IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT

Case No: CO/2334/2022

IN THE MATTER OF AN APPEAL UNDER S.103 OF THE EXTRADITION ACT 2003

B E T W E E N:

JULIAN ASSANGE

Appellant

v

GOVERNMENT OF THE UNITED STATES OF AMERICA

Respondent

PERFECTED GROUNDS OF APPEAL

References to CB/X are references to the core permission bundle.
*EB/X are references to the **section 103** evidence bundle.*

1. Introduction

1.1. Julian Assange and Wikileaks were responsible for the exposure of criminality on the part of the US Government on a massive and unprecedented scale. The publication in 2010 and 2011 of materials sent by a serving military officer, Private Manning, sit at the very apex of public-interest disclosures. By publishing this material '*WikiLeaks...exposed outrageous, even murderous wrongdoing [including] war crimes, torture and atrocities on civilians'* (Feldstein, EB/10, §4).

1.2. Julian Assange's work, dedicated to ensuring public accountability by exposing global human rights abuses, and facilitating the investigation of and prosecution for state criminality, has contributed to the saving of countless lives, stopped human rights abuses in their tracks, and brought down despotic and autocratic regimes.

1.3. Those who expose grave state criminality, defenders of fundamental human rights, are, and always have been, vulnerable to acts of political retaliation and persecution from the regimes whose criminality they expose. Julian Assange is no exception.

1.4. The law is fiercely protective of human rights defenders. Exposure of state criminality is, in law, a protected political act, the product of a political opinion. Prosecutions 'on account of' such acts are straightforwardly prohibited by s.81 of the 2003 Act.

1.5. The history of this prosecution, between Mr Assange's exposures in 2010 and 2011 and the indictment in 2018, is a textbook example of political persecution. The course of this case since 2011 is simply extraordinary. It involves, *inter alia*, US Governmental plots to interfere

with judges who investigate the matters Mr Assange exposed; to silence the International Criminal Court (ICC) who have taken up Mr Assange's disclosures; and to kidnap and rendition Mr Assange himself, or else murder him. What follows below is conduct of the type one would normally expect from a military dictatorship. The DJ failed to act upon (or even address) these issues from the perspective of s.81 because (despite having the law drawn squarely and repeatedly to her attention) she failed to recognise or acknowledge that exposure of state criminality is, in law, a protected 'political' act, engaging s.81.

1.6. The evidence in this case has, moreover, developed since the DJ's decision in January 2021. Investigations in America now provide a fuller picture of the US state-level plans to kidnap, rendition and murder Mr Assange. They also reveal that the initiation of criminal proceedings in this case – by a criminal complaint in December 2017 resulted after obstacles (some reported as having been erected by the UK) to those criminal plans.

1.7. The prosecution that the US were forced to resort to instead, commenced in 2018, is no less extraordinary. (a) It is unprecedented in law. (b) It cuts clean across established principles of free speech. (c) To deal with that, it anticipates a trial at which Mr Assange, as a foreigner, can be denied reliance on the First Amendment (d) indeed, a trial outwith protections of the US Constitution altogether, and (e) is accompanied by exposure to a grossly disproportionate sentence. In short, the circumstances of the prosecution are so stark and unusual that they engage bars to extradition in their own right.

1.8. As to the circumstances of the ensuing extradition request. (f) It violates the prohibition on extradition for political offences expressly provided for in the relevant treaty and under international law. (g) It deliberately misstates the core facts. The DJ took these issues one by one and reasoned that none offended the 2003 Act. For reasons which follow, she was plainly wrong in multiple respects.

1.9. But even if she were right on each of these issues when viewed separately, the DJ then needed, but failed entirely, to stand back and examine what they cumulatively told her about the political origins of this case. They were all, in short, individually and cumulatively, the clearest evidence of a prosecution mounted 'on account of' Mr Assange's political opinions – namely his stated and proven commitment to the exposure of US-state-level criminality.

1.10. These Perfected Grounds of Appeal, served in accordance with Crim PR r.50.20(5), are structured as follows:

1.11. **Part A**: addresses **Ground of Appeal 1**, namely that the judge wrongly rejected the argument that the request was being made for the purposes of prosecuting or punishing Julian Assange for his political opinions, and therefore barred by s.81(a).[1] Accordingly Part A provides an overview of the history of this matter, and explains the over-arching s.81 case the DJ failed to engage with. This includes:

(i) **Section 2**: the evidence before the DJ concerning Mr Assange's political opinions;

(ii) **Section 3**: the evidence before the DJ about the criminality Mr Assange exposed.

