

TRANSCRIPT OF PROCEEDINGS

Ref. U20200010

IN THE CROWN COURT AT WOOLWICH

Belmarsh Road
London

Before DISTRICT JUDGE VANESSA BARAITSER

GOVERNMENT OF THE UNITED STATES OF AMERICA

-v-

JULIAN ASSANGE

**MR J LEWIS QC, MS C DOBBIN & MR J SMITH appeared on behalf of the
Prosecution**

**MR E FITZGERALD QC, MR M SUMMERS QC & MS F IVESON appeared on
behalf of the Defence**

**WHOLE HEARING
25th FEBRUARY 2020, 10.18-15.49**

1 JUDGE BARAITSER: Thank you. Can you ask for Mr Assange to be brought in?
2 Thank you. Please come in and take a seat. I do not think there is any need to formally
3 identify you today, Mr Assange. Please sit down. Thank you. Mr Lewis?
4 MR LEWIS: A matter has come to my attention this morning that needs to be dealt with.
5 JUDGE BARAITSER: Yes.
6 MR LEWIS: I had not appreciated it yesterday but these matters are being transcribed.
7 JUDGE BARAITSER: Yes.
8 MR LEWIS: And the transcript is being given to the defence.
9 JUDGE BARAITSER: Yes. I think they have arranged for ---
10 MR LEWIS: The application ---
11 JUDGE BARAITSER: I think they have arranged privately for it to take place.
12 MR LEWIS: Well, madam, apparently ---
13 JUDGE BARAITSER: Let me just pause. You cannot hear?
14 NEW SPEAKER: No.
15 MR LEWIS: Apparently, madam, an ex parte without notice application was made to you, in
16 clear breach of the Criminal Procedure Rules, because we were not given notice of it. We
17 certainly would object to any transcribing, unless we are also supplied, in the normal way,
18 with a copy. It may be that the court was told that we would be given a copy, I cannot
19 believe otherwise. The court would have granted the application without notice to the parties.
20 The rules say clearly ---
21 JUDGE BARAITSER: Yes, let us turn them up.
22 MR LEWIS: --- at 6.9 of the Criminal Procedure Rules.
23 JUDGE BARAITSER: Just pause for a moment. I am wondering if I can find a copy. It
24 may be in here.
25 MR LEWIS: It is 6.9, madam.
26 JUDGE BARAITSER: Let me just see if they are in here. Yes, they are. 6.9, sound
27 recordings, yes.
28 MR LEWIS: So 6.9(2): “The court may give such permission.” This is for the recording
29 here. And (3): “A person who wants the court to give such permission must, as soon as
30 reasonably practicable, notify each party.” So madam, we were not notified. The normal
31 position is that unless both parties are given, or have access to the transcript, the transcript is
32 never authorised. Now, what happened this morning ---
33 JUDGE BARAITSER: Can we just go back one step? I am just looking at the rules for the
34 first time now: “The court may give such permission on application or on its own initiative.”

1 If that is the case, what are the provisions in relation to notice, if that is the case, say you?

2 Looking at 6.9(2).

3 MR LEWIS: Well, madam, I have not looked at it, but the point is that it does not really
4 matter, because no notice was given. An ex parte application without notice to us was given,
5 which is unique, in my experience. What must happen is that all parties, if the court is going
6 to have a transcript, if my friend is going to have a transcript, we must also have a transcript,
7 or no-one has a transcript. That is the normal general rule of thumb. And what is happening
8 at the moment, we asked this morning if we could have a transcript. Firstly, we were told no.
9 Secondly, that was modified to, if we paid for half.

10 Now madam, this is the second day of the hearing. I have no idea what the costs are.
11 It might be quite large. In order to get authorisation from the Crown Prosecution Service, it
12 would be a momentous task. So I formally object to any further transcribing, if and until it is
13 made clear that we get a copy of the transcript. My learned friend also has a copy of
14 yesterday's transcript, we do not.

15 JUDGE BARAITSER: The background to this, Mr Lewis, is that very recently, probably no
16 more than a week or two ago, at Westminster Magistrates' Court, there began to be, as
17 authorised I think by the Chief Magistrate, recordings of all proceedings in extradition. That
18 is the background. Of course, this court is sitting as a court at Westminster Magistrates'
19 Court, albeit at Belmarsh Magistrates' Court. And my understanding was that all
20 proceedings, therefore, would be recorded and on application by the defence, a copy, I think
21 with payment, of the recording would be provided. I know no more than that.

22 MR LEWIS: Madam, that is not this proceeding. This is a private transcript, with private
23 transcribers, and it is not a court transcript. It is quite usual to have, we have all done
24 thousands of cases where we have had transcripts and LiveNote. But it always is the
25 situation that everyone is on the same playing field and at the moment, we are not. And that
26 is why I formally object and therefore I say there should be no more transcribing, if and until
27 an undertaking is given that we will also be given a copy of the transcript.

28 JUDGE BARAITSER: Let me ask the defence whether or not this was a privately
29 transcribed company or whether this was part of the Westminster initiative which started two
30 weeks ago.

31 MR FITZGERALD: Madam, as I understand it, it is the court's company and they are saying
32 we will make it available if the court's own ---

33 JUDGE BARAITSER: Is it privately funded or is this court funded?

1 MR FITZGERALD: We are paying for it, madam; but it is the court's company that is doing
2 it.

3 JUDGE BARAITSER: Is that mere coincidence?

4 MR FITZGERALD: As I understand it, that is mere coincidence, yes.

5 JUDGE BARAITSER: Right. So it has nothing to do with the court?

6 MR FITZGERALD: No, no. Madam, as I understand it, my learned friend is not objecting
7 to a transcript being made. What he is objecting to is the prosecution not having a copy, if
8 one is made and provided to the court. We accept that, so long as the transcript is being made
9 as a matter of fairness, the prosecution should have a copy but the normal course, as my
10 learned friend has indicated, is that the two parties then share the costs. And certainly
11 yesterday's hearing, it may well be in the interests of justice that both sides have copies of it,
12 again today's. Beyond that, whether we have further transcripts may have to be decided. But
13 beyond this week ---

14 JUDGE BARAITSER: Is there a rule which requires you to notify the other side if you are
15 making an application for the transcript?

16 MR FITZGERALD: Well, madam, not that I am aware of but if there has been a failure,
17 obviously it is regrettable but it is remediable by simply saying that if the court regards it, and
18 I can see that the court might regard it, that if the judge has a copy, we have a copy and the
19 prosecution should have a copy. Yesterday was two fairly formal openings. We cannot have
20 any objection to ---

21 JUDGE BARAITSER: Do I have to become involved in the funding issue?

22 MR FITZGERALD: Not at this stage, because madam, what we will do is, for yesterday and
23 today, so as not to hold proceedings up, we will simply provide a copy to my learned friend.
24 Thereafter, we may have to discuss joint funding, if it is to carry on at all. But we are
25 prepared to do that for today and yesterday.

26 JUDGE BARAITSER: Will that do, Mr Lewis, for the time being in any event?

27 MR LEWIS: That is fine, madam.

28 JUDGE BARAITSER: Thank you very much.

29 MR FITZGERALD: Madam, can I just raise one other matter and it relates to the way that
30 Mr Assange is being treated in prison during the course of these proceedings. Yesterday,
31 Mr Assange was handcuffed 11 times, stripped naked twice at Belmarsh and put in five
32 separate holding cells.

33 JUDGE BARAITSER: Just pause for a moment. What is my jurisdiction to comment on or
34 deal with this?

1 MR FITZGERALD: Madam, what I think the court can do, it can give an indication to the
2 prison authorities, if there is a risk that treatment of this nature will impinge on these
3 proceedings, that is to say, his preparedness to be able to participate in these proceedings. So,
4 madam, that is the position. The court does not have any jurisdiction to give a direction, but
5 it does frequently give an indication to the prison authorities as to what is desirable, in order
6 for the proceedings to continue in a humane fashion that respects legal professional privilege.

7 JUDGE BARAITSER: Mr Fitzgerald, I have been asked more than once during the course of
8 these proceedings to either make directions or to comment openly on his treatment by the
9 prison estate and I have repeatedly said that applications in relation to the conditions of his
10 detention must be made elsewhere and not to this court, unless you have clear authority for
11 my having the power to make a direction or even comment upon his treatment; in which case,
12 you really ought to produce it.

13 MR FITZGERALD: Well, all I can say, madam, is that Crown Court judges and magistrates
14 frequently do give indications which they hope will be respected by the prison authorities as
15 to what should or should not happen, so as not to impinge on the ability of the defendant to
16 participate in the proceedings. So that is really it.

17 JUDGE BARAITSER: Well, if there is some evidence for him not being able to participate
18 in the proceedings, then no doubt you will produce it.

19 MR FITZGERALD: Yes.

20 JUDGE BARAITSER: Unless and until that takes place, it must surely be by application to
21 the prison authorities, if you are intending for his treatment to change, rather than to the
22 court.

23 MR FITZGERALD: Yes. Well, madam, the concern is that the papers that he was bringing
24 to court were taken from him at Belmarsh. The papers that were given to him at court were
25 taken from him again before he went back, so that he could not ---

26 JUDGE BARAITSER: Mr Fitzgerald, that must surely be an application to the governor of
27 the prison and beyond, if you are concerned about those issues.

28 MR FITZGERALD: Yes. Madam, of course ---

29 JUDGE BARAITSER: I just cannot see the jurisdiction that I have to intervene or interfere
30 with that part of this case.

31 MR FITZGERALD: Madam, I accept that strictly speaking, you have no jurisdiction.
32 However ---

1 JUDGE BARAITSER: Can I say, with the greatest will in the world, even if I agreed with
2 you in principle, it is the lack of any authority to be able to do that; the lack of power by this
3 court to interfere or dictate to the prison authorities about his treatment. One can see ---

4 MR FITZGERALD: I suppose in the final analysis, it could be contempt of this court, if
5 someone were limited in their ability to participate, so that that ---

6 JUDGE BARAITSER: If it comes to that, please let me know and you can make
7 submissions along those lines, Mr Fitzgerald, but unless and until it does, unless you are
8 asking this court to make a finding of contempt, then again, I think my powers are very
9 limited in this respect.

10 MR FITZGERALD: Well, madam, if you take that view as to the limits of your jurisdiction
11 and indeed ability to give any indication, then I cannot take it any further than to draw it to
12 your attention that there have been these problems, in particular in relation to his legally
13 professionally privileged papers. But madam, we will set it out, if necessary, in detail with
14 the precedents. I know that frequently judges do give indications in all courts which they
15 hope are then respected.

16 JUDGE BARAITSER: I would expect Mr Assange to be treated in accordance with his
17 convention rights in this jurisdiction, as I would in any jurisdiction. If they are breached,
18 I have no doubt you will bring it to my attention and I can make observations then.

19 MR FITZGERALD: Madam, I am very grateful for that and we will, in due course, if this
20 continues, make an application.

21 JUDGE BARAITSER: Thank you.

22 MR LEWIS: Madam, can I just give some support to my learned friend on this?

23 JUDGE BARAITSER: You can.

24 MR LEWIS: Obviously I do not know any of the circumstances; I am not privy to that. But
25 in my respectful submission, it is clearly open to the court to make some pretty trenchant
26 comments to the governor if the proceedings are jeopardised in any way, so that Mr Assange
27 does not have a fair hearing.

28 JUDGE BARAITSER: Yes. Well, if it comes to that, Mr Lewis, no doubt ---

29 MR LEWIS: And so far as the prosecution is concerned, we completely support that
30 position.

31 JUDGE BARAITSER: I think everyone in this court supports a fair hearing. So if there was
32 any evidence which undermines, in any way, a fair hearing, I have no doubt it will be brought
33 to my attention and I will certainly make rulings then. But unless and until you reach that

1 position, my view is that I have no jurisdiction to interfere with the conditions in which he is
2 currently held.

3 MR FITZGERALD: Madam, obviously it is not just the conditions; it is the interference with
4 his legally professionally privileged papers. That is the concern. Madam, we will set it out in
5 writing, if this matter continues. But hopefully the prison authorities will respond to our
6 concerns and this will not continue.

7 JUDGE BARAITSER: I agree. I hope so too, Mr Fitzgerald.

8 MR SUMMERS: Madam, we turn to the case on Zakrzewski abuse, which has been
9 summarised for you in the particulars of abuse at paragraph 54 onwards.

10 In opening our case on this, we are going to delve into some of the detail of the evidence, in
11 an attempt, I hope, to help you navigate in due course the evidence that you are going to hear,
12 and to help you assess, at this stage, the admissibility of Mr Eller's evidence.

13 Now, the background ---

14 MR LEWIS: I am sorry to interrupt. I should have let you know, madam. We completely
15 agree with your suggestion about Mr Eller and we would respectfully adopt the position that
16 his evidence could be heard de bene esse and then we can make any further admissions.

17 JUDGE BARAITSER: Thank you.

18 MR LEWIS: So there will be no argument or no decision required as to his admissibility.

19 JUDGE BARAITSER: Thank you. That is very helpful. Thank you, Mr Lewis.

20 Yes?

21 MR SUMMERS: The background to all of this, as we saw in the request yesterday, and we
22 heard from Mr Lewis, is that there are three foundational factual allegations contained in this
23 request, each necessary, as a matter of US law and I think it emerged UK law, to sustain the
24 charges; just to recap.

25 Firstly, the allegation about decrypting a hash value; the purpose of which, and we
26 will return to this, is spelled out at paragraph 29 of the request, madam; to enable
27 Ms Manning to log on to the SIPRNet, and we will come back to the SIPRNet, using a name
28 that did not belong to her, to "make it more difficult for investigators to identify Manning as
29 the source of the confidential disclosures." That is the first, and one of the core factual
30 allegations in this case, that is provably wrong. It is a false allegation, and you do not need
31 defence evidence to see it; because it is provably wrong from the Manning trial, from the
32 evidence given by the prosecution's own witnesses or read as agreed evidence or
33 unchallenged defence evidence. It is a knowingly false account of the conduct that occurred.

34

1 The second key allegation is that Mr Assange was also concerned in the theft of the
2 underlying materials, in addition to decrypting the hash value, it is said, but by soliciting
3 them through what has been termed “the Most Wanted list”. That is set out and we had it
4 read to us yesterday in the indictment. The allegation between paragraphs 12 and 16 of the
5 request alleges in terms that Mr Assange intentionally solicited the four databases via what is
6 termed the “Most Wanted list”. Again, utter rubbish, provably wrong, this time from publicly
7 available information.

8 Then lastly, in relation to two of the databases, the significant activity reports, that is
9 the Iraq/Afghanistan materials and the cables; the allegation is made and was made
10 trenchantly yesterday that Mr Assange knowingly put people and lives at risk. That is the
11 allegation that underlies counts 15 to 17 and the pure publication counts. It is the US’s
12 answer, as they see it, to the First Amendment and Article 10. It is obviously and provably
13 false; again from publicly available information and information known to the US
14 government.

15 Now, you are going to need some materials, madam, to navigate these issues in due
16 course. We have isolated them for you. The white box that sits on your table ---

17 JUDGE BARAITSER: Yes.

18 MR SUMMERS: --- should contain a reduced version of volume H, the Eller exhibits. Now,
19 I say “reduced”, because we all know that volume H runs to about 5,000 pages. We have
20 reduced for you, in a file which should have “Eller” highlighted in pink on the side, those
21 parts of volume H that Mr Eller refers to specifically in his report. You have volumes L1 and
22 2. That is the “Most Wanted list” materials.

23 JUDGE BARAITSER: Yes.

24 MR SUMMERS: You have another file of Professor Grothoff’s exhibits.

25 JUDGE BARAITSER: Mmm.

26 MR SUMMERS: You will also need the core bundle, madam.

27 JUDGE BARAITSER: Yes. I have all of that. Thank you.

28 MR SUMMERS: Thank you. Now, one could accurately describe this chapter of the case as
29 “lies, lies and more lies”.

30 To orientate ourselves, the most convenient document is the Manning plea allocation
31 statement. It is at H17, so the Eller papers, tab 17. It is in multiple places in your papers,
32 madam. It is also at B1 and I think it found its way into the core submissions file, but H17 is
33 where you find it in the papers that you do have.

34 JUDGE BARAITSER: Thank you.

1 MR SUMMERS: It is the statement made after trial, in which Ms Manning explains why she
2 did what the trial established she did.

3 JUDGE BARAITSER: Can we be clear: this is the court martial, rather than the criminal
4 trial? The court martial, rather than the criminal trial?

5 MR SUMMERS: Yes. All of this is the court martial.

6 JUDGE BARAITSER: Thank you.

7 MR SUMMERS: Now we could, of course, dig around in the 10,000 or so pages of materials
8 to find these key dates, but they are all here in a useful place in this single document, so it is
9 probably most useful to navigate using this.

10 So can we begin please, madam, at 6744? Lines 3 to 4 explain what the SIPRNet is.
11 It is the Secret Internet Protocol Router Network. It is the network to which Ms Manning had
12 access during her time in Iraq. And it was through that that she had access, lawful access, to
13 each of the four batches of materials that were ultimately downloaded and we find mentioned
14 in our indictment.

15 Can I ask you to note that 6745, the reference to Interlink at line 19, a search engine;
16 that was the primary vehicle through which she was able to access the various materials.
17 Now, chronologically, I want, I think, to start at the end. But before we get there, can I invite
18 you to note, please, reference at 6761, lines 9 to 13, to a single cable called the “Reykjavik
19 cable” obtained on the SIPRNet, sitting in a database called the Net Centric Diplomacy
20 portal, were the cables in this case; and it is the cables that I would like to begin with, please.
21 And the reason I am taking you to the Iceland cable is not subject to the indictment, but
22 chronologically it becomes important. At 6763, you will see lines 15 onwards; this cable was
23 copied and uploaded on 15 February 2010.

24 JUDGE BARAITSER: That is the Iceland cable?

25 MR SUMMERS: This is the Iceland cable, madam. And just to remind ourselves,
26 Ms Manning was not the only analyst who had access to the SIPRNet; everyone did.

