundle L, Tab 69) - in turn fuelled by governmental lies and secrecy surrounding those deaths (H17 pg.6767)[31] - which Manning read in the NY Times; '*it humanized the whole thing… re-sensitized me'* (Bundle M2, Tab 499, pg.37). *'i want people to see the truth'* (Bundle M2, Tab 499, pg.50). 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 (Bundle L, Tabs 69-70). WikiLeaks had published versions of the Rules in the past (H17

[30]. The '*list'* changed over time. Compare (Bundle L, Tab 2) at 4 November 2009 before Manning's first upload with (bundle L, Tab 4) 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 (Bundle L, Tab 2) was the version available to Manning.

[31]. See. e.g. (Bundle L, Tabs 72-74).

pg.6752),[32] so Manning uploaded the versions (2006-2008) current to the time of the video (H17 pg.6768; L69-71). Whether she did that at the same time as (H17 pg.6768), or shortly after, she uploaded the video, matters not. What matters is that both the video and the Rules were published by WikiLeaks on 5 April 2020 simultaneously and together as part of the Collateral Murder publication (Bundle L, Tab 69). The Rules were necessary for the interpretation and evaluation of the video, and this is reflected uniformly in the stories by journalists about and discussions of the video after their simultaneous release.

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

- 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 (Bundle L, Tab 16) and 17 May 2010 (Bundle L, Tab 18).

12.15. The evidence summarised above shows that the *'draft 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)

12.16. First, Mr Kromberg suggests that, even though not the author of the list (Kromberg 4, para 19), Mr Assange nonetheless used it to solicit classified materials (Kromberg 4, para 20), and that Manning was '*responsive'* to those solicitations (Kromberg 2, para 12). Tellingly, all the examples given of Manning's '*responsiveness'* to the list

[32]. See (Bundle L, Tab 6 pg.5) and (Bundle L, Tabs 19-21, 23).

(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 '*draft most wanted'* list and Manning's actual disclosures is plain.

12.17. Secondly, acknowledging that none of the war diary, Guantánamo or cable materials that were supplied by Manning were ever listed by WikiLeaks (Kromberg 4, para 21), it is nonetheless suggested that '*bulk databases'* were listed and that is what Manning provided (Kromberg 2, para 13) (Kromberg 4, paras 22-23). Of course, what it omitted from this (new) theory, is that the '*bulk databases'* that the '*draft most wanted'* list sought were in fact specified by name in the list (L2, pgs.12-13), and did not include any of what Manning provided.

12.18. Following receipt of the defence evidence the 'draft 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, para 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.

12.19. 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, para 9(a)). '*News organisations commonly issue detailed instructions like this'* (Tigar, Tab 23, pg.5 - agreed s.9) (Ellsberg, Tab 55, para 29 – unchallenged) (Timm, Tab 65, paras 8-16, 31) See generally (L, section E).

12.20. Thirdly, Mr Kromberg suggests that the '*shortening'* of the list (see Bundle L, Tab 4) was done '*after Manning had already supplied troves of responsive classified information to Assange and around the time of Manning's arrest'* (Kromberg 4, para 24). This is the point detailed at para 12.13 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:

i. 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 to this Court.

ii. 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.[33]

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

12.21. The request separately alleges that Mr Assange assisted Manning to '*steal'* classified documents by agreeing to help to decrypt a '*passcode hash'* value (Dwyer, paras 7, 25-30).

12.22. 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, para 63 / Tr 25.9.20, xic, pg.25 – unchallenged). They do not even suggest that the hash related to a Government computer (Eller, Tr 25.9.20, xic, pg.25 – unchallenged).

12.23. Moreover, as at 2010,[34] 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

[33].And despite the fact that the entire list was offline in its entirety between at least 28 January (Bundle L, Tab 16) and at least 17 May 2010 (Bundle L, Tabs 17-18).

[34].Years later, in 2016, '*doubts began to emerge about vulnerability 6 of the Microsoft software, such that it was removed from service in 2019'* (Eller, Tr 25.9.20, xx, pg.39, 41-42 / re-x, pg.52).

relevant portions of the SAM[35] file, to reconstruct the key (Eller, Tab 17, paras 29-36 / Tr 25.9.20, xic, pgs.25-26). '*At the time, the time being 2010...it would not have been possible to crack an encrypted password hash, such as the one Manning obtained'* (Eller, Tr 25.9.20, re-x, pgs.51-52), '*and my opinion again aligns with the opinion of the government's expert in the court martial'* (Eller, Tr 25.9.20, re-x, pg.52) (see Shaver, H3 pg.8538). This would be known to anyone with '*basic technical knowledge'* (Eller, Tab 17, paras 63-65). Contrary suggestions put to Mr Eller in cross-examination based on weaknesses identified in the Microsoft encryption programme in 1999, it was <u>not</u> possible in 2010 to crack the passcode without the key because the weakness identified by the Government had long been '*eliminated'* by Microsoft (Eller, Tr 25.9.20, xx, pg.42 / re-x, pg.51). As at 2010, what was being suggested was, according to Microsoft, '*computationally infeasible'* (Eller, Tr 25.9.20, xx, pg.42 / re-x, pg.51). Mr Eller confirmed that not even a '*skilled hacker'* could at that time achieve what is computationally unfeasible unless '*all the data is provided'* (Eller, Tr 25.9.20, xx, pg.43 / re-x, pg.51). Even the '*government's own expert witness in the court-martial stated that that was not enough for them to actually be able to do it'* (Eller, Tr 25.9.20, xx, pg.43).

12.24. 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, para 29) (Kromberg 1, para 168).

<u>The allegation that accessing the FTP user account would have provided anonymous access to the databases</u>

12.25. 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, in broad summary, is that:

[35].Security Accounts Manager database (Eller, Tab 17, para 31).

i. First, accessing documents by logging in using the 'FTP user' account[36] *'would not have provided her with more access than she already possessed'* (Eller, Tab 17, para 37). By March 2010, Manning had already downloaded significant quantities of classified material *from her own computer account* (Eller, Tab 17, paras 24, 59 / Tr 25.9.20, xic, pg.27 – unchallenged). Namely, (a) the Guantánamo Detainee Assessment Briefs, (b) the Iraq and Afghan War diaries, (c) the Iceland cable, and (d) the collateral murder video;

ii. Secondly, it is impossible for Manning to have downloaded any data '*anonymously'* from any government database using the FTP user 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)) required no accounts, or login information *at all*. Rather they were accessible to anyone who, like Manning, had SIPRNet[37] access (Eller, Tab 17, paras 39-41 / Tr 25.9.20, xic, pgs.29-30 – unchallenged); and anyway;

- Manning *'could [not] have downloaded materials from those sites without possibility of being traced'* (Eller, tr 25.9.20, xic, pg.30), because, as the US Government agreed in evidence (Tr 25.9.20, pg.43), 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'* even if Manning *had* logged on using a different user account (Eller, tab 17, paras 42-50 / Tr 25.9.20, xic, pg.30 / re-x, pg.52).[38]

- Yet other databases (namely Active Directory or T drive) did require domain accounts, not the local accounts that Manning was discussing

[36].'*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, pg.10999).
[37].Secret Internet Protocol Router Network (Eller, Tab 17, para 6).
[38].The IP address would attach to the specific computer, and the timing of the activity would then serve to identify which specific user (day shift or night shift) was responsible (Eller, Tr 25.9.20, re-x, pgs.53-54).

(Eller, Tab 17, paras 53-55 / Tr 25.9.20, xic, pgs.27, 29 – unchallenged / re-x, pg.53).

12.26. 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, paras 55, 60-61). '*Forensic evidence of activity on the FTP account...would be available in the image of the computer itself'* (Eller, Tr 25.9.20, xx, pgs.46-47). This is a matter of '*basic technical knowledge'* (Eller, Tab 17, para 63 / Tr 25.9.20, xx, pg.30).

12.27. 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).

12.28. Thus, Mr Eller gave unchallenged evidence that:

i. The Guantánamo Detainee Assessment Briefs (counts 1, 6, 9, 12, 18): emanated from US Southern Command (H17 p6775) located on Intelipedia (Eller, Tab 17, para 41) (Motes, H8 pg.8734) accessible on the SIPRNet (Eller, para 39), open to thousands of military and non-military personnel (H17 pg.6744),[39] all of whom had unlimited access (H17 pg.6745) and was navigated using the 'Intelink' search engine (Eller, Tab 17, para 41, 45-46) (Buchanan, H5 para 1) (H10-11);

- Manning already had access to, and had uploaded these on 8 March 2010 (Eller, tab 17, paras 24, 37, 59; Dwyer para 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 (Eller, Tr

[39]. In the region of 2½ or 3 million people (Grothoff ex 3, Tab 47). '*Probably millions'* (Eller, Tr 25.9.20, re-x, pg.52).

25.9.20, xic, pg.31) - because SIPRNet and Intelink **(a)** required no account or login information or password (Eller, Tab 17, paras 39, 41, 60) (Buchanan, H5 para 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, Tab 17, paras 42-46) (Buchanan, H5 paras 6-8) (H10-11).

ii. Likewise, the cables (counts 1, 3, 7, 10, 13, 17): were on the NetCentric Diplomacy Portal database (Eller, Tab 17, para 39) (H17 pg.6761), accessible via the SIPRNet (Eller, Tabs 17, 39) (H17 pgs.6744-5) by all analysts (H17 pgs.6761, 6781-2) (Capt. Lim, H18 pgs.9885-7):

- Manning already had access to the cables, and had uploaded some on 15 February 2010 (Eller, Tab 17, paras 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 (Eller, Tr 25.9.20, xic, pgs.31-32) - because, access to NetCentric on SIPRNet and Intelink **(a)** required no account or login information or password (Eller, Tab 17, paras 39-40, 47-48, 60) (Capt. Lim, H18 p9887), **(b)** were tracked instead via IP addresses not user accounts (Eller, Tab 17, paras 42-47) (Buchanan, H5 para 6-8) (Janek, H16, paras 2, 6).

iii. The Rules of Engagement (counts 1, 4, 8, 11, 14): These and the video were available on Active Directory within the T-Drive (H17 pgs.6764-7) (Bundle M2, Tab 499, p37):

- Manning already had access to, and had uploaded these on 21 February 2010 (Eller, Tab 17, paras 24-25, 37, 59); before the '*passcode hash'* conversation on 8-10 March 2010; and

- That database was inaccessible at all without a domain account invitation (Capt. Cherepko, H8 pgs.8643-4, 8668-9, 8672-3) (Chief Rouillard, H12 pgs.8910-2) (Sergeant Madaras H9 pg.8041). Using a different local computer user account would not give access to the T Drive / Active Directory *at all*, let alone anonymous access (Eller, Tab 17, paras 53-55 / Tr 25.9.20, xic, pgs.27, 32).

iv. Likewise, the Iraq and Afghan War diaries (counts 1, 15, 16): these are the 'Sigacts'[40] (H17, pgs.6741-3) published on the 'CIDNE'[41] database (H17, pg.6743) on Active Directory within the T-Drive (Eller, Tr 25.9.20, xic, pg.30):

- Manning already had access to, and had uploaded these on 3 February 2010 (Eller, Tab 17, paras 24, 37, 59; Dwyer para 30); before the '*passcode hash'* conversation on 8-10 March 2010; and
- As with the Rules of Engagement, the CIDNE database on the Active Directory was inaccessible without a domain account. Using a different local computer user account would not give access to it *at all*, let alone anonymous access (Eller, Tr 25.9.20, xic, pgs.30, 32).

12.29. 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'.*

12.30. The evidence summarised above shows that the '*passcode hash'* conspiracy allegation, the purpose of which was alleged to have been to facilitate anonymous access to the databases, is completely misleading.

12.31. Applying ***Zakrzewski*** para 13:

[40].Significant Activity Reports.
[41].Combined Information Data Network Exchange. In particular on the CIDNE-I (Iraq) and CIDNE-A (Afghanistan) sub-databases.

i. 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)*';

ii. 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;

iii. 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. 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.

So the US allegation morphs

12.32. Mr Kromberg now suggests (Kromberg 4, paras 10-17) that it is '...*not alleged that the purpose of the hash-cracking agreement was to gain anonymous access to the NetCentric Diplomacy database or, for that matter, any other 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)*...'.

12.33. Mr Kromberg details (at Kromberg 4, para 12) four separate stages the 'conspiracy' had to surmount, 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)'.

12.34. As Mr Eller comprehensively showed – in evidence that was not challenged - having anonymous access to a different SIPRNet computer account could not conceivably further either of the first two of those stages. '*Stages 1 and 2 could not have been achieved anonymously*' (Eller, Tr 25.9.20, xic, pg.33 – unchallenged).

12.35. Mr Eller candidly accepted that '*using the FTP user account would have provided some anonymity for the task of exfiltrating materials from the government machine onto a non-government machine, stage [c] of Mr Kromberg's analysis*' (Eller, Tr 25.9.20, xx. pgs.46-47 / re-x, pg.54).

12.36. But, as he also said:

i. Manning already had the facilities to do just that, anonymously, using the Linux CD in her possession. In fact, she had used the Linux CD for that very purpose (Eller, Tab 17, para 64 / Tr 25.9.20, xic, pg.34). The CD already afforded Manning '*access to all of the files on the computer by bypassing all of the Windows security features…and we know that that was done [by her previously] based on that is how the SAM file was accessed using that exact method'* (Eller, Tr 25.9.20, xic, pg.34). '*And [this is] something that the Government's own experts spoke about in detail in the court martial*' (Eller, Tr 25.9.20, xic, pg.34). '*The capability could have been provided by the Linux CD as well...So the benefit that Mr Kromberg suggests could have been obtained from getting into the FTP user account was already available...to Chelsea Manning because she had the Linux Live CD*' (Eller, Tr 25.9.20, re-x, pg.54). Manning obtained this access to all files on the computer via the Linux CD independently and before the hash cracking conversation.

ii. More importantly still, using the FTP user account (or even the Linux CD) would have left the <u>original</u> download from stages **(a)** and **(b)** <u>still traceable to Manning's own computer</u>. All the '*forensic artifacts'* that Mr Kromberg details (at Kromberg 4, paras 13-14), and which were put to Mr Eller in evidence (Tr 25.9.20, xx, pg.46), relating to stages **(a)** and **(b)** <u>would remain</u> on her

computer. '*If Chelsea Manning had used the FTP user account to move materials from her SCIF computer onto her personal laptop and then used the personal laptop to upload it to WikiLeaks...the original download onto the SCIF computer still be traceable to her'* (Eller, Tr 25.9.20, xic, pg.33). '*Would [using the FTP user acocunt] have achieved anything by way of disguising the activity of accessing documents from the databases originally?..No, it would not...because the IP trail would have led...back to the same computer'* (Eller, 25.9.20, re-x, pg.54).

12.37. In sum, Mr Eller's evidence, unchallenged on this issue too, shows that access to the FTP user account still fails to enable the suggested conspiracy to be furthered; even in its new incarnation.

And morphs again

12.38. Finally, presumably with knowledge of this in mind, Mr Kromberg evasively suggests a third version of the 'hash cracking' conspiracy purpose. Now it is put as '*use for Manning's ongoing theft of [other] classified information generally*' (Kromberg 4, paras 11, 17). I.e. a roaming criminality again, untethered from the receipt or publication of the war diaries, Guantánamo briefs, rules of engagement or cables.

12.39. That, of course, is not the conduct that underlies the notional UK charges for dual criminality purposes, nor could it.

12.40. Nor is it a theory that meets the unchallenged defence evidence in any event. The evidence shows that it is impossible for Manning to have downloaded any data anonymously from the FTP user account. Eller's evidence is not merely that Manning could not use the FTP user 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).

The US also conceals Manning's obvious, true, purpose

12.41. The court will lastly note that Mr Kromberg's evidence 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)[42] (Eller, Tab 17, paras 8-11), namely installing programs to play movies and music:

i. In addition to the instillation of other unauthorised programs (Eller, Tab 17, paras 69-72 / Tr 25.9.20, xic, pg.34) (Capt. Cherepko, H8 pgs.8642-3) (Sgt. Madaras H9 pgs.8028-42) (Chief Warrant Officer Ehresman H13 pgs.9848-50) (H19 pgs.139-141, 145);

ii. Unauthorised use of computers for listening to music or watching films was '*commonplace'* amongst Manning and her colleagues (Eller, Tab 17, paras 67-69, 79-82 / Tr 25.9.20, xic, pg.34) (multiple US witnesses, H19 pgs.252-3, 269) (Sgt. Madaras, H1 pg.112, H9 pg.8034) (Milliman, H8 pgs.9705-6);

iii. Cracking of administrator passwords in order to install programs was a '*common occurrence*' (Eller, Tab 17, paras 73-74 / Tr 25.9.20, xx, pg.47) (Milliman, H8 pgs.8707, 8711).;

iv. Manning was known to have a keen interest and skill in this respect. She assisted colleagues to do this (Eller, Tab 17, paras 79-82) (Sgt. Madaras, H9 pg.8028) (Showman, H15 pg.7754), and had done so even at the request of her own superior (Capt. Fulton, H19 pgs.142-3, 145, 252);

v. Manning had even been openly discussing cracking passcode hashes with her colleagues (Eller, Tab 17, paras 77-78) (Stadtler, H13 pg.9854);

vi. Mere days before the Jabber conversation on 8-10 March 2010, Manning's computer had been re-imaged (wiped and re-set with a fresh operating system), and to re-install programs for music and films, the administrator access thus needed to be bypassed again (Eller, Tab 17, paras 83-88 / Tr 25.9.20, xic, pgs.35-36 / xx, pg.48) (Shaver, H20, pg.130) (Sgt. Madaras, H9 pgs.8040-1).

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

vii. As Mr Eller told this Court, the FTP user account would have provided such administrator access; '*it is a file transfer protocol account that is typically used by administrators that that account could possess administrator privileges...the FTP user account would provide you access to the local system to be able to install [unauthorised programs, film] files'* (Eller, Tr 25.9.20, xic, pg.35 / xx, pg.48). '*I am explaining that...the local accounts on this system looks like it did have administrative privileges...based on [my] experience as an expert forensic examiner'* (Eller, Tr 25.9.20, re-x, pg.55).

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

12.42. 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 paras 4, 8) through publication of the War diaries (Dwyer paras 39, 41, 44, 45) and the Cables (Dwyer paras 36, 39, 42, 44). The Government's arguments have been, accordingly, devoted almost entirely to this issue. But it is also likewise '*wrong'* on a number of levels.

i. As detailed above, Mr Assange is a journalist and these publications were '*the essence of journalism*' (Feldstein 1, Tab 18, para 3) (Jaffer, Tab 22, para 27 - agreed s.9). '*To such people, we owe a great deal'* (Tigar, Tab 23, pgs.4-8 - agreed s.9). Investigative national security journalism, and press freedom, is the '*avowed target of this prosecution'* (Tigar, Tab 23, pg.8 - agreed s.9).
ii. 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, para 6 / Tr 8.9.20, xic, pgs.35-36) (Jaffer, Tab 22, para 14 - agreed s.9).

12.43. But most importantly for ***Zakrzewski*** purposes, the factual allegation of wilfully reckless data-dumping of classified materials[43] 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).

12.44. WikiLeaks held back information while it formed media partnerships with prominent organisations around the world, including with the Guardian, the New York Times, Der Spiegel and the Telegraph (Goetz, Tab 31, para 6 / Tr 16.9.20, xic, pg.4 – unchallenged) (Worthington, Tab 33, para 4 - agreed s.9), as well as local operations '*all around the world'* selected for their local knowledge (Goetz, para 25 / Tr 16.9.20, xic, pgs.10-11 – unchallenged), such as L'espresso in Italy (Maurizi, Tab 69, paras 16, 45 - agreed s.9), or the New Zealand Star-Times (Hager, Tab 71, paras 15-17; Tr 18.9.20, xic, pg.8 – unchallenged); all of whom 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. 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'* (Hager, Tab 71, para 28). '*I can tell you from my experience was that the material I was reading was – I was comfortable that there were not risks to [sources] and I am experienced in this*' (Hager, Tr 18.9.20, xx, pg.19).

12.45. As Mr Hager, one of the local media partners, told this Court '*the idea that WikiLeaks had come up with to try to have a more rigorous process of publication, and simultaneously vetting their documents to make sure that there were no people who were harmed by the publication of them and that the right redactions were made, was, first of all, to bring in some very large media outlets, major world news media, but also for an area like Australasia and New Zealand and Australia to invite people*

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

like me, who knew the area and could...be the local eyes that would recognise where the risks were and what areas should be redacted...the deliberate strategy was to not just have every country in the world that all the cables came out at once, but to go from region to region and countries that had the capability as WikiLeaks to hear - to hear what documents needed to be redacted, redact them and then move on to the next area. So it was a deliberately slowed down process...[it was a thoroughly] careful and diligent process...My experience of it was that they were very serious about what they were doing, that they were being careful and responsible. In fact, my - my main memory of my time with them working on the project, and this gives a picture of it, was just people working hour after hour in total silence because they were so concentrated on the work' (Hager, Tr 18.9.20, xic, pg.8).

12.46. Thus:

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

- Were materials assessed by Manning to be historical non-sensitive data (H17 pgs.6742-3). The evidence of US Government officers at Manning's Court Martial was that these materials did <u>not</u> disclose key human intelligence sources (Chief Warrant Officer Ehresman, H13 pgs.9805-7) (Capt. Lim, H18 pgs.9881-3).

- WikiLeaks nonetheless took the issue of redaction seriously.[44] The contrary suggestion is '*bluntly false'* (Ellsberg, Tr 16.9.20, xx, pg.56). The media partners' work on the <u>Afghan</u> diaries to ensure they were vetted to prevent harm was '*constant*' (Goetz, Tab 31, paras 5-17 / Tr 16.9.20, xic, pgs.5-6 – unchallenged). The process even included the partnership communicating with the White House directly in advance of releasing them (Goetz, Tab 31, paras 14-15 / Tr 16.9.20, xic, pg.6 – unchallenged). On 25 July 2010, WikiLeaks therefore held back the publication of 15,000 documents, even after media partners had published their respective stories, to ensure its *'harm minimisation*

[44]. Explaining that it was '*important to protect certain US and ISAF sources*': (Bundle P, Tab D34).

process' (Goetz, Tab 31, paras 15-16 / Tr 16.9.20, xic, pg.6) (Maurizi, Tab 69, para 45 - agreed s.9). '*Those names were redacted*' and have never been released (Goetz, Tr 16.9.20, xx, pgs.18-20). Mr Assange even '*requested help from the State Department and the Defence Department on redacting names and they refused'* (Ellsberg, Tr 16.9.20, xx, pg.56) (Goetz, Tr 16.9.20, xic, pg.6 – unchallenged).