[1] Ground 1 also encompasses the allegation of abuse of process, by reason of ulterior motivation of the request and the underlying prosecution, which is dealt with in Part D.

(iii) **Section 4**: The law the DJ ignored;

(iv) **Section 5 and 6**: the other evidence before the DJ concerning the origins of the 2018 prosecution.

(v) Section 7: The DJ's decision

1.12. **Part B**: addresses **Grounds of Appeal 2 to 6**. That is the various egregious aspects of the prosecution, eventually commenced in 2018, which individually bar extradition, regardless of s.81; including:

(i) **Section 9**: An unprecedented prosecution (**Ground of Appeal 2**: Article 7 ECHR);

(ii) **Section 10**: A prosecution for protected speech (**Ground of Appeal 3:** Article 10 ECHR);

(iii) **Section 11**: A prosecution designed to secure a guilty verdict (**Ground of Appeal 4**: Article 6 ECHR);

(iv) **Section 12**: A prosecution with no Convention Rights protections at all (**Ground of Appeal 5**);

(v) **Section 13**: Followed by a grossly disproportionate sentence (**Ground of Appeal 6**).

1.13. **Part C**: addresses **Grounds of Appeal 7 to 8**. That is the aspects of the ensuing extradition request which individually bar extradition, regardless of s.81; including:

(i) **Section 14**: An extradition request for political offences, in violation of the treaty and international law (**Ground of Appeal 7**);

(ii) **Section 15**: An extradition request which deliberately misstates the core facts, unfairly improperly and inaccurately (**Ground of Appeal 8**).

1.14. **Part D**: returns to s.81 and abuse of process (**Ground of Appeal 1**), as the DJ ought to have done, in **Section 16**. Finally, **Sections 17 and 18** address the new evidence in this case.

Glossary

Article 3: The article of the European Convention on Human Rights which bans torture and inhuman or degrading treatment.

Article 5: The article of the European Convention on Human Rights which bans unlawful detentions.

Article 6: The article of the European Convention on Human Rights which protects the right to a fair trial.

Article 7: The article of the European Convention on Human Rights which requires that the law be foreseeable.

Article 10: Article 10 of the European Convention on Human Rights, which provides for the right to freedom of expression (including press freedom).

CAT: Convention Against Torture

DJ: District Judge, the judge for the 2020 extradition hearing at Westminster Magistrates' Court (Vanessa Baraitser)

ECHR: European Convention on Human Rights

ECtHR: European Court of Human Rights

EHWL: Law report reference

ICC: International Criminal Court

ICCPR: International Covenant on Civil and Political Rights

Part 1 of the UK Extradition Act 2003: Covers extraditions to EU states

Part 2 of the UK Extradition Act 2003: Covers extraditions to non-EU states, including the United States

re-x: Re-examination

s.81: The section of the UK Extradition Act which bans extraditions influenced by an accused's political opinions, nationality, race, religion, gender, or sexual orientation. s.81(a) bans extraditions that have improper motivations. s.81(b) bans extraditions where the accused could be prejudiced at trial or sentenced based on improper factors.

s.87: The section of the UK Extradition Act that refers to the Human Rights Act.

s.103: The section of the UK Extradition Act which provides for the right to appeal against an extradition judgment.

s.108: The section of the of the UK Extradition Act which provides for the right to appeal against an extradition decision by the Secretary of State for the Home Department.

SAMs: Special Administrative Measures, a highly isolating prison regime

SoS: Secretary of State

SSHD: Secretary of State for the Home Department (the minister in charge of the Home Office)

Tr: Transcript

WLR: Law report reference

xic: Examination in chief

xx: Cross examination

PART A: THE MOTIVATION

2. The evidence before the DJ concerning Mr Assange's political views

Overview

2.1. Professor Noam Chomsky, Professor Paul Rogers and Daniel Ellsberg all outlined for the DJ Mr Assange's political opinions and how/why these opinions brought him into conflict with the US Government. The US, in the end, did not challenge those witnesses' assertion that Mr Assange has '*political opinions'* related to transparency, democratic accountability, opposition to surveillance, opposition to war crimes and human rights abuses. Nor did the prosecution challenge the evidence of Rogers, Ellsberg and Chomsky that these opinions motivated his conduct.