27 Now, jumping forwards, then, in the chronology, please. Can we go to 6783; line 7
28 onwards. Ms Manning began the process of downloading the cables, that is the large
29 database of 250,000 cables, on 22nd March. She downloaded them all the way through to
30 9th April, saved them on to her computer on 10th April and uploaded them on to the
31 WikiLeaks site on 10th April.

32 JUDGE BARAITSER: Uploaded them on to which site?

1 MR SUMMERS: WikiLeaks. You see line 17, madam, “WLO WikiLeaks organisation”;
2 that is how it is referred to in these materials. She explains her decision to upload those
3 cables, in public interest terms.

4 Just pausing and so you are aware, madam. The cables had obvious public interest.
5 They disclosed, for example, US spying on UN diplomats, previously denied US involvement
6 in the conflict in Yemen, drone strikes and the like, CIA and US forces’ involvement in
7 extra-judicial killings in Pakistan. They are an archive that has altered the world we live in; it
8 has altered the course of human rights litigation. You heard about Chagos yesterday. It has
9 caused oppressive governments to fall.

10 Ms Manning describes, at 6781 to 6783, why she took the view that it was necessary
11 and in the public interest, in her view, that they be known. Just pausing, madam. I made the
12 point, I think a little earlier that the SIPRNet was a database to which all had access. She
13 made the same point at page 6782; thousands of military personnel, Department of Defense,
14 Department of State and other civilian agencies had easy access to the cables. And she talks
15 there, and I will return to this, about their sensitivity level.

16 So that, madam, is the background to the cables.

17 JUDGE BARAITSER: So you have been talking about 250,000 State Department cables.

18 MR SUMMERS: Yes.

19 JUDGE BARAITSER: How do they relate to the Iceland cables?

20 MR SUMMERS: Well, the Iceland cable is relevant because it is a cable.

21 JUDGE BARAITSER: But it is not incorporated in the 250,000?

22 MR SUMMERS: It is not?

23 JUDGE BARAITSER: Incorporated within the 250,000?

24 MR SUMMERS: No, it is an earlier cable. The point is that she had access to the cables
25 before 10 April. Now, against that background, we need to turn to the three core allegations
26 that are made in the indictment.

27 The first is that the efforts to decrypt the hash value which occurred, and this is
28 important, madam, between 8th and 10th March 2010 was for the purpose, it is said, of
29 gaining access to the cables or else gaining anonymous access to the cables. That is the
30 allegation that is made in terms before you. I hope you can obviously see why I brought your
31 attention to the Reykjavik cable uploaded in February. Long before this conversation, she
32 already had access to the cables. On no sensible view of the known chronology could the
33 cables have had anything to do with the decryption of the hash value, so far as access is

1 concerned. But what, then, about gaining anonymous access to them? And that is the
2 allegation that is squarely made at paragraph 29 of the request.

3 That is where Mr Eller's evidence is going to help you, madam, and in particular
4 paragraphs 39 to 40 of Mr Eller's evidence, because he draws out for you the evidence
5 adduced in the court martial concerning - and here we are concerned with the Net Centric
6 Diplomacy database. That is where the cables sat. And he tells you, in terms, that the
7 evidence given to the knowledge of the US government in the court martial is that that
8 database required no account to access, no log-in information, no password to access. He
9 cites for you, and you have it in your volumes, the evidence given. The easiest way, I think,
10 probably to deal with this is to look at tab 16 of the Eller materials. This is agreed evidence
11 read into the record in the court martial, known obviously to the US government. It is the
12 evidence concerning the operation of the Net Centric Diplomacy system and it tells you in
13 terms that the way the usage on that database is tracked is not via accounts or log-in
14 information, but via internet protocol IP addresses of the terminal that the user is using to
15 access the database; paragraph 2.

16 That is the point that Mr Eller makes at paragraphs 42 to 44 of his report. And the
17 evidence that he cites in those paragraphs, you have in your materials, and it shows what
18 Mr Eller says it shows.

19 So the short point here is that using the terminal to log into the Net Centric database,
20 using a different user account, would and could have made absolutely no difference to
21 Ms Manning's anonymity.

22 JUDGE BARAITSER: That is assuming she was aware of this of, course.

23 MR SUMMERS: Absolutely, and this is the agreed evidence.

24 MR LEWIS: It is not agreed in this case.

25 JUDGE BARAITSER: It is not agreed obviously in these proceedings.

26 MR SUMMERS: The evidence that was read by agreement in the court martial ---

27 JUDGE BARAITSER: Yes.

28 MR SUMMERS: --- is that that is how it is tracked.

29 JUDGE BARAITSER: Yes. But the point they make is, assuming she was aware of that, of
30 all that you say.

31 MR SUMMERS: Yes, absolutely.

32 JUDGE BARAITSER: And I am assuming you do not have evidence that she was.

33 MR SUMMERS: Well, I am sure we can deal with that in due course, if that is the point that
34 is being taken. But the bold allegation that is made in the request is that the attempt to

1 decrypt a hash value, in March 2010, was somehow referable to gaining anonymity on the
2 cable database which simply could not have happened.

3 The second allegation, of course, is that Mr Assange somehow solicited this material
4 through what is termed “the Most Wanted list”. So can I invite you to put Mr Eller away just
5 for a moment and open file L?

6 JUDGE BARAITSER: Do you want L1 or L2?

7 MR SUMMERS: L1, please.

8 JUDGE BARAITSER: Yes.

9 MR SUMMERS: Now, some introductory words, please, about the list. The first thing ---

10 MR LEWIS: I am sorry, I am just having trouble finding it. Is this one of the files my
11 learned friend gave us this morning?

12 MR SUMMERS: No. This is L. This is the L files.

13 MR LEWIS: I do not know if we brought them. Would you give us a moment, madam?
14 Thank you.

15 JUDGE BARAITSER: Yes, Mr Summers?

16 MR SUMMERS: L/2, please.

17 JUDGE BARAITSER: L2, not L1?

18 MR SUMMERS: Well. Volume L1, tab 2. You are looking, madam, at what is termed the
19 “Most Wanted list”, as it appeared on the internet on 4 November 2009.

20 JUDGE BARAITSER: Just for my note, where do I get the date from, please?

21 MR SUMMERS: It is in the heading of the document, “web archive”, that is the
22 Wayback Machine; that is what is referenced in the request at paragraph 12: “Web/2009”.
23 “11” is November, “04”; so 4 November.

24 Madam, just so you know I am not talking nonsense, tab 1 is the diary of the
25 Wayback Machine. It highlights 4th November 2009. The Wayback Machine scans the
26 internet periodically, imaging websites and provides us all with an archive of various sites on
27 different days. This is what this page in the WikiLeaks sites looked like on 4 November. It
28 is a list of the concealed documents or recordings most sought after by a country’s journalists,
29 activists, historians, lawyers, police or human rights investigators.

30 The first thing that you ought to understand, madam about the Most Wanted list is that
31 it is collaborative. In the same way that Wikipedia works, this worked the same way.

32 Anyone can edit it, or could. It is a collaborative living document; contributed, as it says, to
33 by journalists, individuals, NGOs, human rights activists. For ---

34 JUDGE BARAITSER: The information that it is collaborative comes from where, please?

1 MR SUMMERS: Sorry, the evidence. If you look, madam, at L/7. Page 5, this is the
2 “about” page of WikiLeaks. It talks about anyone being an author.

3 JUDGE BARAITSER: Can you just identify where it says that that anybody can contribute?

4 MR SUMMERS: At the bottom: “What is your relationship to Wikipedia? WikiLeaks has
5 no formal relationship to Wikipedia; however both employ the same Wiki interface and
6 technology.” That is collaborative, madam.

7 JUDGE BARAITSER: Where are you reading from, please?

8 MR SUMMERS: Page 5 of tab 7. This is the “about” page of WikiLeaks: “Both share the
9 same radically democratic philosophy which holds of allowing anyone to be an author.” That
10 is how the list works. Of course, if it is something that you require more evidence about in
11 due course, we can provide it. We are simply opening the case at the moment.

12 JUDGE BARAITSER: Mmm.

13 MR SUMMERS: So the first thing to understand about the list is that it is a collaborative
14 living document. The second is that, as a result, it changed.

15 Now, the Wayback Machine doesn’t record internet sites every day. It next recorded
16 the site on 16th March 2010. It next recorded this page on 16th March 2010. You see that in
17 tab 3. In fact, madam, the site was down on that date; if you look at tab 17. It recorded it
18 again on 26th May; that is after everything that we are concerned with has played out, and
19 you will find what it looked like at tab 4. And just to highlight, if I may: the point to be
20 drawn from all of this is that the list, insofar as it concerned the US, had been shortened
21 significantly and in a significant way, so far as we are concerned, by May.

22 So what we know, and what the US government knows, is that in the period that we
23 are talking about, at some point, the list changed and significant materials dropped off it.
24 What I cannot tell you now, not based on public materials in any event, is exactly when that
25 occurred; so I invite you to proceed for the purposes of our submissions on the basis that the
26 full list was available at all times and visible to Chelsea Manning. In inviting you to proceed
27 on that basis, I hope it is apparent that we make a significant concession, because that is not
28 actually what the evidence will show; but I am concentrating on what must be known to the
29 US government.

30 We have seen at tab 17, that at various times, and indeed for some period, the site was
31 just down completely; but again, I invite you to proceed on the worst case, so far as we are
32 concerned, which is that the list was there all the time and at all material times visible to
33 Chelsea Manning.

1 So madam, back to the allegation made in the indictment about which we have heard
2 much; and the allegation, of course, here is that the cables were somehow solicited through
3 this list, the Most Wanted list.

4 The punchline, so far as our evidence will demonstrate in due course, is that no matter
5 how hard you read this list, you are not going to find reference to cables anywhere on it.

6 So madam, can you turn to tab 2? This is the list that we are all assuming was visible at all
7 times and known to Chelsea Manning; tab 2. Page 12, begins “What the world wants to have
8 in relation to the USA”. The world wants a number of bulk databases; Intellipedia which we
9 will be able to show you in due course Chelsea Manning had access to, but never uploaded.
10 The common core database, the Open Source Centre analytical database and the Paton
11 database which is of course the database. None of those were ever submitted,
12 notwithstanding that they appear on the list.

13 The military and intelligence section sets out various things that the world wanted to
14 know and to see. None of them concern diplomatic cables. The short point, madam, is that
15 despite the impression you must have had from the request and from my learned friend’s
16 submissions to you, the Most Wanted list has absolutely nothing to do with diplomatic cables.
17 They were never solicited by anybody and the notion that they were uploaded to WikiLeaks
18 as a result of Chelsea Manning having seen the Most Wanted list, even if that is a sound
19 assumption to make, is absolute fantasy.

20 Can I invite you just to have your - we will come back to it, I think. Rather than
21 keeping pages open, I think the most sensible way of managing the papers is to come back.
22 MR LEWIS: I wonder if my learned friend can look at some of the other things which are
23 needed, while we are looking at the page, on page 14 of 16; such as the Iran and Iraq army
24 Rules of Engagement, et cetera.

25 MR SUMMERS: I hope I made clear that in order to assist you, I am planning to go through
26 each of the databases or groups of materials that were uploaded. There are four. I have
27 started with the cables. We will move chronologically to the Rules of Engagement in due
28 course.

29 JUDGE BARAITSER: So the State Department cables, there is an absence of request for
30 them.

31 MR SUMMERS: Sorry?

32 JUDGE BARAITSER: So the State Department cables, the 250,000, there is an absence of
33 request for them?

1 MR SUMMERS: Yes, that is putting it bluntly. But based on nothing, what appears in the
2 request is an allegation that somehow they were solicited by Mr Assange from Ms Manning
3 through this list, and through that there is an attempt to establish due criminality, based on an
4 involvement in the underlying theft. It is a palpably false assertion to have made and
5 knowingly so.

6 JUDGE BARAITSER: All right.

7 MR SUMMERS: So staying with the cables, we will come back to the list, insofar as it
8 relates to other materials, shortly; staying with the cables.

9 The next and the third core allegation that is made and was made, as I say, trenchantly
10 and in terms, was that Mr Assange knowingly placed lives at risk through their unredacted
11 release. There are a large number of things that need to be said about this allegation and how
12 it is a knowingly false allegation. Can I begin ---

13 JUDGE BARAITSER: You can, Mr Summers, but if the noise is disruptive, I am very happy
14 to rise until it settles down. If you or your client feel they cannot follow properly the
15 proceedings or are in any way disrupted by the noise, please let me know.

16 MR SUMMERS: Thank you. Can we go back, please, to Ms Manning's statement, H17.
17 We looked briefly at the section that deals with the release of the cables; 6781.

18 JUDGE BARAITSER: Is this Mr Eller's file?

19 MR SUMMERS: H17. Yes, the Eller file.

20 JUDGE BARAITSER: Tab 17.

21 MR SUMMERS: Tab 17, yes. Now, the allegation, of course, is that Mr Assange knew there
22 were sensitive names in this document and knowingly put those lives at risk. Ms Manning's
23 take on all of this was that these were non-sensitive documents from the beginning. At the
24 bottom of page 6781, she explains that genuinely sensitive materials are captioned "no dis",
25 no distribution.

26 JUDGE BARAITSER: 6781?

27 MR SUMMERS: 6781, madam. Those that we are concerned with, and that were available
28 on the SIPRNet, you will recall everyone has access to it, were "SIP dis"; distribution on the
29 SIPRNet. At the top of 6782, madam: "Deemed appropriate for release to a wide number of
30 individuals." Just reading down 6782, the "SIP dis" caption was only for information that
31 could be shared with anyone with access to the SIPRNet; thousands of personnel. We looked
32 at this before. "It made sense to me", says Ms Manning, "Given that the vast majority of the
33 Net Centric Diplomacy cables were not classified." That is her understanding of the
34 materials.

1 Mr Eller, at 48 to 50, madam, makes the same point, based on that same material.

2 JUDGE BARAITSER: Is Mr Eller's statement in the bundle?

3 MR SUMMERS: Sorry?

4 JUDGE BARAITSER: Is Mr Eller's statement in the bundle?

5 MR SUMMERS: Mr Eller's statement is at core, tab 17. It might be sensible to take it out
6 and put it with the small H file that you have.

7 JUDGE BARAITSER: Yes.

8 MR SUMMERS: This is the point made in terms by Mr Eller. He draws on Ms Manning's
9 statement, of course. We have also looked already today at evidence agreed in the court
10 martial, tab 16.

11 JUDGE BARAITSER: Oh dear. The documents you have given me, the statement of
12 Mr Eller is every other page, I am afraid, 9, 11, 13, 15.

13 MR SUMMERS: Well, I am sure we can provide, madam, a fresh copy of Mr Eller's
14 statement.

15 JUDGE BARAITSER: Yes, please. That would be helpful. Thank you, yes.

16 MR SUMMERS: Eller, 48 to 50; he makes the point about lack of sensitivity from the start.
17 And in fact, in tab 16, he has provided for us the agreed evidence. I say "agreed", of course;
18 agreed by the US government in Ms Manning's court martial at tab 16, which makes
19 precisely that same point at paragraph 3.

20 MR LEWIS: Sorry, which paragraph?

21 MR SUMMERS: Paragraph 3; "SIP dis" is for distribution on the SIPRNet generally. The
22 second half of that long paragraph 3 deals with the issue of classification, captioning of the
23 cables, and it says exactly what Ms Manning says.

24 Now, nevertheless, what the US knows, because it makes oblique reference to it in its
25 request at paragraph 44, is that neither Mr Assange, nor WikiLeaks, having received these
26 materials in April 2010, rushed to publish them precipitously. What the US knows, as the
27 world knows, is that instead, Mr Assange and WikiLeaks entered into a partnership with
28 a series of mainstream media organisations, in order to understand and deal responsibly with
29 these materials. It is the partnership that is referred to at the foot of paragraph 44:

30

31 "Prior to this publication of the unredacted State Department
32 cables, Assange claimed that he intended to gradually roll out
33 the cables in a safe way by partnering with mainstream media
34 outlets, reading through every single one and redacting identities
35 accordingly."

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JUDGE BARAITSER: You are reading there from?

MR SUMMERS: From the request, paragraph 44. Just so you understand how what you are about to learn is put in the request, paragraph 44 continues. We had it read to us yesterday, but just to remind you:

“Nevertheless, whilst they published some of the cables in redacted form, beginning in November 2010, they published over 250,000 of them in September 2011 in unredacted form.”

That is it; that is all the US government sees fit to tell you in this request about the chronology of publication of the cables.

Can I begin by directing your attention to what everyone knows to be the true chronologies surrounding, first, the redaction process. The reference that the request makes, because the US government is fully aware of it, is that a redaction process was agreed with media partners, that is to say the Guardian, Der Spiegel, Le Monde, El País and the New York Times. That process was aimed at and intended to identify the redactions that were needed, which would then be implemented before the cable was published. Mr Goetz from Der Spiegel tells you that in terms at paragraph 21, but it is clear from the indictment that the US knows this. You may wish to note Mr Goetz’s evidence at paragraph 22 that that process involved the US government and the State Department feeding suggested redactions into the media partnership.

Madam, do you have the core volume? Mr Goetz’s evidence is at tab 30. Insofar as it concerns the cables, it begins at paragraph 21.

JUDGE BARAITSER: It is actually tab 31, but it makes no difference.

MR SUMMERS: Sorry?

JUDGE BARAITSER: It is actually tab 31.

MR SUMMERS: Not in my volume. 31.

JUDGE BARAITSER: Tab 30 is ---

MR SUMMERS: OK.

MR FITZGERALD: 30 is the index.

MR SUMMERS: Right, OK. That is what happens when you replace your old copies with your own marked-up versions. Right, 31, are we all there?

JUDGE BARAITSER: Yes.

MR SUMMERS: Paragraph 21 begins, “The cables chronology”. We are just talking at the

1 moment about the period of the nine months after receipt of these cables in which they were
2 rolled out gradually in redacted form. Mr Goetz tells you there was an agreement with the
3 media partners who had access to the cables, paragraph 21:

4

5 “The agreement was that they notify WikiLeaks of the
6 problematic cables that required redaction and that WikiLeaks
7 then followed through accordingly. Then it became necessary to
8 involve local media partners in specific countries.