- Redaction of the Iraq War diaries was likewise '*painstakingly approached'* and involved the development of specially devised redaction software (Sloboda, Tab 63, para 4 / Tr 17.9.20, xic, pgs.7-8). '*It was impressed upon us from very early in our encounter with Mr Assange and WikiLeaks that the aim was the very, very stringent redaction of the logs before publication...That was the aim of Mr Assange and WikiLeaks... to ensure that no information which could be damaging to living individuals, including those involved, or others, would be present in the version of the logs which was made public'* (Sloboda, Tr 17.9.20, xic, pg.7). This included guarding against '*jigsaw risk'* and thus involved the redaction of other information from which identities could be inferred (Sloboda, Tr 17.9.20, xx, pg.12). Publication was even delayed in August 2010, for redaction processes, despite this bothering some media partners (David Leigh), because Mr Assange *'did not want to rush'* and the WikiLeaks team required more time *'to redact bad stuff'* (Goetz, Tab 31, para 19 / Tr 16.9.20, xic, pg.8 – unchallenged). '*There were considerable pressures on the co-founder of WikiLeaks to hurry up because the partners wanted to publish and those pressures were consistently and clearly rejected. They could not be published before a redaction had been agreed with which everyone was satisfied, and that was stuck to completely consistently with no equivocation*' (Sloboda, Tr 17.9.20, xic, pg.8). 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*' (Sloboda, Tab 63, para 4).

- WikiLeaks was even criticised at the time for *'over redaction'* of materials (Sloboda, Tr 17.9.20, xic, pg.8 – unchallenged), even redacting more than the Government did. '*There was a Freedom of Information Act request and more information was released by the department of defence FOIA than actually had been in the WikiLeaks redaction process'* (Goetz, Tab 31, para 20 / Tr 16.9.20, xic, pg.7 – unchallenged). 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 (Bundle P, Tab E54).

- WikiLeaks ultimately published the Afghan War Diary <u>after</u> the media partners (both Der Speigel and Guardian) first published the Afghan materials (Goetz, tab 31, para 17 / Tr 16.9.20, xic, pgs.6-7 – unchallenged).

ii. <u>The Rules of Engagement</u> (counts 1, 4, 8, 11, 14):

- Are not suggested by the US government to have contained sensitive names or '*put lives at risk'*.

iii. <u>The Guantánamo Detainee Assessment Briefs</u> (counts 1, 6, 9, 12, 18):

- Were old and unclassified (H17 pg.6777) and are not suggested by the US government to have contained sensitive names or '*put lives at risk'*.

- Were also nonetheless the subject of media partnership (Goetz, Tab 31, para 26 – unchallenged) designed to publish '*without risking damage to persons who could not be protected*' (Worthington, Tab 33, paras 3, 11-12 - agreed s.9);

iv. <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 '*NoDis'* (H17 pgs.6781-2), and were mostly unclassified and non-sensitive (H17 pgs.6761, 6782) (Eller, Tab 17, paras 48-50) (Janek, H16 para 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, paras 21-25 / Tr 16.9.20, xic, pg.11 – unchallenged) (Maurizi, Tab 69, paras 24, 45 - agreed s.9). See generally (Bundle P, Tabs C1-154).

- The 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, para 22 / Tr 16.9.20, xic, pg.11 – unchallenged) (Augstein, Tab 32, pg.2 - agreed s.9).

- *'It was a very rigorous redaction process and, as far as I know, no names came out of that period'* (Goetz, Tr 16.9.20, re-x, pg.21). It was a process that was in place right up to September 2011 and, so far as WikiLeaks was concerned, was going to continue being operated for another year thereafter as the – responsible, redacted, '*rollout'* of the cables continued (Goetz, Tr 16.9.20, xx, pg.17 / re-ex, pg.24).

- Note the extended discussion of steps taken and context in the state department call of 26 August 2011 (Bundle P, Tab C277).

- The US request acknowledges that '*Assange published...the cables in redacted form beginning in November 2010'* (Dwyer para 44). Counsel for the US government even confirmed that '*I am not talking about any cables or documents which were published during the period of collaboration between The Guardian, The New York Times and Der*

Spiegel and WikiLeaks before late August and early September 2011' (Tr 16.9.20, pg.17).

12.47. 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 paras 44, 36).

12.48. The US government knows well (but has withheld from this Court) that this 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'* outside of the control of Mr Assange or indeed WikiLeaks, and despite Mr Assange's '*strong attempts to prevent'* it (Goetz, Tab 31, para 31 / Tr 16.9.20, xic, pg.12 / xx, pg.14). The following facts are evidenced before this Court but are in the public domain and known to the US government:

i. 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 (Grothoff 1, Tab 37, para 1 / Tr 21.9.20, xic, pg.4). In order to access encrypted data, it would be necessary to know both the location of the ciphertext 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, pg.3 / Tr 21.9.20, xic, pg.4). Encryption of sensitive data online in this way is '*common practice'*, routine, '*perfectly acceptable'* (Grothoff 2, Tab 60, para 12/ / Tr 21.9.20, xic, pg.4 / re-x pg.48).

ii. The secret – and robust - key to this 'obscurely' located file (accessible only to someone who knew the exact URL) had been '*reluctantly'* shared by Mr Assange with one of the media partners, David Leigh of the Guardian (Grothoff, Tr 21.9.20, xic, pgs.3-4 / xx, pgs.19, 22-23 / re-x, pgs.47-48). In doing so, Mr Assange had written down only part of the key, and verbally informed Mr Leigh of the additional portion (Grothoff, Tr 21.9.20, pg.48). There is nothing to suggest that anyone other than David Leigh received the key (Grothoff, Tr 21.9.20, re-x, pgs.46-47).

iii. During late 2010, it had become necessary to '*mirror'* or replicate the WikiLeaks site in numerous locations across the internet as a result of cyberattacks made against the website (Grothoff 1, Tab 37, paras 2-4 / Tr 21.9.20, xic, pgs.5-6) (Tab 47, ex 4-7). See generally (Bundle P, Tabs C2, C169-173, C185-197).

iv. WikiLeaks' mirroring instructions did not include, and did not lead to the duplicating of, the ciphertext file (the encrypted cache of cables) (Grothoff, Tr 21.9.20, xic, pg.10 / xx, pgs.25-26 / re-x, pg.49). However, a small number of mirrors, created independently by internet users and using different software, did include the ciphertext file (Grothoff, Tr 21.9.20, xic, pgs.6-8 / re-x, pg.50).

v. The mirrored file remained encrypted and was '*useless'* (Grothoff, Tr 21.9.20, xic, pg.8).

vi. In February 2011, David Leigh inexplicably (Grothoff 2, Tab 60, para 13), and for his '*own reasons'* (Hager, Tr 18.9.20, re-x, pg.22),[45] unilaterally published the entire encryption key to the ciphertext in a book (Grothoff 1, Tab 37, para 5 / Tr 21.9.20, xic, g.p8 / xx, pg.24) (Tab 47, ex 2, pgs.135, 138-9) (Bundle P, Tab C201). David Leigh's book also '*explained that this was the passwords he had been given by Julian Assange to decrypt the cables, so a very revealing publication*' (Grothoff, Tr 21.9.20, xic, pg.8).

vii. WikiLeaks had no means of removing a file that appeared on third party mirrors: *'WikiLeaks was not in control of the many mirrors of [the ciphertext] already online'* (Grothoff 1, Tab 37, para 5 / Tr 21.9.20, xic, pgs.8-9). Neither did WikiLeaks have the power to change the passcode; once created, it *'never changes'* (Grothoff 1, Tab 37, para 1 / Tr 21.9.20, xic, pg.9) (Grothoff 2, Tab 60, para 11 / Tr 21.9.20, xic, pg.4).

viii. The 'secret' lay dormant for months until 25 August 2011 when Der Freitag reported that it had *'discovered a copy of the full [cables] archive 'on the internet' and was able to decrypt it using a passphrase also found 'on the internet'* (Augstein, Tab 32 - agreed s.9) (Tab 47, ex 8-9) (Bundle P, Tab C203) - which revelation therefore drew *'public attention to David Leigh's information leak'* (Grothoff 1, Tab 37, para 6 / Tr 21.9.20, xic, pg.9). '*The story*

[45].Whose relationship with the media partners had broken down by this point (Goetz / Tr 16.9.20, xic, pg.13), '*I am very aware through a list of journalism networks that there was bitter animosity between David Leigh and Julian Assange by this time*' (Hager, Tr 18.9.20, xx, pg.15).

in Der Freitag, which is still accessible today, is crucial because it was the first published story to put these things together' (Grothoff, Tr 21.9.20, xx, pgs.14, 30).

ix. Prior to the publication of the Der Freitag article, Mr Assange had contacted the paper's editor to prevent the revelation (Augstein, Tab 32, pg.3 - agreed s.9), but the article was published anyway. Assange was '*trying to get the Freitag article not to appear. They made great efforts to stop this from happening'* (Goetz, Tr 16.9.20, re-x, pg.25).

x. Now, the '*cat was forever out of the bag'* and internet users immediately began the search for both the file and password (Tab 47, ex 9, pg.8) (Grothoff, Tr 21.9.20, xic, pg.9).

xi. Mr Assange, now '*acutely troubled'* by the prospect of unintended unredacted publication (Maurizi, Tab 69, paras 45-46 - agreed s.9), then set about immediate steps to try to prevent or minimise it:

- On 25 August 2011 (the date of the Der Freitag publication), Mr Assange contacted the US Ambassador in the UK (Bundle P, Tabs 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, para 31 / Tr 16.9.20, xic, pg.12 – unchallenged) (Peirce 4, Tab 36, para 11 - agreed s.9). The Court has the transcript of this call at (Tab 37, attachment 1).

- Mr Assange's attempts to warn the US government continued over the following days and were personally witnessed by Ms Maurizi (Maurizi, Tab 69, para 49 - agreed s.9) (Bundle P, Tabs C221-227).

- This Court has a transcript of Mr Assange's 75-minute call to the State Department on 26 August (Bundle P, Tab C227) and is invited to read it. In that call, for example, Mr Assange explains that he has attempted legal action against individuals in Germany to prevent the imminent third party uncontrolled dissemination of the unredacted cables, but these attempts have failed. In light of that, WikiLeaks had commenced the release of all of

the unclassified cables as a means of distracting the public from the Der Freitag revelation. Assange tells the State Department lawyer: '*we release cables slowly, to media partners, and went through every cable and redacted source identities accordingly...journalists and human rights activists reading cables, redacting them and putting them out through us, which is what has been happening...we have written legal demands [...] through our German lawyers [...] to not publicly reveal the key information that would permit them to spread...What we want the State Department to do is to step up its warning procedures which it was engaged in earlier in the year, like last year, to State Department sources mentioned in the cables...in case they are any individuals who haven't been warned that they should be warned. Insofar as the State Department can impress upon people within Germany to encourage them to desist that behaviour that would be helpful'.*

12.49. Likewise, on 29 August, WikiLeaks' attempted to further deflect the public by suggesting that the Der Freitag article was '*false'* (Grothoff, Tr 21.9.20, xx, pg.31).

12.50. By 31 August 2011, however, spurred by the Der Freitag hint, *'well known'* US-based Cryptome.org published the text of the *'specific passphrase and [the exact name of] which file it decrypts'* online (Tab 47, ex 9, pg.9) (Grothoff, Tr 21.9.20, xx, pgs.34, 38, 40) (Bundle P, Tabs C205-207, 228).

12.51. By 10pm on 31 August, others, such as Nigel Parry, had also published the same password (Grothoff, Tr 21.9.20, xx, pgs.38-40) (Tab 47, ex 9, pg.8).

12.52. The chronology of what happened over the next 48 hours (i.e. the publication of the unredacted cables themselves) was the subject of detailed questioning of Prof. Grothoff, and is the subject of detailed evidence - but in the end was '*not disputed'* by counsel for the Government (Tr 21.9.20, pg.55) to include:

i. By or before 11.27pm on 31 August 2011: [46] an internet user named Nim_99 '*uploaded the unredacted cables onto the internet'* (Tab 47, ex 9, pg.8) (Grothoff, Tr 21.9.20, xx, pg.40);

ii. By or before 12.27am on 1 September 2011:[47] the cables were available on Cryptome (Tab 47, ex 9, pgs.8-9) (Grothoff, Tr 21.9.20, xx, pgs.40-41) (Maurizi, Tab 69, para 48 - agreed s.9);

iii. By 11.23am on 1 September 2011, the Pirate Bay website contained a BitTorrent link (posted by 'yoshima') to the unredacted cable archive (Grothoff, Tr 21.9.20, xx, pg.41);

iv. By 1.09pm, the Pirate Bay website contained another BitTorrent link (posted by droehien') to the unredacted cable archive (Grothoff 1, Tab 37, para 8 / Tr 21.9.20, xx, pg.41) (Tab 47, ex 11) (Bundle P, Tabs C211-212);

v. The US Government even obtained a copy from Pirate Bay (Grothoff 2, Tab 60, para 10) on 1 September 2011.

12.53. At 7.58pm on 1 September 2011: mrkva.eu published *'the first searchable copy of the cables'* (Grothoff 1, Tab 37, para 7 / Tr 21.9.20, xx, pgs.34-37) (Grothoff 2, Tab 60, paras 7-8) (Bundle P, Tab C209).

12.54. By 1 September 2011, the cables were now available to anyone able to operate a computer (Grothoff 1, Tab 37, para 9) (Grothoff 2, Tab 60, para 6).

12.55. These *'were unpredicted actions by others that resulted in publication against [Mr Assange's] wishes'* (Goetz, Tab 31, para 32 / Tr 16.9.20, xic, pg.12). '*Every possible step had been taken for over a year to avoid it'* (Maurizi, Tab 69, para 48 - agreed s.9).

12.56. 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, para 44), and the linked allegation of '*intentional outing of intelligence sources'* (Kromberg 1, paras 8-9, 20-22) (Kromberg 2, para 10) - was, in truth, and uncontrovertibly, the re-publication, on 2 September, of the now-public database

[46]. '*Within an hour'* of the WikiLeaks statement at 10.27pm on 31 August (Tab 47, ex 9, pg.8).
[47]. '*Within a couple of hours'* of the WikiLeaks statement at 10.27pm on 31 August (Tab 47, ex 9, pg.8).

which had *'already been published by others'* (Grothoff 1, Tab 37, para 9 / Tr 21.9.20, xic, pg.12 / xx, pg.43) (Tab 47, ex 12) (Maurizi, Tab 69, para 50 - agreed s.9) (Goetz, Tab 31, para 31 / Tr 16.9.20, xic, pg.12 / xx pg.14 / re-x, pgs.24-25) (Hager, Tr 18.9.20, xx, pg.14 / re-x, pg.21).[48]

12.57. WikiLeaks did so in circumstances where, according to WikiLeaks, '*the full database [was already] downloadable from hundreds of sites*' (Grothoff, Tr 21.9.20, xx, pgs.42-43; citing a WikiLeaks editorial said to have been posted at 11.44pm on 31 August).

12.58. It is '*very much...wrong...it is unfair...to accuse Mr Assange of having published the unredacted, unclassified cables'* (Grothoff, Tr 21,.9.20, xx, pg.17).

12.59. More importantly, as a matter of law, 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.

12.60. Proof that the disclosure is or is likely to be damaging is a necessary ingredient of the OSAs in the UK:[49] unlike under US law (Jaffer, Tab 22, para 6 - agreed s.9) (Dwyer).[50]

The US response (Kromberg)

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

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[48].Condemnation of WikiLeaks by media partners in the immediate wake of 2 September 2011 (of the type that was put to various witnesses) was '*made at a stage before the chain of events was actually known'* (Goetz, Tr 16.9.20, xx, pg.18). As Mr Hager also observed (Tr 18.9.20, re-x, pgs.21-22), the probable reason that the actions of Cryptome etc. resulted in no actual harm to the sources exposed by their unredacted publication on 31 August / 1 September - was likely the time taken by WikiLeaks during November 2010-August 2011 to carefully redact, which afforded time to the US Government to warn those sources.

[49].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 paras 12-13, 18. That is to say damage '*beyond the damage inherent in disclosure by a former member of these services'* (para 36).

[50].Under US law there is no requirement even to show *intention* to cause damage (Shenkman, tab 4, paras 23, 28-29) (Jaffer, Tab 22, para 7 - agreed s.9) reason to believe that damage may be caused is sufficient (Dwyer).

i. 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, para 31), but:

- The August 2010 Frontline Club speech put to various witnesses simply confirms on its face that Mr Assange did understand and acknowledge the '*obligation to protect other people's sources...from unjust retribution'* (Hager, Tr 18.9.20, re-x, pgs.22-23).
- As to David Leigh's account of a conversation from Moro restaurant (put to various witnesses, except the single one who was actually present, Mr Goetz): '*I am very aware through a list of journalism networks that there was bitter animosity between David Leigh and Julian Assange by this time and I would take anything written by the people defending their own side here with a grain of salt. I do not actually want to dignify it by having to comment on something with such loaded hearsay... [as] a source that is really potentially unreliable'* (Hager, tr 18.9.20, xx, pg.15 / re-x, pg.22). '*I am not going to judge either Mr Leigh or Mr Assange based on page 111 of a book'* (Stafford-Smith, Tr 8.9.20, xx, pg.25).

- No single witness agreed that David Leigh's story accorded with what they had witnessed or observed: '*the WikiLeaks people...invited me into a process of great care and protection and trying to redact and to avoid any damage to any people when the data was being looked...I do not believe that Julian Assange or the others somehow changed their minds later and did not care anymore... I was part of the process of redaction*' (Hager, Tr 18.9.20, re-x, pg.21). Mr Ellsberg was even more clear in telling this Court that Mr Assange's actions were '*[un]answerably antithetical to the notion that he purposefully revealed such names since he took major important actions to redact*' (Ellsberg, Tr 16.9.20, xx, pg.62).

12.62. Ultimately, and much more importantly, the Government does not dispute that Mr Assange 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, para 16). It was '*a process of great care and protection and trying to redact and to avoid any damage to any people when the data was being looked at'* (Hager, Tr 18.9.20, re-x, pg.21). '*It was a cautious process'* (Maurizi, Tab 69, para 45 - agreed s.9).

12.63. The related suggestion that Mr Assange's redaction '*efforts'* extended only to those whose names were successfully redacted by that process (Kromberg 4, para 33), i.e. he made no '*efforts'* at all to protect the names of persons which were revealed, is simply inconsistent with the evidence. The evidence concerning WikiLeaks' tireless efforts, throughout 2010 and 2011, to redact is legion. Their efforts extended to, for example, to the desperate calls to the State Department on 25 and 26 August 2011 when *others* were poised to reveal the names of sources.

12.64. 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, para 37).

12.65. As stated above, the key to the 'temporary website' had been '*reluctantly'* shared by Mr Assange only after Mr Leigh insisted (Grothoff, Tr 21.9.20, xic, pgs.3-4 / xx, pgs.19, 22-23 / re-x, pgs.47-48). In doing so, Mr Assange had written down only part of the key, and verbally informed Mr Leigh of the additional portion (Grothoff, Tr 21.9.20, pg.48). There is nothing to suggest that anyone other than David Leigh received the key (Grothoff, Tr 21.9.20, re-x, pgs.46-47). Ms Maurizi, for example, described an entirely different means of receiving the US diplomatic cables from WikiLeaks in January 2011: an encrypted USB stick for which she received a password upon arrival in Italy (Maurizi, Tab 69 para 17 - agreed s.9).

12.66. In any event, as also stated above, the evidence is that encryption of sensitive data online[51] in the way WikiLeaks provided it to Mr Leigh is routine (Grothoff 2, Tab 60, para 12). '*Keeping passwords private is very basic'* (Maurizi, Tab 69, paras 22-23 - agreed s.9). The media partnerships were formed upon the basis of clearly stipulated security procedures and guidelines for handling and publishing the material securely (Maurizi, Tab 69, paras 17-22 - agreed s.9), which were according to Goetz '*more extreme measures taken'* than he had *'ever observed as a journalist'* to *'secure the data'* (Goetz, Tab 31, para 13 / Tr 16.9.20, xic, pgs.5, 11 – unchallenged). WikiLeaks pioneered methods for secure communications which have *'become the norm amongst investigative journalists'* (Goetz, Tab 31, para 28 / Tr 16.9.20, xic, pg.5 – unchallenged).

12.67. Thirdly, and relatedly, Mr Kromberg cites David Leigh's assertions about whether he (Leigh) is to '*blame'* for what occurred (Kromberg 4, para 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.

12.68. 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.[52] Once set, an encryption key *'never changes'* (Grothoff 1, Tab 37, para 1).

12.69. 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, para 38). What Mr Kromberg fails to mention is that these were the unclassified portion of the cables (see Bundle P, Tabs C233-234). '*Those are different'* (Goetz, Tr 16.9.20, xx, pg.16). '*It was unclassified material that was released then'* (Goetz, Tr 16.9.20, re-x, pgs.23-24). '*They decided to release unclassified cables early'* (Grothoff, Tr 21.9.20, xx, pg.28).

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

[52].His own book refers to a '*temporary website'*, not a '*temporary password'* (Grothoff, Tr 21.9.20, re-x, pg.48).

12.70. As stated above, on 26 August 2011 following the Der Freitag publication, 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 an attempt to distract those moving to post 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 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*' (Bundle P, Tab C227).[53]

> '...*WikiLeaks has not released the names of any 'informants'. The material is unclassified and previously released by mainstream media*...' (Bundle P, Tab C233).

12.71. 133,887 is the exact number of unclassified cables in the total WikiLeaks archive (Bundle P, Tab C234).[54] Prof. Grothoff personally '*verified against the archive developed from Cryptome that those were unclassified cables...I specifically checked that the mark was unclassified...if you go through the database and look for unclassified you find 133,887 unclassified cables...[also] the numbers released by country or by embassy...they correlate to the number of unclassified cables within the store referable to that country or embassy...I checked dozens of embassies and they always matched'* (Grothoff, Tr 21.9.20, xx, pg.29 / re-x pgs.51-52).

[53].Note also (Bundle P, tab C217) '...*Over the past week, we have published over 130,000 cables, mostly unclassified. The cables have led 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 redacted classified cables. Those classified cables, as had been the case since November 2010, were released only 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. For a sample of these cables, see (Bundle P, Tabs C50, 56, 65, 70, 78, 82, 92, 96, 107, 115, 118, 134, 139, 144).

[54].See (Bundle P, Tab C157) for verification. And also (Bundle P, Tabs C235-244) for verification of the individual embassy figures.

12.72. It is ultimately telling that Mr Kromberg declines to '*vouch for the accuracy*' of media articles he cites[55] which suggest that some of these cables were classified, and therefore disclosed the names of sources marked 'strictly protect') The articles were and are palpably wrong (as Mr Kromberg well knows). The cables were not, in fact, classified. And, in any event, 'strictly protect' was not a marking which denoted risk to lives; it denoted political sensitivity: *'it was more about the political content'* (Goetz, Tr 16.8.20, re-x, pg.22). '*There were quite a few places where it said 'sensitive,' 'protect,' and words like that, but...there was no threat to the people. There was just a political embarrassment factor, not a risk to their lives'* (Hager, Tr 18.9.20, xx, pg.19). That is why cables containing 'strictly protect' were routinely deemed suitable and safe for publication by the media partners (Goetz, Tr 16.8.20, re-x, pg.22) (Grothoff, Tr 21.9.20, xx, pg.33).

12.73. Fifthly, concerning the 2 September release by WikiLeaks (and ignoring, again, the fact that this was re-publication of material already in the public domain), Mr Kromberg re-asserts the US's unspecific and unsubstantiated allegations of the creation of a risk of possible '*harm'* to unspecified persons (Kromberg 1, paras 25-35, 39, 44, 49, 55, 60-64),[56] often by no more than a recounting of prevailing human rights situations in various countries (Kromberg 1, paras 40-59). Mr Kromberg suggests for example that, even if '*key'* sources were not named by the disclosures, some sources nonetheless were (Kromberg 4, paras 26-29).