The evidence before the DJ

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

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

2.3. WikiLeaks became part of a wider movement to criticise and expose US policy, most particularly in the wake of the 11 September 2001 attacks, and the secrecy with which the US conducted its actions: '*...In reality, the security situation [for the United States Government] was far more complex, with major problems evolving right from the start but persistently covered up'* (Rogers, EB/14, §16, 20). Beyond the disclosures of war crimes that are the subject of the indictments in this case, WikiLeaks played its part in the worldwide opposition to US actions. It continued to address broader issues of geopolitical significance around the world. Thus:

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

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

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

(iv) In 2015, revelations of espionage against the European Commission, European Central Bank and French industry were published by WikiLeaks (Bundle M2, 215-228).

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

(vi) In 2017, WikiLeaks published revelations of US spying during the French Presidential election campaign (Bundle M2, 316-322).

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

(viii) More recently, WikiLeaks published materials pertaining to the organisation responsible for enacting President Trump's extremely controversial '*family separation policy'* which separated children from their families at the US-Mexico border.

2.4. Across the world, opposition to the US actions taken after 9/11 developed amongst a range of political actors, including journalists, lawyers, activists and NGOs, all of whom it has been said encountered '*enormous barriers to adequate or reliable information'* about possible abuses by the United States (Maurizi, EB/30, §26). Experts confirmed the necessity of the publication of national security information for exposing abusive conduct, leading to public deliberation on these issues (see for example Jaffer, EB/12, §16). Their evidence was not challenged during the hearing.

2.5. Assange and WikiLeaks had published political commentary for a number of years prior to the publications which are the subject of the indictment, creating innovative tools to receive information securely in a way which provides sufficient source protection (these methods having later been adopted across mainstream news media organisations – Timm, EB/42 - Transcript 09.09.20, p56). These publications focussed on policy and actions that governments concealed from the electorate (including but by no means limited to the US) in parallel with an increase in government secrecy in relation to war, torture, rendition, surveillance and corruption. Examples of such pre-2010 publication in evidence before the DJ include writings on the battle for Fallujah (Bundle M1, 8b, 9n, 9o, Bundle M2, 172, 176), the use of chemical weapons in warfare (Bundle M1, 9e, Bundle M2, 1, 23), Guantanamo Bay (Bundle M1, 9m, M2, 122, 127, 128, 129, 131, 137, 140-141), interrogation of detainees and allegations of torture by ISAF (Bundle M1, 9ll, Bundle M2, 130, 138, 143, 145 – 148).

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

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

2.8. Participants in the open government movement saw the internet as a crucial tool for increasing transparency and accountability by sharing government data with the public. For example, the Washington DC based Center for Democracy and Technology called for the collaborative use of the internet to remedy *'government secrecy that runs counter to core democratic values… to access government information so that the public has the means to hold its government accountable, make our families safer, and generally strengthen democracy'* (Bundle L, Tab F6) through the use of crowdsourced list of most wanted items.

2.9. The WikiLeaks '*Draft: The Most Wanted Leaks of 2009'* had a similar aim of compiling a list of the '*concealed documents or recordings most sought after by a country's journalists, activists, historians, lawyers, police, or human rights investigators'*. The draft page sought nominations for specific documents that were '*likely to have political, diplomatic, ethical or historical impact on release'*. The Electronic Frontier Foundation, a US-based NGO that advocates for civil liberties online observe that the draft list *'[w]as a host for a crowdsourced page where activists, scholars, and government accountability experts from across the globe could safely and anonymously offer their feedback on the transparency failures of their own governments.'*[REF]

Julian Assange's own personal political opinions

2.10. The evidence before the DJ from Professor Rogers, Professor Feldstein and Professor Noam Chomsky (EB/14, 10, 29 and 16 respectively) and the evidence of Daniel Ellsberg (EB/27) was that:-

(i) He is a leading proponent of an open society and of freedom of expression.

(ii) He is an opponent of war, state surveillance and imperialism.

(iii) He is a champion of political transparency as a means of achieving democratic accountability, and of the public's right to access information on issues of importance – issues such as political corruption, war crimes, torture, rendition and the mistreatment of Guantanamo detainees.

(iv) More specifically, he advocates the exposure of crimes against humanity and accountability for such crimes.

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

2.12. Professor Rogers identified Mr Assange's belief in *'transparency and accountability'* as inevitably bringing him into conflict with the Trump administration (EB/41 Tr 9.9.20, p9). As he says '*thus the opinions and views of Mr Assange demonstrated in his words and actions can be seen as very clearly placing him in the crosshairs of dispute with the philosophy of the Trump administration'* (Rogers, EB/14, §12), '*essentially at the root of it is this belief that Assange and what he stands for represents some kind of threat to the normal political endeavour'* (EB/41 Tr 9.9.20, p8).