9 “There was a regional redaction process. The State
10 Department initially actually participated in the redaction
11 process. At Der Spiegel, we had a conference call with a
12 number of officials from the Department of State. They read
13 numbers to us of documents they felt were sensitive with the
14 understanding that we would give these numbers to WikiLeaks
15 to properly redact. WikiLeaks did exactly that.”
16

17 Just pause. Knowing that the US Government were involved in the redaction process,
18 can it be said on any sensible view that the request represents a fair or accurate representation
19 of what occurred? “We protected the names”, he says, in paragraph 23. “We had many
20 suggestions for redactions, which WikiLeaks agreed with. We requested that WikiLeaks not
21 publish the name and the name was not published”.

22 You have evidence, and we will hear in due course, from the local media partners
23 involved in publication of the cables. Now I have got it at tab 33, is that right, Ms Tissu-
24 Becker?

25 MR FITZGERALD: I think it is 34.

26 JUDGE BARAITSER: No.

27 MR SUMMERS: 34.

28 MR FITZGERALD: 34, yes.

29 JUDGE BARAITSER: Right.

30 MR SUMMERS: Thank you. This is the joint statement. It is ---

31 JUDGE BARAITSER: I have, of course, read it.

32 MR SUMMERS: Yes.

33 JUDGE BARAITSER: But I appreciate others have not.

34 MR SUMMERS: Replicated by Mr Garbia who is its joint author at tab 35. These are two of
35 the local media partners that Mr Goetz is referring to who were drawn into the same redaction
36 process that WikiLeaks was responsibly controlling and the US Government knows it was
37 responsibly controlling. They tell you in terms that they took the memoranda of

1 understanding that they were required to enter into very seriously.

2 They had clearly stipulated security procedures and guidelines for handling and
3 publishing, instructed specifically by WikiLeaks to redact information that had a reasonable
4 probability of identifying an individual at risk. It does not sound very much like the
5 submissions you heard yesterday morning. Professor Grothoff at tab 37.

6 MR FITZGERALD: Yes, it is tab 2 of ---

7 MR SUMMERS: Tab 37, divider 2, Professor Grothoff ---

8 JUDGE BARAITSER: No, I am afraid not.

9 MR SUMMERS: No. Where is this one then?

10 MR FITZGERALD: It is, it is tab 2 of 37.

11 MR SUMMERS: Tab 37, there is subdividers.

12 JUDGE BARAITSER: Ah.

13 MR FITZGERALD: Subdivider 2, yes.

14 MR SUMMERS: Do you have it, madam? Professor Grothoff's evidence is important.

15 JUDGE BARAITSER: Is this a letter?

16 MR FITZGERALD: The letter.

17 MR SUMMERS: It is a letter. It has been reduced into statement form. I do not know
18 whether that is at tab 46, but it is precisely the same materials.

19 JUDGE BARAITSER: All right.

20 MR SUMMERS: In case there were objection to Professor Grothoff writing in the form that
21 he has. You have a file of the materials that he produces, which we will have to look at
22 briefly. But he talks also, madam, at the first paragraph, the bold paragraph, about what is
23 known in the public domain about handling of these documents in the nine months following
24 their receipt by the media partners. They were decrypted. They were protected by
25 decryption. There were extensive security instructions for how to keep the documents safe.

26 Madam, his second paragraph tells us that, as we well know, on 28 November 2010
27 the partnership began publishing the redacted cables. We will come back to Professor
28 Grothoff in a moment, but that is the first nine months after they were received. The notion
29 that they were dealt with in a way that knowingly placed lives at risk is a knowingly false
30 allegation. What you will have recalled from paragraph 44 of the request is that in three lines
31 those responsible for the US request moved from this to the unredacted release in September
32 2011 and the bare allegation made in that request is that the unredacted release, which
33 occurred in September 2011, was knowingly reckless.

34 Before we break - and I do invite you to break shortly just for five minutes - can I tell

1 you what the evidence is going to tell us. Far from being a reckless, unredacted release, the
2 world knows, every reporter in this courtroom knows and the US Government knows, that
3 what actually occurred is that one of the media partners published a book in February 2011 -
4 you have it at tab 2 of the Grothoff file - and published the password to the unredacted
5 materials in a book which then enabled the world to publish those unredacted materials.

6 They circulated on the internet, not on the WikiLeaks site but on other sites, none of
7 whom have been prosecuted, some of which are US-based, all - and we will look at them -
8 published first. Some of them are still there. But the notion that Mr Assange deliberately put
9 lives at risk by dumping an unredacted database of cables is knowingly inaccurate. Can I
10 return to that, please, madam, after a short break.

11 JUDGE BARAITSER: Can I just clarify then, the cables were published on 28 November
12 2010?

13 MR SUMMERS: In redacted form. The process of redacted, careful, responsible publication
14 began on 28 November 2010. Whilst that ---

15 JUDGE BARAITSER: Can I just ask the question.

16 MR SUMMERS: Sorry?

17 JUDGE BARAITSER: Can I just ask the question.

18 MR SUMMERS: Yes, yes.

19 JUDGE BARAITSER: So in unredacted form on 28 November 2010.

20 MR SUMMERS: Yes.

21 JUDGE BARAITSER: The same cables, the same 250,000 cables, were republished then,
22 you are saying, in September 2011 in unredacted form?

23 MR SUMMERS: No. So, from that database, the responsible system of redaction and
24 controlled publication began in November 2010 and was going on for the months that
25 followed, but the gates got opened not by Mr Assange or WikiLeaks but by another member
26 of that partnership doing what I have just told you. He did it ---

27 JUDGE BARAITSER: When was the book published?

28 MR SUMMERS: February 2011. No one made the link until August 2011. I will take you
29 through the chronology ---

30 JUDGE BARAITSER: No, I think I have it now.

31 MR SUMMERS: --- when we return.

32 JUDGE BARAITSER: Thank you. That is very helpful. All right. How long are you asking
33 for, Mr Summers?

34 MR SUMMERS: Just five or 10 minutes for a comfort break.

1 JUDGE BARAITSER: All right. Shall we say back at 20 to 12 then, please?

2 MR SUMMERS: Thank you.

3 JUDGE BARAITSER: Thank you.

4 (Short adjournment)

5 JUDGE BARAITSER: Thank you very much.

6 MR SUMMERS: Thank you madam. So, we left the chronology on 28 November 2010
7 when the responsible redacted publications began at the hands of the responsible media ---

8 JUDGE BARAITSER: Just pause. (a) Mr Assange cannot hear you and (b) I can see the
9 public gallery is entirely empty. I am not sure why.

10 MR SUMMERS: Apparently that problem is being dealt with. I am not sure what I can do
11 with the machinery we are being given to make myself louder. I am standing as close as I
12 can to this microphone.

13 COURT OFFICIAL: I think the Judge has pointed to - the gallery appears to be empty.

14 MR SUMMERS: Yes. That is being dealt with. A member of staff outside has been spoken
15 to.

16 JUDGE BARAITSER: All right.

17 COURT OFFICIAL: We have not had any negative feedback so far, Mr Summers. They can
18 hear you very well in terms of audibility.

19 JUDGE BARAITSER: I think we probably have to wait for the public to have access to the
20 hearing.

21 MR SUMMERS: Thank you.

22 JUDGE BARAITSER: I think rather than sit and wait, with Mr Assange staying where he is,
23 I am going to rise for a moment and as soon as the public are back in ---

24 MR SUMMERS: Of course. Thank you.

25 JUDGE BARAITSER: --- no doubt someone will let me know.

26 (Short adjournment)

27 (The court reconvened at 11.54)

28 JUDGE BARAITSER: Right. Good. Yes, Mr Summers.

29 MR SUMMERS: Thank you. We are all now here. Just to repeat myself, we left the
30 chronology, madam, on 28 November 2010, when the media partnership that had been set up
31 by WikiLeaks, with procedures devised by WikiLeaks and implemented by WikiLeaks –
32 something which the evidence before you will say – see, for example, Goetz, paragraph 28 –
33 was utterly innovative so far as journalism was concerned at the time and has now become
34 normal and has been rolled out, for example, in relation to the Panama Papers. The result of

1 all of that was that controlled responsible publication began on 28 November 2010. Can I
2 then take you back, please, to Professor Grothoff, at tab 37, sub-divider 2.

3 JUDGE BARAITSER: Yes.

4 MR SUMMERS: His paragraph 2 is where we are up to – 28 November 2010. Those media
5 outlets began publishing the redacted cables they had obtained from WikiLeaks. Madam, the
6 next day, the WikiLeaks site came under what is known as a denial of service attack – a
7 distributor denial of service attack. Essentially, it was being flooded. Again, can I make this
8 point: everything I am referring to is in the public domain. You do not need Professor
9 Grothoff and indeed, you do not need Mr Eller to understand any of this. They are there to
10 give it structure and to summarise it for you but the evidence that they refer to and from
11 which they draw their statements, is a publicly available document - and I say that because it
12 is available to the US Government and was at the time this request was draft and, we say,
13 misrepresented the true position.

14 The true position is immediately after the controlled publication began, the WikiLeaks
15 site came under a cyberattack – and I use that phrase because that is how it was reported at
16 the time. Tab 4 of Professor Grothoff – his exhibit 4 – is publicly available information,
17 madam, from 29 November 2010, the very next day – do you have it?

18 JUDGE BARAITSER: Tab 3?

19 MR SUMMERS: Sorry? Yes. The Grothoff bundle, madam.

20 JUDGE BARAITSER: Oh, the Grothoff bundle. Yes.

21 MR SUMMERS: Do you have that?

22 JUDGE BARAITSER: I have a Grothoff bundle.

23 MR SUMMERS: You can put away Eller for a moment, madam. I apologise for the mound
24 of papers.

25 JUDGE BARAITSER: All right. So this begins at tab ---

26 MR SUMMERS: I promise we have done our best to make it more manageable than it has
27 been for us.

28 JUDGE BARAITSER: You have been very helpful indeed. It begins at tab 20.

29 MR SUMMERS: Yes. They are all tab 20, but then they are subdivided. 20, sub 4?

30 JUDGE BARAITSER: Yes. All right.

31 MR SUMMERS: So they all say 20, because that is the core bundle references, and then ---

32 JUDGE BARAITSER: Sub tab 3?

33 MR SUMMERS: Yes. They run sequentially. These are his exhibits.

34 JUDGE BARAITSER: Right.

1 MR SUMMERS: The headline for you is that this is all publicly available information.

2 JUDGE BARAITSER: All right. Thank you.

3 MR SUMMERS: Tab 4 is the cyber-attack that was launched against the WikiLeaks site on
4 the very next day and, in particular, in relation to what was the Cablegate region of the
5 WikiLeaks site. The site recovered, briefly, and then went offline and, madam, we will come
6 to this in due course but this is chronologically what happened next, as Professor Grothoff
7 tells you. The attack continued and tab 6 – three days later – was threatening the stability of
8 all of the websites hosted by the server, the server being EveryDNS.net, who decided, in
9 those circumstances, to terminate their hosting of the WikiLeaks site, the response to which –
10 in order not to lose the database of properly redacted cables – was to mirror the site, tab 7,
11 Professor Grothoff’s paragraph 4, in a number of locations, in order that that kind of attack
12 could not disable this public archive of public interest materials.

13 It found, madam – well, you can see for yourself. The database was mirrored in a
14 number of locations. Now, this was the redacted materials, but contained within it was the
15 encrypted, unredacted file that was necessary to host it, in order to release the redacted
16 materials. Now, what happened next – Professor Grothoff, paragraph 5 – is on 1 February
17 2011, David Leigh, one of the media partners, published this book. You have an extract from
18 it, madam, at tab 2 of the Grothoff materials – page 135.

19 JUDGE BARAITSER: Mmm.

20 MR SUMMERS: Well, you can see what the title to the chapter is, madam. And if there was
21 any doubt about it ---

22 JUDGE BARAITSER: So are you saying somewhere here, the password is disclosed?

23 MR SUMMERS: It is the title of the chapter, madam. A collection of – it is a 58-key
24 password: “A collection of diplomatic history since 1966 to the present day”. That is ---

25 JUDGE BARAITSER: That is the password?

26 MR SUMMERS: That is the password that David Leigh had been given in order to
27 participate in the innovative WikiLeaks-driven, redaction-responsible process. And if there
28 was any doubt about it, the index – the page 332 – tells you that that is the password.

29 MR LEWIS: Sorry. Where is the password?

30 MR SUMMERS: Sorry?

31 JUDGE BARAITSER: Page 135.

32 MR SUMMERS: Just point it out to Mr Lewis, please.

33 MR LEWIS: I see that. Does it – where is the actual password?

34 MR SUMMERS: That is it.

1 MR LEWIS: I see.

2 JUDGE BARAITSER: Yes.

3 MR SUMMERS: Now, mercifully, back to Professor Grothoff – nobody put two and two
4 together for a number of months and the rollout, the responsible rollout of these redacted
5 cables continued. But on 25 August, some six months later, madam, Professor Grothoff,
6 paragraph 6: A German news outlet, called Der Freitag, began reporting that it had
7 discovered the password and it had access to the archive because it had been mirrored.

8 Madam, that is the article you have. We will have it translated in due course, but it is at tab 8
9 of Professor Grothoff's – it is his exhibit 8. It is in German. He tells us that Der Freitag was
10 claiming to have access to the unredacted database through something it had found on the
11 internet. Can I just divert from Professor Grothoff for a moment and just show you what this
12 irresponsible data dumper then did? Tab 37, subtab 1 ---

13 JUDGE BARAITSER: Of?

14 MR SUMMERS: Sorry, the core volume.

15 JUDGE BARAITSER: Yes.

16 MR SUMMERS: That day, 25 August 2011, the day Der Freitag was telling the world that it
17 had the key, Mr Assange is on the telephone to The White House. Sarah Harrison, who
18 works for WikiLeaks, and Mr Assange are telephoning the US Department of State to warn
19 them about what might just be about to happen, and I invite you, madam, in due course, to
20 read this. We will go through it in evidence. But they talk in terms of an emergency about to
21 happen. The cables – they have intelligence that they are about to be put on the web,
22 unredacted, not by them – middle of page 1. Page 2, third of the way down: "This is an
23 emergency." This is the Secretary of State's emergency line. It is a matter of urgency, great
24 urgency – page 2. "We need to communicate with her staff right now." They are then told to
25 please call back in a couple of hours.

26 They have apparently – bottom of page 2 – tried to get hold of the ambassador in the
27 UK. Page 3, middle of the page:

28

29 "This is a very large emergency. The US cables have been
30 accessed by someone else and are all about to be dumped online,
31 unredacted. We understand that you have a program to warn
32 people. We want to know if it's complete and, if not, can you
33 escalate it."

34

35 Page 3, madam. See, in the middle of the page?

1 JUDGE BARAITSER: Yes.

2 MR SUMMERS: Page 4, top of the page:

3

4 “Just so you are aware, this is about to happen imminently. It
5 could happen at any moment and I know you feel that it’s a
6 matter of US security, so I don’t know if anything can be moved
7 faster. We need to talk to Hillary Clinton.”
8

9 She was the Secretary of State. And then, at the bottom, Mr Assange comes on the
10 line, but above it, madam, in that large section at the bottom of page 4, “I do not understand
11 why you are not seeing the urgency in this. Unless we do something then peoples’ lives at
12 put at risk.”

13 Not madam, you might conclude in due course, the picture you are being given by this
14 extradition request. That is on 25 August. In fact, the date is on the top of page 1 madam ---

15 JUDGE BARAITSER: Do we know if this only relates to the 250,000 State Department
16 cables?

17 MR SUMMERS: Yes.

18 JUDGE BARAITSER: Yes?

19 MR SUMMERS: That is on 25 August. Back to Professor Grothoff who continues the
20 chronology, the next thing that happens is that Der Spiegel attempts successfully to confirm
21 what is being reported on 29 August and itself gains access to the unredacted database. You
22 have evidence from Der Spiegel, Mr Augustine – I hesitate to give you a tab reference but ---

23 MR FITZGERALD: One does not have one.

24 MR SUMMERS: --- it is 32. He picks up the chronology madam at 10.32, paragraph 3. An
25 article outlining events published at the time on 25 August. That is the Der Freitag article.
26 And he then describes how Der Spiegel was able with that information to themselves gain
27 access to the unredacted and now unlocked database.

28 By 31 August madam, the world was picking up this story. Tab 9 gives you a
29 chronology of it as it was happening. It is titled “Guardian investigator editor David Leigh
30 publishes top secret cable gate password revealing the names of US collaborators and
31 informants in his book.”

32 JUDGE BARAITSER: Tab 9 but not of the core bundle.

33 MR SUMMERS: Sorry?

34 JUDGE BARAITSER: Tab 9 but not of the core bundle.

35 MR SUMMERS: I am sorry. Professor Grothoff, bundle ---

1 JUDGE BARAITSER: All right. I am going to take it from you what you have just said
2 rather than turn to it.

3 MR SUMMERS: Well actually madam, I do invite you to turn to it ---

4 JUDGE BARAITSER: All right.

5 MR SUMMERS: --- because you are going to see where the flood began.

6 JUDGE BARAITSER: And you were looking at tab 9.

7 MR SUMMERS: The Grothoff file, tab 9.

8 JUDGE BARAITSER: Yes. All right.

9 MR SUMMERS: It is contemporaneous reporting at the time by somebody called Nigel
10 Perry. He begins with David Leigh letting slip the passwords, page 2 is what I have shown
11 you. He has some very unflattering things to say about David Leigh so let us carry it over
12 please to page 5, heading “The cat out of the bag”. August 25 Der Freitag report, that is what
13 I have shown you. 29th, Der Spiegel confirm it.

14 Page 6 from the two German reports, it became clear that a tormented mirror of
15 WikiLeaks had accidentally included an encrypted copy of the cable gate cables and that the
16 password was now easy to find on the internet. Surely, it could not be that easy said Mr
17 Perry? So, in the evening of August 30 he started searching for it online and page 7, it
18 unzipped the zip file, it spat out – his words, not mine – a file called “cablesc.csv” dated
19 April 12 2010. You will recall that is when they were received by WikiLeaks.