12.74. The most obvious point to note is that any such possible exposure to 'harm', if it was caused, was caused by the predicate actions of Cryptome, Pirate Bay etc in releasing the unredacted cables on 31 August / 1 September.

12.75. But, in any event, the point is bad. 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, para 6 and the examples there cited / Tr 8.9.20, xic, pgs.35-36). This case is no different. No *actual* harm occurred:

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[55].Which themselves emanate from a CIA co-operator, Ken Dilanian (Bundle P, Tabs C229-232). '*He was fired from the Los Angeles Times for having discussed his stories with the CIA in advance*' (Goetz, Tr 16.9.20, re-x, pg.23).

[56]. So general to be impossible to investigate, particularly with the passage of time (Peirce 4, Tab 36, paras 15-18 - agreed s.9).

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

- 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'* (Bundle Q Tab 5) (Bundle P, D43).

- The US government wrongfully accused WikiLeaks of publishing 300 names, which it claimed, '*could be endangered'* (Bundle Q, Tab 2). 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 (Bundle Q, Tabs 3-4).

- '...*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 to their release by Wikileaks, ensuring that information that could identify and possibly endanger the living was not available*...' (Sloboda, Tab 63, para 3). The Iraq war diaries '*were published in a wholly appropriate, highly redacted form*' (Sloboda, Tr 17.9.20, xic, pg.8). The suggestion in this case that names were in fact contained in the published Iraq war diaries is the '*first I have heard of it'* (Sloboda, Tr 17.9.20, xx, pgs.20-21).

- In the '*ten years since then, [the US] have not been able to identify a single person that kept the requirement that the State Department mentioned of a person at risk, namely risk of death, physical harm or incarceration, the fact is that not a single one of those did... the risk was not 1 as great as they claimed since no one was harmed. The same was true in the Pentagon Papers. I was told, as they all would say, blood would be on my hands. They were wrong'* (Ellsberg, tr 16.9.20, xx, pgs.56-64 / re-x, pgs.69-71).

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

- Led to physical harm to no-one. See, e.g. (Bundle P, Tab C220) in which an Associated Press review *'finds no threatened WikiLeaks sources*';

- Reuters reported that State Department officials concluded that the publication of diplomatic cables obtained by WikiLeaks *'was embarrassing but not damaging'* (Bundle P, Tab C200).
- Defence Secretary Robert Gates, a former CIA director, is quoted by The New York Times assaying: *'Is this embarrassing? Yes. Is it awkward? Yes. Consequences for U.S. foreign policy? I think fairly modest'* (Bundle P, Tabs C168, C200)
- '*I do not know of any case of anyone having harm from the publication of the diplomatic cables'* (Goetz, Tr 16.9.20, xic, pg.11 – unchallenged).

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'* by the Information Review Task Force ultimately '*failed'*, as was acknowledged by its chair, Brigadier General Carr, at Manning's sentencing hearing (Cockburn, Tab 51, para 12 - agreed s.9) (Ellsberg, Tr 16.9.20, re-x, pg.71). '*This question of harm was the central issue in the Chelsea Manning trial, and as far as I know there is, I have never known of any case of any specific incident where harm has been shown from the release of the documents'* (Goetz, Tr 16.9.20, re-x, pg.23).

12.76. 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 into the public domain. This is not a '*defence theory...for the United States courts to resolve'* (Kromberg 4, paras 35-37), it is, as explained above, an unchallenged fact as such a dual criminality issue: ***Attorney-General v Guardian Newspapers*** (No 2) [1990] 1 AC 109.

12.77. 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, para 9 / Tr 21.9.20, xic, pgs.11-12) (Tab 47, ex 9, pg.9). The unredacted cables hosted by those US-based sites are *still* hosted there (Grothoff 1, Tab 47, ex 14) and Crytome confirms that the US has never requested their removal (Young, Tab 68 - agreed s.9).

Conclusion

12.78. 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*** 4 per Lord Sumption at paras 8-13.[57]

12.79. 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.

12.80. 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 under s.137(3) is, per s.137(7A),[58] 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:

i. The '*draft 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;

[57]. 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 para 52; ***Toliono v San Marino & Italy*** (2012) Appg. No. 44853/10 at para 56.

[58]. And ***Shlessinger***.

ii. The '*passcode hash'* chapter concerned installing unauthorized programs at Forward Operating Base Hammer, not some technically impossible '*plot'* to anonymously steal data to which the '*conspirators'* already had access;

iii. 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.

12.81. This is not, and is not to be confused with, an enquiry into evidential sufficiency. In ***Castillo***, Lord Thomas held, at para 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 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...'*

12.82. Neither is bad faith required; ***Murua*** (at para 59) and ***Zakrzewski*** (at para 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.[59] But bad faith is not legally necessary, and is irrelevant, to the existence of ***Zakrzewski*** abuse***.***

[59].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 paras 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 para 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 para 55), the lack of candour demonstrated in this case is significant.

13. Dual criminality: Disclosing / preventing criminality and gross human rights violations

13.1. 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, para 4). The subject matter of the publications is currently the subject of criminal investigation of the CIA before the International Criminal Court.

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

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

- Evidence of CIA and US forces involvement in a programme of targeted, extra-judicial assassinations in Afghanistan and Pakistan (Stafford-Smith, Tab 64, paras 78-83 / Tr 8.9.20, xic, pgs.5-7 – unchallenged); including the targeting of journalists for death; actions which '*are not only unlawful but morally, utterly reprehensible...a monumental criminal offence and as a lawyer it is my duty to do what I can to prevent'* it (Stafford-Smith, Tr 8.9.20, xic, pgs.5-7 – unchallenged).

- Deliberate killing of civilians (Bundle M2, Tabs 48-54);

- Evidence of the US government-ordered spying on UN diplomats (Feldstein, Tab 18, para 4) (Bundle M2, section 13);

- Proof of previously denied US involvement in the conflict in Yemen, including drone strikes (Bundle M2, Tabs 36-52, 94-113, 117);

- Evidence of the UK training death squads in Bangladesh (Bundle M2, Tab 35).

13.3. '*The cables revealed evidence of renditions and torture, dark prisons, drone killings, assassinations, and the like...the government['s claim they can] keep it all secret, to me that is utterly, utterly mad'* (Stafford-Smith, Tr 8.9.20, re-x, pg.26 – unchallenged).

13.4. Mr Stafford-Smith's unchallenged evidence was that cables, for example, revealed by WikiLeaks[60] 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, paras 84, 91). '*Those were very important in litigation in Pakistan'* (Tr 8.9.20, xic, pg.4). 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, para 91). What '*we have to term criminal offences were taking place*' (Tr 8.9.230, xic. pg.4). 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, Tab 64, para 93). WikiLeaks had '*put a stop to a massive human rights abuse'* (Stafford-Smith, Tab 64, paras 92-93). *'Pakistan was an American ally. It was not like we were doing that to an enemy, and that again is just extraordinary to me'* (Stafford-Smith, Tr 8.9.20, re-x, pgs.26-27). Without the WikiLeaks disclosures, it '*would have been very, very different and very difficult*' to prevent this crime (Stafford-Smith, Tr 8.9.20, xic, pg.5).

13.5. 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 (Bundle Q, Tab 6).

[60].Via the media partners (Stafford-Smith, Tr 8.9.20, xx, pg.13-15).

13.6. The importance of the cables in revealing abhorrent 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, para 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, para 77).

13.7. 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, para 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 paras 191-192).

13.8. 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 pervert such 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, paras 26-28 - agreed s.9) (Goetz 2, Tab 58, paras 4, 10 / Tr 16.9.20, xic, pgs.8-10 – unchallenged) (Stafford-Smith, Tab 64, para 95 / Tr 8.9.20, xic, pg.5 – unchallenged) (Bundle M2, Tabs 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, para 34 - agreed s.9).

13.9. 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, paras 28-42 - agreed s.9).

13.10. The cables similarly demonstrated US interference with other rendition investigations in Spain and Poland (Stafford-Smith, Tab 64, paras 95-96 – unchallenged).

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

13.11. As detailed above, but purposefully excised by the extradition request (Kromberg 1, para 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, paras 21-23; Tr 18.9.20, xic, pg.7) (Bundle P, sections B6-8).[61]

13.12. The US army helicopter video footage from Iraq in 2007 is as '*disturbing'* now as it was in 2010 (Felstein, Tab 18, para 4) (Boyle, Tab 5, para 11) (Yates, Tab 67 - agreed s.9) (Bundle 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, paras 5-6 - agreed s.9). 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 children and one (thought to be Reuters assistant Saeed Chmagh) as he crawled for help (Cockburn, Tab 51, para 8 - agreed s.9). 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, Tab 51, paras 6-8 - agreed s.9).

13.13. 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, para 23 - agreed s.9). The US had also cited the Rules of Engagement '*to justify the initial attack'* (Yates, Tab 67, para 12 - agreed s.9). The Rules of Engagement are '*designed to forestall commission of war crimes'* such as this (Tigar, Tab 23, pg.9 - agreed s.9).

13.14. '*What was depicted in [the video released by WikiLeaks] deserved the term murder, a war crime'* (Ellsberg, Tab 55, para 28 / Tr 16.9.20, xic, pg.47 – unchallenged) (Yates, Tab 67, para 27 - agreed s.9) (Maurizi, Tab 69, para 10 - agreed s.9). The release of the video was '*picked up by thousands of news organisations worldwide, sparking global outrage and condemnation'* (Yates, Tab 67, para 28 - agreed s.9) (Bundle P, sections B9-17). '*It would be hard to overstate how important it was...[it]*

[61].(Bundle M2, Tab 501).

demonstrated...actions were unlawful both under international law and the US military's own Rules of Engagement' (Hager, Tab 71, para 23). '*They had a profound effect on public opinion in the world. Whether they - they had a profound effect through the video, through the accompanying rules of engagement which showed what had gone on and what was wrong with it. And then they were followed, importantly, by the war logs coming out a few months later and the combined net effect of those was to electrify the world for the first time about the issue of civilian casualties in Afghanistan'* (Hager, Tr 18.9.20, xic, pg.7). Mr Assange was invited to speak to the European Parliament on the issue (Maurizi, Tab 69, para 11 - agreed s.9).

13.15. Mr Ellsberg told this Court that '*even more shocking to me and newsworthy [than the video itself]...was the context of that video...we were told in the press was that there had been no punishment because the rules of engagement had not been violated. To say that is to say that the rules of engagement permitted murder and must be changed and were inadequate'* (Ellsberg, Tr 16.9.20, xic, pg.48 – unchallenged). Mr Assange's '*release of [the Rules of Engagement] demonstrated that the rules of engagement are entirely inadequate to assure supporting the laws of war...the two are – go together as an important revelation to the public and to the Government'* (Ellsberg, Tr 16.9.20, xx, pg.50). Obtaining and disclosing the Rules of Engagement alongside the video '*First of all, it gave a yardstick to judge whether they were obeying their own rules of engagement, which is a serious subject, but it also allows the rules of engagement themselves to be evaluated because this was the period where...there was a realisation that civilian casualties were out of control in those two wars...whether the rules of engagement are adequate, whether the rules of engagement also are consistent with the laws of armed conflict. So that is a highly relevant document'* (Hager, Tr 18.9.20, re-x, pg.24).

13.16. One of the results was that the Rules were later changed (Ellsberg, Tr 16.9.20, xic, pg.48 – unchallenged) (Hager, Tr 18.9.20, xic, pg.7 – unchallenged).

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

13.17. 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, paras 8, 14 - agreed s.9),[62] for example:[63]

i. 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;

ii. 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;

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

iv. 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;

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

vi. 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;

vii. 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;[64]

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[62]. 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, paras 9, 42 / Tr 8.9.20, xic, pg.7 – unchallenged).

[63]. (Bundle P, Tabs A1-10). See also (Bundle Q, Tab 7).

[64]. See also (Bundle Q, Tab 8).

viii. Mohammed Ahmed Ghulam Rabbani was subject to the same treatment (Stafford-Smith, Tab 64, paras 54-57 – unchallenged);

ix. 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;

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

13.18. Mr Stafford-Smith's unchallenged evidence was '*You know, we are talking about criminal offences of torture, you know, kidnapping, renditions, holding people without the rule of law, and, sad to say, murder...the US government thought it was OK for them to keep that secret... they said that was a method or a means of interrogation, to murder people in Bagram air force base. I mean that is just beyond my capacity to understand... strappado, which is something that I believe Donald Rumsfeld said was not a big deal, which is hanging people by their wrists and as their shoulders gradually dislocate...it is really shocking to me that [the US has] done this... the psychological torture was worse than the razor blades...all the documentation that WikiLeaks leak, there are all sorts of things identified through there about where people are taken, rendered to different places'* (Stafford-Smith, Tr 8.9.20, xic, pg.10-12). '*We have caught sad, sad, sad, we have caught the United States with its pants down on criminal acts...issues that are just criminality'* (Stafford-Smith, Tr 8.9.20, xx, pg.20).

13.19. 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...' (Bundle Q, Tab 10)

'...*We have brought that based, in part, on the documentation of torture and abuse that came through WikiLeaks*...' (Stafford-Smith, Tr 8.9.20, xic, pg.12).

'...*the ICC are investigating these actions as war crimes...there needs to be an investigation certainly'* (Stafford-Smith, Tr 8.9.20, re-x, pg.27).

13.20. 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, para 4) (Bundle P, Tabs A1-11), even on the '*best face that the US Government could put'* (Stafford-Smith, Tab 64, paras 25-41). The WikiLeaks disclosures were '*really important because the world did not know the allegations... they were very useful for different people to analyse the...total drivel...this core group of informants that were being used to justify the continued detention of a number of people... the world had no idea of the sort of unreliability, shall we say kindly, of the evidence being alleged against my clients...[using the WikiLeaks information] Andy Worthington has [been able to] analyse the number of times, for example, certain informants were the main basis for detaining prisoners... And these are people...over the years we have been able to get federal judges to find...to be incredible'* (Stafford-Smith, Tr 8.9.20, xic, pgs.8-10 – unchallenged).

13.21. The use of evidence obtained by torture, and arbitrary detention of this nature are international crimes '*of colossal proportions'* (Worthington, Tab 33, para 9 - agreed s.9).

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

13.22. The Afghan war diaries (Bundle P, section D) revealed '*what seemed to be war crimes'* (Goetz, Tab 31, para 11 – unchallenged) and included, *inter alia*:

i. The existence of '*black unit'* Task Force 373 operating 'kill or capture lists' hunting down targets for extra-judicial killings (Feldstein, Tab 18, para 4) (Goetz,

Tab 31, para 11 / Tr 16.9.20, xic, pg.5 – unchallenged) (Hager, Tab 71, para 21 – unchallenged) (Bundle P, Tabs D15, D25);

ii. killing of civilians, including women and children (Bundle P, section D);

iii. The role of Pakistan intelligence in arming and training terrorist groups (Bundle P, Tab D4);

iv. The role of the CIA in the conflict, including participation in strikes and night raids (Hager, Tab 71, para 21 – unchallenged) (Bundle P, Tab D13).

13.23. The Iraq material (Bundle 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:

i. Systematic torture of detainees (including women and children) by Iraqi and US forces (Feldstein, Tab 18, para 4), including a secret order by which the US ignored the abuse and handed detainees over to the Iraqi torture squad (Bundle P, Tabs E1, 8, 11-14, 22, 25, 29, 33, 44, 51);

ii. Helicopter killings, including of insurgents trying to surrender (Bundle P, Tabs E3-4, 18, 35, 57);

iii. Details of 15,000 previously unreported civilian deaths (Feldstein, Tab 18, para 4) (Rogers, Tr 9.9.20, xic, pg.5 – unchallenged) (Sloboda, Tab 63, para 2 / Tr 17.9.20, xic, pgs.5-6 – unchallenged) (Hager, Tab 71, para 21 – unchallenged) (Bundle P, Tabs E2, 6-7, 9-10, 19-21), including through checkpoint killings (Bundle P, Tabs E23, 39, 45), use of contractors (Bundle P, Tabs E16, 31, 41-42), targeted assassinations, drive-by killings, executions (Bundle P, Tabs E47, E52); showing that the US Government was hiding the full civilian cost of the Iraq war (Feldstein, tab 18, para 4). '*Protection of civilians is the universally accepted precondition of lawful armed conflict, and the deliberate targeting of civilians is a war crime*' (Sloboda, Tab 63, para 2 / Tr 17.9.20, xic, pg.4 – unchallenged). The Iraq war diaries were the '*largest single contribution to knowledge about civilian casualties in the Iraq war'* (Sloboda, Tr 17.9.20, xic, pg.5 – unchallenged). To this day, '*no other public domain force has come forward to corroborate or provide*

independent evidence about those particular deaths, so the Iraq war logs remain the only source of those deaths' (Sloboda, Tr 17.9.20, xic, pg.9 – unchallenged).

iv. Details of 23,000 previously unreported other violent incidents in which Iraqi civilians were killed or their bodies were found (Sloboda, Tab 63, para 2 – unchallenged).

13.24. As Mr Assange himself observed when he spoke on the issue at the UN:

i. There are at least '*42 allegations of serious abuse by US Forces appearing in the Iraq War Logs, including electric shocks, water torture and mock executions. In 30 of these serious cases the reports showed that medical evidence was taken that backs up detainee torture claims. For example, on July 11, 2006, a report states, a detainee stated that after he was flexed up, one person sat on his chest, another on his legs, and the person punched him in the back of the head, picked up his head and slapped him, put a plastic pipe in his mouth. Persons conducting the questioning also kicked him in the sides of his body, after the persons threw the bag over his head. The medic working for the US Army concluded the detainee did have injuries through his back which were consistent with the allegations of abuse. The War Log states that a statement was taken from the detainee and pictures were taken to document the abuse. Now we are aware of no prosecution of any alleged case of US torture since Abu Ghraib. And it is not just physical abuse US troops committed, it is also psychological. The report made on January 22nd, 2007, states, Marines grabbed detainee by the neck, took him to a suspected IED, threw him to the ground, kicked him hard in the stomach. The detainee further alleged Marines made him start digging up the suspected IED, pointed a rifle to his neck, while counting 1, 2, 3'* (Bundle M2, Tab 352),

ii. '*We have also found reports containing mock executions, specifically forbidden by the Geneva Conventions. On November 12, 2006, two Marines allegedly videotaped themselves holding a knife to a detainee's throat and an M9 machine gun to the detainee's head. US soldiers were also witness to many incidents of torture by Iraqi security forces. The Iraq War Logs document 1365 cases*' (Bundle M2, Tab 352).

13.25. 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 (see generally Bundle M2, Tab 352):

i. 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*' (Bundle P, Tab E8).

ii. 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'* (Bundle P, Tab E50);

iii. 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'* (Bundle P, Tab E49). In response, an investigation by the Danish military was ordered by the then minister of defence (Bundle P, Tab E34);

iv. The UN Special Rapporteur on Torture, Manfred Nowak called on the Obama administration to investigate the torture claims contained in Iraq war diaries (Bundle P, Tab E52);

v. 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'* (Bundle P, Tabs E52-53).

13.26. Mr Ellsberg reminded this Court that '*The Afghan war logs and the Iraq war logs...did expose a very serious pattern of actual war crimes...reports of torture and assassination and death squads were clearly describing war crimes....What these reports [also] reveal was that...torture had become so normalised and death squads and assassination that reports of them could be entrusted to a network at the secret level available to a hundred thousand people with low level clearances. In other words, it had become normalised. That is a shocking fact'* (Ellsberg, Tr 16.9.20, xic, pg.46 – unchallenged).

13.27. 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, para C(iii) / Tr 9.9.20, xic, pg.6 – unchallenged).

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

13.28. 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 paras 191-193; ***Al Nashiri v Romania*** (2019) 68 EHRR 3 at para 641; UN Commission on Human Rights' (OHCHR) Resolution 2005/66 on the '*Right to the truth*';[65] UN Human Rights Council Resolution 21/7 on the '*Right to the truth*' (27 September 2012);[66] UN General Assembly Resolution 68/165 on the '*Right to the truth*' (21 January 2014);[67] UN Economic and Social Council '*set of principles for the protection and promotion of human rights through action to combat impunity*'.[68]

13.29. 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*.[69] 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*

[65].Available at: https://www.refworld.org/docid/45377c7d0.html
[66] https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G12/173/61/PDF/G1217361.pdf
[67] https://documents-dds-ny.un.org/doc/UNDOC/GEN/N13/449/35/PDF/N1344935.pdf
[68].https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf
[69].https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-52_en.pdf

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 Convention on the Protection of All Persons from Enforced Disappearances...[para 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....'

13.30. In September 2013, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression published a report[70] which reiterated amongst other things that: *'Elucidating past and present human rights violations*

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

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' (para 5). To this end, '*International human rights bodies and mechanisms have recognized and developed the right to truth as a distinct right*' (para 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*' (paras 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'* (para 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 may not be withheld on national security grounds in any circumstances...'* (para 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...'* (para 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*...' (para 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*...' (para 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....' (para 107).

13.31. UK law – and in particular UK criminal law concerning the Official Secrets Acts - recognises and gives effect to these core principles.[71] 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.

13.32. 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 <u>not</u> 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 forms of treason'* (para 70).[72] Lord Woolf CJ confirmed that:

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[71]. 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 para 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 , para 84) and in the defences provided by s.170 of the Data Protection Act 2018.

[72]. 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 para 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'.*

'…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...' (para 63)

13.33. The Court of Appeal 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,*** para 68).

13.34. 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 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...' (Bundle Q, Tab 9).

None of this is relevant under US law

13.35. 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.

13.36. 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, para 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, para 7 - agreed s.9).

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

13.37. 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:

i. 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, paras 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'.* 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, paras 12, 32 / Tr 16.9.20, xic, pgs.48-49 – unchallenged);

ii. 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, para 23);

iii. 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, para 23);

iv. 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, para 33 – unchallenged).

13.38. '*[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, para 28).

<u>The result for these proceedings</u>

13.39. The US Government must prove, to the criminal standard,[73] that the conduct it alleges amounts to extradition offences, as defined in s.137 of the Act.

13.40. 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, paras 15-17).

13.41. 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 <u>impel the inference</u> that he did so; it <u>must be the only reasonable inference to be drawn</u> from the facts alleged. Otherwise, a*

[73]. Section 206 of the Act. See eg. ***M v Italy*** [2018] EWHC 1808 (Admin) at para 46.

> *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 para 57).

13.42. 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 para 59).

13.43. 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.

13.44. 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.

13.45. 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.

14. Section 81(a): Disclosing criminality

14.1. Under the 2003 Act, and in any event, the fact that WikiLeaks were engaged in the revelation of state crimes 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)

14.2. Where a state is involved in criminal activity, as the US was 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…*'[74]

14.3. These concepts are likewise embedded in the case law of England and Wales, and constitute imputed[75] political opinions. In ***Suarez*** [2002] 1 WLR 2663, the Court of Appeal held at paras 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.* 76

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[74]. 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'* (para 20).

[75]. ***Gomez v SSHD*** [2000] INLR 549 at para 73; ***RT (Zimbabwe) v SSHD*** [2013] 1 AC 1 at paras 53-55.

[76]. 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

…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 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

14.4. 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) (pg.154), 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*…'

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

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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 para 215 et seq).