2.13. Mr Assange has long been a vocal opponent of unjust wars with their concomitant war crimes, crimes against civilians and use of torture and rendition. He has made many public contributions on this issue (Rogers, EB/14, p3-4), for instance at a Stop the War rally in 2011 in London, as quoted by Professor Rogers:

> *'...We must form our own networks of strength and mutual value, which can challenge those strengths and self-interested values of warmongers in this country and in others, that have formed hand in hand an alliance to take money from the United States… we have revealed [information] showing the everyday squalor and barbarity of war, information such as the individual deaths of over 130,000 people in Iraq, individual deaths that were kept secret by the US military who denied that they have counted the deaths of civilians… I want to tell you what I think is the way that wars come to be and that wars can come undone … It should lead us also to an understanding because if wars can be started by lies, peace can be started by truth'* (Rogers, tab 40, p4; Bundle M1, 2e),

2.14. Mr Assange has spoken many times on the abuse of secrecy by governments, and the need to expose concealed state-criminality in order to achieve accountability and justice:

> *'...There is a legitimate role for secrecy, and there is a legitimate role for openness. Unfortunately, those who commit abuses against humanity or against the law find abusing legitimate secrecy to conceal their abuse all too easy. People of good conscience have always revealed abuses by ignoring abusive strictures. It is not WikiLeaks that decides to reveal something.* ***It is a whistle-blower or a dissident who decides to reveal it. Our job is to make sure that these individuals are protected, the public is informed and the historical record is not denied'*** (Bundle M, D34, emphasis added). (26 July 2010)

2.15. Daniel Ellsberg told the DJ that Mr Assange believes *'in open government and democracy'* and that *'it is essentially impossible…[to question] foreign affairs or military affairs with so little true information being shared with the public'* (EB/27 Tr 16.9.20, p45). Ellsberg explained that he and Mr Assange shared the belief that without transparency *'there was really no effective democracy'* (EB/27 Tr 16.9.20, p45). The fact that Mr Assange '*challenged the legitimacy of the government secrecy system'* was the reason for his prosecution (EB/27 Tr 16.9.20, p68).

2.16. Finally, John Goetz stated '*on the basis of my conversations and dealings with Mr Assange I regard his thoughts, ideas and actions to have been consistent with an overall political philosophy of seeking to bring to light the hidden criminal actions of states and in particular (central to the publications with which he is charged) by the exposure of criminal conduct in war to persuade the government concerned to alter the policies and bring war and those particular wars in question and their consequences to an end'* (Goetz 2, EB/28, §14).

2.17. Successive US administrations themselves have identified Julian Assange as a political actor, whose motivations include wanting to expose criminality and thereby influence US policy. For example, in reaction to the Afghan War Diaries, a White House memo told reporters: '*WikiLeaks is not an objective news outlet but rather an organization that opposes US policy in Afghanistan'* (EB/37 Tr. 27.02.20, p31). And President Obama's Assistant Secretary of State, PJ Crowley, characterised Julian Assange as an actor with a '*particular political objective'* (Bundle M Continuation, Section 19, 536, §16).

2.18. Professor Chomsky put it like this: '*in courageously upholding political beliefs that most profess to share he has performed an enormous service to all those in the world who treasure the values of freedom and democracy and who therefore demand the right to know what their elected representatives are doing'* (EB/16, §14).

The DJ's analysis

2.19. In the end, the US did not challenge the evidence of Professors Rogers and Chomsky, and Daniel Ellsberg, that Mr Assange's 'political opinions' related to opposition to war crimes and human rights abuses. Nor did the prosecution challenge the evidence of the same witnesses that these opinions motivated his conduct.

2.20. The DJ ultimately (and inevitably) concluded, '*I accept that Mr. Assange has political opinions, outlined and explained to the court by defence witness including Professor Rogers, Noam Chomsky and Daniel Ellsberg'* (Judgment CB/2 §156). Specifically, the DJ accepted that:

> '*like Mr. Shayler, Mr. Assange was disclosing information about the past conduct of the US government and its agencies in order to seek their reform...he expressed a wish to expose criminal conduct of the sort revealed by the Manning disclosures'* (Judgment CB/2 §147).