20 At page 8, top of the page, game over at this point as the cat was forever out of the
21 bag. Middle of page 8, he emails WikiLeaks who sprang into action and released a statement
22 within 20 minutes but – and this is what I am keen to show you madam – within an hour they
23 were on other websites. Cryptone.org and he has on page 9 for you madam, a screenshot of
24 the Cryptone site on 31 August, they are announcing that they decrypted the file. And in the
25 early hours of 1 September, there it is.

26 Cryptone, just so you know and you have more about Cryptone at tab 14, is a US
27 based site, the first to do what this indictment alleges Mr Assange did. And it is still there,
28 tab 14, and nobody has tried to prosecute Cryptone.

29 (Counsel conferred)

30 Can I just – I am grateful for this – can I just take you back, ask you to pause, take
31 you back in the chronology to 25 August and Der Freitag’s announcement to the world, and
32 in particular the evidence of Mr Augustine. That is core volume madam, tab 32, page 3. The
33 paragraphs are not numbered but it is the big one. Second half of the paragraph there, we are
34 back in 25 August, I should have drawn this to your attention. You will remember that is the

1 date Der Freitag announce that the password is – they have done it, they have put two and
2 two together.

3 JUDGE BARAITSER: Yes.

4 MR SUMMERS: They are – the article that you have seen is confirmed to be correct. They
5 received a telephone call from Mr Assange, this is before he phones the White House, saying
6 that he feared for the safety of informants. What Mr Augustine will tell you is that Mr
7 Assange was begging them not to make any wider what they had discovered.

8 So, back please then to the chronology. We are on 1 September. We have seen Der
9 Freitag discovered it, Der Spiegel confirmed it, others on the internet have done the same,
10 Cryptone have now published it, and Professor Grothoff tells you that they – that others then
11 followed.

12 So, paragraph 8 of Professor Grothoff on 1 September, “As we saw, the cat is out of
13 the bag and the site Pirate Bay gave is the next to put it all up. And you have that madam, tab
14 11, announcing again – sorry ---

15 JUDGE BARAITSER: Mr Grothoff.

16 MR SUMMERS: Grothoff file.

17 JUDGE BARAITSER: 11.

18 MR SUMMERS: Tab 11.

19 JUDGE BARAITSER: Twitter account.

20 MR SUMMERS: It should be the Pirate Bay – it should be a document that has a sailing ship
21 on the top left hand corner.

22 JUDGE BARAITSER: Not tab 11 I am afraid.

23 MR SUMMERS: Does anybody have a copy I can hand up just to – thank you. That is what
24 tab 11 – exhibit 11 should look like.

25 MR LEWIS: Where are we looking?

26 MR SUMMERS: Tab 11, Grothoff file.

27 JUDGE BARAITSER: I do not know where to find but it is not at tab 11.

28 MR SUMMERS: Yes. We will make sure that your papers are in proper order ---

29 JUDGE BARAITSER: All right.

30 MR SUMMERS: --- by the time we come back to all of this madam.

31 JUDGE BARAITSER: Thank you. Pirate Bay, yes.

32 MR SUMMERS: By way of highlight for you, the evidence you are going to hear, this is 1
33 September, PirateBay.org announcing to the world and posting the WikiLeaks cables, full,
34 unredacted, and decrypted. And for good measure in the box in the middle, “got from” and

1 tells you where they found the encrypted file and decrypted it using a password in a book
2 which is then recounted.

3 Madam, back then to remind ourselves about what the request says about all of this.
4 It says that in September 2011, WikiLeaks recklessly put lives at risk by publishing the
5 unredacted data. You have that madam at tab 12, that is the Twitter release that you have
6 later in September. And that is the point that Professor Grothoff makes at paragraph 9.

7 So madam, that is the true picture. You will have to determine in due course whether
8 it is fair, proper, or accurate for the US government, knowing all of that as they do, to allege
9 in documents submitted to you that Mr Assange knowingly put lives at risk by deciding to
10 publish the full unredacted cash of cables.

11 JUDGE BARAITSER: To be clear, are you saying the requests relate to all four sets of
12 information? It is not specific is it in referring to the publishing of unredacted cables?

13 MR SUMMERS: No, absolutely. Well ---

14 JUDGE BARAITSER: To these 250,000?

15 MR SUMMERS: Can I pause and answer that with two answers? Firstly, the request is
16 unambiguous about putting lives at risk ---

17 JUDGE BARAITSER: Yes.

18 MR SUMMERS: --- in relation to the cables. See for example paragraph 39 of the request.
19 It is one of the two databases that that allegation is aimed at, but madam, you are right, it is
20 not an allegation that is levelled against all four databases. The detainee assessment briefs
21 are not alleged to have put lives at risk. The allegation is levelled in the indictment only
22 madam against the cables and you will make of that what you will but it is levelled expressly
23 and explicitly in relation to what we have just looked at. And it is also levelled against the
24 war diaries to which I will return.

25 So madam, in due course and once I have done this exercise I will look briefly at the
26 law, but in due course madam, we will be submitting to you that it is difficult to conceive of a
27 clearer example of an extradition request that boldly and blatantly mistakes the facts as they
28 are known to be to the US government and so squarely engages the jurisdiction you have
29 under *Zakrzewski* and which was exercised by your sister Judges and by the High Court in
30 *Marua* and *Castille*. We will look at those authorities briefly but the allegations that are
31 made are material to the statutory scheme and they are knowingly wrong.

32 Can I then move back in time and look next please at the detainee assessment briefs
33 and ask whether any of the three allegations are fair, proper, or accurate in relation to that
34 batch of materials? Now, can we go back please to the – just to remind ourselves and to

1 orientate ourselves on dates the Manning statement because it is the best place to look for a
2 chronology – the Manning statement is Eller, tab 17 madam.

3 JUDGE BARAITSER: Yes, thank you.

4 MR SUMMERS: These are detainee assessment briefs for Guantanamo Prison. Just before
5 we look at Ms Manning’s statement, can I give this introduction to them. The time we are
6 talking about, and this is March 2010, Guantanamo was - I want to put this as neutrally as I
7 can - a hot topic. You have in the L files - just for your note, I do not think there is any need
8 to take them out now - materials from that time pertaining to the Guantanamo issue. For
9 example, madam, you have at L60 reporting that funding had been blocked by the US Senate
10 for closure of the camp.

11 Madam, just to remind you, in January 2009 President Obama had promised to close
12 the camp within a year. By May, the Senate had intervened to stop the necessary funding for
13 that process. L62, in November 2009 the merits of the closure was being hotly debated in
14 congress. L66, November 2009, WikiLeaks was busy analysing data in relation to released
15 detainees. L63 to 64, in December 2009 there was an ongoing public debate about
16 misinformation being given to the world about deaths at the camp and Human Rights Watch
17 calling for the release of investigation reports.

18 In January 2010, the Joint Task Force had reported on what might happen to the 240
19 detainees who were there in the event that the camp closed. You will also learn in due
20 course, madam, that on the WikiLeaks site there was a great deal of material, analysis and
21 attention concerning Guantanamo. For example, the WikiLeaks site had released the
22 Standard Operating Procedures for Guantanamo for 2003 and 2004 in 2007, L24 and 25,
23 which had precipitated a great deal of analysis on the WikiLeaks site.

24 You have a large number of the articles that flowed from that at L26 all the way
25 through to 38. That was a debate that was contributing to and taking place in the context of a
26 wider public debate about what was going on at that camp, not least of all in relation to
27 ongoing proceedings before the US Supreme Court at that time, L29 and L32, concerning
28 non-disclosure, non-release of photographs of detainees.

29 That is the context, madam, for Ms Manning, in March 2010, deciding to release
30 Guantanamo detainee briefs to WikiLeaks. She tells us at H17, 6.7.76, that she came across
31 them - and we will look at technically how she came across them - looking into something
32 else, an ongoing Iraqi federal investigation in relation to individuals worried that the people
33 she was looking at might end up in Guantanamo and, to use her phrase, “found them
34 disturbing”. So, madam, her account of the uploading begins at 6.7.75 from line 15 onwards,

1 “Began sifting through information concerning the Joint Task Force Guantanamo”. That is
2 what had been published in January 2010 to see if the individuals that she was looking at, for
3 other reasons, might be turned over back into US custody and ending up in Guantanamo.

4 Over the page, 6.7.76, “I quickly found the detainee assessment briefs”, or DABs.
5 She explains what they were. Bottom of the page, “It seemed that we found ourselves
6 holding an increasing number of individuals indefinitely that we believed or knew to be
7 innocent”. Top of page 6.7.77, “They compromised our standing in the world and diminished
8 our moral authority”.

9 JUDGE BARAITSER: This goes to how reasons for disclosure ---

10 MR SUMMERS: That is why she is disclosing, but ---

11 JUDGE BARAITSER: But how is it relevant to your abuse argument, please?

12 MR SUMMERS: Sorry?

13 JUDGE BARAITSER: But how is it relevant to your abuse argument, please?

14 MR SUMMERS: I agree it is peripheral, but it is what you have to set against the contrary
15 allegation that is made that this was all solicited through the Most Wanted list, because the
16 Government’s case is not that Ms Manning took a decision based on intelligible, credible
17 reasons to upload this but Mr Assange brought it about by soliciting it through the Most
18 Wanted list.

19 The background for you is that Ms Manning says precisely the opposite. Of course,
20 the US Government are not bound by what Ms Manning says, but they do allege that these
21 materials were solicited via the Most Wanted list. Now look again, please, at the Most
22 Wanted list, L2. Assume that in its fullest version it was available at all times and Ms
23 Manning knew about it, had access to it.

24 JUDGE BARAITSER: L1-2?

25 MR SUMMERS: So it is file L1, tab 2.

26 JUDGE BARAITSER: 2, yes.

27 MR SUMMERS: Assume against the evidence that it was online at all times in that full
28 format. Look as hard as you like, but you are not going to find, madam, detainee assessment
29 briefs anywhere on this list. Other Guantanamo materials are on the list. Look at page 13 of
30 16, the Standard Operating Procedure, do you see that, three bullet points up from the
31 bottom?

32 JUDGE BARAITSER: Yes.

33 MR SUMMERS: Interrogation Standard Operating Procedures, two bullet points up. None
34 of those were sent. The Government say Mr Assange solicited these detainee assessment

1 briefs through the Most Wanted list. They are not there. What else do they say about the
2 detainee assessment briefs? Well, the passcode, decrypting the hash value.

3 Well, the first thing to note about this is that decrypting the hash value could not
4 conceivably have given Private Manning access to the detainee assessment briefs that she did
5 not otherwise have because they were uploaded on 8 March before that conversation, the
6 Jabber chat decryption hash value conversation, began. So much is recognised in the request
7 at 31(d). So the allegation must be that she was seeking anonymous access to that database.

8 Well, back to Mr Eller. What we know is that her existing access to that database was
9 available to her through the SIPNet and particularly through the Intelink search system. Mr
10 Eller, from paragraph 41 onwards, tells you that that was a system that required no user name.
11 She did not need a user account to access it, no password, no account at all. In so far as it
12 was tracked, it was again tracked by IP addresses, Eller paragraphs 42 to 46.

13 So I take, madam, your point about whether Ms Manning knew about the IP tracking,
14 but the fact is, because she had access to Intelink and through that to the briefs, she must have
15 known that she did not need a user account to do it or a password or a username. On the
16 Government's case, and the allegation it makes to you in these proceedings, what is she doing
17 trying to decrypt her way into another user account to gain "anonymous access" to these
18 briefs?

19 JUDGE BARAITSER: Well, I do not know the answer to that, Mr Summers.

20 MR SUMMERS: Well ---

21 JUDGE BARAITSER: And I suspect you do not either.

22 MR SUMMERS: Well, I do because there is no logical reason why anyone would do that.

23 JUDGE BARAITSER: But that is not the answer, is it, that is a proposition.

24 MR SUMMERS: But the proposition that is advanced to you is that, in order to gain
25 anonymous access to these briefs, she was trying, with Mr Assange, to decrypt a hash value
26 to gain anonymous access to another user account. What you are not told is that these briefs
27 did not require a user account to access at all. So the answer to your question, madam, is that
28 there is absolutely no logical reason or basis for the US's allegation. But none of that, of
29 course, finds any mention at all in the extradition request.

30 What finds its way into the extradition request - and to remind you, madam, it is
31 paragraphs 25 to 30 - is the bare allegation that the decryption hash value conversation was
32 referable to gaining anonymous access to these materials. Wrong, wrong, wrong. So what is
33 left? Well, in relation to the detainee assessment briefs, even the US Government makes no
34 allegation of recklessness and neither could it because they contain no sensitive names. They

1 are, on the evidence from the court-martial, old and unclassified.

2 So of the three allegations that are levelled, none of them logically, sensibly, fairly or
3 accurately attach themselves to the detainee assessment briefs. The next batch of materials is
4 the Rules of Engagement. Can I make, straight away, the case in relation to the decryption of
5 the hash code value in relation to this batch of materials as well because, as I am sure you
6 anticipate, this is going to get repetitive. The Rules of Engagement documents were on Ms
7 Manning's chronology, which correlates with what the Evidence Act trial showed, but for
8 convenience is the easiest way of doing it, were copied by her on 15 February – page 6768 –
9 and uploaded to WikiLeaks on 21 February, page 6768, all long before the has value
10 conversation in March from which, as Eller makes clear at paragraph 24, you know that she
11 already had access to the Rules of Engagement so she did not need access to them. And so
12 far as seeking anonymous access to them is concerned, they were on what is called the T
13 drive – the active directory on the T drive, which is a local computer network, access to
14 which ---

15 JUDGE BARAITSER: Is that the FT?

16 MR SUMMERS: Sorry?

17 JUDGE BARAITSER: Is that the FT user account?

18 MR SUMMERS: The? No, Madam. So the T drive – capital T drive – is the domain in
19 which these materials came from. Active directory is on it. The FTP user account is what the
20 government say she was trying to crack or, more accurately, decrypt.

21 JUDGE BARAITSER: Can I just ask you a simple question? You do not dispute that her
22 access – attempted access, albeit failed – was unauthorised, in relation to the hash value she
23 was attempting to access?

24 MR SUMMERS: Yes. No. I do not dispute that.

25 JUDGE BARAITSER: You accept it was unauthorised?

26 MR SUMMERS: That is the allegation that is made. It is not part of my case to dispute that
27 that was an unauthorised activity. The issue is whether it is referable to any of the materials
28 that this case is referable to, and logically it cannot be. And that is the import of Mr Eller's
29 evidence. What we are going to see a little later on is that logically, there exists a body of
30 evidence adduced by the government's own witnesses in the evidence in the court martial to
31 which this not only could but obviously does actually relate. It is putting videos onto the
32 computers in the base.

1 JUDGE BARAITSER: So while you are saying they are wrong to suggest it enabled her to
2 access information anonymously, you do not dispute that they are right to say that it was
3 unauthorised – her attempt?

4 MR SUMMERS: The attempt was unauthorised. It logically could not have been, in order to
5 gain access to any of the materials to which this case pertains, because she – as we have seen
6 and will continue to see – already had access to them, and neither logically can it possibly
7 have been to obtain anonymous access to that which she already had access to, because that is
8 not how the systems worked. But you are not told how the systems worked. You only learn
9 that through Mr Eller and his recounting to you of the evidence – uncontroversial evidence
10 that was given in the court martial.

11 JUDGE BARAITSER: Given that you accept it was unauthorised and she knew that it was
12 unauthorised, you cannot answer for obvious reasons why she went ahead, nevertheless, to
13 try and crack that code?

14 MR SUMMERS: No, but I can show you that it cannot have had anything to do with these
15 materials and these databases, because that is now how they worked. So she was obviously
16 up to something. She was obviously trying to gain unauthorised access to something, for
17 some end. What the evidence in the court martial showed, and uncontroversially, was that
18 she was concerned in uploading the software in order to play videos, games, music within the
19 base, but the government take that and try and transpose it onto these documents and these
20 disclosures, and it does not work. It does not work when you know the full facts.

21 JUDGE BARAITSER: And are you going to come to whether or not you accept Mr Assange
22 assisted her to crack this password and make this unauthorised access?

23 MR SUMMERS: The chat that you have is alleged to show that and it is not part of my case
24 to suggest that it is wrong.

25 JUDGE BARAITSER: Thank you. I say that, because Mr Eller does make some effort in
26 suggesting it is wrong, but if that is not part of your case, then that is very helpful.

27 MR SUMMERS: Can I come back to that? Because that is not my understanding of Mr
28 Eller's evidence. The weight of his evidence is that this must logically, once you know the
29 full picture, have been referable to something completely different.

30 JUDGE BARAITSER: All right. Thank you.

31 MR SUMMERS: And is being knowingly misrepresented as referable to these data releases
32 and it cannot be.

33 JUDGE BARAITSER: So it is not so much his participation. It is not so much the fact it
34 was unauthorised. It is the fact that it does relate to these identified for data downloads.

1 MR SUMMERS: It is what it is about. Yes. Yes. And that is all this case is about.

2 JUDGE BARAITSER: Right.

3 MR SUMMERS: And if the attempt to link this activity – the hash value activity – assuming
4 for these purposes that it is what the government say it is – the attempt to link it to these
5 downloads, uploads, is wrong and knowingly wrong.

6 JUDGE BARAITSER: Thank you. Now, you got to the T drive before I interrupted you.

7 MR SUMMERS: I did. The T drive is a local domain, accessible to a limited number of
8 people within the battalion and, importantly for our purposes – Eller, paragraphs 53 to 55 –
9 not from the FTP user account with which the Jabber chat is concerned. There are numerous
10 references to that in Mr Eller’s exhibits. He summarises them, Madam, as I say, at 53 to 55.
11 But you can look briefly at tab 12 of the Eller exhibits. Do you have it?

12 JUDGE BARAITSER: I hope so.

13 MR SUMMERS: Page 8912.

14 JUDGE BARAITSER: Yes. Thank you.

15 MR SUMMERS: It has not, for the purposes of this opening, been necessary to take you to
16 much of this, but what we have done is extracted only the pages that Mr Eller refers to. So
17 you have to take from me, I am afraid, that this is evidence given on 17 June 2013 – I can
18 give you the page references where that comes from, but I hope it is not necessary – from
19 somebody called Chief Rouillard, a prosecution witness.