'…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…'

14.6. 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*…'

14.7. 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 (pg.1) '*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 (paras 24-31).

15. Serving the public interest and article 10 again

15.1. 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).

15.2. WikiLeaks 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, paras 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, paras 30-31 / Tr 9.9.20, xic, pgs.4-5 – unchallenged).

15.3. As Mr Assange himself explained publicly in 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, para C(vii) / Tr 9.9.20, xic. pgs.6-7 – unchallenged). Mr Assange's motivation was manifest: '*if wars can be started by lies, peace can be started by truth'* (Rogers, Tab 40, para C(vii)). Mr Assange was '*obviously opposed to war crimes and interested in the exposure and rendering accountable for those'* (Rogers, Tr 9.9.20, xic, pg.7 - unchallenged). 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, para 24 / Tr

16.9.20, xic, p45 – unchallenged). 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, para 28 – unchallenged).

15.4. 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.[77] 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, para 23 / Tr 16.9.20, xic, pg.44 – unchallenged). The public interest was '*self-evident'* (Ellsberg, Tr 16.9.20, re-x, pg.67).

15.5. 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, paras 26-27 - agreed s.9). WikiLeaks materials were '*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, para 19 / Tr 18.9.20, xic, pg.6 – unchallenged). '*The war logs are an outstanding example of information that services public interest'* (Hager, Tr 18.9.20, xic, pg.6 – unchallenged).

15.6. 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 (Cockburn, Tab 51, paras 6-7 - agreed s.9).

15.7. Evidence of the kind of human rights abuses that were exposed by Mr Assange via

[77].See also (Hager, Tab 71, para 32 / Tr 18.9.20, xic, pgs.9-10 – unchallenged) who draws a similar parallel with the Pentagon Papers.

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, paras 12-25 - agreed s.9) (Stafford-Smith, Tab 64). Even where journalists are able to get hold of such evidence, they then often receive misleading or untruthful responses to it from government officials, as well as facing harassment and intimidation in order to try and prevent publication (Cobain, Tab 50, paras 26-38 - agreed s.9). 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, para 83 – unchallenged). 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, para 83 – unchallenged).

15.8. Mr 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, para 4).

15.9. 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'* (Sloboda, Tab 63, paras 2-3 / Tr 17.9.20, xic, pg.9 – unchallenged). 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'* (Sloboda, Tab 63, para 2 – unchallenged). The data was used as the principal 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'* (Sloboda, Tab 63, paras

1-2 – unchallenged). 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...'* (Bundle P, Tab D42).

15.10. 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, para 30). '*If you take the period from about 2011 more or less through to the present time there has been much greater caution among western countries, specifically the United States and the UK, in the willingness to go to war at an early stage. I think that is to a considerable extent due to WikiLeaks'* (Rogers, Tr 9.9.20, xic, pg.5 – unchallenged).

15.11. Amnesty International credited WikiLeaks with sparking the Arab Spring via these releases (Bundle M2, Tabs 544-545),[78] including as a catalyst for the Tunisian revolution (Feldstein, Tab 18, para 4) (Bundle M2, Tab 504).

15.12. The documents have been, and continue to be, used by mainstream media organisations in their reporting (Goetz 1, Tab 31, para 29 – unchallenged). '*One has to see WikiLeaks also as a type of archive, a record, and that had been very widely used by a wide variety of international relations and war scholars to fill in the detail, if you like*' (Rogers, Tr 9.9.20, xic, pg.5).

15.13. The documents likewise 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 (the Chagos Islands case) (Maurizi, Tab 69, para 52 - agreed s.9). See generally (Bundle M2, section 18).

15.14. A small example of the public interest value of the WikiLeaks disclosures, and a stark

[78].Which, in turn, revealed further US involvement in rendition and torture: (Cobain, Tab 50, para 20-25 - agreed s.9).

reminder of the personal value of what WikiLeaks was taking steps to redress, is recounted by Khalid El-Masri (Tab 53 - agreed s.9) 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, para 22 - agreed s.9). 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, paras 15-16, 19, 26-28 - agreed s.9) (Goetz 2, Tab 58, paras 4, 10-12 / Tr 16.9.20, xic, pgs.8-10 – unchallenged).

15.15. 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) at para 191). The ECtHR made similar observations in ***Al Nashiri*** (supra) at para 641.

15.16. 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, paras C(v)-(vi) / Tr 9.9.20, xic, p6).

US law is not article 10 compliant

15.17. As stated above, US law provides no power for any US court to consider any sort of 'public interest' justification (Shenkman, Tab 4, paras 13, 18, 23, 28, 31, 41) (Jaffer, Tab 22, para 7 - agreed s.9).

15.18. 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.

15.19. 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 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). 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...'* (para 36)

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

i. 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 (paras 27, 64, 103-106).

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

iii. 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' (para 31) in the context of a '*rigorous and intrusive review'* (paras 33, 72-79, 107-111).

iv. 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'* (para 35).

15.21. 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'* (para 30). Lord Bingham considered that in their totality, these cumulative measures, '*properly applied'*, do *'provide sufficient and effective safeguards'* of Article 10 rights.

15.22. 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 paras 21-23, 27; Lord Hope at paras 40-45, 69, 80-86.

15.23. 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.

15.24. 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' (Shenkman, Tab 4, para 23).

15.25. Indeed, early sponsors of the Espionage Act in its first iteration, acknowledged '*prosecutorial discretion'* to be its sole safety valve against misuse (Shenkman, Tab 4, paras 13 and 21). That feeble safeguard has, predictably, not even proved robust enough to prevent political threats to prosecute publishers whose subsequent abandonment demonstrates them to have been either 'ill-*judged… ill-founded or improperly motivated'* (Shenkman, Tab 4, para 34).

15.26. 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*' (para 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*' (paras 71-72).

15.27. 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, pg.10 - agreed s.9).

16. <u>The ICC and this prosecution</u>

16.1. 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.

16.2. The Court has also seen above the evidence of 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 arrest warrants issued by Germany (El-Masri, Tab 53, para 26-28 - agreed s.9) (Goetz 2, Tab 58, paras 4, 10-12 / Tr 16.9.20, xic, pgs.8-10 – unchallenged), and by Italy (Maurizi, Tab 69, paras 28-42 - agreed s.9), the US managed to subvert the international legal order to secure impunity (Stafford-Smith, Tab 64, paras 95-96 – unchallenged) (Bundle M2, Tabs 114, 151-158).

16.3. 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.

16.4. On 20 November 2017, ICC Prosecutor Bensouda submitted to the pre-trial chamber a request 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, para 13) (Lewis 5, exhibit 3, pgs.2-4, 9-10) and brought to light by *inter alia* the WikiLeaks disclosures (Lewis 5, Tab 81, para 9).

16.5. WikiLeaks' materials, and Mr Assange, would be '*essential'* to any ICC prosecution (Lewis 5, Tab 81, para 16 / Tr 14.9.20, pg.14 – unchallenged). For example, **(a)** the Prosecutor's public redacted investigation request relies upon the '*CIA cables*' reviewed by the US Senate Select Committee on Intelligence (Bundle Q, Tab 11, pg.155), **(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, para 43 - agreed s.9). **(c)** The ICC investigation also names Abdul al-Rahim Ghulam Rabbani (Stafford-Smith, Tab 64, para 59), confirmed by WikiLeaks cables to have been subject to rendition and torture (see above). In short, Mr Stafford-Smith's evidence (also unchallenged) was that '*we have brought [the ICC complaints] based, in part, on the documentation of torture and abuse that came through WikiLeaks*' (Tr 8.9.20, xic, pg.12).

16.6. The criminal complaint against Mr Assange (and application for his provisional arrest under the 2003 Act) materialised in December 2017;[79] days after the prosecutor's investigation request.

16.7. Mr Lewis' unchallenged evidence – contained in his fifth statement - was that it is reasonable to infer that the two events were linked (Lewis 5, Tab 81, paras 9, 16 / Tr 14.9.20, pg.6).

Torture and war crimes

16.8. 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.[80] As a *jus cogens* prohibition, no State may enter into agreements for contracting around it, given the fundamental values for which it stands.

16.9. 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,[81] and '*it is the duty of every State to exercise criminal jurisdiction over those responsible for international crimes'*.[82] There is no discretion to address the breach otherwise.[83]

16.10. 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.[84] Failure by States to do so eviscerates the

[79]. And, on the evidence the Court has, behind-the-scenes efforts to persuade Ecuador to end his asylum began (Bundle M2, Tab 539).
[80]. The US is States Party to the CAT (1994), ICCPR (1992) and 1949 Geneva Conventions (1955).
[81]. Rome Statute, Arts. 7, 8.
[82]. Rome Statute, Preamble.
[83]. 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, paras 128-142.
[84] 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

prohibition against torture, and itself violates Article 3 ECHR.[85] 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.[86]

Background: US strives for impunity for War Crimes

16.11. All of the following chronology, provided by Mr Lewis (Tr 14.9.20, pgs.6, 14), was unchallenged.

16.12. 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, para 8) (Lewis 5, exhibit 3, pg.4). The US then put in place bi-lateral Article 98 agreements[87] 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, para 8) (Lewis 5, exhibit 3, pgs.4, 8).[88]

16.13. The US then passed legislation in 2002 which actively prevented US cooperation

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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).

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

[86] 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.

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

[88] .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*' (Bundle M2, Tab 108, pgs.4-10). 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).

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, para 8) (Lewis 5, exhibit 3, pg.8).

16.14. 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, para 12) (Lewis 5, exhibit 3, pgs.4, 9).

16.15. 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: paras 63, 191 (see El-Masri, Tab 53, paras 36-38 - agreed s.9) (Goetz 2, Tab 58, para 8 – unchallenged).[89] The recent June 2020 decision of the Inter-American Commission on Human Rights' on admissibility, regarding the rendition and torture of four petitioners,[90] 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...'* (Bundle F2, Tab 40, para 23).

16.16. 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 (Lewis 5, Tab 81, paras 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, paras 40-41).

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89. See also generally (Bundle M2, Tab 108).
90. Including two UK residents.

16.17. 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 which hosted the CIA '*black sites'*) and will act when national authorities do not genuinely pursue cases (Lewis 5, Tab 81, para 10).

16.18. 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, para 14).

16.19. 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, para 15) (Lewis 5, exhibit 3, pg.11).

16.20. 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, para 15) (Lewis 5, exhibit 3, pg.12). 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, pg.12) (Lewis 5, exhibit 5).

16.21. 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.

16.22. 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, para 17) (Lewis 5, exhibit 6).

16.23. Mr Bolton made a further speech in November 2018, stating:

> '...*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, para 18) (Lewis 5, exhibit 3, pg.13) Bundle F2, Tabs 4-6).

16.24. 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, para 18) (Lewis 5, exhibit 3, pg.13) (Lewis 5, exhibit 7).

16.25. 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, para 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, pg.14) (Lewis 5, exhibit 8-9) (Bundle M2, Tab 115).

16.26. The US then did revoke the ICC prosecutor's visa (Lewis 5, Tab 81, para 19) (Lewis 5, exhibit 3, pg.14) (Bundle F2, Tab 31).

16.27. 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, para 22) (Lewis 5, exhibit 3, pgs.2, 14) (Bundle F2, Tab 28).[91]

16.28. However, on 5 March 2020 this decision was reversed, and an investigation authorised, by the ICC Appeals Chamber (Lewis 5, Tab 81, para 26) (Lewis 5, exhibit 12) (Bundle F2, Tab 28) (Bundle F2, Tab 53).[92]

16.29. 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.*

[91].https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF
[92].https://www.icc-cpi.int/CourtRecords/CR2020_00828.PDF

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...' (Bundle F2, Tab 30, pg.4) (Bundle F2, Tab 31).

16.30. 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[93] and blocking entry of those same people into the US, as well as ICC staff, their agents and their families (Lewis 5, Tab 81, para 28) (Lewis 5, exhibit 13) (Bundle F2, Tab 43) (Stafford-Smith, Tab 62, para 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, para 33). It is '*legally outrageous'* (Stafford-Smith, Tr 8.9.20, xic, pg.12). '*Assertions made, for example, that the ICC conducting a proper legal investigation into torture is somehow a threat to national security, the president of the United States has just made that statement in an executive order, I think that is manifestly absurd*' (Stafford-Smith, Tr 8.9.20, xx, pg.21).

This case

16.31. In short, the unchallenged evidence shows that 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. Mr Lewis' unchallenged evidence was that 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.

[93].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, para 7 – unchallenged].

16.32. Neither should the notion that '*any means necessary'* may, in the mouth of the US government, include bad faith prosecution, shock this Court:

i. It is what the US specifically threatened against the ICC staff and judiciary.

ii. 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 judge by offering him directorship of the FBI (Tigar, Tab 23, pg.13 - agreed s.9), and (it later emerged) to '*incapacitate [Ellsberg] totally'*, and to break his legs (Ellsberg, Tab 55, paras 31, 33 / Tr 16.9.20, xic, pg.44 – unchallenged). Mr Ellsberg sees '*no difference in connection with the illegal acts taken of surveillance which in my case involved (inaudible) and efforts to incapacitate me, and as I understand in Assange's case it involved the illegal wiretaps of his communications to his lawyers'* (Ellsberg, Tr 16.9.20, re-x, pg.68).

iii. Likewise, in the Jack Anderson case: when '*Attorney General John Mitchell told [President Nixon] that he could not do that, that publishing classified documents was not a crime. They reverted to other extra-legal ways to get revenge...leaking news that he was gay which were false, planting a spy in his office to see what he was up to, forging incriminating documents... And the ultimate sort of mind bending plot that the White House concocted was 1 to assassinate him'* (Feldstein, Tr 8.9.20, xic, pgs.33-34) (Shenkman, tr 17.9.20, xic, pg.31).

Improper motives and these proceedings

16.33. 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 para 97);
>
> '...*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 para 33)

16.34. 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 para 100).[94]

16.35. 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 paras 12-13, 32-34).

[94]. See also ***Symeou*** at paras 6-9, 33-34, 40; ***Atanasova-Kalaidzhieva*** at para 36; ***Belbin*** at para 43-44.

PART C

Human Rights challenges under Article 6 and Article 3 and the challenges based on section 91 and section 82

17. Flagrant Denial of Justice and Article 6 ECHR

17.1. The evidence of a number of experts supports the submission that there is a real risk that Julian Assange will be exposed to a flagrant denial of justice both at trial and at the sentencing stage. The Defendant relies on the evidence of:-

i. **Eric Lewis,** a practising lawyer in the US who deals with issues both of trial and sentence in his first statement of 18th October 2019 (Tab 3) and in his fourth statement (Tab 70) at paras 15 – 19 (in relation to sentence). His evidence on this issue was given on 14th September 2020 (Tr 14.09.20 pg. 11, l 26 - pg.12, l 27). He made clear that, on his analysis of the guidelines, Julian Assange faced a sentence 'of somewhere between around 20 years if everything goes brilliantly to a full 175 years which the government could easily ask for' (Tr 14.09.20, pg.12, ll 9 – 12). He made clear that there would be pressure put on him to plead because of his massive potential sentence (Lewis 1, Tab 3, paras 36 – 48) and the likelihood that he would be subjected to SAMs (Lewis 1, Tab 3, para 23). He further confirmed that his sentence could be increased by reference to allegations of which he had not even been convicted (Lewis 4, Tab 70, para 17)

ii. **Robert Boyle,** an expert on grand juries, who dealt with the Chelsea Manning contempt proceedings in his two reports of 18th December 2019 (Tab 5) and 17th July 2020 (Tab 49).

iii. **Thomas Durkin,** a former Federal Prosecutor who dealt with the history of this prosecution and fair trial issues in his reports of 17th December 2019 and 11th February 2020 (Tabs 16 and 43). At paragraph 20 – 22 of his first report, he deals with the power of the courts to impose sentences on the basis of conduct not proven at trial. He also deals with the pressure to plead that is induced by the threat of extraordinarily inflated potential penalties at paras 17 – 18 of his first statement. He amplified those points in his evidence,

explaining that Julian Assange 'does face a real risk of a sentence in the range of anywhere from 30 years to 40 years' on the basis of the guidelines and that this would create an overwhelming pressure on him to plead guilty because 'most clients… simply cannot risk that type of exposure and will take a plea that is put in front of them because they cannot run the risk of going to trial' (Tr. 15.09.20, pg.57, l 28 – pg.60, l 30)

17.2. Against that background it is clear that the US Federal System operates to secure pleas through coercive plea-bargaining powers, swinging sentences and overloaded indictments designed to increase sentence exposure. That was amply demonstrated by the oral and written evidence of Eric Lewis and Thomas Durkin summarised above. These pressures are coupled, in case such as this, with the effects of pre-trial detention in solitary confinement in a '*cage the size of a parking space, deprived of any meaningful human contact'* (Lewis 1, Tab 3, paras 12-23) (Ellis 1, Tab 15, paras 7-8). The result is a system in which the plea rate is over 97%, higher than any other country, including Russia. That is clearly shown in the written evidence of Eric Lewis in his statement (Tab 3, para 40) and by the first statement of Thomas Durkin (Tab 16, para 18).

17.3. The system will be skewed even further against Julian Assange, because this prosecution will be located in Alexandria, Virginia; from which a jury pool comprised almost entirely of government employees and/or government contractors is guaranteed (Prince 1, Tab 13).

17.4. He will be liable to be tried on the basis of evidence obtained from Chelsea Manning by inhuman treatment and torture. The liability to be tried on evidence obtained from an accomplice by torture has been held to be unlawful in ***Othman v UK.*** The fact that Chelsea Manning was exposed to inhuman treatment is established in the evidence of Robert Boyle (both in relation to her pre-trial detention and her post-commutation incarceration for civil contempt, see Boyle 1, Tab 5, Exhibit 1; and Boyle 2, Tab 49, Exhibit 1, Exhibit 3).

17.5. He will in any event be deprived of the supporting evidence of Chelsea Manning because of coercion by the contempt proceedings, as described by grand jury expert

Robert Boyle (Tab 5). It is also foreseeable that the prosecution seek to pressure Mr Assange to cooperate and further to identify other sources of the WikiLeaks publications.

His trial will be prejudiced by public denunciations violating the presumption of innocence

17.6. In addition, his trial will be seriously prejudiced irretrievably by the very fact of the public denunciations of him made by a series of administration officials from the President, to the present Secretary of State Mike Pompeo and successive Attorney Generals (as summarised above at 4.7 – 4.11 and see Bundle E, Prince 2, Tab 10). These intemperate public denunciations violate the presumption of innocence, as is clearly established by the European Court decision in ***Allenet de Ribemont*** **(1996) 22 E.H.R.R. 582**.

The unjust sentencing procedure

17.7. Moreover, his sentence can be enhanced on the basis of unproven allegations even where he is acquitted of those same allegations at trial, as per the evidence of former federal prosecutor Thomas Durkin and Eric Lewis as summarised above. The prosecution say that this procedure has been found to accord with the principles of specialty in the case of ***Welsh*** **and** ***Thrasher***. That may be so. But the fact of compliance with the technical rules of specialty is one thing. It is quite different to assert that a procedure which enables the Court to increase the sentence on the basis of allegations that were rejected even by the jury accords with the fundamental principles of a fair trial. The decision in the Cayman Islands case of *McKellar* that this procedure does not constitute a flagrant denial of justice is not the last word. Indeed, permission has recently been granted (on 25 September 2020) by Sir Ross Cranston to argue this very point in the case of *Jabir Saddiq v USA,* where there was a real risk of a 'terrorism enhancement' despite the fact that the US had not actually charged the Requested Person with a terrorism offence.

17.8. For these reasons Mr Assange's extradition would violate Article 6 of the ECHR.

18. The risk of inhuman and oppressive treatment contrary to Article 3 of the ECHR and section 91 of the Extradition Act 2003

18.1. There is a real risk that Julian Assange will be exposed to inhuman treatment in the United States. That is firstly because there is a risk that he will be subjected to a disproportionately long sentence for his actual conduct. The sentence could be as long as his whole life and certainly is likely to be between 30 – 40 years for the reasons given by both Eric Lewis (Tr 15.09.20, pgs.51 – 53) and Thomas Durkin in his evidence (at Tr 15.09.20, pgs.58, ll 8 – 28). A sentence of this length is not just permitted but strongly indicated by the guidelines because of the way in which this case has been prosecuted and the way in which the two superseding indictments have been framed. This creates a 'real risk' of a massively disproportionate and wholly inappropriate sentence, given that the conduct now alleged was not even deemed criminal but the DoJ under the Obama administration.

18.2. But more particularly, the 'real risk' of inhuman treatment arises by reason of the fact that Julian Assange, a psychologically vulnerable person suffering from depression and autism spectrum disorder (ASD), is most likely to be subjected to conditions of solitary confinement, both at the pre-trial stage and post-trial stage, in spite of his mental vulnerability. Those very facts further make his extradition unjust and oppressive by reason of his mental disorder.

18.3. In support of the submission that extradition would violate Article 3 because of the prison conditions he would be subjected to, we rely upon the following evidence:-

i. **Eric Lewis,** who deals with the issue of sentencing and with prison conditions in his first declaration at tab 3 of the core bundle, in his fourth declaration at tab 70 and in his oral evidence. He made clear there is a likelihood of detention in administrative segregation ('ad seg') and under SAMs pre-trial and that *'he would be very surprised if that did not happen'* because '*it is a national security case'* (Tr 14.9.20, pg.13, ll 6 – 10). He also gave evidence that post-trial, the most likely placement would be in ADX Florence Colorado

(Tr 14.9.20, pg.13, ll 19). In both situations he would be deprived of association with other prisoners.

ii. **Yancey Ellis,** an experienced lawyer who practices in the very area of Virginia in which Mr Assange's trial and pre-trial detention will take place (Ellis 1, Tab 15, Ellis 2, Tab 54). His evidence was that Mr Assange is likely to be held pre-trial in conditions of isolation in the ad-seg unit in X Block in ADC Alexandria. Again he confirmed that there would be no association with other prisoners (Tr 28.9.20, pgs.6 - 7, ll 28 – 33, 1 – 2).

iii. **Joel Sickler,** an expert on prison conditions in the Federal System at Tab 20 of the core bundle and in his second statement of 20 June 2020 at Tab 62.

iv. **Lindsay Lewis,** an experienced federal defence lawyer and expert on prison conditions, in her affidavit of 17 July 2020 (Tab 60) and in her evidence. In her oral evidence she stated that she would say that it was *'almost certainly'* the case that Julian Assange would be subject to SAMs on grounds of national security, both pre-trial and post-trial (Tr 29.9.20, pg.54, ll 1 – 5) and that he would be detained at ADX Florence under SAMs in the post-trial phase (Tr 29.9.20, pg.57, ll 21 – 24), most probably in H Unit (Tr 29.9.20, pg.56, ll 29 – 30). Under such a regime he would spend all day, every day completely alone and this could go on for many years (Tr 29.9.20, pg.57, ll 25 – 31).

v. **Maureen Baird,** the former warden of MCC, who gave evidence that *'it is likely that he will be subject to special administrative measures pre-trial'* (Tr 29.9.20, pg.3, ll 1 – 3) and that he would be permitted no communication with other inmates under such a regime (Tr 29.9.20, pg.3, ll 16 – 17 and pg.5, ll 5 – 19). She further gave evidence that post-trial, he would be likely to be detained under SAMs and at ADX Florence Colorado (Tr 29.9.20, pg.9, ll 4 – 8).

vi. The undisputed psychiatric evidence of **Professor Kopelman** that he suffers from depression of varying degrees of severity which is most severe at times when he is kept in conditions of isolation; and the convincing evidence of **Dr Deeley** that he suffers from ASD.