3. The content of Mr Assange's 2010 publications

And that is precisely what he did do. Every single one of the five 'national security' publications that are the subject of this extradition request exposed US Governmental involvement in crimes of the first order of magnitude. These disclosures exposed irrefutable evidence of, *inter alia*, illegal rendition, torture, and black site CIA prisons across Europe, as well as aggressive steps taken to maintain impunity and prevent the prosecution of any American operatives involved in these crimes. The following represents the unchallenged evidence before the DJ of the atrocities Mr Assange exposed.

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

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

(i) Evidence of CIA and US forces involvement in a programme of targeted, extra-judicial assassinations in Afghanistan and Pakistan (Stafford-Smith, EB/22, §78-83 / EB/40 Tr 8.9.20, xic, p5-7 – unchallenged); including the targeting of journalists for death; actions which '*are not only unlawful but morally, utterly reprehensible...a monumental criminal offence and as a lawyer it is my duty to do what I can to prevent'* it (Stafford-Smith, EB/40 Tr 8.9.20, xic, p5-7 – unchallenged).

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

(iii) Attempts to improperly influence judicial proceedings and subvert prosecutions of US personnel by European states (Bundle M2, 511-513, 515-517);

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

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

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

(vii) Corruption in US-backed dictatorships where the Wikileaks revelations played an important part in the Arab Spring uprising (Bundle M2, 544-545).

3.2. '*The cables revealed evidence of renditions and torture, dark prisons, drone killings, assassinations, and the like...the government['s claim they can] keep it all secret, to me that is utterly, utterly mad'* (Stafford-Smith, EB/40 Tr 8.9.20, re-x, p26 – unchallenged).

3.3. Mr Stafford-Smith's unchallenged evidence was that cables, for example, revealed by WikiLeaks[2] regarding US government drone killings in Pakistan '*contributed to [subsequent] court findings that US drone strikes are criminal offences and that criminal proceedings should be initiated against senior US officials involved in such strikes'* (Stafford-Smith, EB/22, §84, 91). '*Those were very important in litigation in Pakistan'* (EB/40 Tr 8.9.20, xic, p4). The Peshawar High Court ruled, *inter alia*, that the drone strikes carried out by the CIA and US authorities were a *'blatant violation of basic human rights'* including '*a blatant*

[2]. Via the media partners (Stafford-Smith, Tr 8.9.20, xx, p13-15).

breach of the absolute right to life' and *'a war crime'* (Stafford-Smith, EB/22, §91). What '*we have to term criminal offences were taking place*' (EB/40 Tr 8.9.230, xic. p4). Moreover, and as a result, '*the drone strikes, which were in their hundreds and causing many…innocent deaths, stopped very rapidly'* such that '*there were none reported…in 2019'* (Stafford-Smith, EB/22, §93). WikiLeaks had '*put a stop to a massive human rights abuse'* (Stafford-Smith, EB/22, §92-93). *'Pakistan was an American ally. It was not like we were doing that to an enemy, and that again is just extraordinary to me'* (Stafford-Smith, EB/40 Tr 8.9.20, re-x, 26-27). Without the WikiLeaks disclosures, it '*would have been very, very different and very difficult*' to prevent this crime (Stafford-Smith, EB/40 Tr 8.9.20, xic, p5).

3.4. Amnesty International has reported that the cables confirmed human rights violations that they had publicly raised before, including about complicity of European states in CIA rendition and US drone strikes in Yemen (Bundle Q, Tab 6).

3.5. The importance of the cables in revealing abhorrent crimes (and successive measures taken by the US state to cover them up) is evident, for example, from the damning judgment of the Grand Chamber of the ECtHR in ***El Masri v Macedonia*** (2013) 57 EHRR 25 concerning Macedonia's co-operation in the US rendition program, whereby '*agents of the respondent State had arrested [el-Masri], held him incommunicado, questioned and ill-treated him, and handed him over at Skopje Airport to agents of the US Central Intelligence Agency (CIA) who had transferred him, on a special CIA-operated flight, to a CIA-run secret detention facility in Afghanistan, where he had been ill-treated for over four months'* (judgment, §3). Evidence of the crimes committed by the US and its allies against Mr El-Masri included:

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

3.6. The ECtHR found that Mr El-Masri had been, inter alia, '*handcuffed and blindfolded...beaten severely by several disguised men dressed in black. He was stripped and sodomised with an object. He was placed in an adult nappy and dressed in a dark blue short-sleeved tracksuit. Shackled and hooded, and subjected to total sensory deprivation, the applicant was forcibly marched to a CIA aircraft (a Boeing 737 with the tail number N313P), which was surrounded by Macedonian security agents who formed a cordon around the plane. When on the plane, he was thrown to the floor, chained down and forcibly tranquillised. While in that position, the applicant was flown to Kabul (Afghanistan) via Baghdad (Iraq)...'* (judgment, §205). Official investigations into the CIA's unlawful rendition operations in Europe were '*invariably faced with obstruction or dismissal, from the United States and its European Partners alike'* (judgment, §43). It was WikiLeaks disclosures which helped detail the most degrading and appalling torture of an entirely innocent man, in the face of determined invocation by the US and European governments of '*state secrets'* in order to '*obstruct the search for truth'* (judgmentCB/2 §191-192).