20 MR LEWIS: How do you spell Rouillard?

21 MR SUMMER: R-o-u-i-l-l-a-r-d. As in, chocolate roll – a prosecution witness under cross-
22 examination, page 8912. If I plug into the network, but I log in locally – and that is what the
23 FTP user account could do – I am not part of the domain. I just log into with a local user
24 account. I can print. I can visit websites. I can run programs on my machine, but I am not
25 part of the domain. To have the domain, you need further downlines 13 – domain passwords
26 which I do not have, and to have access to the active directory which is in the domain on the
27 T drive, you are not going to have it through a local account, like the FTP user account. So
28 how does it make sense for the prosecution to allege that trying to get into the FTP user
29 account was an attempt to seek anonymous access to the contents of the T drive and the
30 active directory?

31 Is the request a fair, accurate, proper description of what is known to the US
32 Government? Answer glaringly “No.” But what else is alleged about the Rules of
33 Engagement? Well, back please to what is called the “Most Wanted” list. And here, it is
34 going to be necessary for me to be a little less blunt.

1 JUDGE BARAITSER: Can you remind me where the list ---

2 MR SUMMERS: L2, Madam.

3 JUDGE BARAITSER: Thank you. And – yes. 2.

4 MR SUMMERS: A little less blunt and simply say it is not on the list. So all of the things
5 that were – that are the subject of this request, the Iraq Rules of Engagement for 2007 are part
6 of one of the things referenced in the list. So do you have the list? Page 14. Mr Lewis was
7 keen that you look at it. First bullet point. Do you have it?

8 JUDGE BARAITSER: Page 13?

9 MR SUMMERS: Page 14, Madam.

10 JUDGE BARAITSER: 14. Thank you. First bullet point.

11 MR SUMMERS: First bullet point.

12 JUDGE BARAITSER: Iraq and Afghanistan US Army Rules. Yes.

13 MR SUMMERS: The list – and this is the only thing of any relevance to this case. The list
14 did seek Iraq and Afghanistan US Army Rules of Engagement 2007 to 2009.

15 JUDGE BARAITSER: Yes. I have that.

16 MR SUMMERS: Now, what we know from the request is that Ms Manning uploaded part of
17 that. The request, paragraph 34 – what she uploaded were the Rules of Engagement for 2006
18 and 2007. And only for Iraq. So the list asks for 2007, 2008, 2009. She does not upload
19 2008, 2009. She does upload something that they do not want – 2006 – but included in it is
20 the 2007 Rules of Engagement. Just so you are aware, she also does not upload – although
21 she plainly has access to them – anything from Afghanistan. So based on that overlap, some
22 of what they do want, not some of what they do not want, the government alleged that Mr
23 Assange had been soliciting what arrived, and their theory is that makes him guilty of
24 complicity in the underlying theft.

25 You will have to ask yourself, in due course, when you have heard the evidence,
26 whether there is a much more obvious, realistic and, in terms of the law, proper, accurate and
27 fair account of why Chelsea Manning uploaded the 2007 Rules of Engagement, bearing in
28 mind that there is no evidence at all that she ever saw the Most Wanted list. Can I tell you
29 what that is and what the request should have told you? At the same time that Miss Manning
30 uploaded the Rules of Engagement, she uploaded to the WikiLeaks site what has become
31 known to the world as the collateral murder video. I do not know madam, maybe you are
32 familiar with the collateral murder video?

33 JUDGE BARAITSER: I am.

34 MR SUMMERS: It is genuinely chilling.

1 MR SUMMERS: You have had the transcript of it in the materials. It reads like a five year
2 old playing a computer game with real people being killed, including children being shot at.

3 The evidence is that that is what was uploaded at the same time as the Rules of
4 Engagement. The video was of obvious public interest and no one seriously disputes that.
5 Two Reuters' journalists have been killed in the helicopter gun ship attack. Their requests
6 under what we would know as the Freedom of Information Act for release of information,
7 had been refused. And knowing all that, Miss Manning decided that her conscience required
8 her to make public this horrific video. That is what she tells us at 6764 to 6768 of tab 17. In
9 due course madam, we will look at it but it ought to be absolutely self-evident that there was
10 oppressive public interest in release of that horrific video.

11 She tells us, 6752, that she had seen outdated Iraq Rules of Engagement on
12 WikiLeaks and indeed there were. In the "L" file madam, beginning at L6, page 5, you will
13 see that WikiLeaks was hosting – do you have the L file?

14 JUDGE BARAITSER: Yes. Tab?

15 MR SUMMERS: Tab 6.

16 JUDGE BARAITSER: Yes.

17 MR SUMMERS: Page 5 under L – this is the index to what they heard at the time. You
18 know it is 4 November 2009 still. On the far right column in the middle, US/Iraq Rules of
19 Engagement have been leaked to them by somebody completely different. And what you
20 will learn when we look madam at tabs 19 to 23, is what they had and what the world had
21 reported that they had, were the 2005 Rules of Engagement for Iraq.

22 So, New York Times, page 19, reporting in February 2008 that WikiLeaks had
23 published them. Tab 20, same thing, this is WikiLeaks' own analysis of them. Tab 21, the
24 same. And you learn at tab 23 that they came from a different leaker altogether. That is what
25 was on the site at the time that Miss Manning found the collateral murder video. So, she tells
26 us, 6752, she had seen outdated Rules of Engagement, we know that is right.

27 So, she searched for the proper Rules of Engagement that were applicable at the time
28 of the video, 2007, see page 6768, and uploaded them. And only them. Not 2008, not 2009,
29 nothing from Afghanistan, just what was referable to the video in order that the world could
30 assess the US assertions that that engagement by that helicopter gun ship had complied with
31 the US Rules of Engagement. That is what she says. That is what she does.

32 JUDGE BARAITSER: Do we know that she uploaded the 2006/7 rules? Sorry, Rules of
33 Engagement from her own accounts in the court martial or from some other source?

1 MR SUMMERS: We know it says as much in the request, paragraph 34 tells us what she
2 uploaded. It is there in her own account but her own account correlates of course with the
3 evidence that had been found by them by the court martial.

4 And can I just finally on this topic before we break ask you to take one further file
5 out. Volume 2 of the L file, tab 69.

6 JUDGE BARAITSER: Yes.

7 MR SUMMERS: Just so that you know which bit of the file we are in, tab 70 includes
8 WikiLeaks' publication of stills from the video. Tab 71 is the transcript of the video which
9 we will look at in due course but it is what I have described as chilling and I would be
10 surprised if anybody disagreed, but tab 69 ---

11 JUDGE BARAITSER: Again, relevance to the issue in particular is?

12 MR SUMMERS: Is the allegation that rather than being uploaded because it was relevant to
13 the video, these Rules of Engagement were uploaded because the Most Wanted list has asked
14 for some Rules of Engagement.

15 JUDGE BARAITSER: And the reason you are focussing on the video is to show me that
16 they were being uploaded because of the video.

17 MR SUMMERS: Yes. What a fair, accurate, proper extradition request would have told you
18 is that these Rules of Engagement were not uploaded in isolation. They came with the video
19 in order to show what occurred in the video, was not in accordance with the then current
20 Rules of Engagement as was being claimed. So, tab ---

21 JUDGE BARAITSER: You are forgetting that the prosecution, the government, has to put in
22 context the uploads ---

23 MR SUMMERS: Absolutely. In order to be fair and accurate. It is utterly misleading to just
24 allege that in response to the Most Wanted list, and this is a – the Most Wanted list is a key
25 jurisdictional allegation that is made because it is through that allegation that the US
26 government seeks to impugn Mr Assange into the underlying data theft.

27 So, through that allegation what the request says is well look, they uploaded
28 paragraph 34, they uploaded the Rules of Engagement, and that is on the Most Wanted list.
29 What they do not tell you is that it is only part of what was on the Most Wanted list. Other
30 parts from that part of the Most Wanted list were not uploaded and they make absolutely no
31 mention of the fact that it came with and to explain this horrific war crimes video.

32 And this is not, and this is the final thing I will do before we break madam, this is not
33 my post-hoc rationalisation of what occurred. Look at tab 69. This is WikiLeaks' own
34 explanation of why it was publishing the collateral murder video. Reuters had been trying to

1 obtain the video through Freedom of Information Act without success. It clearly shows the
2 slaying of the wounded Reuters' employee. Two young children involved in the rescue were
3 also seriously wounded. Over the page, military did not reveal any of that. After demands by
4 Reuters, the US military concluded that the actions of the soldiers were in accordance with
5 the law of armed conflict and its own Rules of Engagement. Consequently, WikiLeaks has
6 released the classified Rules of Engagement.

7 JUDGE BARAITSER: All right. I have that point Mr Summers.

8 MR SUMMERS: Thank you.

9 MR SUMMERS: Thank you very much.

10 JUDGE BARAITSER: Now would be a good time. Five past 1. Five past 2 then please.
11 Thank you.

12 (Luncheon adjournment)

13 JUDGE BARAITSER: Thank you very much. Just for housekeeping purposes, Mr
14 Summers, how long do you think you will be?

15 MR SUMMERS: 45 minutes is my best guess, although I broke my glasses over the
16 luncheon adjournment so that might slow me down a little.

17 JUDGE BARAITSER: Can you manage?

18 MR SUMMERS: I can, but if I am squinting at you it is not because ---

19 JUDGE BARAITSER: I am not going to ask how you broke your glasses, Mr Summers.

20 MR SUMMERS: No, do not. All right. So we left off, madam, in relation to the Rules of
21 Engagement and we had seen - sorry.

22 JUDGE BARAITSER: Is there a problem? Oh, Mr Assange, is not here.

23 MR SUMMERS: I am glad I was not the only one.

24 JUDGE BARAITSER: I cannot blame you for that, Mr Summers. I imagine you would not
25 be able to see one way or the other. Yes, Mr Summers.

26 MR SUMMERS: Thank you. Madam, when we broke we were dealing with the Rules of
27 Engagement and we had established that you are going to hear evidence that the first
28 American allegation, namely that the hash value decryption conversation had anything to do
29 with this, was obviously and logically wrong.

30 USHER: Do you have an audibility problem, Mr Assange?

31 JUDGE BARAITSER: You cannot hear?

32 MR SUMMERS: You cannot hear?

33 DEFENDANT: I can't hear you.

1 MR SUMMERS: That access to the FTP user account would not have given access to the T-
2 drive or the active directory, let alone anonymous access to that drive or directory. We had
3 also dealt, I hope, with the second American allegation in relation to the Rules of
4 Engagement, namely that there was correlation between the upload and the Most Wanted list
5 and seen that the request has stripped completely all references to the video that accompanied
6 it and, therefore, the relevant context by which you would be able to see that the
7 prosecution's theory was palpably wrong.

8 The third allegation, recklessness, not made in relation to the Rules of Engagement
9 and there is nothing left. Can I just before I move on to the last category of materials, turn
10 back, please, to the detainee assessment briefs.

11 JUDGE BARAITSER: Yes.

12 MR SUMMERS: And deal with what may have been a misunderstanding on my part. You
13 asked me, madam, whether it is simply my deduction that Ms Manning, when dealing with
14 the passcode allegation so far as it relates to those documents and the Intelink search engine
15 through which they were obtained, you asked me whether it is my deduction that Ms
16 Manning would have known that the detainee assessment briefs were accessible without
17 passwords, user name, account details. I took you in response to Eller paragraph 41 and I
18 fear I did not do it justice. Can I invite you just to look at it again, please.

19 JUDGE BARAITSER: Before I do, you are not going to refer me to a part of his statement
20 which relies on information outside the court-martial?

21 MR SUMMERS: No.

22 JUDGE BARAITSER: For example, I know that he, of course, interviews or is present at
23 interviews in relation to military personnel which do not form part of the court-martial.

24 MR SUMMERS: No, I ---

25 JUDGE BARAITSER: Some of his information regarding Ms Manning's knowledge of the
26 computer system comes from that source.

27 MR SUMMERS: Yes, absolutely. In response, madam, to your questions, firstly, nothing in
28 the submissions I make today pertains to anything that he has adduced from anything other
29 than the court-martial transcripts but, of course, as an expert, he is duty bound to try and
30 verify what he believes to be the case and that is how he has gone about it and it is potentially
31 relevant for that purpose.

32 JUDGE BARAITSER: So his statement?

33 MR SUMMERS: His statement, paragraph 41, the detainee assessment briefs.

34 JUDGE BARAITSER: Yes.

1 MR SUMMERS: Now you know that Ms Manning said she got them from Intelink. What
2 Mr Eller tells us is - and this is his tab 9 reference - that it was uncontentious in the court-
3 martial that the Intelink engine required no user name, no password. Can I show you that. In
4 fact, tab 9 is the reading into the record in the court-martial of tab 5.

5 JUDGE INCLEDON: So do you want me to look at 5 on the ---

6 MR SUMMERS: Yes, 5 is the easiest place to go. What Mr Eller has referred to in
7 paragraph 41 is the reading into the record of this agreed stipulation in the witness statement.
8 It deals with the Intelink facility. It makes the point that I have made about being tracked by
9 IP addresses. I take, madam, your point in relation to that, but if you turn to paragraph 9 it
10 was - and this is the point Mr Eller makes - entirely uncontentious in the court-martial that, at
11 the time - do you see, four lines down in paragraph 9 - users were not required to have an
12 Intelink passport account to use it, including using ---

13 JUDGE BARAITSER: Paragraph 9 begins, "These Intelink logs only audit what happens",
14 is that right?

15 MR SUMMERS: Yes, that is the paragraph. This is the evidence that was uncontested, four
16 lines in, "At the time, users were not required to have Intelink passport accounts to use it,
17 including for SIPNet internet search and browsing. A SIPNet internet passport account is a
18 user name and password". So it was not necessary.

19 JUDGE BARAITSER: So what is this, is this a quote from the proceedings?

20 MR SUMMERS: No, this is a statement that was agreed and, therefore, read into the record
21 as agreed evidence in the proceedings that Mr Eller has also produced at tab 9. His point is it
22 was, and ought still to be, uncontentious given that this is the prosecution's own statement
23 that the Intelink site at that time required no password or user name. Ms Manning said she
24 got it from the Intelink site. If you need more, madam, tab 10 and tab 11 shows that the
25 Intelink logs proved that that is where it came from. So it is not, and this is what I am keen to
26 ---

27 JUDGE BARAITSER: "It" being the detainee assessment briefs.

28 MR SUMMERS: Yes, absolutely. It is not my deduction that this this is how they were
29 extracted. It is what the evidence showed. It is not, therefore, my deduction that Manning
30 would have known that she did not need a password or user name or account to get in there.
31 It is what the evidence showed.

32 JUDGE BARAITSER: So the evidence showed they were not required, but it is still your
33 deduction that she knew that?

34 MR SUMMERS: We know she accessed these.

1 JUDGE BARAITSER: Right. Thank you.

2 MR SUMMERS: Can I, finally, then, please, move to the war diaries and, again, I think I can
3 take at least two aspects of this relatively quickly. Now back to Ms Manning's statement.

4 That is Eller tab 17. The chronology of the war diaries is dealt with, she begins at page
5 6.7.41 by describing what the significant activity reports are. That is how they are referred to
6 in the extradition request. At 6.7.43, she says where they were. They were ---

7 JUDGE BARAITSER: There is no distinction being made between Afghanistan and Iraq,
8 you are referring to them globally together?

9 MR SUMMERS: For these purposes, we can deal with them together.

10 JUDGE BARAITSER: All right.

11 MR SUMMERS: When we come to the allegation about publication, it is going to be
12 necessary to split them up.

13 JUDGE BARAITSER: All right.

14 MR SUMMERS: So they both were on a database called CIDNE, the Combined Information
15 Data Network Exchange. That is 6.7.43. Within that database, there were separate databases
16 - this is 6.7.44 - which included CIDNE-I for Iraq, and CIDNE-A for Afghanistan. Those are
17 the two sub-databases that we are talking about. They were accessible to her via the SIPNet,
18 6.7.44, like thousands of other people and she accessed them again using Intelink. They were
19 uploaded or they were copied at some point before 8 January 2010, 6.7.55, and uploaded on 3
20 February, 6.7.59 to 6.7.60.

21 Just so you understand, madam, what exactly we are talking about, these materials
22 disclosed so far as the Afghan war was concerned, the covering up of civilian casualties,
23 extra killings, killings of civilians, women and children, a black unit involved in that. The
24 Iraq diaries involved and pertained to torture the detainees by Iraqi and US forces, a secret
25 order that the US ignored and handed over detainees to the Iraq torture squads, unreported
26 civilian deaths and alike. That is the background, that is what we are talking about. Miss
27 Manning at 6757 to 8 took the view that her conscience required her to disclose those
28 particulars, that is what she says.

29 Is it fair, accurate, or proper to allege as this request does that Mr Assange solicited
30 these materials via the Most Wanted list? We can deal with that very quickly. No. They are
31 not on it. You would not know that of course from the US request but that is what you can
32 see for yourself at tab L2. Is it fair, accurate, and proper to try and describe the hash value
33 decrypting conversation to these materials? Well, you know that they were uploaded on 3

1 February 2010 long before the conversation, therefore she had access to them already. She
2 did not need a different user account to gain access.

3 Could she however have been seeking anonymous access to and through Intelink? I
4 have just dealt with that, that is Eller41. This is precisely the same position as pertained to
5 the detainee assessment briefs. Nothing in, and that is assuming that this is what the
6 conversation was about as alleged, nothing in that conversation could conceivably or
7 logically have afforded anonymous access to Intelink and therefore to any more war diary
8 reports. It is logically impossible. But you would not know that from the request.

9 So, what is left is the allegation of recklessness which is made in relation to the war
10 diaries, paragraphs 39 and 40 of the request. What you are not told is that these materials
11 were assessed by Miss Manning as historical and non-sensitive, 6742 to 3, that any sensitivity
12 they ever possessed would dissipate within 72 hours, 6746, that the trial evidence had
13 established, and I say established because witnesses have given this evidence and had not
14 been challenged, that these materials contained no sensitive names.