18.4. **Firstly**, against that background, it should be stressed that Mr Assange is likely to be singled out for special conditions of administrative segregation and SAMs, both at

the pre-trial stage and the post-trial stage, because of national security nature of his case.

18.5. **As to the pre-trial stage,** the risk of detention in conditions of isolation in administrative segregation or under SAMs is confirmed by the evidence of Yancey Ellis, Maureen Baird and Eric Lewis (summarised above). In fact, Mr Kromberg expressly recognises the possibility that Julian Assange would be subject to SAMs in his First Declaration (Prosecution Bundle, Tab 2, para 95).

18.6. **As to the post trial stage** there is then the real likelihood of detention under SAMs at ADX Florence as confirmed by the evidence of Eric Lewis, Maureen Baird and Lindsay Lewis, summarised above. Mr Kromberg does not rule out detention in ADX Florence in either his First Declaration (Prosecution Bundle, Tab 2, paras 102 – 106) or his Second Supplemental Declaration (para 14 onwards). The reality is, that this would involve conditions tantamount to solitary confinement. For prolonged periods. Without proper review. And without proper consideration of his mental condition.

18.7. The evidence is clear that such a regime precipitates mental breakdowns and heightens the risk of suicide even for mentally stable prisoners and that such a regime is inappropriate and dangerous for mentally ill inmates. That is the conclusion of the report of the Centre for Constitutional Rights, (Bundle O, Tab 7) and of the 2014 Amnesty Report 'Entombed: Isolation in the US Federal Prison System (Bundle O, Tab 15). The realities of detention there were brought out by Lindsay Lewis's evidence and that of Maureen Baird.

18.8. Mental health treatment and care in these regimes fails to comply with minimum Article 3 protections see for example the report from the Centre for Constitutional Rights and the Amnesty International Report; see also the recent Complaint Declared Admissible, in Defence Bundle for Prison Experts, tab 8; Observations on US Response, 19 November 2018, Tab 9.

18.9. This is significant because there is clear evidence from Professor Kopelman, Professor Mullen, Dr Deeley and the prosecution expert Professor Fazel that Mr Assange suffers from serious clinical depression and requires medical treatment –

including prescribed medication for his depression and psychological support. Even Dr Blackwood did not dispute that Julian Assange suffers from a depressive illness. Moreover, he has now been diagnosed as suffering from Asperger's Syndrome (ASD) by Dr Deeley, a psychiatrist with special expertise in ASD, whose convincing evidence the Court heard from him in person.

19. Legal significance of the prison conditions

19.1. Mr Assange does not seek to challenge the inhumanity of the US prison system in the abstract. It is its likely operation in his case and its effect on him, given his mental and physical problems, that creates the risk of inhumanity contrary to Article 3 and of oppression under section 91. This accords with the approach of the UK courts in such cases as Lauri Love (2018) EWHC 172 at paras 116-120 and Aswat 2014 EWHC 1216 (Admin) and of the European Court itself in the same case of Aswat v UK (2014) 58 EHRR 1 at paras 52 – 57. Mr Assange is likely to be detained in the most restrictive conditions, amounting to solitary confinement, because of his political profile and perceived threat to the US; and yet these very conditions will make it virtually certain that he will suffer mental deterioration and commit suicide given the history of his mental condition.

The recognised risk of pre-trial detention in isolation in the US for the mentally disordered

19.2. The English High Court has already identified the special problems that may arise in pre-trial detention in the US for those suffering from mental disorder. That was what led to decisions to discharge the Requested Persons in the case of ***Lauri Love*** [2018] EWHC 172 at paras 116-120 and to require special assurances in the case of ***Aswat*** (2014) EWHC 1216 at paras 38 - 40***.*** Here there is a real likelihood that Mr Assange will be detained in administrative segregation and even under special administrative measures at the pre-trial phase. He will effectively be subject to solitary confinement, denied association and have limited contact with the outside world. And he will receive no specialist mental health care. The full circumstances are set out below.

Risks of detention post-trial in solitary confinement in ADX Florence

19.3. Turning to the position post-trial, the US acknowledges that there is a real risk that Mr Assange will be subjected to a SAMS regime at ADX Florence, Colorado. They have confirmed that 4 out of the 9 persons convicted of espionage who are detained under SAMs are detained at ADX Florence, Colorado whilst one other is detained at MCC, New York and a further woman prisoner at an exclusively female prison. So on any view there is a very significant risk that he will be detained under SAMs and detained at ADX Florence. That is particularly so given that this is one of the most notorious espionage cases and he has already been singled by the Attorney General for particular attention with the two superseding indictments brought under William Barr.

The legal position

19.4. **As a matter of law**, the US government submits that these regimes would not contravene Article 3; and they rely on decisions such as ***Ahmad v UK*** in 2010 and ***Pham v US*** in 2014. However the legal background needs some analysis before accepting any trite proposition that neither the conditions in ADX nor the SAMS regime violate Article 3 or render extradition 'oppressive' for the purposes of Section 91.

19.5. The true position in law is as follows:-

i. Neither the European Court of Human Rights, nor the English High Court, have ever made a blanket statement that detention in isolation in the US federal prison system under SAMs will always comply with Article 3.

ii. Rather, both the European Court and the English High Court have held that detention in conditions of isolation such as the US provides under SAMs and particularly those in ADX Florence will not breach Article 3 if it is appropriate for the individual case, not long-lasting or indefinite, is subject to review, and is not imposed on those suffering from mental disorder. That was implicit in the observations made both in the ***Hamza*** case by the High Court and by the European Court in ***Ahmad***.

iii. Moreover, both the European Court ***Aswat*** and the English High Court in ***Love*** have refused extradition as inhuman or oppressive by reason of mental disorder in cases where the likely conditions in US detention were found to be wholly inappropriate for the particular requested person by reason of their mental disorder.

We now turn to a review of the key authorities to make good these points.

19.6. In the case of ***Abu Hamza v United States*** [2008] EWHC 1357 (Admin) the President of the Queen's Bench Division stated:-

> '…*like Judge Workman, we too are troubled about what we have read about conditions in some of the Supermax prisons in the United States… confinement for years and years in what effectively amounts to isolation, may well be held to be, if not torture, then ill-treatment which contravenes Article 3. This problem may fall to be addressed in a different case'* (para 70).

19.7. In the case of *Hamza*, the question of whether it would be inhuman to subject a man with his disabilities to the conditions in ADX Florence was not determined by the English Court. The only reason why it was not determined was because the High Court, and subsequently the European Court, were wrongly informed by the US authorities that there was no real prospect of Mr Hamza being detained in Supermax conditions in ADX Florence for more than a few months, for administrative reasons, pending allocation to a more suitable prison. The fact that the European Court acted on the basis of this false assertion that any detention of Mr Hamza in ADX Florence would only be short-term was expressly recognised by the European Court itself in the later case of ***Aswat v UK*** (2014) 58 E.H.R.R.1 at para 56. But, in fact, Mr Hamza has now been detained in ADX Florence for more than five years, since 8 October 2015 (Core Bundle, Tab 60). The whole history of Mr Hamza's treatment is dealt with in the affidavit of Lindsay Lewis dated 17 July 2020 at Tab 60 of the core bundle. As she shows, the representations made by the US government to the English and European courts that Mr Hamza would be extremely unlikely to go to ADX Florence proved misleading. Moreover, despite protests, he has now been held there for the past 5 years. She further makes the point that inmates held under SAMS at ADX *'are housed in a special secure unit of ADX known as H unit which*

may result in further limitations on an inmate's ability to benefit from any remaining available mental illness treatment options.' And she predicts a similar fate for Mr Assange at paragraph 74 of her affidavit (Tab 60).

19.8. The prosecution has referred to the decision in ***Babar Ahmad v United Kingdom*** (2013) 56 E.H.R.R. 1 (Submissions Bundle, Tab 6, para 72) and Mr Kromberg refers to the evidence before the European Court in that case in his First Supplemental Declaration (Prosecution Bundle, Tab 3, para 14). It is accepted that the European Court in 2012, on the basis of the evidence then before it, rejected a challenge to the compatibility with Article 3 of the conditions in ADX Florence and the regime of segregation there. However:-

i. The European Court recognised in ***Ahmad*** that indefinite detention in conditions of segregation could violate Article 3, depending on the particular conditions – the stringency of the measure, its duration, the objective pursued, and its affect on the person concerned (para 209). They recognised that '*solitary confinement, even in cases entailing relative isolation, cannot be imposed on a prisoner indefinitely'* (para 210).

ii. The Court further recognised that solitary confinement must be accompanied by procedural safeguards guaranteeing the prisoner's welfare and the proportionality of the measure (para 212). They emphasised the need for review procedure, reasons for any review, and regular monitoring of the prisoners physical and mental condition (para 212).

iii. The Court recognised also that it was important to ensure monitoring and appropriate medical treatment for those suffering from mental illness, detained in conditions such as ADX Florence (para 212).

iv. However, the Court found that there was scope for procedural review (para 220), that conditions were not unduly restrictive given the security risk posed by the Applicant in that case, and that there were well established procedures for reviewing the continuation of detention so that detention need not be indefinite (paras 221 – 223).

19.9. Thus the findings of the European Court were premised on the mistaken assumption that **detention would not be long-lasting or indefinite; that there was a proper**

system of review in place and that appropriate treatment would be assured for those with mental illness. None of these assumptions hold good today.

19.10. Furthermore, the Wylie affidavits referred to by Mr Kromberg in his First Supplemental Declaration at paragraph 14 - which were relied upon by the European Court in ***Ahmad*** - were filed in 2007 and 2009, so that they are over a decade out of date. Subsequent events and further revelations have demonstrated that the contents of those affidavits is no longer an accurate reflection of the conditions there.

19.11. In the later case of ***Pham v US*** [2014] EWHC 4167 (Admin), in December 2014, the High Court only rejected the submission that detention in ADX Florence under SAMS would violate Article 3 on the basis of two key findings and assumptions. These were in turn that:-

i. Placement in ADX Florence is not indeterminate (para 49 of *Pham*);
ii. It is subject to periodic reviews, so that there is no real risk of indefinite detention in ADX Florence.

19.12. Since the decisions in ***Ahmad*** and ***Pham*** there have been developments. It can now be said that the true situation in ADX Florence has either changed or at least been clarified by further developments and further revelations. These include:-

i. The Amnesty report of 2014 'Entombed…Isolation in the US Federal System' which observed that conditions for prisoners at ADX had become increasingly restrictive and isolated in recent years (see page 12)
ii. The report of Allard Lowenstein, dated September 2017, for the Centre of Constitutional Rights 'The Darkest Corner: Special Administrative Measures and Extreme Isolation in the Federal Bureau of Prisons' (Bundle O, Tab 7).
iii. Clear evidence that the BOP does not set an upper limit on the amount of time a person can spend in isolation including evidence that one man with mental illness spent 19 years in ADX Florence before he was finally transferred out. (See the July 2017 Review of the Federal Bureau of Prisons use of restrictive housing for inmates with mental illness and see the evidence of Lindsay Lewis at Tr 29.9.20, pg.58, ll 31 – 34, that 82% had been held under SAMs and 13

of those for more than a decade and that Mr Hamza himself was now in his 8th year of detention under SAMs).

iv. The history of the case of Abu Hamza himself as set out in Lindsay Lewis's affidavit.

v. The lawsuit filed by a group of inmates at ADX Florence in the case of *Cunningham v BOP* is analysed by Sickler in his second declaration dated 20 June 2020 (Tab 62). This shows in shocking detail that inmates with mental illness housed at ADX Florence suffered 'a near complete lack of mental health care', that 'suicide attempts were common', and that 'many have been successful' (Tab 62, paragraphs 63 – 67). Despite a settlement approved by the federal district court in 2017[95] which included promises of various improvements in conditions, Sickler shows that the problem of severe lack of medical treatment persists at the prison and that there remains a high rate of suicide (Tab 62, paras 65 – 66).

vi. The Inter-American Commission recent decision on 16 March 2020 (Defence Prison Expert Bundle, Tab 7) to declare admissible the complaint of petitioners presently detained in ADX Florence, Colorado, many of whom suffer from mental illness. Their observations dated 19 November 2018 are contained at tab 8 of the Defence Prison Expert Bundle.

19.13. Thus the true position that Mr Assange faces is now clearer, in that:-

i. The evidence of Eric Lewis, Maureen Baird and Lindsay Lewis clearly shows that there is a 'real risk' that Julian Assange will be subjected to indefinite detention in ADX Florence.

ii. There is evidence that detention in ADX Florence in segregation can be long-lasting and indefinite. That is shown by the evidence summarised above as to the long periods in excess of a decade served by many of those subject to SAMs and detained in ADX Florence (see Lindsay Lewis' affidavit and see Sickler at paragraph 56, where he refers to *'one man with mental illness spending 19 years in ADX before he was finally transferred out').*

[95] https://www.prisonlegalnews.org/news/2017/aug/30/federal-court-approves-landmark-bop-adx-mental-health-settlement/

iii. There is no proper system of review of detention (see Lindsay Lewis's evidence, Tr 29.9.20, pgs.58 – 60 and Maureen Baird, Tr 29.9.20, pg.9 and the further analysis below).

iv. Moreover, there is no guarantee that Mr Assange will be protected from such detention by reason of his mental disorder. That was made clear by both Lindsay Lewis and Maureen Baird. Nor will he be treated any differently than a convicted terrorist - as was again made clear by Maureen Baird in her evidence at Tr 29.09.20, pg.5, ll 2 – 18. The mere fact that SAMs would be imposed on national security grounds would mean that 'he will be treated similarly to all other prisoners under SAMs' (ibid, ll 9 – 10). But this would in fact be wholly disproportionate and arbitrary.

Inappropriateness of detention in segregation for someone suffering from clinical depression

19.14. Both the English High Court in the case of ***Love*** and the European Court of Human Rights in ***Ahmad*** have expressed profound concerns about the potential inhumanity of conditions in so-called administrative segregation in the US prison system, amounting effectively to solitary confinement, **particularly for those with special mental vulnerability**.

19.15. In the case of ***Aswat v UK*** (2014) 58 E.H.R.R. 1 at paras 52 - 56 the European Court found that extradition to the US would violate Article 3 because there was no sufficient evidence that Mr Aswat would receive an appropriate location and appropriate treatment for his mental disorder in the US system. At para 56 the Court took account of the fact that:-

> '*there is no guarantee that, if tried and convicted he would not be detained in ADX Florence, where he would be exposed to a highly restrictive regime with long periods of social isolation. In this regard, the Court notes that the Applicant's case can be distinguished from that of Mustafa (Abu Hamza). While no 'diplomatic assurances' were given that Abu Hamza would not be detained in ADX Florence the High Court found on the evidence before it that his medical condition was such that, at most, he would only spend a short period of time there. The Court notes, however, that there is no evidence to indicate the length of time that the present Applicant would spend in ADX Florence.*

While the Court in Ahmad did not accept that the conditions in ADX Florence would reach the Article 3 threshold for persons in good health or with less serious mental health problems, the Applicant's case can be distinguished on account of the severity of his mental condition. The Applicant's case can also be distinguished from that of Ben Said v United Kingdom as he is facing not expulsion but extradition to a country where he has no ties, where he will be detained and where he will not have the support of family and friends. Therefore in light of the current medical evidence, the Court finds that there is a real risk that the Applicant's extradition to a different country and to a different, and potentially more hostile prison environment, would result in a significant deterioration in his mental physical health and that such a deterioration would be capable of breaching the Article 3 threshold.'

19.16. The English High Court in its decision in 2014 ***Aswat v UK*** EWHC 1216 (Admin) followed the European Court's decision. And it was only after specific guarantees were given that Mr Aswat would be sent to an appropriate mental health institution that his extradition went ahead. Nonetheless, after he was extradited, he was only briefly detained in a psychiatric institution and then almost immediately sent to MCC New York.

19.17. More recently in 2018 the English High Court in the case of ***Lauri Love*** has found that the pre-trial conditions in Metropolitan Correctional Centre ('MCC') and Metropolitan Detention Centre ('MDC') in New York are so defective and inappropriate for someone suffering from depression and autism as to render extradition oppressive.

19.18. Those cases are significant because here we are dealing with an extremely vulnerable person with a long history of clinical depression, a diagnosis of Asperger's Syndrome, and an established risk of suicide. Detention in such conditions for Julian Assange would be the height of inhumanity.

19.19. There is clear evidence that he will not receive the necessary medical care either pre-trial or post-trial. Yancey Ellis refers to the very limited medical support that will be available to Mr Assange in Alexandria, as does Joel Sickler (Ellis 1, Tab 15, para 11 and Sickler 1, Tab 20, paras 54 – 57).

Lack of appropriate medical treatment post-trial

19.20. As to the general lack of medical care post-trial in the US federal prison system for those suffering from mental illness, the Court is respectfully referred to the following official US reports:-

i. The 2014 Bureau of Prisons ('BOP') report as to the acute lack of appropriate psychiatric care and the dramatic under-diagnosing of mental illness (see Sickler 2, Tab 62, at para 15);

ii. The 2017 Department of Justice ('DOJ') Report from the Office of the Inspector General, 'Review of the Federal Bureau of Prisons use of restrictive housing for inmates with mental illness'. This makes clear that the mental disorders of the inmate population are grossly under recorded and, as a consequence, *'the BOP is unable to ensure that it is providing appropriate care'* to those with mental disorder (see Sickler 2, Tab 62, at para 18);

iii. The November 2018 report of the Marshall Project, a prominent criminal justice NGO, which revealed that '*increasingly, prison staff are determining that prisoners – some with long histories of psychiatric problems – don't require any routine care at all'*. Moreover the report found that though the BOP itself states that 23% of incarcerated people have a diagnosed mental illness, it classified just 3% as having a mental illness serious enough to require regular treatment. Mr Sickler drew attention to the consequences of the '*steep drop in mental health treatment*' including the increased number of suicides and suicide attempts. (see Sickler 2 Tab 62, at paras 19 – 21).

Course to be taken

19.21. In what follows we will first summarise why the regime Mr Assange faces both pre-trial and post-trial would constitute inhuman and degrading treatment contrary to Article 3. And then go on to deal with the oppressiveness of the extradition to face such conditions in the light of Julian Assange's mental condition.

20. Article 3: the risk of inhuman and degrading conditions pre-trial

20.1. In respect of Article 3 we will deal in turn with the conditions pre-trial, the risk of inhuman conditions post-conviction, and the general lack of appropriate medical care.

Conditions Mr Assange faces pre-trial

20.2. The likelihood is that Mr Assange will be detained pre-trial in wholly inappropriate and dangerous conditions for someone in his mental state thus:-

i. The evidence of Yancey Ellis establishes that he will be detained in the ADSEG unit in X block in ADX Alexandria, rather than the general population, because that is the uniform practice for prisoners with such notoriety (see Tr. 28.9.20 pgs.6-7 ll 28-33).

ii. He will be confined to a windowless, single occupancy cell, approximately 50ft square, which contains a sleeping area, a small sink, and a toilet for 22-23 hours a day in ADSEG (Ellis 1, Tab 15, para 8). He will take his meals in his cell. As he made clear in his statement, there will be no real interaction with other inmates because the door and the food tray slots will be closed at all times (Ellis 2, Tab 54, para 5) and in his oral evidence (Tr. 28.09.2020, pg.6, ll 28 – pg.7, ll 2)

iii. He will not be able to associate with other prisoners even when he is out of his cell (see Ellis's second declaration at Tab 54, para 4) and his oral evidence at Tr. 28.09.2020 pg.6, ll 28 – 30); and see Lewis 4, dated 18 July 2020 at Tab 70, para 14).

iv. Kromberg's account at paras 86-87 of his first declaration as to the ability of inmates to speak through the doors and windows of their cells is emphatically contradicted by Yancey Ellis in his second declaration of 14 July 2020 (Ellis 2, Tab 54, para. 5 and in his oral evidence, Tr. 28.09.2020, pg.7, ll 3 – 10, where he made clear that Kromberg could never have tried communicating through the doors of the cells or must 'just not be familiar with actually the setting that the X clock is located').

v. **Taken as a whole, this effectively amounts to solitary confinement**.

20.3. **There is the additional risk that Mr Assange will be placed under SAMS pre-trial.** Mr Kromberg accepts this as a real possibility at paragraphs 95 of his first declaration. Eric Lewis confirms that '*he would be very surprised if this did not happen*' because '*it is a national security case'*. (Tr 14.9.20, pg.13 ll 6-10). Lindsay Lewis gave evidence to similar effect (Tr 29.9.20 pg.54 ll 1-5). So too did Maureen Baird, the former warden of MCC, the pre-trial facility in New York. SAMs will place yet further restrictions on his contact with other prisoners and with the outside world – as confirmed by Sickler in his second declaration at para 37 and by Maureen Baird in her evidence to the Court (Tr 29.09.20, pg.3, ll 12 - pg.5, ll 19).

20.4. **The combination of ADSEG and SAMs is definitely equivalent to solitary confinement.** There would be absolutely no association with other prisoners. Mr Kromberg's denial that this constitutes solitary confinement at paras 86-87 of his first declaration is contradicted by all of the defence experts on pre-trial prison conditions (Lewis, Sickler, and Yancey Ellis as well as Maureen Baird and Lindsay Lewis in their oral evidence). Indeed, the Federal Court in the case of *El Hage* correctly characterised the situation of a prisoner detained in a single cell under SAMs as one of 'solitary confinement' (see prosecution prison bundle, Tab 14, pg.481, where the United States Court of Appeals for the Second Circuit described the situation of El Hage in the year 2000 pre-trial as one where he was '*subject to* ***solitary confinement*** *for the first 15 months of his detention*' before he was exceptionally permitted a cell mate for a brief period. See also Lindsay Lewis' evidence on this at Tr 29.9.20, pg.59, ll 23 – 27).

20.5. Therefore the likely conditions of detention pre-trial would be both inappropriate and dangerous for someone with Mr Assange's medical history. As the UN Special Rapporteur on Torture commented, the practice of solitary confinement during pre-trial detention is 'meant to bludgeon people into co-operating with the Government, accepting a plea or breaking their spirit'. Mr Sickler declared that due to the stress of this type of confinement, the Government has found inmates will often change their plea and co-operate with the Government. (see Sickler 1, Tab 20 para 60). A regime of detention which is designed to break one's spirit is clearly contrary to Article 3 (Lewis 1, Tab 3, para 23).

21. Risk of SAMs and solitary detention post-trial at ADX Florence

21.1. Post-trial there is a strong likelihood that Julian Assange will be detained under SAMs at ADX Florence. This was the evidence of **Eric Lewis** who stated that he would be likely to be detained post-trial under SAMs and that the most likely placement would be in ADX Florence (Tr 14.9.20, pg.13, l 19). **Lindsay Lewis** in her oral evidence stated that Julian Assange would 'almost certainly be subject to SAMs on grounds of national security; that he would be detained at ADX Florence under SAMS in the post-trial phase (Tr 29.9.20, pg.57, ll 21-24) and that he would probably be detained in H-Block (Tr 29.9.20, pg.56, ll 29-30). **Maureen Baird** also gave evidence that he would be likely to be detained under SAMs and at ADX Florence post-trial in H-Unit (Tr 29.9.20, pg.9, ll 4-8, ll 16-24). She confirmed that this would be on grounds of 'national security' (Tr. 29.09.20, pg.54, ll 1 – 5). H-Unit is reserved for those at ADX under SAMs.