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

3.7. The release of the 2006-2008 versions of the US Iraq Rules of Engagement, was integral to and co-terminous with the release to the public of the infamous '*collateral murder video'* (Hager, EB/33, §21-23; EB/50 Tr 18.9.20, xic, p7) (Bundle P, sections B6-8).[3] As the Guardian described, the video was *'heralded by some as the most important revelation since Abu Ghraib and challenges not only the effectiveness of the US military's Rules of Engagement policy but also the integrity of the mainstream media's coverage of similar incidents'* (Bundle P, Tab B13).

3.8. The US army helicopter video footage from Iraq in 2007 is as '*disturbing'* now as it was in 2010 (Feldstein, EB/10, §4) (Boyle, EB/3, §11) (Yates, EB/53 - agreed s.9) (Bundle P, section B7). It shows '*the killing of 11 people by a US helicopter in Baghdad'* on 12 July 2007, a full version of which the US government had refused to release, instead issuing flat denials of wrongdoing, such that at the time it was '*impossible to prove that all those who died were unarmed civilians'* including two Reuters journalists, despite compelling witness evidence (Cockburn, EB/23, §5-6 - agreed s.9). The video released by WikiLeaks revealed that the helicopter pilots in fact '*exchanged banter about the slaughter in the street below',* continued to shoot the wounded victims, including children and one (thought to be Reuters assistant Saeed Chmagh) as he crawled for help (Cockburn, EB/23, §8 - agreed s.9). It is a video which '*still has to power to shock'* but which, at the time, disclosed acute criminality which the US government sought to actively cover up and which '*could never have been established'* through more traditional journalistic efforts (Cockburn, EB/23, §6-8 - agreed s.9).

3.9. '*What was depicted in [the video released by WikiLeaks] deserved the term murder, a war crime'* (Ellsberg, EB/27, §28 / Tab 47 Tr 16.9.20, xic, p47 – unchallenged) (Maurizi, EB/30, §10 - agreed s.9). *'The US knows how devastating the Collateral Murder video is, how shameful it is to the military – they are fully aware that experts believe that the shooting of the van was a potential war crime*' (Yates, EB/53 §27). The release of the video was '*picked up by thousands of news organisations worldwide, sparking global outrage and condemnation'* (Yates, EB/53 §28 - agreed s.9) (Bundle P, sections B9-17). '*It would be hard to overstate how important it was...[it] demonstrated...actions were unlawful both under international law and the US military's own Rules of Engagement'* (Hager, EB/33, §23). '*They had a profound effect on public opinion in the world. Whether they - they had a profound effect through the video, through the accompanying rules of engagement which showed what had gone on and what was wrong with it. And then they were followed, importantly, by the war logs coming out a few months later and the combined net effect of those was to electrify the world for the first time about the issue of civilian casualties in Afghanistan'* (Hager, EB/50 Tr 18.9.20, xic, p7). Mr Assange was invited to speak to the European Parliament on the issue (Maurizi, EB/30, §11 - agreed s.9).

3.10. In efforts to conceal the truth of this war crime, the US military shortly after the incident had '*choreographed'* extracts from the footage to create *'a certain impression',* and '*cheated'* and '*lied to'* the world's press about the truth of the matter (Yates, EB/53 §23 - agreed s.9). The US had also cited the Rules of Engagement '*to justify the initial attack'* (Yates, EB/53 §12 - agreed s.9). The Rules of Engagement are '*designed to forestall commission of war crimes'* such as this (Tigar, EB/13, p9 - agreed s.9).