15 That might sound like a surprising thing to say but can we look please therefore at
16 what the evidence was, H13, Eller, tab 13 madam, page 9805 to 7. This is the evidence-in-
17 chief of Chief Warrant Officer Joshua Erisman called by the defence, not challenged on this
18 issue on 8 July 2013. At page 9805 he begins talking about the SIGATs, those are
19 Significant Activity Reports, what we are talking about. There is nothing top secret? No sir.
20 Do you know of SIGATs contain names of key sources that are working with our
21 government? Not names, sir. Then he talks about them becoming dated and historical
22 records at lines 10 and 11, and on page 9807 after the SIGATs in this case were posted online
23 in open source, did you continue to use SIGATs? Yes sir. Why? Because they are just
24 historical references sir. Could you still use them? Yes sir. Did it change how you used the
25 SIGATs once they were released by WikiLeaks? No sir. Why not? Because it is just
26 historical information.

27 Madam, he was not the only witness who said this. If you turn to tab 18, Captain
28 Limb, another supervisor of Miss Manning giving evidence-in-chief on the same day, talking
29 about the CIDNE database, the SIGAT database, do you see that at lines 5 to 6? He says at
30 19 to 20, it is very large because it has the historical repository of all the SIGATs. Would
31 you describe it as a historical document? Line 23. Yes sir. Why? Because it is what
32 happened in the past. Line 3 on page 9882.

33 Line 20, do SIGATs contain the name of key sources that are working with our
34 government? Generally no. Why do you say generally no? There is a possibility that you

1 may see one in there, an error of some sort. So, it would be of error to have it in there?
2 Possibly, yes. How do we keep track of our key sources? By number. In the human
3 intelligence reports, HUMIT reports? Just the number.

4 And then he goes on at the bottom of 9883 to describe the type of extraordinary
5 situation that could result in a name being in a SIGAT on this database, that is one unit
6 unknowingly arrested another person's source. So, that is the database we are talking about.
7 The prospect of any sensitive information by way of names and putting people at risk was
8 and is known to the government on the evidence given to be minimal.

9 What also happened, but which finds no mention at all in the extradition request, is
10 that when Chelsea Manning uploaded these materials, she accompanied them with a text fire
11 saying that they had been sanitised of source identifying information, 6760. You might think
12 that that is the type of thing that you would have liked to have known when being told that
13 Mr Assange deliberately placed lives at risk. So, you have a set of data that is inherently
14 unlikely to contain sensitive information of the sort that is being alleged. Mr Assange was
15 told that they had been sanitised but nonetheless the evidence that you have is that in keeping
16 with what we already know about the cables, in June 2010 WikiLeaks set up a media
17 partnership in order to properly consider and responsibly publish these materials. What an
18 English lawyer would call belt and braces.

19 So, can you go please madam next to the core file and back to Mr Goetz where we
20 began. Tab 31. He deals, and this is why I said what I did about separating them out at this
21 point, he deals with them separately because they were separate processes that were applied
22 to them. Just to give you the summary, the Afghan war logs were published in July 2010, but
23 pursuant to a request to which I will return, about 20 per cent of them were withheld from
24 publication in order to protect the identity of sources. The Iraq war diaries on the other hand
25 were published in October 2010 redacted.

26 So, for the Afghan diaries, Mr Goetz, his evidence begins at paragraph 9 and runs to
27 paragraph 7 – 17. He talks at paragraph 9 about the media partnership and its purpose in
28 finding a constructive way of managing the data using its publication in a responsible way.
29 The intention was that all would publish at the same time, paragraph 10. 12, before
30 publication, they discussed in detail with Mr Assange in London how the documents might
31 be vetted to prevent harm, risk of harm, to anyone. He was in agreement as to the importance
32 of protecting confidential sources.

33 We discussed how harm could be minimised and he explained the approach of
34 WikiLeaks, namely that cases were identified where there might be a reasonable chance of

1 harm and edited accordingly. That was agreed by all of the media partners. These were, says
2 Mr Goetz of Der Spiegel, more extreme measures taken than I had ever previously observed
3 as a journalist to secure the data and ensure that it remained only accessible to members of a
4 journalistic cooperation. They used cryptophones, they used encrypted chat.

5 Paragraph 14 you might think of some relevance to this case given the allegation you
6 heard yesterday morning. The partners agreed that the New York Times would approach the
7 White House for comment in advance of the release. That was undertaken by one of the
8 partners called Eric Schmidt, paragraph 15. Eric Schmidt wrote an email to Mr Goetz about
9 the attempt of Assange to get help from the US government to vet the materials. The White
10 House had requested that WikiLeaks redact the documents of informants' names and then his
11 response, that is Mr Assange, that he withhold 15,000 documents and entertain suggestions
12 for names to remove if they provided technical assistance.

13 16, when the partners published on July 25, WikiLeaks delayed the release of those
14 15,000 documents as part of what Assange called "the harm minimisation process". In fact,
15 Der Spiegel and the Guardian published before WikiLeaks. Those were the Assange diaries.
16 You might have hoped and expected for some mention of any of that in the request
17 accompanying the kind of allegation you heard yesterday.

18 So far as the Iraq diaries are concerned, the picture is similar, paragraphs 18 through
19 to 20. 19, David Leigh, about whom we have already heard, emailed Mr Goetz
20 saying that WikiLeaks say they require more time to publish because they have a team
21 attempting to redact, redact bad stuff. In fact, WikiLeaks wanted more time. That bothered
22 some of the members of the cooperation. And then 20, because this is what I was referring to
23 earlier, the process for redaction of Iraq data changed. Essentially, they replaced all names
24 with blanks or X's. I remember reading stories involving WikiLeaks being criticised for
25 over-redaction. Even documents that had been released by the Pentagon, as a result of
26 freedom of information requests provided more information than the redacted WikiLeaks
27 documents. Is it fair, proper or accurate in those circumstances for the US to say any of what
28 it said to you yesterday morning about reckless publication? We respectfully submit that
29 when the evidence is in, that you will unhesitatingly conclude "No."

30 Can I then turn to – or back to the passcode – the hash value decrypting conversation
31 on Jabber – and remind you that the Jabber conversation says nothing about the purpose of
32 decryption. It says nothing about why Manning was asking for help decrypting anything. It
33 does not mention government computers, sensitive information, anything at all. We know,
34 because we have now been through it, that the purpose that the US Government, in that

1 vacuum, seek to ascribe to that conversation in early March is logically impossible to sustain.
2 But we know more. What we also know is that the true purpose, insofar as it is possible to
3 discern it at all, has been also completely stripped out of what you have been told about the
4 relevant conduct, and this is where the remainder of Mr Eller’s report is relevant. So it
5 begins, Madam, at paragraph 56.

6 I am not going to read out all of this evidence because, Madam, I know you are
7 familiar with it. But this section of the report throws revealing light on the context of the
8 Jabber conversation. What Mr Eller’s study of the transcripts of the court martial evidence
9 tell you is, firstly, that they are littered with evidential reference to soldiers in the unit playing
10 unauthorised – and that is relevant, Madam, as you have made clear. Unauthorised movies,
11 games, music and software on their computers. Can I just give you one example of the
12 volume of evidence that exists on that? So, Madam, tab 19, page 252 is – and it is done this
13 way because it is just easier to condense it this way – is an extract from a judge’s ruling – the
14 judge’s ruling on a discovery application on 24 April 2012.

15 Here she is reciting defence submissions about why they want all of the computers
16 from the room kept for analysis. They tell the judge, at lines 12 onwards, that there has
17 already been evidence in the case in what we would understand as committal proceedings,
18 from all of the people that are listed there, that have testified to the practice of members of
19 this unit having on their computers unauthorised music, movies, games and software.
20 Captain Limb – we have already been to his evidence. He was a defence witness. He was
21 one of Ms Manning’s superiors. Captain Fulton actually requested Ms Manning to put it on.
22 She was a superior. Mr Millerman was a prosecution witness, as was Captain Churepko and
23 Mr Schomann.

24 The evidence in the court martial about this unauthorised and illicit practice was
25 completely legion. Secondly, in order to do it, members of the unit had had to decrypt
26 passwords – administrator passwords – to get it on. H8, page 8707, is a prosecution witness
27 describing it as “common practice.”

28 MR LEWIS: What is the page number?

29 MR SUMMERS: 8707. This is Mr Millerman being cross-examined on 12 June 2013. He is
30 a prosecution witness. “Now, based on your experience.”

31 JUDGE BARAITSER: Which tab is this, please?

32 MR SUMMERS: H8.

33 JUDGE BARAITSER: H8.

34 MR SUMMERS: Eller exhibit 8.

1 JUDGE BARAITSER: Exhibits. So which tab?

2 MR SUMMERS: 8.

3 JUDGE BARAITSER: Yes.

4 MR SUMMERS: Do you have it? Page 8707. These transcripts are big. We've extracted
5 the relevant page.

6

7 "Based upon your experience, did you have situation where, in
8 the past, you had military members trying to crack the password
9 to the DCGSA computer?"

10

11 Those are the computers in the room.

12

13 "It was a common occurrence. It was particularly, specifically,
14 a common occurrence where units were coming in, going out
15 and they wanted their own materials, games, music, software on
16 their computers. There were a couple of occasions at the end
17 where they would crack my password, to remove the
18 administrator account and we would battle that out."

19

20 We know, from Mr Eller's analysis, that Manning's colleagues viewed her as a
21 technical expert, person to turn to for things like this – paragraph 75 to 78. Manning had
22 even been asked by one of her direct supervisors for help adding programs to her computer.

23 JUDGE BARAITSER: Now, that really is information that he has gathered, is it not?

24 MR SUMMERS: No. That is the evidence. That is exhibit 19, pages 142 to 3, and 145.

25 That was the evidence. That is what Ms Fulton said. That is paragraph 80 of Mr Eller's
26 report. That is not from people he has spoken to. That is from his review of the transcripts
27 and we have the transcripts that he produces.

28 JUDGE BARAITSER: The last reference then was, please?

29 MR SUMMERS: 80. Paragraph 80, exhibit 19.

30 JUDGE BARAITSER: So that exhibit – was that here, at tab 19?

31 MR SUMMERS: Yes.

32 JUDGE BARAITSER: Can you just direct me to where that is?

33 MR SUMMERS: Tab 19 – your papers should begin at page 139.

34 JUDGE BARAITSER: Yes.

35 MR SUMMERS: These are submissions by defence counsel on 15 March 2012, to the judge
36 where, at the bottom of 142, he says: "We could take Captain Fulton's testimony, which is
37 that the officer in charge of my client, who directed him to add the software to her computer."

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I am sure we can do better and find you the actual testimony.

JUDGE BARAITSER: Right. Your point is that they viewed her colleague as a technical expert. So you have not yet produced the evidence to support that.

MR SUMMERS: Right. Well, Madam, I was trying to take Mr Eller’s – it is my fault. I have not been cross-referencing. So my – dealing with Mr Eller’s report. Soldiers putting unauthorised files and programs onto the computers – he deals with it at 67 to 72. All of the references he gives in that section are to the transcripts and we will examine them, no doubt, when he gives evidence. Soldiers cracking the administrator password in order to install all of those programs – 73 to 74. Those are evidence references. None of those are from his private conversations to corroborate what he understands to be the case. 75 to 78 – colleagues viewed her as a technical expert. Those are evidence references. Mr Schomann, prosecution witness – that is his evidence that is correctly cited at paragraph 75.

David Stadler was another prosecution witness, who talked – or who told the court martial that Ms Manning’s expertise was such that she was openly discussing starting a business, cracking passwords with her colleagues. She wanted to generate hash tables on a computer and market that in some kind of fashion. That is the evidence that was given by the prosecution witnesses in the court martial. It was not a brilliant idea, because it was already out there, but there you are. Manning’s colleagues regularly asked her to install programs on their computers – 79 to 82. That is what the evidence that I was just taking you to – that includes paragraph 80, her supervisor, Ms Fulton, asking her to install unauthorised programs on her own computer. Those are all evidence references. None of that is from private conversation.

And then lastly, on 2 March – that is, seven days before the Jabber conversation about decryption – we know, because it is referenced in the evidence, that Ms Manning’s computer was reimaged. That is to say, wiped. So if she wanted unauthorised programs like movies, games, software and the like, she needed to have another go at the passwords again. None of that context finds even the faintest mention in this extradition request, and so the sum of where we arrive is, we hope, when you hear the evidence, that the hash value decryption allegation is logically impossible in relation to all four of the categories of materials with which this request is concerned, and has been deliberately stripped of its proper and known context – namely, the movies.

1 Secondly, the Most Wanted list is simply false, in relation to three of the four
2 categories, and in relation to the Rules of Engagement, has again been completely stripped of
3 relevant context.

4 JUDGE BARAITSER: Just before you move on, can we deal with the status of the court
5 martial evidence in these proceedings? Because clearly you are reliant on it as truth. Can
6 you just help me with how you get to that position? They are a mixture, are they not of
7 defence submissions to a judge, prosecution and defence witness accounts. Some statements
8 which are not disputed but of course sometimes statements are not disputed for reasons which
9 are pertinent to those particular proceedings. They may not be relevant, for example. There
10 may be all kinds of reasons. So can we deal with the status of that evidence because it is
11 clearly key to that submission.

12 MR SUMMERS: The status of that evidence is that it comprise the knowledge base of the
13 US government. It knows what went on in the court martial. It knows the evidence that was
14 given by its own witnesses largely. And we have been careful, and Mr Eller has been careful,
15 to select for you evidence from the prosecution's own witnesses, from agreed evidence and
16 from unchallenged defence evidence. And insofar as we have been referring to submissions,
17 it is because they reflect ---

18 JUDGE BARAITSER: So you are not saying it is true, what you are telling me, but you are
19 saying that it is within the knowledge of the US government.

20 MR SUMMERS: It is true ---

21 JUDGE BARAITSER: I am looking at here at the *Zakrzewski* test. It is right in front of me
22 here. "The true facts required to correct the error or omission must be clear beyond
23 legitimate dispute." So we are talking about true facts, not the knowledge of the state.

24 MR SUMMERS: Well, they have to be true facts within the knowledge of the state. If they
25 were untrue facts, they would have been challenged. If they were untrue facts, they would
26 not have fallen from the mouths of the prosecution witnesses. If they were untrue facts, they
27 would not have been agreed as capable of being read into the record. And if they were untrue
28 facts, when defence witnesses said them, there would have been an evidential challenge to
29 them.

30 JUDGE BARAITSER: So that is what you have to say about that?

31 MR SUMMERS: Absolutely.

32 JUDGE BARAITSER: And you ---

33 MR SUMMERS: Can I take you, madam, because you are obviously at that point, to the
34 case law? And it may not assist you to go straight to *Zakrzewski*; it may assist you to start

1 with *Castillo*. And I say that because, madam, you have said to me: is it improper to strip
2 context from factual allegations? And my answer to that is: unequivocally, yes, it is
3 improper. Can we look, please, at *Castillo*.

4 JUDGE BARAITSER: Is this in one of these case bundles?

5 MR SUMMERS: It is abuse authorities, volume 1, tab 14.

6 JUDGE BARAITSER: Tab 14?

7 MR SUMMERS: Tab 14 of the Tollman volumes.

8 MR FITZGERALD: Yes, the abuse authorities.

9 MR SUMMERS: I have got that ---

10 MR FITZGERALD: The abuse authorities.

11 JUDGE BARAITSER: I am looking at the political offence ones now. All right. Tab 13?

12 MR SUMMERS: Tab 14.

13 JUDGE BARAITSER: *Castillo*.

14 MR SUMMERS: Of course we can return to this, when we return to final submissions, but it
15 is important that we understand the legal framework into which these misrepresentations
16 feed.

17 So *Castillo*, just to remind you, madam, concerned three extradition requests, of which
18 the third is relevant for our purposes. One was withdrawn, one was executed and one was
19 stayed as an abuse of process. The third extradition request, paragraph 3, subparagraph 3,
20 concerned an attempt to place an explosive under a motor vehicle of a member of the police;
21 out of which arose a charge of attempting to cause an explosion of a nature likely to endanger
22 life, and attempting to cause really serious bodily injury and attempted murder.

23 When faced with the facts as described in the request, the Divisional Court originally
24 found dual criminality was established, paragraph 9, and denied there was any reason to
25 question the good faith of the request.

26 Then what happens, madam, the defence discover in the court file that the evidence is not
27 exactly as had been described. They were not allowed to make copies, paragraph 10, but they
28 were allowed to make notes; and those notes showed there to have been a significant
29 misrepresentation of the conduct as described in the request. Eventually Spain made
30 available that evidence, paragraph 14 and paragraph 20. And what that evidence actually
31 showed - and this is key, madam, to your comments about the context - is that whilst the
32 request was accurate, in that witnesses had seen the bomb placed under the car, what was
33 missing from the request was the fact that it was 150 metres away from the policeman or his
34 house.

1 This court having examined the materials and the various misrepresentations by omission
 2 that the request contained at paragraph 21, there was in fact no-one nearby who could have
 3 been harmed, as you might think here would be similarities to the pass code decryption
 4 allegations in this case, in fact could not have happened. It set out at paragraph 22 what it
 5 regarded as a true description of the conduct. The true description would be that there was no
 6 evidence that there was anyone nearby at the time; subparagraph 3, for example. And then at
 7 paragraph 27, it applied what it found to be the true conduct and fed that into the dual
 8 criminality machine. Paragraph 27:

9
 10 “If the description had made that clear, as plainly it should have
 11 done, it is quite impossible for anybody to conclude that it could
 12 cover the offences under the law of the UK of attempted murder
 13 of the police officer or attempting to cause him grievous bodily
 14 harm. On a proper description, there was no basis for charging
 15 him with any offence under the law of the UK in respect of any
 16 attempt to kill a policeman or do GBH.