21.2. Maureen Baird confirmed that **the fact that he suffers from mental illness would <u>not</u> be a bar** to his being held in ADX Florence (Tr. 29.09.20, pg.56, ll 1 – 3). **Lindsay Lewis equally accepted that 'suffering from mental illness' 'is not a bar' to detention at ADX** (Tr. 29.09.20, pg.56, ll 1 – 4). She made clear that the test for exclusion from ADX detention on grounds of mental illness would be 'incredibly high' and the mere fact of suffering from depression would not be enough (pg.56, ll 11 – 14). Moreover, even if suffering from serious mental illness, detainees can 'nonetheless, if security concerns dictate that they have to be placed at ADX Florence because of the unavailability of other facilities in the BOP to accommodate them… be placed there' (pg.56, ll 4 – 10). Eric Lewis gave evidence to like effect, see Tr 14.09.20, pg.13, ll 19 – 22. Therefore, there is a very real risk that he will be detained in the inappropriate conditions of ADX Florence despite his diagnosed history of depression, and despite the fact that it is known that he is prone to deteriorate in conditions of isolation (see Professor Kopelman, Tr. 22.09.20, pg.10, ll 19 – 21, and Professor Fazel, Tr 23.09.20, pg.57, II 21 – 25). Yet this was the very matter that concerned the European Court in the case of ***Aswat*** in the passage cited above - from paragraph 56 of the judgment, where they remarked that 'there was no

guarantee' that Mr Aswat, a mentally disordered person, 'would not be detained in ADX Florence where he would be exposed to a highly restrictive regime with long periods of social isolation'.

21.3. In the event that Julian Assange is held in ADX Florence under SAMs at H Unit, he will be detained in circumstances of extreme isolation that effectively amount to solitary confinement. As Lindsay Lewis and Maureen Baird confirmed, prisoners detained at ADX Florence spend from 22-24 hours per day locked alone in their cells; they are not permitted any association with other prisoners and they are not permitted any group activities at all. A psychologist at ADX Florence stated to the DoJ: *'[Y]ou have no contact, you don't speak to anybody, and it's a form of torture on some level…. [Inmates] still talk to officers and stuff like that, but they don't really get a chance to see anybody…. They rec[reate] alone; we don't even have to be back there to rec them. So, yes, I would say that <u>they are in fact in solitary confinement</u>.' (*Sickler 2, Tab 62, para 52; DOJ 2017 Report*).* Maureen Baird referred in her evidence to the fact that the former warden of ADX Florence, Robert Hood, had described the conditions as 'not built for humanity. I think that being there, day by day, it's worse than death' (See Baird at defence prison bundle, Tab 6, pg.251, para 22. See also Sickler 2, Tab 62, para 59). It is significant that Robert Hood had worked for the BOP for over 20 years and was the warden of ADX Florence between 2002 – 2005. So he spoke with some authority on this subject.

21.4. Communication between inmates is completely prohibited for those under SAMs (see Lewis at Tr 29.09.20, pg.58, ll21 – 22 and Baird at Tr 29.09.20, pg.10, ll 10 – 14, and 19 – 21).

21.5. Moreover, both Lindsay Lewis and Maureen Baird confirmed in their evidence that these conditions could go on indefinitely, without any proper review, and that many prisoners had been detained there for many years. This is further confirmed by the statistics. '82% of prisoners placed under SAMs were under those restrictions for more than a year, and **13 of those were held for more than a decade'** (See Lindsay Lewis, Tr 29.09.20, pg.58, ll 31 – 34). Indeed, there is evidence that '*one man with mental illness spent 19 years in ADX before he was finally transferred out'*

(Sickler 2, pg.34, para 62 citing the Inspector General's July 2017 review of 'Federal Bureau of Prisons' Use of Restrictive Housing for Inmates with Mental Illness').

21.6. So the Court can see that there is clear evidence of a real risk that Julian Assange despite his confirmed diagnosis of depression and his liability to deteriorate in conditions of isolation will be held in ADX Florence, in H unit, in conditions of isolation; that his detention there will be indefinite; that it will be subject to no proper review; and that it may go on for many years without him receiving proper medical treatment. That of itself is enough to render his extradition a breach of Article 3, but we will set out below a more detailed analysis of the evidence as to the inhumanity of detention in ADX Florence – particularly for someone with a diagnosed mental condition.

21.7. The combined effects of these measures preventing almost all forms of communication were strongly denounced by Maureen Baird, who had to enforce them in her former role as an MCC warden: 'Placement in this type of isolation, for any extended time period is dehumanizing. In my opinion, any person with a conscience and an ounce of compassion, would believe these extreme tactics utilized for any reason are cruel and inhuman. [...] If Mr. Assange is extradited and subjected to SAMs, he will be treated similarly to all other prisoners under SAMs. I have witnessed first-hand, these unduly harsh conditions experienced by inmates under SAMs.' (Statement of Maureen Baird, para 18)

More detailed analysis of the ADX regime

The physical conditions

21.8. Prisoners at ADX are locked for 22-23 hours per day in their cells, which are designed to prevent any contact with detainees in adjacent cells (Sickler 2, Tab 62, para 60; DOJ 2017 Report; Amnesty International (AI) 2014 Report p 8; Eric Lewis 2, Tab 38, para 31). Meals are eaten inside cells and limited recreation time consists of being alone in individual cages (Sickler 2, Tab 62, para 60; AI 2014 Report, pgs.9-10).

Contact with others

21.9. The US government's claim that inmates have daily contact with correctional counsellors, medical and mental health and religious staff, in reality comes down to only a few words per day by staff (AI 2014 Report, pg.16). Amnesty International observed that conditions for prisoners at ADX have become increasingly restrictive and isolated in recent years, with, for example, group recreation being banned (Id., pg.12). Similarly, Mr Kromberg's long list of recreational opportunities, visits and options to communicate obscures the fact that these are unavailable for prisoners under SAMs at ADX, who are in fact in solitary confinement even if the BOP does not recognise this term.

21.10. Prisoners in the general population units may write letters and make two 15-minute non-legal phone calls a month (or, six hours per year in total to speak with their family) (Id., pg.16). All social and legal visits at the facility take place in a non-contact setting, behind a thick plexiglass screen (Id., pg.16). Even though visits are non-contact; detainees are shackled and in pain nonetheless (Id., pg.16). Other than when being placed in restraints and escorted by guards, prisoners may spend years without touching another human being (Id., pg.16). Nevertheless, due to ADX' remote location, visitors will only rarely be able to meet Mr Assange, a problem that has been reported by other prisoners as well (Id., pg.16).

21.11. Visits and correspondence for SAMs prisoners at ADX are typically limited to approved attorneys and approved immediate family members only (Sickler 2, Tab 62, para 53; AI 2014 Report). There is a real risk that even his close family members will not be approved: in Abu Hamza's case, the majority of his children and grandchildren are not approved- the oldest grandchild being 6 years old (Lewis, Tab 60, para 91). Correspondence to or from approved contacts, which is monitored along with the twice-monthly non-legal phone calls allowed, may be limited to only one letter a week (Id.). Abu Hamza described in his own case how he is only allowed to send one letter a week, subject to various controls, due to which its writing and receiving a reply takes 6 months (Lewis, Tab 60, para 92). The monitoring of phone calls by an FBI agent also substantially complicates the process as the agent must be available for the call (Statement of Maureen Baird, para 10).

21.12. The experiences of the American University Human Rights Clinic in setting up phone calls and legal visits in preparation of a complaint on ADX conditions before the Inter American Commission of Human Rights are illustrative of the additional procedural difficulties for inmates in communicating with people outside prison (and this concerned inmates from the general population, not even under SAMs) (the court is referred to the Defence Prisons Bundle at Tab 8).

21.13. As shown in the Human Rights Clinic's observations in the Defence Prisons Bundle at Tab 8, to set up a phone call, one student attorney had to contact an inmate's counselor every day for over two weeks until he heard back from the counselor (IACHR Observations at Tab 8 of Defence Bundle for Prison Experts, pg.17). Another student attorney never heard back from a counselor and was simply unable to set up a phone call as her request for help from other counselors to reach the counselor in question was refused (pg.17). Once the request is received the option to have a phone call depends on the availability of the counselor and can be cancelled last-minute, as was the case for another student attorney (pg.18).

21.14. For their legal visit, they were told that all three legal booths were fully booked on the days of their visit (pg.18). After negotiations, they were allowed to use a psychological booth which contained a recording device (pg.18). On the day of their visit, however, only one other attorney team was present and the legal booths remained empty for the rest of the day (pgs.18-19). They were then also prevented from passing on legal documents to their clients. They had to send them by mail but were not allowed to add stamped envelopes to return the documents to them, adding an extra financial burden to the inmate's ability to pay for the posting of a bundle of legal documents (pg.19).

Absence of proper review or opportunity to progress

21.15. The BOP's rules to assign a facility would not provide Mr Assange a realistic prospect of earning his way out of this extremely restrictive solitary confinement regime.

21.16. First, Ms Lewis' experiences from representing Abu Hamza make apparent the courts' inability to exercise control over the BOP's designation process. After the US had provided assurances to UK courts and the ECtHR that Abu Hamza would not be detained at ADX Florence due to his severe disabilities, it became clear during the sentencing proceedings that the BOP intended to detain him there after all (Lindsay Lewis, Tab 60, para 39). Despite the prior assurances to the UK, the sentencing court refused to make any orders or recommendations to take control of the designation process (Lindsay Lewis, Tab 60, para 42-43). The only concession it made was to recommend that the BOP take into account the health and needs assessment of the medical doctor hired by the defence and that an occupational therapist be part of the BOP's team evaluating Abu Hamza (Lindsay Lewis, Tab 60, para 44). However, when 8 months later still no designation decision had been reached and Ms Lewis requested the Court to order the BOP to disclose any decision reached and any occupational therapist report prepared, the Court rejected her application (Lindsay Lewis, Tab 60, para 47-52). **It stated that it followed the BOP's reasoning that it is 'outside the court's post-sentencing jurisdiction' and an 'invitation to the Court to involve itself in the BOP's classification and designation process'** (Lindsay Lewis, Tab 60, para 47-52). She was never provided with any information as to whether the BOP followed the Court's two limited recommendations (Lindsay Lewis, Tab 60, para 52).

21.17. Secondly, once assigned to H-Unit, Mr Assange would not have the opportunity to enter the Step Down Program in the General Population: he will only be able to leave the H-Unit if the Department of Justice, instead of the prison administration, lifts his SAMs (Sickler 2, Tab 62, Exhibit 15, AI 2014 Report, pg.25). Even though there is an internal step down programme within the H-Unit, prisoners cannot move to the last stage as long as the DOJ does not lift their SAMs, despite clear records of good conduct (id). The lack of procedural fairness has increasingly been acknowledged in US courts. In the very federal court district where Mr. Assange could be placed if he is sentenced to ADX in Colorado, the District Judge found in 2014 that the due process of SAMs failed the very basics of fairness (Sickler 2, Tab 62, para 53). Senior U.S. District Judge Richard Matsch concluded his opinion with the remark that the SAMs renewal procedure 'is offensive to traditional values of fairness and transparency' (Id.)

21.18. Although decisions may be appealed through an administrative remedy process, this is an ineffective remedy in practice due to the wide deference afforded to prison administrators in decisions relating to institutional security (Sickler 2, Tab 62, Exhibit 15, AI 2014 Report, pg.22). The process has been described in court documents as 'meaningless because no administrative remedy challenging a Step-Down denial has ever been successful' (Id). Similarly, Ms Lewis has described in her statement how the administrative remedy process functions to deter and delay court challenges to BOP decisions (Lindsay Lewis, Tab 60, paras 100-104). She was only able to commence court proceedings 8 years after Abu Hamza was first detained in the US, as she had to exhaust all administrative remedies first (Lindsay Lewis, Tab 60, para 103). The transferring between different facilities even further delays challenges to SAMs, as the administrative review process (about the same issue) must begin anew in every new facility (Lindsay Lewis, Tab 60, para 106).

21.19. In March 2020, the Inter American Commission of Human Rights declared the American University Human Rights Clinic's petition regarding prison conditions at ADX admissible. It was satisfied on the basis of their submissions that they had made out a 'colorable claim' for further investigation regarding the 'conditions of detention and circumstances of confinement of the alleged victims, without opportunity for review of their status, as well as the lack of due process and the discriminatory treatment' (Defence Prison Bundle, Tab 7, pg.272).

21.20. In its observations to the IACHR, the Clinic describes the various additional procedural challenges thwarting the administrative remedy process. For instance, missing a deadline, failing to file a form or a copy of a form are sufficient to dismiss a complaint (IACHR Observations at Tab 8, Defence Prison Bundle, pg.10). The inmate is dependent on his counselor to obtain the required forms to file complaints in time, which delays and often prevents the inmate from filing the complaint (Id pgs.12-13). As mentioned above, arranging legal visits and phone calls is also extremely difficult.

21.21. These, and various other obstacles, render the procedure ultimately entirely ineffective: '[b]etween March 2016 and February 2017, a total of 3,522 requests for

administrative remedies were filed by inmates at ADX Florence, and 10 of these were recorded as 'granted' (0.2%).' (Sickler 2, Tab 62, Exhibit 14, DC Corrections Information Council ADX Report, pg.29). To be clear, none of the granted administrative remedy requests concerned the lifting of SAMs, instead the requests granted were related to medical or operational issues (Id, Annex A, pg.40).

21.22. The other means to contest one's SAMs, during the annual extension evaluation, also provides a merely theoretical, paper remedy, according to Ms Baird. 'Mr. Kromberg asserts these SAMs are imposed in, 'up to one year' increments, with the time-requirements the same for any extension beyond one year. During my term as Warden at MCC New York, I have never seen an inmate have SAMs removed, only extended.' (Statement of Maureen Baird, para 8).

21.23. Moreover, Mr Kromberg's references to various judgments in order to prove that inmates are afforded due process when fighting their SAMs merely serve to demonstrate that inmates have no effective recourse to the courts when they are not afforded procedural fairness. The judgments which Mr Kromberg cited all agree that inmates have no 'liberty interest' in having their SAMs removed and as such have no right to due process. According to Ms Lewis, this can be explained by the fact that the courts show a very high level of deference to the BOP, simply because holding that SAMs are unconstitutional would create irresolvable practical problems (Lindsay Lewis hearing 29 September 2020, pg.81).

Inadequate mental health care regime at ADX Florence

21.24. As summarised above, Julian Assange's well-documented record of mental health issues would not prevent him from being held in isolation at ADX with no or highly limited access to mental health services.

21.25. Contrary to Dr Leukefeld's evidence, also post-Cunningham v BOP, a class-action suit concerning the detention of mentally ill detainees at ADX, ADX still houses mentally ill detainees in isolation (Lindsay Lewis, Tab 60 paras 70-71). Dr Leukefeld refers to the BOP policy, 'Treatment and Care for Inmates with Mental Illness' (PS5310.16) to argue that detainees with a mental illness would not be designated to

ADX. She however fails to address the exception in the BOP's policy which opens the door for such designation based on vague security needs. 'Placement of a seriously mentally ill inmate in the ADX or a SMU will only occur if extraordinary security needs are identified that cannot be managed elsewhere.'96 She also does not mention the arbitrary diagnosing of care levels for inmates to avoid that their mental health care levels prevent them from being sent to certain facilities.

21.26. This explains the high number of mentally ill prisoners at ADX: Ms Baird, ex-warden and ex-designator, has stated that once a prisoner is held under SAMs, there are no alternatives available than ADX (Statement of Maureen Baird, para 16). 'If the inmate isn't gravely ill, requiring placement at a Federal Medical Center, regardless of the length of sentence, or any other factors, as suggested by Mr. Kromberg, I don't believe there are other options, except for placement at the ADX' (Id). She agrees with Mr Sickler that if Mr Assange is assigned SAMs, he will most likely be placed in the H-Unit at ADX, the unit for detainees under SAMs (Id).

21.27. Once at the H-Unit, he would be deprived of any meaningful opportunity to participate in programmes or counseling. Mr Kromberg goes into great detail describing the living conditions in the various sections of ADX and the available programmes. Yet, the large majority of this is of little relevance since Mr Assange will be held at the H-Unit under SAMs and has no ability to progress to the general population without his SAMs being lifted.

21.28. Maureen Baird, based on her experience as warden at MCC where inmates were subject to SAMs, found Mr Kromberg's statement that he would be able to participate in group counseling or socialise with other inmates or members of the public 'baffling' and 'contrary to the facts as I have observed them' (Baird, para 15; Kromberg para 33). 'The main premise of assigning SAMs, is to restrict a person's communication and the only way to accomplish this is through isolation' (Baird para 15). These programmes would be 'non-existent and meaningless' to Mr Assange, and even if a warden would want to allow him to participate, they would not have the authority to do so (Id). Ms Lewis further added that individual therapy is offered on a very limited

96 Federal Bureau of Prisons, "Treatment and Care for Inmates with Mental Illness" (PS5310.16), pg.19, https://www.bopg.gov/policy/progstat/5310_16.pdf.

basis (5 patients per week), inmates under SAMs are likely to be ineligible, and conversations with SAMs inmates are likely to be monitored, which prevents the patient from effectively engaging (Lindsay Lewis, para 75).

21.29. Since any mental health care improvements following from the Cunningham v BOP lawsuit do not apply to inmates under SAMs, Mr Kromberg's comments on the implementation of the Cunningham settlement bear no relevance to Mr Assange's case (Statement of Maureen Baird, para 41).

21.30. Not only would Julian Assange be excluded from the settlement's scope due to his SAMs, he will also not obtain any benefits from it as the time period throughout which ADX had to implement the settlement conditions expired in December 2019.

21.31. The lack of progress post Cunningham is documented in the 2017 CIC Report. Inmates often have difficulty accessing medication for their psychological disorders and are being taken off medication (Sickler 2, Tab 62, para 65, 2017 CIC Report pg.18). ADX's alarmingly high rates of documented 'Threatening Bodily Harm' incidents (8.7/100 inmates at ADX compared to the overall BOP rate of 0.9/100 inmates) indicates that mental health care at ADX is still highly inadequate, even compared to the BOP's own poor standards (Sickler 2, para 65; Exhibit 14, 2017 CIC Report pgs.18-19). According to the report, those committing self-harm or suicide are treated not seriously, but as 'attention seeking' (Id). In a recent case from February 2020, the Court held the care at ADX to be 'dramatically short of medically acceptable standards of care, even for prisoners' (Sickler 2, Tab 62, para 66). Whilst the case concerned physical care, the underlying complaint demonstrated a lack of health care generally (Sickler 2, para 66).

21.32. The various complaints currently lodged before national and international bodies demonstrate that the Cunningham settlement far from resolved mental health care issues at ADX and also did not succeed in its narrow goal of transferring seriously mentally ill people out of ADX .

21.33. The recent observations of the Petitioners to the Inter American Commission of Human Rights (IACHR) demonstrated the ongoing issues for inmates with similar

mental health issues to Mr Assange. '*One example of this is Petitioner REDACTED, who was diagnosed with Post Traumatic Stress Disorder ('PTSD') in 2001. Since arriving at ADX in 2007, Petitioner REDACTED has not received treatment for his PTSD. Petitioner REDACTED, as recently as February 11, 2018, sent a 'letter of desperation' requesting psychological help.*' (IACHR Observations of Petitioners, Petition No P-387-09, pgs.55-56).

Conclusion on compatibility of ADX regime with Article 3

21.34. The prison regime described above, the accompanying isolation and the life-threatening effects are likely to be imposed on Mr Assange arbitrarily and despite the fact that he is alleged to be neither a violent offender or a terrorist. He is not even a Category A prisoner in the UK, in contrast to the prisoners whose cases were considered in ***Ahmad and Ors***. Moreover, he will be exposed to these regimes irrespective of his mental condition and suicidal tendencies as is clear from the long history of inappropriate use of isolation in general and the ADX regime in particular on those suffering from mental illness.

21.35. For the reasons set out above it is submitted that earlier cases such as ***Ahmad v UK*** and ***Pham*** relied on by the prosecution do not address the particular type of situation here or the evidence that is now available on the prison conditions that Julian Assange will face in the year 2020 and the effects that these prison regimes will have in his particular case. In summary, the prison regimes he faces and in particular the risk of detention under SAMS and in ADX Florence are inhuman for the following reasons:-

i. They are wholly inappropriate in his case given the actual nature of his alleged offending.
ii. The imposition of such regimes would be inhuman given his mental vulnerabilities.
iii. The SAMS regime and detention in ADX Florence could be potentially indefinite as shown by the examples Joel Sickler cites, the evidence of Maureen Baird, and the evidence of Lindsay Lewis and the case of ***Abu Hamza*** himself.

iv. Despite Kromberg's assertions to the contrary, placement under SAMS and subjection to the ADX regime is not subject to any realistic or effective review. That was clearly shown by the oral evidence of Lindsay Lewis and Maureen Baird.

The subjection of Julian Assange to these draconian and dehumanising regimes will inevitably increase the high risk of suicide that already exists.

The report of Professor Craig Haney

21.36. On the 25 September 2020, the Court exercised its case management powers to exclude the evidence of Professor Craig Haney dated 23 September 2020. However, the Court is respectfully invited to note the following facts:-

i. This report responds to and seeks to correct the assertions made in relation to ADX Florence by Gordon Kromberg in his Fourth Supplementary Declaration of **3 September 2020** and the report of Dr Alison Leukefeld dated 24 August 2020.

ii. This is a report by a distinguished professor of psychology who is the acknowleged expert on the effects of solitary confinement on prisoners and who has 'personally toured and inspected conditions of confinement at the Administrative Maximum or 'ADX' facility in Flornce, Colorado on a number of occasions' (see para. 7 of his report). In his report, he states that the declarations of Kromberg and Leukefeld:

'*fail to adequately describe the extreme levels of social isolation or 'solitary confinement' to which prisoners housed at ADX are subjected, and they both fail to sufficiently acknowledge the deleterious and dangerous effects that this level of social isolation can have on prisoners in general and mentally ill prisoners in particular'* (para 8).

iii. As Professor Haney states:

'ADX is a truly harsh, deprived prison environment that subjects prisoners to a level of social isolation that is as extreme and dangerous as any facility I have encountered. Solitary confinement of the kind imposed at ADX places all prisoners at significant risk of serious psychological harm. The risk of harm to which solitary confinement at ADX subjects mentally ill prisoners is far greater

than for other prisoners, and it includes an especially heightened risk of self-harm and suicide' (para. 8).

iv. Professor Haney goes on to give an accurate and detailed account of the regime for prisoners in all but the 'step down' units and to conclude that 'ADX imposes a truly profound level of social isolation. The deprivation of meaningful social contact is as complete and extreme as any I have encountered in any prison in the United States or in other parts of the world, and far worse than most' (para. 14).

v. From paragraphs 15 onwards, he shows the *Cunningham* settlement relied on by Leukefeld and Kromberg in their most recent affidavits has not in fact appreciably altered the basic conditions, though it has ensured that those suffering from what the prison authorities consider serious mental illness will be excluded. He further makes the point that prisoners suffering from serious mental illness with 'extraordinary security needs who are subject to SAMs and housed in H Unit', as we submit Julian Assange would be, can be 'retained in ADX' and then have no direct social contact with other persons (see paras 18 – 20).

vi. He exposed the falsehood of the suggestion that prisoners housed in H unit could participate in any way with group activities or group therapy (para 23).

vii. Finally, he showed based on his unrivalled experience and study of the subject, the extent to which detention in a facility such as ADX creates a greatly increased risk of suicide (para 28) and inflicts an extraordinary degree of stress and pain (para 30).