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[3]. (Bundle M2, Tab 501); the following video was in evidence: https://www.nytimes.com/video/multimedia/1248069533084/collateral-murder.html

3.11. Mr Ellsberg told the district judge that '*even more shocking to me and newsworthy [than the video itself]...was the context of that video...we were told in the press was that there had been no punishment because the rules of engagement had not been violated. To say that is to say that the rules of engagement permitted murder and must be changed and were inadequate'* (Ellsberg, EB/47 Tr 16.9.20, xic, p48 – unchallenged). Mr Assange's '*release of [the Rules of Engagement] demonstrated that the rules of engagement are entirely inadequate to assure supporting the laws of war...the two are – go together as an important revelation to the public and to the Government'* (Ellsberg, EB/47 Tr 16.9.20, xx, p50). Obtaining and disclosing the Rules of Engagement alongside the video '*First of all, it gave a yardstick to judge whether they were obeying their own rules of engagement, which is a serious subject, but it also allows the rules of engagement themselves to be evaluated because this was the period where...there was a realisation that civilian casualties were out of control in those two wars...whether the rules of engagement are adequate, whether the rules of engagement also are consistent with the laws of armed conflict. So that is a highly relevant document'* (Hager, EB/50 Tr 18.9.20, re-x, p24).

3.12. One of the results was that the Rules were later changed (Ellsberg, EB/47 Tr 16.9.20, xic, p48 – unchallenged) (Hager, EB/50 Tr 18.9.20, xic, p7 – unchallenged).

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

3.13. These documents provided evidence that Guantánamo detainees had been the subject of prior rendition and detention in CIA '*black sites'* before their arrival at Guantánamo (Worthington, EB/19, §8, 14 - agreed s.9),[4] for example:[5]

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

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

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

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

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

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

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4. I.e. Revealed that many of the people held and tortured at Guantánamo Bay had not been arrested '*on the battlefield'*, but had in fact '*had been turned over to the US [from Pakistan] not because they were guilty of crimes, but because the US was offering substantial bounties for exclusively Muslim men'* and they were in fact '*totally innocent of anything that could remotely be deemed a crime'* (Stafford-Smith, Tab 64, paras 9, 42 / Tr 8.9.20, xic, p7 – unchallenged).

5. (Bundle P, Tabs A1-10). See also (Bundle Q, Tab 7).

(vii) Abdul al-Rahim Ghulam Rabbani remained in Kabul for seven months and was then moved to another prison (which reports indicate was a CIA black site) before being transferred to US Forces custody;[6]

(viii) Mohammed Ahmed Ghulam Rabbani was subject to the same treatment (Stafford-Smith, EB/22, §54-57 – unchallenged);

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

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

3.14. Mr Stafford-Smith's unchallenged evidence was '*You know, we are talking about criminal offences of torture, you know, kidnapping, renditions, holding people without the rule of law, and, sad to say, murder...the US government thought it was OK for them to keep that secret... they said that was a method or a means of interrogation, to murder people in Bagram air force base. I mean that is just beyond my capacity to understand... strappado, which is something that I believe Donald Rumsfeld said was not a big deal, which is hanging people by their wrists and as their shoulders gradually dislocate...it is really shocking to me that [the US has] done this... the psychological torture was worse than the razor blades...all the documentation that WikiLeaks leak, there are all sorts of things identified through there about where people are taken, rendered to different places'* (Stafford-Smith, Tr 8.9.20, xic, p10-12). '*We have caught sad, sad, sad, we have caught the United States with its pants down on criminal acts...issues that are just criminality'* (Stafford-Smith, EB/40 Tr 8.9.20, xx, p20).

3.15. The ICC is currently investigating:

> *'...War crimes by members of the United States ('US') armed forces on the territory of Afghanistan, and by members of the US Central Intelligence Agency ('CIA') in secret detention facilities in Afghanistan and on the territory of other States Parties to the Rome Statute, principally in the period of 2003-2004...'* (Bundle Q, Tab 10)
>
> '*...We have brought that based, in part, on the documentation of torture and abuse that came through WikiLeaks...*' (Stafford-Smith, EB/40 Tr 8.9.20, xic, p12).
>
> '*...the ICC are investigating these actions as war crimes...there needs to be an investigation certainly'* (Stafford-Smith, EB/40 Tr 8.9.20, re-x, p27).

3.16. The Detainee Assessment Briefs also documented the nature of the evidence relied upon by the US to '*justify'* the detentions, including the repeated use of information and informants known to be unreliable or to have been tortured, and in some cases the detention of persons known to be innocent (Feldstein, Tab 18, §4) (Bundle P, Tabs A1-11), even on the '*best face that the US Government could put'* (Stafford-Smith, EB/22, §25-41). The WikiLeaks disclosures were '*really important because the world did not know the allegations... they*

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

were very useful for different people to analyse the...total drivel...this core group of informants that were being used to justify the continued detention of a number of people... the world had no idea of the sort of unreliability, shall we say kindly, of the evidence being alleged against my clients...[using the WikiLeaks information] Andy Worthington has [been able to] analyse the number of times, for example, certain informants were the main basis for detaining prisoners... And these are people...over the years we have been able to get federal judges to find...to be incredible' (Stafford-Smith, EB/40 Tr 8.9.20, xic, p8-10 – unchallenged).