17 “It would have been proper [paragraph 28] to charge him
 18 with attempting to cause an explosion likely to endanger life,
 19 namely the life of anyone who happened to be in the vicinity of
 20 the car, but that is not what was alleged.”
 21

22 Paragraph 25 makes prelusively clear that the task that the court engaged in was not any
 23 type of prohibited evidential assessment. Spain, at that time of the European Convention on
 24 Extradition, was one of those states for whom no prima facie case was required to be shown.
 25 It was then, and it is now, impermissible to try and engage with the merits of the evidence.
 26 This is not what is going on here; this is a different and separate juridical enquiry. Scrutiny
 27 of the description of the conduct alleged, to constitute the offence alleged, where here
 28 a question is raised about its accuracy, said Thomas LJ, later to become the Chief Justice, is
 29 not an enquiry into evidential sufficiency.
 30

31 “The court is not concerned to assess the quality or sufficiency
 32 of the evidence in support of the conduct alleged; but it is
 33 concerned, if materials are put before it which call into question
 34 the accuracy or fairness of the description, to see if the
 35 description of the conduct alleged is fair and accurate.”
 36

37 JUDGE BARAITSER: Where were you just reading from?

38 MR SUMMERS: Sorry?

39 JUDGE BARAITSER: That was paragraph?

1 MR SUMMERS: 25. So you have a primary fact-finding exercise to do, based on the
2 evidence that you will hear. Is what is said and alleged in the request a fair and accurate
3 description of what is known to the American government? If “yes”, end of enquiry. If “no”,
4 you find those facts; you find what a fair and accurate request should have said and you feed
5 that into the dual criminality machine and see what the result of it would be. And if the result
6 of it would be no crime, that is the end.

7 And exactly the same thing, madam, happened in *Marua*. *Marua* is the next volume,
8 tab 31.

9 JUDGE BARAITSER: Next volume, did you say?

10 MR SUMMERS: Yes. Volume 2, madam. Madam, do you have tab 31, *Marua*?

11 JUDGE BARAITSER: Hang on. I was just reading paragraph 25.

12 MR SUMMERS: Paragraph 25 of *Castillo*?

13 JUDGE BARAITSER: Of the *Castillo* case. Was that your case or was that in the decision
14 that a finding that was made in relation to lack of truth, that it goes back to the dual
15 criminality issue?

16 MR SUMMERS: Sorry. I missed you, madam.

17 JUDGE BARAITSER: Was that your gloss or was that in the decision, that the court having
18 made a decision regarding the accuracy of the underlying facts, that that impacted upon the
19 dual criminality issue?

20 MR SUMMERS: Absolutely. That is 27. So having set out, at 25, what your task is, that is
21 to say to determine for yourself what the true facts fairly and accurately described would say;
22 at 27, the court then, if that description had been made clear, it would be quite impossible for
23 anyone to conclude that it could cover the offences under the law of the UK of attempted
24 murder. So you feed your facts as you find them back into the dual criminality issue. And
25 that is exactly what happened in *Marua*.

26 JUDGE BARAITSER: All right.

27 MR SUMMERS: So *Marua*, tab 31, madam.

28 JUDGE BARAITSER: Yes. I have it.

29 MR SUMMERS: So madam, can I just go back to *Castillo*, because Mr Fitzgerald reminds
30 me that the court returns to this at paragraph 46.

31 JUDGE BARAITSER: Yes.

32 MR SUMMERS:

33

34 “As I have set out in paragraph 27, it is clear on a proper

1 description of the conduct alleged that the offences under the
2 law of the UK of attempted murder of the police officer and
3 attempting to cause serious bodily harm to the police officer,
4 cannot be made out.”
5

6 And then at 47:

8 “It is right that on this basis, this court should at once take the
9 step in the exercise of its discretion which all parties accepted it
10 should consider exercising or discharging on those charges,
11 because if a proper description had been provided to the
12 Secretary of State or to the District Judge, the applicant would
13 not have been committed on those charges.”
14

15 JUDGE BARAITSER: Thank you.

16 MR SUMMERS: So *Marua* was another Spanish case. This one concerned an individual
17 who, with others, had been engaged in throwing fire bombs at various things. So
18 paragraph 14, throwing them at a car, and not just any car; the car of somebody who worked
19 for the regional government; paragraph 15, at a post office; and at paragraph 16, at a bus. All
20 of which caused significant monetary loss, but also it was said endangered lives.

21 Paragraph 15, three lines from the bottom.

22 They were thus charged, madam, paragraph 21, with causing a threat of public injury, in
23 the middle of the paragraph; that is an “estragos”. I am sure my pronunciation is not great,
24 but that is a serious offence which attracted a very serious custodial sentence; founded, as it
25 was, on a danger to life caused by the defendants’ actions.

26 On the face of it, what was alleged in the request complied with the Act, paragraph 12.
27 When, however, paragraph 18, the defence went to look at the underlying evidence, it
28 transpired that the request was far from that. In fact, in the trial of the co-defendants, the
29 prosecutor had conceded that the evidence could not possibly sustain an inference of danger
30 to life. Paragraph 26, the court concurred.

31 Based on that, the charges against all the co-defendants had been reduced to “danos”,
32 lesser charges, punishable with two years’ imprisonment, paragraph 23 and 24, to which
33 charges a limitation period applied, which had by now expired; paragraph 19.

34 The Spanish judge, when asked to comment on these strange goings on, contested that
35 they had any relevance to the case; paragraphs 31 and 35. And that is important, you might
36 think, because it is sometimes thought that a bare assertion that the government does not
37 agree with what the defence are showing is sufficient to dispose of this kind of argument and

1 application. It is not. And it is not because *Castillo* tells you that you have a primary
2 fact-finding exercise to undertake.

3 Thus it was that your sister judge, the previous Deputy Senior District Judge Wickham,
4 made factual findings at paragraphs 7 and 20 that Mr Marua’s case was indistinguishable
5 from his co-defendants’. There is no logical, rational basis to treat them differently. That
6 was a finding with which the Divisional Court factually agreed; paragraphs 61 to 64. All
7 despite the protestations of the Spanish judge who wanted to, nonetheless, apply “estragos”
8 and a 48-year sentence to Mr Marua.

9 The end result of which, madam, paragraph 64, was for the High Court to feed the true
10 facts, as it had done in *Castillo*, into the dual criminality machine and when viewed in its true
11 and fair and accurate light, the High Court found that those particulars were not capable of
12 constituting a viable extradition offence; did not contain a description of the conduct alleged
13 which is proper, fair or accurate.

14 Of course, the court’s process of getting there begins with a review of the prior
15 authorities, including *Castillo*, and the jurisprudence. So at 58, the court sets out the task it
16 needs to be engaged in. The court’s task, jurisdiction if you like, is to determine whether the
17 particulars required by section 2, subsection 4, those are particulars of conduct; here
18 section 78, subsection 2, are properly given. Of course it is to be undertaken with a firm
19 regard to mutual cooperation, recognition, et cetera, et cetera. It does not extend to
20 a debatable analysis of arguably discrepant evidence or any critique of the law of the
21 requesting state.

22 It may, however, on appropriately clear facts, where the description of the conduct
23 alleged may however be appropriate and necessary to ask, on appropriately clear facts,
24 whether the description of the conduct alleged to constitute the extradition offence is fair,
25 proper and accurate, as a matter of fact and degree; and it should not undermine the principles
26 of the framework decision. What is important, of course, is that the enquiry that was
27 undertaken in *Marua* and did result in his discharge was not thought to undermine even the
28 principles that underpinned the framework decision.

29 So madam, *Castillo* is applied to this Act; the same result. If your particulars of conduct
30 are inaccurate or lacking in proper context or false by omission, then it is the duty of this
31 court to find that and then apply the true facts into the machine to see what the result would
32 be.

33 And that is precisely what the Supreme Court held ultimately in *Zakrzewski*. I know,
34 madam, that you have it before you. It is tab 39 of the same volume. *Zakrzewski* expressly

1 approved the *Marua* decision. It begins, madam, at paragraph 8 by recalling that the problem
 2 that we are grappling with is not a problem of validity. That is the wrong lens through which
 3 to view it. However, it does not, paragraph 9, follow that there is nothing to be done if the
 4 prescribed particulars in the warrant are, or have become, incorrect. There are two
 5 safeguards. One is the hope that the requesting state will amend it itself and come clean. But
 6 secondly, paragraph 11 is the abuse safeguard. And what *Marua* treated as a validity issue,
 7 *Zakrzewski* tells us is actually an abuse of the process.

8 And *Marua* provides, paragraph 12, the clearest statement of the principle and cites 58 to
 9 which I have just taken you and 59.

10 At 13, therefore, the Supreme Court restates the relevant principles. Firstly, the
 11 jurisdiction is exceptional. The statements in the warrant must comprise statutory particulars.
 12 Pause there. The particulars of conduct said to constitute the extradition offence are statutory
 13 particulars; firstly because section 78 requires them to be given, and secondly because those
 14 are the particulars of conduct that inform the decision on dual criminality.

15 *Norris*, paragraph 99, says that the relevant particulars of conduct that you feed into the
 16 dual criminality machinery are those that constitute the following offence. And what we
 17 have seen is that the allegations, the three core allegations about which I make serious
 18 complaint, are necessary as a matter of US law; they are therefore statutory particulars of
 19 conduct; and as it happens, they are necessary as a matter of English law in the dual
 20 criminality exercise.

21 So these are - all three allegations comprise statutory particulars. They are wrong or
 22 incomplete in some respect which is misleading. That has been the burden of my submission
 23 to you over the past three hours; although not necessarily intentionally, I will return to that,
 24 but note that it is no part or necessary part of the *Zakrzewski* submission that there be bad
 25 faith.

26 Secondly, the true facts required to correct the error or omission must be clear and
 27 beyond legitimate. It is not sufficient for Mr Eller to say: "I have spoken to some defence
 28 witnesses and this is what they say". There has to be, as indeed there was in *Marua* and
 29 *Castillo*, material emanating from the government themselves; or, if not from the government
 30 themselves, material which is not capable of legitimate dispute. And by "legitimate", of
 31 course, the court is discounting the kind of illegitimate dispute with which the Spanish judge
 32 engaged in *Marua*.

33 So the bare fact of disputing it isn't enough; if it is beyond a legitimate dispute, those are
 34 the true facts. And we say, at the risk of repeating myself: evidence which comes from the

1 prosecution’s own witnesses, evidence which the government has agreed in a different
 2 proceedings, and evidence which it has not challenged in different proceedings; and by
 3 “different”, of course, I do not really mean different. Ms Manning’s trial was not materially
 4 different in issues to that with which we are concerned. That is all evidence which is beyond
 5 legitimate dispute. It shows you the true facts. They are a very, very long way from those
 6 that are described in the request.

7 So therefore, third: is the error or omission material to the operation of the statutory
 8 scheme? Of course it is, because if you feed the true facts into the dual criminality
 9 assessment, the answer that comes out, stripped away of the false decryption hash value
 10 allegation, of false soliciting through the Most Wanted list allegation and the patently false
 11 allegation of reckless endangerment, if you strip all those away and feed what is left into the
 12 dual criminality machine, what comes out is not criminal; it is not criminal as a matter of US
 13 law, but most importantly is not criminal as a matter of English law.

14 And therefore fourthly, you engage your abuse jurisdiction. That is the sole juridical
 15 basis for this enquiry. *Marua* was wrong, insofar as it suggested validity was the legal route
 16 through which these kinds of arguments go. It is abuse; and this is an abuse.

17 Mr Zakrzewski’s case failed, notwithstanding that the particulars were wrong. His sentence
 18 was not now as described in the extradition offence. Notwithstanding that, the error was
 19 clear beyond legitimate dispute, because the Polish court had imposed a new sentence; but it
 20 failed at the third stage, because the error was not material to the statutory scheme. Even if
 21 you fed the correct sentence, as it now stood, into the dual criminality machine, it was more
 22 than four months in a conviction case and therefore it made no difference at all. That is how
 23 the jurisdiction works, madam, and that is the jurisdiction, in the end, that we will invite you
 24 to apply in this case.

25 Of course, we also say that the misrepresentations here are so stark, so bad, that they are
 26 also fodder for Mr Fitzgerald’s broader submission on bad faith, the Tollman abuse. But they
 27 do not need to be. *Zakrzewski* tells you that its separate different abuse jurisdiction is
 28 engaged, even in cases where, paragraph 13, it is unintentional.

29 JUDGE BARAITSER: Can you help me with the court martial again?

30 MR SUMMERS: Sorry?

31 JUDGE BARAITSER: Can you help me again with the court martial proceedings? My
 32 understanding is that Ms Manning pleaded guilty to some aspects or some of the charges
 33 alleged.

34 MR SUMMERS: Madam, yes.

1 JUDGE BARAITSER: Is that right?

2 MR SUMMERS: Yes, and then stood trial on those which she contested.

3 JUDGE BARAITSER: Within the court martial setting, not in a court; is that correct?

4 MR SUMMERS: Yes, yes.

5 JUDGE BARAITSER: And was convicted of all, bar one offence?

6 MR SUMMERS: She was acquitted of aiding the enemy and convicted on the remainder, as

7 I understand. I will be corrected, I am sure.

8 JUDGE BARAITSER: And the evidence that you have produced, or referred to today, all

9 related to the contested part of the court martial proceedings; is that correct?

10 MR SUMMERS: It was all part of the prosecution case in seeking to prove its case that she

11 had committed criminal offences in leaking the materials to WikiLeaks.

12 JUDGE BARAITSER: Do we have a list of charges that she faced?

13 MR SUMMERS: I am sure it can be produced, madam. I am sure it is. It is in file H

14 somewhere. We will dig it out for you.

15 JUDGE BARAITSER: And all of the references you have made to those proceedings related

16 to the contested part of her court martial proceedings?

17 MR SUMMERS: Well, contested; the trial was contested, madam.

18 JUDGE BARAITSER: In the trial sense.

19 MR SUMMERS: But the evidence to which you are being referred was not. It was either

20 from the prosecution's own witnesses or from agreed evidence or from unchallenged defence

21 evidence.

22 JUDGE BARAITSER: When you say "unchallenged defence evidence", what do you mean

23 exactly?

24 MR SUMMERS: Defence evidence that was called and then not challenged.

25 JUDGE BARAITSER: You mean a witness gave an account and no questions were asked?

26 MR SUMMERS: So take Mr Airsman, for example, who gives evidence that the ---

27 JUDGE BARAITSER: Can I say, I have not read the bundle at all.

28 MR SUMMERS: No, but madam, it is one of the examples to which -- you will recall,

29 madam, in relation to the war diaries, that I took you briefly to the evidence of Mr Airsman.

30 JUDGE BARAITSER: Yes.

31 MR SUMMERS: Who said there were no names in it; and Captain Lim who said: only if by

32 accident. But that was evidence that was given by defence witnesses and then not

33 challenged.

34 JUDGE BARAITSER: I see. So some aspects of the evidence were challenged, but not

1 those aspects you have read out?

2 MR SUMMERS: Yes, yes. Madam, I am conscious that all I am doing at this stage is
3 opening our case and that, when the evidence is called, you will no doubt have questions for
4 the witnesses and we will be cognisant of the observations that you are now making, but
5 some of these issues probably are better left and addressed for when the witnesses give
6 evidence before you.

7 JUDGE BARAITSER: I imagine that is going to be key ---

8 MR SUMMERS: Yes.

9 JUDGE BARAITSER: --- to you establishing this part of your case.

10 MR SUMMERS: Yes. Well, I am grateful, madam, for that indication and it certainly
11 assists.

12 JUDGE BARAITSER: Have you concluded your submissions on this?

13 MR SUMMERS: I have, madam, unless I can assist any further at this stage.

14 JUDGE BARAITSER: No, you have been very helpful, Mr Summers, thank you. How do
15 you propose to deal with this now, Mr Lewis, do you want to start?

16 MR LEWIS: Well, madam, my learned friends and I had discussed this. Both my learned
17 friends have opened their areas of abuse and we have agreed that evidence will be called on
18 both the *Tollman* and *Zakrzewski* principles in May.

19 JUDGE BARAITSER: Yes.

20 MR LEWIS: Accordingly, my answer will be given once the evidence has been given and
21 there has been cross-examination. That is an approach my learned friends agree with.

22 However, it may be helpful if I just touch on a few points which were raised so as the court
23 has the prosecution's direction of travel, as it were.

24 JUDGE BARAITSER: That would be helpful.

25 MR LEWIS: As we have set out in our lengthy written submissions, we say that the issues
26 raised do not engage the court's abuse jurisdiction. They go to statutory bars. That is why
27 the evidence is being given. We do not accept the court has jurisdiction to consider matters
28 as part of its abuse jurisdiction where those matters individually are said by the defence to
29 demonstrate a bar. You cannot have your cake and eat it, in those circumstances. Secondly,
30 as we have made clear, the court's abuse jurisdiction is not engaged by cumulatively taking
31 into account a series ---

32 JUDGE BARAITSER: Sorry, are you dealing with the bad faith *Tollman* first or are you
33 dealing with both the abuse arguments together?

34 MR LEWIS: In fact, I will deal with *Tollman*, then I will move to *Zakrzewski*. Dealing with

1 *Tollman*, we say the court's abuse jurisdiction is not engaged by cumulatively taking into
 2 account a series of allegations which, individually, are not capable of making out a bar to
 3 extradition. Our initial approach means that the court must deal with these allegations in a
 4 disciplined and systematic way. The court, in those circumstances, is bound to follow the
 5 *Tollman* process. We are all agreed.

6 One of the principal reasons for it is that states with whom the United Kingdom has
 7 longstanding extradition relations are not expected to respond to allegations which do not
 8 even amount to abuse of process, so where *Tollman* requires the defence to satisfy the court
 9 the matter complained of is capable of mounting to abuse and satisfy the court there are
 10 reasonable grounds for believing such conduct has occurred. We say, so far as the *Tollman*
 11 side is concerned, that does not mean the defence can put forward innuendo, speculation or
 12 hearsay and ask the court to proceed on that and ask the court to proceed that it is true as a
 13 fact. That goes without saying. That simply would not constitute reasonable grounds for
 14 believing.

15 We are concerned - first, dealing with the *Tollman* position - that a number of the
 16 allegations are no more than innuendo or speculation and put extremely high by my learned
 17 friend. Secondly, the defence invite you to draw inferences on an evidential basis which they
 18 just have not made out. Thirdly, regardless of that, the conduct alleged is not capable of
 19 amounting to an abuse of the court's process when properly considered. Can I just bring that
 20 to life by giving the court just a couple of examples. So the defence case is that, on 21
 21 December 2017, Mr Assange was offered diplomatic status by Ecuador and he was indicted
 22 by the US on the same day. Our response is, what does it matter in these proceedings, much
 23 less could that possibly be described as abusive?