21.37. Julian Assange accepts that the Court was seeking to exercise a case management power. However, the Court is invited to take account of the plain fact that the assertions of Leukefeld and Kromberg about the regime at ADX Colorado, and particularly the regime in H Unit are directly contradicted by the leading expert on solitary confinement in the US, who has actually visited and toured ADX Florence on a number of occasions and has shown that the criticisms made by both Maureen Baird and Lindsay Lewis are well-founded. When it comes to considerations involving the risk of inhuman conditions of detention, the court will obviously be concerned that the evidence of government witnesses who cannot be challenged in cross-examination, that is produced very late in the day and that was within a short

space of 20 days strenuously criticised by Professor Haney. That bare fact cannot, it is respectfully submitted, be ignored.

22. Section 91: unjust and oppressive to extradite by reason of Julian Assange's medical condition

22.1. Section 91 affords a protection from extradition where extradition would be rendered unjust or oppressive by reason of physical or mental disorder. In this context Mr Assange relies upon the evidence of expert psychiatrists and psychologists who deal with Mr Assange's history of clinical depression and trauma, and the high risk of suicide if he is extradited to the US. They are, in turn:-

i. **Professor Kopelman**, a distinguished neuro-psychiatrist, who found episodic clinical depression varying from moderate to severe, and a high risk of suicide on extradition, consequent on his mental disorder. He also found that Julian Assange's depression would be gravely exacerbated by conditions of isolation in US prisons and that he had deteriorated in conditions of isolation in HMP Belmarsh (Kopelman, Tr 22.09.20, pg.10, ll 19 – 21).

ii. **Dr Sondra Crosby,** who examined Julian Assange in the Ecuadorian Embassy in October 2017, and again in HMP Belmarsh, twice, in October 2019 and January 2020. In her evidence, she confirmed the diagnosis of depression and that she considered that there was a very high risk of suicide upon his extradition (Tr 24.9.20, pg.48, ll 1 – 7).

iii. **Dr Quinton Deeley,** an expert in the diagnosis and treatment of ASD in his report of August 14th 2020 (tab 80). He found Julian Assange to suffer from depression and ASD. He further found that there was a high likelihood of suicide and that this high risk of suicide would be linked to his depression and ASD, and his obsessive rumination on the '*unbearable ordeal'* if he were to be extradited (Tr 23.9.20, pg.11, ll 6 – 11).

iv. **Professor Seena Fazel,** prosecution psychiatric expert (Prosecution Core Bundle, Tab 10) who did not dispute that Julian Assange had suffered from clinical depression with a series of earlier episodes. Nor did he dispute that the depression had been severe at the time Julian Assange was seen by Professor Kopelman in December 2019, though Professor Fazel found it to be

moderate when he saw him (Tr 23.9.20, pgs.56 – 57). He agreed that there was a high risk of suicide and that it would be increased by isolation in imprisonment in the US (Tr 23.9.20, pg.61, ll 16 – 21). He thought that the suicide risk could be managed in the US but recognised that he was not an expert on the prisons system there and had no knowledge of conditions in ADX Florence (Tr 23.9.20, pg.65, l 5 and pg.68, ll 17 – 31).

v. **Dr Nigel Blackwood,** prosecution psychiatric expert (Prosecution Core Bundle, tab 11). He confirmed the diagnosis of depression but believed the risk of suicide could be managed. But again he accepted he did not have any specific knowledge of conditions in ADX Florence (Tr 24.9.20, pg.27, ll 14 – 31).

22.2. **This is a classic case for invoking the jurisdiction exercised by the High Court in the case of *Love* pursuant to s.91 of the 2003 Act**. That case provides this Court with a precedent for protecting a person suffering from mental illness from extradition on grounds of oppression on three alternative grounds:

i. Firstly, because it would be oppressive to extradite someone suffering from mental illness where <u>the very fact of extradition</u> and removal from family contact would expose them to a high risk of suicide (paras 118 – 119, and 122 of the judgment in ***Love***);

ii. Secondly, because it would be particularly oppressive to extradite where the underlying illness and the risk of suicide would be exacerbated by **inappropriate conditions of detention** (including segregation) that the requested person would inevitably face in the US (paras 119 – 120, 122);

iii. Thirdly, because it would in any event be oppressive and inhumane to expose the requested person to **harsh conditions of detention** (including segregation) where they were suffering from mental illness and **would inevitably deteriorate** mentally - irrespective of whether they would actually commit suicide (paras 116, 119 – 122).

History of Clinical Depression and Trauma

22.3. It is plain that Julian Assange suffers from a long history of clinical depression that dates back many years. There is a family history of mental illness (Core bundle, Tab 6, para 2).

22.4. As a matter of historical record, he was diagnosed with depression by **Professor Mullen** in 1995, following an earlier history of self-harm in 1990 (Core Bundle, tab 8, para 4). Professor Mullen saw him again in HMP Belmarsh in 2019 and then recorded that he has 'a history of episodes of significant periods of depression dating back to his teens' which 'were for the most part of mild to moderate severity' and that his 'current depression was precipitated by the distress and fear occasioned by his imprisonment and threatened extradition' (Core Bundle, Tab 8, para 38). He concluded that he 'will remain at risk of suicide while the depression continues in its current form' (Core Bundle, Tab 8, para 38). Finally, he gave this view as to the effects of extradition to the US: 'in my opinion his mental health will likely deteriorate further and his risk of suicide will increase if he continues to be subject to the current level of isolation, or to potentially even more isolation and restriction in the US prison system' (Core Bundle, Tab 8, para 40).

22.5. **Professor Kopelman** carried out a series of interviews with Mr Assange over a long period in 2019 and concluded in his report dated 17 December 2019 that 'Mr Assange suffers from recurrent depressive episodes sometimes with psychotic features present, and often with ruminative suicidal ideas' (Core bundle, Tab 6, pg.33, para 9). This report drew on an extensive consideration of Mr Assange's family history, medical history and consultation with Professor Paul Mullen's case history of Mr Assange's treatment in Australia. Professor Kopelman recorded symptoms relevant to Mr Assange's mood disorder that included loss of sleep, loss of weight, a sense of pre-occupation and helplessness as a result of threats to his life, the concealment of a razor blade as a means to self-harm and obsessive ruminations on ways of killing himself (Core bundle, Tab 6, pgs.11-12 and 33, para 9). At that time, Julian Assange expressed frequent suicidal ideas and a constant desire 'to self-harm or suicide' (Core bundle, Tab 6, pg.33, para 9). Professor Kopelman's conclusion was that:

'(a) Mr Assange is indeed suffering from mental disorders, namely a severe depressive episode with psychotic (hallucinatory) and somatic symptoms, in the context of a history of recurrent depression, as well as PTSD and anxiety disorder. (b) In my opinion, there is a very high risk of suicide, should extradition become imminent. Mr Assange shows virtually all the risk factors which researchers from Oxford have described in prisoners who either suicide or make very lethal attempts. I would add that he is telephoning the Samaritans regularly. He has received Catholic absolution, and he wants to prepare a Will. He has had potential suicidal implements confiscated. He is very aware of the example of relatives and friends who have suicided. He has been preparing the ground, like his grandfather, by (in effect) saying Goodbye to those closest to him. (c) ***This suicide risk arises directly from Mr Assange's psychiatric disorder*** *(his severe depression). He finds it difficult to cope in HMP Belmarsh, particularly with his relative isolation in Healthcare, and he thinks of suicide 'hundreds' of times a day. …I reiterate again that I am as certain as a psychiatrist ever can be that, in the event of imminent extradition, Mr Assange would indeed find a way to commit suicide.'* (Core Bundle, Tab 6, p35, para 14 (iv); emphasis added)

22.6. **Dr Sondra Crosby** confirmed the diagnosis of a major depression (Crosby, Tab 7, para 4). On the issue of suicide risk, she assesses a high likelihood of suicide if he is extradited to the United States :-

'It is my strong medical opinion that extradition of Mr Assange to the United States ***will further damage his current fragile state of health and very likely cause his death****. This opinion is not given lightly.'* (Crosby, Tab 7, para 49; emphasis added)

In her oral evidence, she confirmed that extradition would have a disastrous effect on his health (Tr 24.09.20, pg.48, ll 4 – 6) and create a 'very high' risk of suicide (pg.48, ll 1 – 3).

22.7. We rely further on the report of **Dr Quinton Deeley** dated 14th August 2020 (Deeley, Tab 80) and on his oral evidence (Tr. 24.09.20, pgs.4 – 50). At paragraph 29.13 (at page 25). In his report and in his oral evidence, Dr Deeley confirmed Professor Kopelman's diagnosis of a depressive condition (Tr. 24.09.20, pg.10, ll 11 – 29). He highlighted that this is of a fluctuating nature; that Mr Assange was suffering from *'a severe depressive episode with psychotic symptoms'* when Professor Kopelman assessed him; and that he was suffering from a 'moderate depressive episode' in

July 2020. He identifies a succession of symptoms of depression at paragraph 10 of his report and in his oral evidence at Tr 24.09.20, pg.10.

22.8. Dr Deeley, who is a leading expert on Autism Spectrum Disorder, further found that Mr Assange satisfies the criteria for Asperger's Syndrome Disorder (at paras 27.1 to 27.2) and explains that diagnosis fully thereafter. He further explains that the capacity for forming relationships that led Dr Blackwood to discount ASD does not in fact discount such a diagnosis on the basis of Dr Deeley's comprehensive experience in this field (paras 27.6 to 27.9). In his oral evidence, he convincingly explained how Julian Assange met the criteria for a diagnosis (see Tr 23.09.20, pg.7, l 14 – pg.10, l 8), and how the video shown to him by the prosecution actually confirmed the diagnosis (Tr. 23.09.20, pg.22, ll 21 – 31).

22.9. **Dr Deeley finally addressed the risk of suicide** 'should a determination be made to extradite him to the United States'. He indicated in his report that his history of depression (Deeley, Tab 80, paras 31.2 to 31.8), and his Asperger's Syndrome condition (Deeley, Tab 80, para 31.9) greatly increase the risk of suicide if a decision to extradite is taken. He concluded that, if a decision to extradite is taken, 'he is likely to try to kill himself' (Deeley, Tab 80, para 31.14). Still worse, Dr Deeley went on to assess that there is a high risk of attempted suicide if he is actually extradited, detained and tried in the US; and that this risk would be due to a significant degree to the fact that his Asperger's condition 'would render him less able to manage' conditions in US prisons.(para 31.18). In his oral evidence, he firmly maintained this position and stated as follows about the act of extradition: -

> 'It is an act [extradition]… which he fears which he dreads, he has described as contemplating over the sense of horror and he ruminates about his prospective circumstances at length and I think that is influenced by his autistic cognitive style as well, that tendency to ruminate and become preoccupied with matters. And he has consistently maintained that he would find it an **unbearable ordeal and I think his inability to bear that in the context of an acute worsening of his depression would confer a high risk of suicide**' (Tr. 23.09.20 pg.11, ll 6 – 11).

22.10. Taken as a whole therefore the defence expert evidence satisfies the test laid down in ***Turner v United States*** and subsequent cases for discharge under s.91 in cases of suicide risk, in that:-

i. There is a high risk of suicide, as established by the evidence of Professor Kopelman, Dr Sondra Crosby and Dr Quinton Deeley.
ii. That risk of suicide arises out of the diagnosed mental conditions of depression and Asperger's Syndrome as expressly found by both Professor Kopelman and Dr Quinton Deeley.
iii. The evidence is that this risk would not be addressed and obviated by appropriate precautions in the US system.
iv. Moreover for the reasons set out in part 12 above, the US system does not have 'appropriate arrangements in place… so that [the US] authorities can cope properly with the person's mental condition and the risk of suicide' (***Turner v US*****,** para 28 (6))
v. Indeed, for all the reasons set out in part 12 above, the real risk of indefinite detention in solitary confinement and also the denial of human contact under a SAMs regime are likely to exacerbate the deterioration of his mental state and increase the risk of suicide.

22.11. Moreover, there is a very real risk that Julian Assange will be driven to take his own life by the very prospect of extradition or the very fact of being extradition to the US, given the lengthy detention in inappropriate and inhuman conditions that he knows await him there. In this context the Court's attention is drawn to the likely disastrous effects on him of being separated from his family and support system. It is significant that the European Court in ***Aswat*** attached significance to the separation of a mentally ill person from all family support in the alien and hostile prison system of the US [para 56, *supra*]. So too did the English High Court in ***Love*** (para 120). This is relevant to the further and inevitable risk of serious mental deterioration addressed in the next paragraph.

22.12. Finally, irrespective of suicide risk, the fact that he is a person suffering from undeniable depression which has a proven capacity to deteriorate under stress **and in conditions of isolation**, means that extradition to face the conditions of detention

both pre-trial and post-trial isolation described in the sections above (relating to prison conditions and Article 3), also makes it oppressive to extradite him (see paragraphs 116, 119, and 122 of the decision in ***Love***).

22.13. It is submitted that **the evidence of the prosecution experts** does not undermine these conclusions and indeed, in the case of Professor Fazel, significantly supports it. So we next turn to the prosecution experts and Professor Kopelman's response.

Evidence of Professor Fazel

22.14. The prosecution relied on the oral evidence and the report of Professor Seena Fazel dated 30th July 2020, who was requested to address both the diagnosis of depression, and the comparative suicide rates as between US prisons and UK prisons generally.

22.15. In his report, Professor Fazel recorded Julian Assange's history of depression; the antidepressant medication he has received in prison (paras 3.10-3.15); the deterioration in Mr Assange's condition by the 20th June 2020 at part 4, and he confirms a 'clinical diagnosis of depression, which is of moderate severity' (para 5.2). When he gave oral evidence, he significantly did not dispute Professor Kopelman's finding that the depression was severe at the time that Professor Kopelman assessed Julian Assange in November and December 2019 (see Tr. 23.09.20, pg.57). He accepted that it was fair to suppose that the combination of appropriate medication and the removal from the isolation in healthcare had led to an improvement in Julian Assange's condition by the time he assessed him himself in February and March 2020 (pg.57, ll 13 – 32). So he recognised that Julian Assange's depression could vary in severity and that factors such as isolation in solitary confinement and removal of his family support could well exacerbate that condition in the US (Tr. pg.61, ll 16 – 27). He further accepted that he was no expert on the prison system in the United States and that he could not dispute that there was a heightened risk of suicide if he was subject to a very long sentence (pg.65, ll 5 – 7), or to isolation (pg.61, ll 16 – 19).

22.16. Professor Fazel in his report concluded that Mr Assange's suicide risk is currently high but modifiable whilst he is in a UK prison (para 5.6). Turning to the position if Mr Assange is extradited he recognised that his extradition, conviction and sentence in the US 'would further increase his suicide risk'. He went on to say:- 'if Mr Assange is moved to a US prison, his suicide risk may be modifiable but his risk will depend on other circumstances, some of which cannot be anticipated with any certainty' (para 5.6). In his evidence, Professor Fazel accepted that the risk of suicide would be increased by a very long sentence (Tr. pg.59, ll 25 – 27). And he further accepted that detention in solitary confinement was likely to exacerbate symptoms of mental illness as shown in his own research (Tr. pg.60, ll 16 – 22); and that detention in conditions of isolation would increase the risk of suicide (Tr. pg.61, ll 16 – 19, and pg.65, ll 5 - 7)

22.17. Professor Fazel stated at paragraph 5.9 of his report that currently 'Mr Assange's mental condition is not sufficiently severe that it removes his capacity to resist suicide'. But clearly that position *could* alter if he is extradited. And Professor Fazel did not really address in his report, the extent to which the fact of extradition is likely to exacerbate his present condition and the resultant risk that sooner or later he would then commit suicide or at the very least his condition would 'gravely worsen' and he would 'be at permanent risk of suicide'. Yet this is precisely the scenario that was addressed in the context of oppression in ***Love v USA, 2008 1WLR 2889***. And it was this risk that led the High Court to conclude in that case that extradition would be oppressive in the comparable context of a person suffering from both depression and Asperger's Syndrome and likely to suffer a mental deterioration in the US prison system. When Professor Fazel was confronted with the risk of deterioration in the US, he accepted that such a heightened risk did exist, and further accepted that he had no knowledge of what conditions were like under SAMs in the US and no knowledge of the conditions in ADX Florence (Tr 23.09.20, pg.68, ll 1 – 32).

22.18. Professor Fazel referred the Court to the comparative statistics on suicide in US and UK prisons. However, he accepted that these were general figures and did not deal with the very specific risks of detention in isolation and detention in ADX Florence. Moreover, he had not, in his report, addressed the specific risk of suicide in the case

of a mentally disordered foreign national extradited to the United States and detained in conditions of solitary confinement there. But in fact there is evidence that there is a high risk of suicide amongst the mentally disordered in US prisons; a vastly enhanced risk in conditions of solitary confinement as noted by Professor Kopelman at page 20 of his second report (cited below); and a particularly high risk of suicide in conditions of isolation such as those in ADX Florence that have been analysed in the sections above.

22.19. For these reasons we submit that both the written and oral evidence of Professor Fazel actually supports the case that extradition is oppressive by its recognition that Mr Assange suffers from depression; and that his condition may seriously deteriorate in conditions of isolation; and by his recognition that Julian Assange has a currently high risk of suicide; and that that risk of suicide is likely to be increased in the US prison system if he is subject to a long sentence in conditions of isolation - though Professor Fazel, with his limited knowledge of prison conditions in the US, and of the factors that determine the imposition of SAMs, understandably conceded that it is not possible for him to predict the exact circumstances in which he would be detained in the US (see para 5.6 of his report and his oral evidence summarised above).

The evidence of Dr Nigel Blackwood

22.20. The prosecution further relied on the evidence of Dr Blackwood who (somewhat surprisingly, given the limited ambit of appropriate expert comment) ventures his own opinion as to section 91 that Mr Assange's '*mental health condition is not such that it would not [sic] be unjust and oppressive on mental health grounds to extradite him*' (Blackwood, pg.15, para 56). This somewhat incoherent assertion is founded on a number of highly questionable assertions and assumptions:-

i. Firstly, his view that Mr Assange's only mental health problem is a moderate depressive disorder and that he suffers from no other mental health conditions (para 56). This is contrary to the expert evidence of Professor Kopelman, Dr Crosby, Professor Mullen and Dr Deeley, who have far more in-depth and longitudinal knowledge of Mr Assange.

ii. Secondly, his view that there is a risk of suicide, but it is not a substantial risk (para 56). Again this is contrary to the view of all the defence experts, and of the prosecution's own expert Professor Fazel, that Mr Assange presents a high risk of suicide. And it is based on only two interviews with Mr Assange during a particular week in March.

iii. Thirdly, his view that any suicide risk can be managed in the US since 'there appears to be an equivalent multi-disciplinary approach in the Virginia prison system' (para 56). In this respect Dr Blackwood conceded under cross-examination that he had simply taken at face value Mr Kromberg's claims as to the nature of the regime in the Virginia state system. That was why he uncritically repeated those claims at para 55, including the assertion that '*there is no solitary confinement in the ADC*' (Tr 24.09.20, pg.22, ll 19 – 27). Notably, he did not address the question of the federal prison regime outside Virginia that Mr Assange will face post-trial at all, and he accepted that he had no special knowledge of conditions in ADX Florence (pgs.25 – 27). He also accepted that he did not have the necessary knowledge of the US system to express an opinion as to whether it would be inhumane to expose Julian Assange to the specific regime he would be likely to fact in the US prison system (pg.25, l 1 – pg.27, l 31)

iv. Finally, there is his claim that his '***current*** *mental condition … does not remove his capacity to resist the impulse to commit suicide*' (para 56). This assertion does not even begin to address the future risk of deterioration if extradition is ordered and if Mr Assange faces the harsh and isolating conditions he is likely to face in the US prison system and the hostile foreign environment. This was simply brushed aside by a slighting and blithe reference in his report to the fact that 'access to his support network may be restricted in Virginia correctional system, such that he interacts with his support network to an increased degree through his attorneys' (para 57).

v. Summing up, it is submitted that Dr Blackwood, both in his report and in his oral evidence, was guilty of grossly minimising the damaging effects of isolation on those suffering from mental disorder in his evidence under cross-examination (Tr. 24.09.20, pgs.18 – 21); and that he had totally failed to grasp the severity of conditions under SAMs which he mistakenly characterised as having a '*broad rubric'* (Tr 24.09.20, pg. 21, ll 25 – 28). He appears to have

simply accepted Mr Kromberg's untested assertions in every respect as to prison conditions; and he effectively admitted that to be the case under cross-examination (Tr. pg.22).

22.21. In all the circumstances the Court is invited to prefer the evidence of the defence experts, Professor Kopelman, Dr Deeley and Dr Crosby; and to reject Dr Blackwood's optimistic acceptance of all Mr Kromberg's assertions as to prison conditions and the management of suicide risk in the US. Finally, the Court is asked to apply the same critical approach to the effect of prison conditions on Julian Assange's mental condition that the High Court of England adopted in the case of ***Love*** (judgment paras 116 – 119) to the US Government's asserted capacity to manage the suicide risk of a mentally ill foreign extraditee.

Professor Kopelman's response

22.22. In his second report of August 13th Professor Kopelman (Kopelman 2, Tab 78) reaffirmed his diagnosis of severe depression in November and December 2019, and his conclusion that there is a high risk of suicide in the US. This is after a careful analysis of the reports of the Prosecution experts Dr Blackwood and Professor Fazel. He held too this position in evidence despite persistent, hectoring, and at times frankly insulting cross-examination.

22.23. In confirming his diagnosis of serious clinical depression, it is important to stress that Professor Kopelman has drawn on a deeper knowledge of the case than the Prosecution psychiatrists. In particular, as he made clear in his oral evidence (at Tr 22.09.20 from pg.5 onwards, and under re-examination at pgs.86-87):-

i. He draws on the extensive family history of depression set out as point 2 of his opinion on page 16 of his second report (Tr. 22.09.20, pg.7, ll 4 – 9).

ii. He draws on detailed and contemporaneous accounts of Mr Assange's history of earlier depressive episodes including Professor Mullen's 1996 report as to his depressive episode in Australia then and the records of depression and suicidal ideation during the years 2003 to 2005 when he was further treated in Australia (see Tr. pg.7 ll 10 – 27).

iii. He drew on evidence of his mental state in the Embassy from 2012 onwards from Dr Crosby who had examined him then (Tr. pg.7, ll 28 - 31).

iv. He extensively analysed the prison medical records to show how his mental health had deteriorated in seclusion, and that there was a significant improvement after he was removed from seclusion in Healthcare into single cell occupancy (Tr. pg.7, ll 28 - 31). This accorded with his own observations at the time. And he emphasised the findings of Dr Jane Corson and the repeated resort to the Samaritans during the months from September 2019 onwards (see Tr. pgs.83 – 84)

v. He further relies on Dr Humphreys' conclusions on the basis of psychometric tests that Mr Assange has suffered an impairment of his cognitive functions whilst in custody (see his report findings under the heading Neuropsychological Assessment at pages 4 – 5, and see Tr. pg.7).

vi. Moreover, Professor Kopelman has given this case comprehensive consideration. He had a series of interviews with Mr Assange over a long period of time in 2019, two further interviews in January and February 2020 and has further conducted a telephone interview in May 2020 (Tr. pg.4, l 30 – pg.5, l 2).