24 Secondly, for example, what bearing did any indictment of Mr Assange have on him
 25 being made a diplomat as some sort of further device to help him leave the Embassy? It just
 26 does not engage the jurisdiction. To be clear, Mr Assange was never going to have safe
 27 passage out of the Embassy. From 2012 the UK considered the grant of asylum as a device -
 28 there is evidence on that which will come, no doubt in the May hearing - so that Mr Assange
 29 could never have escaped the regular process of the UK courts.

30 The same approach, by way of example, goes to the much repeated suggestion that the
 31 United States ratcheted up the charges against Mr Assange so that it would win any contest
 32 against the Swedish allegations. I am going to put to one side that Mr Assange was accused
 33 in Sweden, but the inference that charging Mr Assange with publishing the names of sources
 34 was simply ratcheting up the charges to defeat a Swedish request is defeated by the facts, the

1 objective facts, that the Grand Jury found them and indicted him. It just does not follow that
2 we can say, “Well, that was the purpose, we will ratchet up the charges just in case there
3 might be a competition with which request is dealt with first”. We have a clear, unequivocal
4 legal basis for charging him and that is the end of it.

5 Madam, the court should note that the fact that Mr Assange has sought, and we say
6 improperly, to put a defence in these proceedings demonstrates there is an issue to be tried.
7 As regards the suggestion, repeated time and time again as if it were a fact, that there was a
8 previous decision not to prosecute Mr Assange, the defence have served no evidence
9 notifying Mr Assange, for instance, from the United States Government that he was not to be
10 prosecuted or notifying him that any investigation had ceased.

11 All they rely on is a hearsay comment in a Washington Post article of 26 November
12 2013 which says it is unlikely Mr Assange will be prosecuted and somehow that has been
13 interpreted as the clear, unequivocal written decision that he will not be prosecuted which
14 they then reversed. One has to be very careful in looking at the way in which this is put and
15 look at the proper basis for it. When one does that, it just simply falls away. There is, and
16 never has been, any notification that an individual will not be prosecuted. It is not evidence
17 of a decision not to prosecute.

18 I repeat that Mr Assange is being prosecuted because of what he did and he did that
19 which the newspapers would not do without redaction - a matter which we will undoubtedly
20 come back to. If Mr Assange understood he was not going to be prosecuted in 2013, why on
21 earth did he not leave the embassy? He has consistently known of the threat of prosecution.
22 Now we point all this out just in a few moments simply to demonstrate that the sort of critical
23 analysis that every head of these bald assertions my learned friend makes as if they were true
24 have to be considered by the court. Our primary position remains that each head of abuse
25 should be examined and rejected.

26 Dealing with what my learned friend has dealt with, the *Zakrzewski* abuse, first what
27 has to be considered in the request is the conduct of that which he is accused. To say that the
28 defence is false and contains “lies, lies and clear lies” is an allegation that should not lightly
29 be made and on the terms of this extradition is simply absurd. The way in which Mr
30 Summers has put it goes upon a fundamental mischaracterisation of how the allegations
31 against Mr Assange are put.

32 It has involved a series of misstatements about how the indictment is formulated.
33 This is especially in relation to one or two examples I can give you. He talks about the hash
34 cracking conspiracy. Can I just ask you to turn up paragraph 18 in the request. It is not, as

1 Mr Summers consistently says, either linked to the different databases ---

2 JUDGE BARAITSER: Just remind me where the request is. I remember it is in the
3 prosecution bundle.

4 MR LEWIS: It is either in the submissions bundle, or it is in the prosecution bundle. I am
5 looking at it at tab 1, or it is in the submissions - no, it is only in the prosecution bundle.

6 JUDGE BARAITSER: Yes.

7 MR LEWIS: Sorry.

8 JUDGE BARAITSER: Right.

9 MR LEWIS: And the indictment is the core document.

10 JUDGE BARAITSER: Let me just find this. It is not in the submissions bundle, is it?

11 MR LEWIS: My Lady, I think we put it in a white chambers bundle.

12 JUDGE BARAITSER: Mine changed over ---

13 MR LEWIS: With ---

14 JUDGE BARAITSER: I do have it. Let me just see if I can, one moment.

15 MR LEWIS: That is what it looks like, madam.

16 JUDGE BARAITSER: Well, if this is the request you are referring to and that alone, perhaps
17 you can just hand me a copy of the request and I will hand it straight back to you. I know
18 what the bundle looks like, I just do not seem to have it on my bench. All right, thank you.
19 Yes, the request.

20 MR LEWIS: So what Mr Summers seeks to do, consistently, is put up a straw man and say,
21 “This is what the prosecution say” and then knock it down. But it is not. One has to look at
22 it very carefully. If one looks at paragraph 18, that is how the password hash is put, “Had
23 Manning received the full password hash and had Assange and Manning successfully cracked
24 it, Manning may have been able to log on to computers under a user name that did not belong
25 to her. Such a measure would have made it more difficult for investigators to identify
26 Manning as the source of disclosure of classified information”.

27 It is not linked to the previous databases or disclosures. It is a general allegation that
28 it would make it more difficult to identify the source of disclosures of classified information.
29 What my learned friend seeks to do consistently is say, “Well, we link it to the different
30 disclosures”. That is not how it is put in the request. It is put much more generally. For
31 instance, he then has made great fuss of “Oh, on the Most Wanted list there was no
32 solicitation for the cables”. But what is not in there, for example, is the WikiLeaks website.

33 If we just look in this same bundle, madam, you will see that it is dealt with in
34 evidence. If one looks at tab 3, paragraph 13 in the second declaration in support, you will

1 see, “Moreover, many of the classified documents that Manning, in fact, stole from the US
2 Government provided to Assange were consistent with the material solicited through
3 WikiLeaks’s website and its Most Wanted leaks, for instance consistent with WikiLeaks’s
4 Most Wanted leaks solicitation of Iraq and Afghanistan US Army Rules of Engagement”,
5 which we have looked at. “Manning stole and transmitted to Assange multiple Rules of
6 Engagement files”.

7 However, similarly, and this is on WikiLeaks’ website, so on WikiLeaks’ website it
8 says they want the solicitation of bulk databases of classified, censored, or otherwise
9 restricted material of political, diplomatic, or ethical significance. So, it is not linked solely
10 to the Most Wanted. The solicitation is much more general and you have not yet seen the
11 actual website. And another good example, if we look at paragraph 21 of the request – of the
12 indictment ---

13 JUDGE BARAITSER: Just pause whilst you are there Mr Lewis, can Miss Peirce or
14 someone, can you just check with Mr Assange that he is feeling well enough just to complete
15 this afternoon?

16 MISS PEIRCE: May I respond madam?

17 JUDGE BARAITSER: Yes, Ms Peirce.

18 MISS PEIRCE: Mr Assange is struggling. He is finding it hard to concentrate. He cannot
19 communicate with his legal team and he is finding it very difficult.

20 JUDGE BARAITSER: All right. Mr Lewis wants to make some concluding comments. I
21 suspect he will be no more than 20 minutes, is that fair?

22 MR LEWIS: I should be less, I should be three or four minutes.

23 JUDGE BARAITSER: Three or four minutes. In that case, we will finish this afternoon.
24 Thank you.

25 MR LEWIS: So, I was just going to show you madam on solicitation ---

26 JUDGE BARAITSER: Yes.

27 MR LEWIS: --- if we went to paragraph 21 of the indictment, the conversation between
28 Manning and Assange ---

29 JUDGE BARAITSER: So, the indictment is one of the exhibits. So, it is towards the end of
30 the ---

31 MR LEWIS: It is exhibit 1 in the request.

32 JUDGE BARAITSER: Yes. So, the indictment, yes. I have got all counts. That is
33 indictment exhibit 2.

1 MR LEWIS: So, what – how it is structured is there are general allegations which run to
2 paragraph 46 ---

3 JUDGE BARAITSER: Yes.

4 MR LEWIS: --- and then it is followed by each count, and each count repeats by
5 incorporation the general allegations ---

6 JUDGE BARAITSER: Yes.

7 MR LEWIS: --- and makes some more specific allegations. But if – so, if we looked at 21
8 which is a general allegation in the indictment, you will see that just picking up four lines
9 from the bottom, Manning later told Assange in reference to Guantanamo Bay detainee
10 assessment briefs, “after this upload that is all I have really have got left”.

11 In response to this statement, this is a chat which indicated that Manning had no more
12 classified documents to disclose, Assange replied “curious eyes never run dry in my
13 experience.” Assange intended this statement to encourage Manning to continue her theft of
14 classified documents from the United States and to continue the unlawful disclosure of those
15 documents to Assange.

16 And if we move to paragraph 27 of the request, you will see that following Assange’s
17 curious eyes never dried comment, and consistent with WikiLeaks’ solicitation of bulk
18 databases and classified materials of diplomatic significance, between on or about March 28
19 and April 9, Manning used the United States Department of Defence computer to download
20 the 250,000 cables. So, the solicitation, there is the chat, there is the hash, then she says well,
21 I have got nothing else, he says well, curious eyes never run dry in my experience, she then
22 two weeks later uploads the cables.

23 That is clear evidence but we do not actually need the evidence because it is the
24 allegation of the conduct which is that he has solicited these matters. So madam, one has to
25 be very careful when simply listening to the defence who put up a story and say this is what
26 they allege, this is what it is linked to, and I can show that it does not link. That is not correct
27 and that is not how the indictment runs.

28 And another point on this which picks up on the point madam you brought up about
29 the court martial, much of the argument rests upon the court accepting as reliable, truthful,
30 and ultimately unimpeachable, the statement, the self-serving statement Miss Chelsea
31 Manning gave in the inquiry. And we would simply say it is enough to dispose of the
32 argument, we just do not accept her self-serving statement. You cannot rely on a self-serving
33 statement, H17, we went to it about 20 times this afternoon as if it were true, without any
34 qualification whatsoever when it is a self-serving statement of a co-conspirator who has been

1 consistently trying to help out Mr Assange. One cannot accept that as reliable or the whole
2 truth.

3 And thirdly, what the defence are inviting you to do, and fundamentally this goes to
4 the heart of an extradition proceeding, is controversial issues in the United States. For
5 example, are the defence really going to ask this court to decide if Chelsea Manning uploaded
6 the Rules of Engagement files because she thought they went with the collateral murder
7 video, or as is accused in the request, because she was solicited by Assange to do so. It
8 cannot possibly be a function of this court to make that decision on challenged positions
9 between the two parties.

10 Another example would be, which Mr Summers spent a long time on, seeking to
11 explain that the – this court should make a decision, a factual decision that the hack, the
12 password hack, was to facilitate the installation of computer games and movies. It is just
13 absurd. That is not how it is put. That is not the allegation put against him. And it is simply
14 not a function of this court to enter into a factual determination of those type of issues. And
15 we do say those are the paradigm examples of trial issues which have to be determined in the
16 United States and not determined in this court. Of course they can run those in the United
17 States. No doubt they will run those and that will be part of his defence.

18 So, on the points made, for instance on prior availability of the material on the
19 internet, we disagree as to how it has been characterised but in any event, Mr Assange did not
20 have to publish the unredacted cables. He decided to do so and he decided to do so on a
21 widely followed and easily searchable website, WikiLeaks, knowing that it was dangerous to
22 do so. That – the fact – that is the allegation and that is the offence.

23 Now, just the final few words by way of just putting it in context and the direction of
24 travel of the prosecution, we do say that as it is clear that the defence are deploying precisely
25 the same evidence on the abuse as the bars, the court should examine the allegations
26 systematically under the statutory scheme. The statutory scheme provides the correct
27 evidential tests to be met and methodical way of working through it. And it is our position in
28 taking this approach the court will effectively rule out any abuse of process. Should the court
29 consider that any residual issues remain that may engage its abuse of jurisdiction, then it can
30 re-examine that in line with the *Tollman* principles. But madam, I understand – that is all I,
31 that is all I will say.

32 JUDGE BARAITSER: All right. Now, for the rest of this week, have any other ---

33 MR FITZGERALD: Madam ---

34 JUDGE BARAITSER: Yes?

1 MR FITZGERALD: Do you want us to reply to those points because ---
2 JUDGE BARAITSER: No, I do not. I tell you why ---
3 MR FITZGERALD: Yes.
4 JUDGE BARAITSER: --- because these points have merely been opened ---
5 MR FITZGERALD: Yes.
6 JUDGE BARAITSER: Both of you will have an opportunity in fact to repeat the argument.
7 So, there is no purpose in answering ---
8 MR FITZGERALD: I understand. I understand.
9 JUDGE BARAITSER: --- those points now.
10 MR FITZGERALD: You will see that we have set out in our reply on the abuse point that
11 we fundamentally disagree with the approach of my learned friend on the law.
12 JUDGE BARAITSER: Yes. I understand that.
13 MR FITZGERALD: And we say that he simply has not answered a whole host of issues in
14 his brief reply. No answer at all about the delay or the earlier decisions. No answer at all, we
15 respectfully submit, on the issues of abuse of power. So, ---
16 JUDGE BARAITSER: He was not intending to do so.
17 MR FITZGERALD: No ---
18 JUDGE BARAITSER: He made it very clear that he was going to make those points after
19 the evidence was heard.
20 MR FITZGERALD: Well madam, it was just so that – I know you are aware, but we do have
21 a response to every single one of the points that my learned friend ---
22 JUDGE BARAITSER: I am sure you do.
23 MR FITZGERALD: --- made, both of law and on the evidence which we will in due course
24 deploy and they are set out in our reply.
25 JUDGE BARAITSER: Right.
26 MR FITZGERALD: In the end, it was my learned friend who said we had to provide the
27 particulars of abuse. We provided them to the court and we also indicated why we said that
28 all the evidence was relevant both to the passage – sorry, to the specific statutory bars and to
29 abuse.
30 JUDGE BARAITSER: All right. I understand the position. What I want to know now is
31 how the rest of the week is going to go.
32 MR FITZGERALD: Right. Madam, from my point of view there is the question of the
33 treaty provisions and I would respectfully invite the court to hear us on those tomorrow.
34 Madam, I think you have our two submissions.

1 JUDGE BARAITSER: I do.

2 MR FITZGERALD: Both our initial submission and our reply to my learned friend, and you
3 have the separate authorities on that.

4 JUDGE BARAITSER: Yes, I do.

5 MR FITZGERALD: And madam, so it may be best if I postpone any further development of
6 that point until tomorrow. But you know – essentially the point is that the treaty ---

7 JUDGE BARAITSER: Do not tell me the essential point. You are going to no doubt tell me
8 tomorrow.

9 MR FITZGERALD: Very well madam. I will, I will hold my horses until tomorrow.

10 JUDGE BARAITSER: Thank you. I am grateful for that. Mr Lewis, do you agree with that
11 then?

12 MR LEWIS: Yes, I do.

13 JUDGE BARAITSER: The political offence, abuse, tomorrow? If it is an abuse. And you
14 will reply to that tomorrow?

15 MR LEWIS: I will.

16 JUDGE BARAITSER: Do you intend to reply to it in full or are you going to adopt the same
17 procedure as ---

18 MR LEWIS: Of course. I think we will be able to give you all the material you need
19 tomorrow, it may trickle into Thursday, for you to make a determination when you see fit on
20 that issue. I do not intend to re-visit it at any other stage, it being a pure legal issue. I do not
21 know if my learned friends agree with that.

22 JUDGE BARAITSER: Thank you. That sounds sensible I have to say.

23 MR FITZGERALD: Yes. Madam, insofar as it is a pure question of law arising on the face
24 of the request ---

25 JUDGE BARAITSER: Yes.

26 MR FITZGERALD: --- I agree with my learned friend to the extent that the question of a
27 pure political offence arises, that is to say we say espionage is a pure political offence, that is
28 in a submission of law. To the extent that the question is whether it is incidental to some
29 political conflict, that could be influenced by the evidence you hear.

30 JUDGE BARAITSER: Well, Mr Lewis' position no doubt will be that I do not need to
31 consider whether or not it is a political offence because it is a provision under a treaty, so that
32 is going to be the primary hurdle.

33 MR FITZGERALD: Yes, I totally appreciate that. We will address the point about whether
34 the treaty – the fact that it is in the treaty but not the Act affords him a right to rely on abuse

1 of process tomorrow. And I agree that if we persuade you of that, then that will be an issue
2 for abuse. If we do not persuade you of that, then that will not be an issue for abuse.

3 JUDGE BARAITSER: All right. Can I just remind both of you that I want a detailed
4 timetable for May please? I want to make sure that we agree a timetable ---

5 MR FITZGERALD: Yes.

6 JUDGE BARAITSER: --- and that it accommodates all of the evidence that is going to be
7 heard so that it does not go beyond the three weeks allocated.

8 MR FITZGERALD: Yes. Madam, can I just say there we have not even yet received the
9 evidence in reply which we have been promised from the prosecution – there is no criticism -
10 --

11 JUDGE BARAITSER: No.

12 MR FITZGERALD: --- it is just in accordance with the timetable.

13 JUDGE BARAITSER: That is true, but you have most of the evidence that both of you
14 intend to rely on.

15 MR FITZGERALD: Yes.

16 MR LEWIS: Due on the 12th?

17 MR FITZGERALD: Yes. There is no criticism. It is just that the other thing is that my
18 learned friend may wish to indicate to us, which witnesses he is content that are read, which
19 witnesses he wishes to challenge, and what the nature of the challenge is. And that may take
20 some time for us to discuss that. So, if we rush to providing tight time estimates before we
21 have discussed what the issues between us may be in relation to each of the witnesses, it may
22 be not as helpful as if we take our time.

23 JUDGE BARAITSER: I do not want you to rush but I do want it settled well in advance of
24 the hearing.

25 MR FITZGERALD: Absolutely. What might assist, madam, is if we have a review once we
26 have received the prosecution evidence, if necessary, a half-day review, at which we do fix a
27 timetable for the witnesses ---

28 JUDGE BARAITSER: Right. We will re-visit this later in the week.

29 MR FITZGERALD: --- can be made.

30 JUDGE BARAITSER: All right. Mr Assange, tomorrow then, I am adjourning the case.
31 Tomorrow again at 10 o'clock. Can you remain in custody as before. Thank you very much
32 everybody.

33

34

ADJOURNED UNTIL 10.00, WEDNESDAY, 26th FEBRUARY 2020

We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.