The cross-examination of Professor Kopelman

22.24. Professor Kopelman was challenged on the basis of his diagnosis in cross-examination. But none of the prosecution psychiatrists disputed the presence of depression or the somatic symptoms of depression. They only pointed out that the depression was not at the same level of severity when they examined him in early 2020 as when Professor Kopelman assessed him in December 2019 (see Professor Fazel, Tr. 23.09.20, pg.57). Mr Lewis QC attempted to suggest the Professor Kopelman's summary of the medical notes was partial or selective. But in fact it was absolutely clear that the Professor had extensively and fairly quoted from the earlier entries in the medial records up until October 2019 where Dr Daly and nursing staff had found Julian Assange to be not suicidal (see the re-examination at pages 82, l 19 - pg.84, l 22). He noted that there came a point where the medical notes drew attention to increasingly depressed and suicidal talk and resort to the Samaritans phone, particularly after October 2019 (see Tr. pg.82 at ll 9 – 18). Finally, he was

challenged on his reference to Julian Assange having secreted a razor blade with the suggestion that it was not verified (Tr. pg.27, l 30 – pg.29, l 17). The clear implication of the questioning was that he had erroneously taken this as true, when it was not in fact established. But the truth, as the Court now knows, is that it was then conclusively established that Julian Assange had been found with a razor blade secreted in his clothes and had been charged with a disciplinary offence by the Governor of HMP Belmarsh as a result (see Tr. pg.79, l 27 – pg.80, l 17). Moreover, the evidence of Daniel Guedalla, which was read to the Court, put this matter beyond doubt. This is one example of how the cross-examination of Professor Kopelman involved unfairness and was conducted in manner that was frankly bullying and inappropriate. To give just one further example, Professor Kopelman was challenged to name on-the-spot the articles he had read on malingering (Tr. pg.21, ll 26), though neither of the prosecution psychiatrists had made any allegation that Julian Assange was malingering.

22.25. **Turning to Professor Kopelman's findings on the question of suicide risk**, his finding that there is a high risk of Mr Assange's suicide in the US is soundly based on a comprehensive review and the following factors:-

i. The family history of depression and suicide (pgs.5-6, pg.16 and at pg. 21 (iii) of the second report and Tr. 22.09.20, pg.7).

ii. Mr Assange's own past history of self-harm and suicidal ruminations (set out at pgs. 16-17 of the second report and in his evidence at Tr. pg.4, ll 20 – 25, pg.7, ll 13 – 17, pg.83, ll 24 – pg.84, l 28).

iii. His current expression of suicidal intentions over a long period of time (first report at pages 11-12 and page 33 at para 9, and see Tr. pgs.83 - 84).

iv. The fact that he now has a confirmed diagnosis of Asperger's/ASD and that the study of Cassidy, Baron-Cohen et al (2014) found that an Asperger's/ASD diagnosis in adults increases the risk of suicidal ideation by 9 times compared with the general population (pgs.21-22 (iii) of second report). The Court is further referred to the additional studies supporting Professor Kopelman's risk prediction set out in the same paragraph.

v. The further statistical evidence that there is a high risk of suicide in the case of those subject to solitary confinement in the US. As Professor Kopelman points

out at page 20 of his second report, the research of Dr Kupers, an American Psychiatrist with 40 years' experience of visiting high security prisons, shows that 'approximately 50% of all successful suicides within US prisons occur in the 3 - 8% of prisoners who are held in segregation or isolated confinement'. Similarly, the rate of 'threatened bodily harm' in ADX facilities was almost 10 times the overall Bureau of Prisons (BoP) prison rate during 2016-17 (8.7 per 100 inmates versus 0.9 per 100) *(Id)*. These statistics completely place in context the more general suggestion of Professor Fazel that the US prison suicide rate is lower generally than the rate of suicide in UK prisons. If one is placed in solitary confinement in the US then the risk of suicide in is very high.

vi. Finally, there is the clear evidence from the prison experts (Maureen Baird, Yancey Ellis, Eric Lewis and Lindsay Lewis) that he is likely to face conditions amounting to solitary confinement in custody in the US. This was most important evidence that Professor Kopelman took into account (Tr. pg.4, ll 1-3; pg.11, ll 8 – 18; and pg.88, ll 29 – pg.90, ll 20) cannot be discounted.

22.26. For all these reasons, we submit that the Court should accept the assessment of Professor Kopelman and Dr Deeley that there is a high risk of suicide in Mr Assange's particular case if he is extradited to the US is well founded on a comprehensive consideration of the case, the overall clinical picture, the statistical evidence and a careful consideration of the prison conditions he is likely to face in the US.

22.27. Moreover, and in any event, it would be oppressive to extradite Julian Assange to face the almost inevitable conditions of isolation, both pre-trial and post-conviction, set out above, given his long history of depression and the likelihood that it would be greatly exacerbated by these extreme limitations of SAMs pre-trial and the draconian regime that he is likely to face post-trial at ADX Florence. The inevitable deterioration was recognised by Professor Kopelman (at Tr. 22.09.20 pg.89, l 21) and by Dr Deeley (at Tr. 23.09.20, pg.13, l 31 – pgs.14, l 2).

The overall oppressiveness of extradition

22.28. In dealing with the question of oppression under s91, the Court is entitled to look at all factors, including the nature of the charges (see ***Obert v Greece*** [2017] EWHC 303 (Admin), para 40 and ***Kakis v Cyprus*** [1978] 1 W.L.R. 779 per Lord Diplock at pg.784G). Here the charges are, to say the least, highly controversial and the evidence to support them deeply suspect. Moreover, the actual lack of gravity of the offences, and the lack of any actual (as opposed to potential) harm is apparent from the very fact that the US did not even consider it right to prosecute until December 2017**.** Thus, though the relevant facts were known in 2010, it was not even considered proper to pursue them until 2017, after current President Trump took office and appointed Mike Pompeo as head of the CIA. In determining this issue of oppression, the Court can have regard to all these matters. It can take account of the delay and the highly unusual and unprecedented nature of the case against him, his mental condition and the risk of prison conditions in the US that are psychologically dangerous and wholly inappropriate. In the light of all these factors taken together, it is our case that it would be 'oppressive and 'unfair' to expose Julian Assange to the very high risk, if not certainty, of suicide if he is extradited to the US.

23. <u>Section 82</u>

23.1. Finally, the Court must consider the passage of time and whether to apply the protection against extradition where it has become unjust and oppressive by reason of the same. The position of Mr Assange is as follows:-

23.2. **Firstly,** there clearly has been a long passage of time. No explanation has been given by the US for bringing the charges as late as December 2017 in respect of conduct known as long ago as 2010. Mr Kromberg has made no less than four declarations. But none of them even attempt to explain the delay in bringing charges, despite the fact that he expressly claims in his Second Supplemental Declaration that it was well publicised as early as 2010 '*that the department of Justice had confirmed it was investigating Assange for his acts in connection with the Manning disclosures'* and that *'the specific concerns of the United States that Assange's publications endangered the lives of innocent informants and sources were well*

publicised' (para 12). (The Court is referred to paragraph 12 of Kromberg's Second Supplemental Declaration and to footnote 2 which quotes articles published in 2010 and 2011).

23.3. If it really is self-evident that Mr Assange should be the subject of prosecution (and the section 81(a) argument is rejected) the Court is still left with the question as to why there has been such a long delay in prosecution Mr Assange for publications that took place in 2010 and 2011. That is relevant because '*culpable delay on the part of the state seeking extradition'* is a factor to be taken into account in deciding whether it would be unjust or oppressive to extradite now (***La Torre v Italy*** [2007] EWHC 1370, at para 37). The relevant authorities are all summarised in the case of ***Obert.*** The Court is referred to Lord Edmund Davies' judgment in ***Kakis*** at p785C, Lord Woolf's judgment in ***Osman No.4*** (1992) 1 AER 579 at p587D- 587H and Lord Justice Henry's judgment in ***Ex Parte Patel*** [1995] Admin 7 LR 56 **pgs.66 – 67:**

> *'All the circumstances must be considered in order to judge whether the unjust/oppressive test is met. Culpable delay on the part of the state may certainly colour that judgment (as to whether it would be unjust or oppressive to extradite him by reason of the passage of time) and may be decisive not least in what is otherwise a marginal case (as Lord Woolf indicated in Osman (No.4). And such delay will often be associated with other factors such as the possibility of a false sense of security on the extraditee's part'.*

23.4. Even if the decision to prosecute now, that was taken from December 2017 onwards, were presumed as a matter of law to be justified, then the long delay does nonetheless require some proper explanation. Absent explanation, the Court is entitled to conclude that there was culpable delay in bringing the prosecution for these offences – which the US now say are very serious – when all the relevant factors were known at the latest by 2012.

23.5. **Secondly,** there has been an earlier considered decision not to prosecute, in 2013. The fact of an earlier inconsistent decision not to pursue a prosecution was recognised to be a highly significant factor in determining injustice and oppression in the leading case of ***Kakis v Cyprus*** [1978] 1 W.L.R. 779, where the requested person's belief that he was covered by an amnesty and the long delay in initiating proceedings against him, taken together, were held to render it oppressive as well as

unjust to extradite (see Lord Diplock (at pg.784) and Lord Scarman (at pg.790)). The Court is further referred to the decision in ***Obert,*** where again delay in seeking extradition was held to be a relevant factor in rendering extradition oppressive (per para 39).

23.6. **Thirdly**, there is a real risk of prejudice given the great difficulties in reconstructing the events of 2010 and 2011, which will be necessary in order to rebut the US's misleading allegations as to recklessness to the causation of harm. There are grave problems in now attempting to reconstruct and prove the sequence of events in 2011 which led to the eventual publication of unredacted materials after publication by others (Peirce 4, (edited) Tab 44, paras 10 – 17). Equally Mr Assange faces real difficulty in rebutting the allegations that individuals in various countries were exposed to danger as a result of the revelations (Peirce 4 (edited), Tab 44, paras 15 – 17). This plainly gives rise to a real risk of prejudice at any forthcoming trial.

23.7. **Fourthly,** the second superseding indictment has been added at a very late stage and presents insuperable problems to Julian Assange in meeting those allegations now after a substantial lapse of time and when he is in custody. No explanation has been given as to why these allegations were held back and were sprung upon him at a late stage in this oppressive and unfair manner.

23.8. **Fifthly,** during the intervening period between 2010 and the present, Julian Assange's mental state has deteriorated and is likely to deteriorate further in the US, such that there is a real risk he could not effectively participate in his trial. That is in no small part due to the prolonged period of uncertainty caused by the original decision not to prosecute followed by repeated calls for prosecution in 2017 and the eventual bringing of a criminal complaint in December 2017.

23.9. **Finally,** it is oppressive to seek his extradition now after the well-publicised decisions in 2013 not to prosecute him for espionage or any other offences. In dealing with this issue of oppression, the Court can also take into account the very grave effect of all this on Julian Assange's own fragile mental condition.

PART D

24. The new allegations and the scope of counts 1 and 2

Background

24.1. These proceedings, upon an indictment issued in March 2018 (superseded in May 2019), began in April 2019 and were squarely focussed for their first 12 months (including throughout opening submissions in February 2020) on the 2010 Manning disclosures.

24.2. On 24 June 2020 – 4 months after opening submissions were heard, and 10 weeks before the evidential stage of the Extradition Hearing was listed to commence, that changed. The US issued a press release signalling that the indictment had been superseded, again. This third iteration of the indictment added a series of new 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 paras 4-6 and 35-92. The US took no steps to bring this to the attention of this Court.

24.3. On 29 July 2020 – 5 weeks before the Extradition Hearing[97] - the US served the new indictment on the Court.

24.4. On 12 August 2020 – 3 weeks prior to the Extradition Hearing - the US issued a fresh extradition request (dated 17 July 2020) founded upon the new indictment. That request was executed on the first day of the Extradition Hearing on 7 September 2020.

24.5. On 21 August 2020, the US served its revised Opening Note, with an 'addendum' which explained the import of the new indictment. It was said that '...*Contrary to the submission of the defence*[98]*...the addendum particulars in the Second Superseding*

[97]. And a week after the expiry of the defence deadline (on 20 July) for service of their evidence concerning the indictment that then formed the basis of the request.

[98].The defence's initial understanding, communicated to the Court, was that, save for the re-numbering of counts 2 and 18, the charges contained in the new indictment were essentially unchanged: compare new para 103 with old para 46. None make any reference to the fresh factual allegations, (or to 'teenager' or

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...' (para 8).

24.6. The new additional conduct (concerning '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) is thus not 'background *narrative'*. It is put before the Court 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).

24.7. 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, this new request arrived a year and half after their commencement, 6 months after opening submissions, days after the final defence evidence deadline had passed, and just days prior to the (third listing) of the evidential EH.

24.8. Yet, the US position is 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

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

the basis of fresh roving, generalised incitement allegations – untethered from the Manning allegations – which it has served without explanation, at the 11th hour. See, for example draft notional charges 12-23.

Unfairness

24.9. The (inexplicably) late arrival of these new allegations placed the defence in an impossible position. On the one hand, and self-evidently, the defence were not in a position to respond to these fresh factual allegations in the (inexplicably small) time afforded by their (inexplicably) late service. In a Part 2 context, it would be extraordinary for a court to commence a hearing within weeks of a fresh extradition request of this kind being made. Not least of all in circumstances where Mr Assange was in custody, without access to legal visits months, and with access to physical materials only via post. 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.

24.10. On the other hand, adjournment of these proceedings, and prolonging the defendant's custody was, equally clearly, unfair, particularly as there was no imminent prospect for in-person access to the defendant to be restored. The defence declined to make that application, because the court possesses ample other powers to address the unfairness.

The proper response

24.11. 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 Prosecutor's Office, Düsseldorf*** [2008] QB 785 at paras 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 para 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 para 67 regarding the power to excise aspects of conduct that offended double jeopardy).

24.12. The power to excise conduct from a request is a 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 pgs.229-240) 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 para 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*...'

24.13. This power is not, contrary to suggestions made by the Government, precluded by Section 137(7A). That section 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.

This Court's ruling

24.14. On 7 September, this Court ruled that the power to excise (which this Court acknowledged to exist) was constrained in law to operate only within the consideration of statutory bars (or other non-statutory questions such as abuse):

> *'...In my view, if it is to be argued that some parts of the request must be excluded from consideration, then this must be done in the context of an extradition bar, or an issue raised, that is, within that statutory scheme. For example, when dual criminality is argued, as it will be in this case, and as it was done with Dabas and other cases, it is open to the court to decide in that context the part of the conduct that should and can be relied upon by the requesting state, and, if it is appropriate, to curtail its scope. Equally, it can be raised as part of an abuse of process argument, either as part of a Zakrzewski*

type abuse argument, as has possibly been suggested by Mr Summers, on the basis that bringing this new request and the recommencement of proceedings on the basis of new conduct could not possibly be relied upon because of its misleading nature and is in itself an abuse of the court's process. That argument is still available to the defence. But these are issues which must take place in the context of considering the request and not before it. There is no requirement for me to determine the scope of the request outside of the issues raised. For these reasons I refuse the defence's invitation to excise some, or any, of the conduct at this stage from the request and invite the defence to raise the issue, if they wish, within the context of the statutory scheme...' (Tr 7.9.20, pgs.32-33).

Submissions on dual criminality (section 78(4)(b))

24.15. On dual criminality, this Court is constrained to consider only the face of the request.

24.16. Draft notional charges 10 (in part) and 12-23 (in whole) relate to the new allegations. None of those charges do what ***Biri*** [2018] 4 WLR 50 mandates at paras 40-42; namely provide '*an English charge...akin to a count on an English indictment, but with an amalgam of the statement of the offence <u>and the particulars</u> of the offence'* (para 40). As the High court made clear in ***Biri*** '*it is essential for the proper presentation of the prosecution's case for charges to be drafted so as to specifically <u>identify</u> for the benefit of the district judge and the defendant <u>the conduct in the [request] that is being relied upon</u>, and what is said to be the equivalent English offence which would, in corresponding circumstances, be constituted by that offence'* (para 42). The charges provided in this case merely recount the language of the offence (the statement of the offence) without specifying any conduct said to constitute that offence (the particulars of the offence). The Court is, at once, unable to determine whether any of the notional offences are in fact supported by the new conduct contained in the request. The burden rests on the Government to establish dual criminality, to the criminal standard, and it has simply made no ***Biri***-compliant attempt to do so.

24.17. In fact, had the exercise been done as it should have, it would have been evident that swathes of the conduct comprising the new allegations has no connection with the USA at all under s.137(3). And none of the draft notional charges are extra-territorial in effect under s.137(4). Neither is s.137(5) applicable because, as vividly

demonstrated by the Southwark Crown Court trials referenced below, the new allegations include conduct in the UK.

Submissions on the other statutory and non-statutory questions

24.18. For the remaining statutory and non-statutory questions, defence evidence is admissible under the scheme of the Act and the Court is obliged to consider it in answering the questions. Here, in sum, by virtue of the (inexplicably) late arrival of these new allegations, this Court does not have access to the information necessary to reach informed or reliable answers to the various statutory and non-statutory questions it must ask itself. Absent being able to know the whole position, the Court cannot fairly answer any of those questions adversely to the defence. The new allegations cannot therefore be the subject of any extradition order and must be excised (from any such order the Court may consider for the Manning allegations).

24.19. Despite its 7 September ruling, this court has declined to admit evidence outlining the areas of defence evidence that would have been adduced had time permitted (Tr 1.10.20, pgs.27-28).

24.20. But, in accordance with this Court's clear 7 September ruling, the defence position in relation to the new allegations remains that this Court must excise them from the request because the court is not in a position to answer, fairly, one or more of the statutory or non-statutory questions. For example:

Section 82: passage of time

24.21. The new allegations are obviously aged and date from 2009. As stated above, despite requests, the US have offered no explanation for the decade-long delay in bringing these charges. Relevantly, this Court has previously been informed that these allegations were in fact the subject of timely charges for the alleged co-conspirators:

i. In 2012, based on ‘Sabu’s cooperation, ‘Topiary’ (Jake Davis) and ‘Kayla’ (Ryan Ackroyd) were prosecuted, in connection with their alleged involvement with LulzSec.

ii. 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.

24.22. On its face, the delay here was culpable. In any event, it is delay which presents the prospect of Mr Assange preparing for a trial, a decade after the events, and without the evidence his alleged co-conspirators could have provided had he been charged when he should have, and without any of his own records (which, as the court knows, were seized from the Ecuadorian embassy during the period of delay).

Section 83A: forum

24.23. This Court has also been informed that the US request fails to disclose that the 2012 trial referred to above took place 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 existence of that prosecution is a clear indicator that extradition is barred by reason of forum considerations.

Section 87: human rights

24.24. Mr Assange’s Convention right, to be informed promptly and in detail of the nature and cause of the accusation against him (Article 6(3)(a)), has manifestly be violated by the holding back of these allegations until late 2020. That, in turn, impacts his ability to defend himself, to recollect events, to trace witnesses, to locate documentation, etc. It is normal for journalists to receive documents from hackers. The alleged conversations, for example, between WikiLeaks and

Sabu/Hammond fall well within the normal range of journalistic relationships (and Article 10 ECHR). One would not reasonably anticipate that a journalist talking with a hacker and receiving documents to publish from a hacker would be considered illegal, because it occurs regularly.

Tollman abuse of process

24.25. In addition to failing to make any mention of the Southwark proceedings, this Court has also been informed, for example, that:

i. 'Teenager', upon whom the bulk of the new allegations rely, was well known to the US at the time of the first request. 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 US investigation was being conducted in order to '*frame Assange*'.

ii. Likewise, 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.

Breach of duty of candour

24.26. Inexplicably, the US fails to tell the court that the person referred to in the latest indictment as 'Teenager' is 'Iceland1' whom it previously counselled 'caution' in respect of (Dwyer's at para 48). He is the individual referred to at (Peirce 2, Tab 21, para 14). The US fails to inform the court that he has been convicted in Iceland of fraud and embezzlement, including impersonation of Julian Assange in online communications at the time of the conduct alleged in the indictment (including stealing LPP materials from him and selling the same to the US). The US fails to

disclose ‘Iceland1’/’teenager’/Thordarson’s psychopathic personality disorder diagnosed during the criminal proceedings referenced in Dwyer’s affidavit. The US fails to disclose that Mr Assange assisted the prosecution of ‘Iceland1’/’teenager’/Thordarson’ for sexual abuse against minors. In short, by deliberate omission, this Court is being provided with a singularly distorted picture of the cogency and efficacy of the allegations levelled in the new indictment. These cumulative omissions are, in their own right, the sort of non-disclosure which courts in the UK have previously found to warrant discharge: see e.g. *R v Governor of Brixton Prison, Ex p Kashamu* (2000) unreported 6 October, DC; *R (Saifi) v Governor of Brixton Prison* [2001] 1 WLR 1134 at paras 63-66; *R (Raissi) v SSHD* [2008] QB 836 at paras 138-144; *Konuksever v Government of Turkey* [2012] EWHC 2166 (Admin) per Irwin J at paras 62–63.

24.27. Likewise in relation to ‘Sabu’ (Hector Xavier Monsegur’s), it is in the public domain that from 8 June 2011, and at the time of the alleged contacts between Anonymous and WikiLeaks, Sabu was an informant acting under the direction of the FBI (indictment, para 61). What is not revealed by the request is that ‘Sabu’s status as an FBI informant was the result of a plea deal whereby he escaped prosecution for hacking, drugs, firearms, theft, and fraud.

Zakrewski abuse

24.28. The request is also materially misleading in its description of Mr Assange’s conduct. But, like all of the above statutory and non-statutory challenges, because of the circumstances in which these new allegations have arisen the defence is hindered in its ability to place the full and complete picture, per ***Zakrzewski***, before the court.

PART E

Conclusion

24.29. For all the reasons set out above it is submitted that this extradition request should be refused. That is because it is politically motivated, it is an abuse of the process of this Court and it is a clear violation of the requirements of the Anglo-US Treaty that governs this extradition. As to the future, it exposes Mr Assange to the real risk of a an entirely unforeseeable prosecution under a capricious extension of the law, and to a trial and sentencing process that constitute a flagrant denial of justice. It further exposes him to prejudice and discrimination by reason of his political opinions and foreign nationality; and to the virtual certainty of conditions of imprisonment that are both inhuman and oppressive. Finally, this unprecedented prosecution constitutes a flagrant denial of his right to freedom of expression and poses a fundamental threat to the freedom of the press throughout the world.

Edward Fitzgerald QC
Mark Summers QC
Ben Cooper QC
Florence Iveson

6th November 2020