3.17. The use of evidence obtained by torture, and arbitrary detention of this nature are international crimes '*of colossal proportions'* (Worthington, EB/19, §9 - agreed s.9).

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

3.18. The Afghan war diaries (Bundle P, section D) revealed '*what seemed to be war crimes'* (Goetz, EB/17, §11 – unchallenged) and included, *inter alia*:

(i) The existence of '*black unit'* Task Force 373 operating 'kill or capture lists' hunting down targets for extra-judicial killings (Feldstein, EB/10, §4) (Goetz, EB/17, §11 / EB/46 Tr 16.9.20, xic, p5 – unchallenged) (Hager, EB/33, §21 – unchallenged) (Bundle P, Tabs D15, D25);

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

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

(iv) The role of the CIA in the conflict, including participation in strikes and night raids (Hager, EB/33, §21 – unchallenged) (Bundle P, Tab D13).

3.19. Mr Assange himself commented as follows about the Afghan War Diary press conference on 26th July 2010: *'We would like to see ... the revelations that this material gives to be taken seriously, investigated by governments and new policies put in place as a result, if not prosecutions of those people who committed abuses ... You can really see how the war in Afghanistan is going and then compare that to government statements and government policy'*. (Bundle P D32(a)).

3.20. Later in the same conference he said: *'But [they] will be forced into investigating it ... what you need is enough investigated to create deterrence – that's how policing works, don't need to catch every criminal, you just need to catch enough to show there's a decent chance of being caught and that provides an effective deterrent for criminal behaviour. And so if the US military engages in enough prosecutions or is sufficiently embarrassed such as the career paths of generals is interfered with that will create an incentive to develop policies and put internal policing that doesn't result in so many casualties and other forms of abuse'* (Bundle P D32(b)).

3.21. In Der Spiegel on 26th July 2010, Mr Assange was quoted on this topic as follows: '*Q: Do you think the publication of this data will influence political decision makers? A: JA: Yes. This material shines light on the everyday brutality and squalor of war. The archive will change public opinion and it will change the opinion of people in positions of political and*

diplomatic influence… There is a move to end the war in Afghanistan. This information wont do it alone, but it will shift political will in a significant manner'. (Bundle P D34).

3.22. The Iraq material (Bundle P, section E) covers the six-year period from 1 January 2004 (just months after the 2003 invasion) to 31 December 2009, exposing numerous cases of torture and abuse of Iraqi prisoners by Iraqi police and soldiers, as well as proof of the US government's involvement in the deaths and maiming of more than 100,000 people in Iraq. Key revelations include:

(i) Systematic torture of detainees (including women and children) by Iraqi and US forces (Feldstein, EB/10, §4), including a secret order by which the US ignored the abuse and handed detainees over to the Iraqi torture squad (Bundle P, Tabs E1, 8, 11-14, 22, 25, 29, 33, 44, 51);

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

(iii) A 2016 raid by US troops in which they had killed Iraqi civilians, including an elderly woman and five-month old child, and then called an airstrike to cover up the evidence (Bundle M11/53). This evidence was widely reported as having contributed to the withdrawal of the US from Iraq (Rogers, EB/14, §30);

(iv) Details of 15,000 previously unreported civilian deaths (Feldstein, EB/10, §4) (Rogers, EB/41 Tr 9.9.20, xic, p5 – unchallenged) (Sloboda, EB/31, §2 / Tab 48 Tr 17.9.20, xic, p5-6 – unchallenged) (Hager, EB/33, §21 – unchallenged) (Bundle P, Tabs E2, 6-7, 9-10, 19-21), including through checkpoint killings (Bundle P, Tabs E23, 39, 45), use of contractors (Bundle P, Tabs E16, 31, 41-42), targeted assassinations, drive-by killings, executions (Bundle P, Tabs E47, E52); showing that the US Government was hiding the full civilian cost of the Iraq war (Feldstein, EB/10, §4). '*Protection of civilians is the universally accepted precondition of lawful armed conflict, and the deliberate targeting of civilians is a war crime*' (Sloboda, EB/31, §2 / EB/48 Tr 17.9.20, xic, p4 – unchallenged). The Iraq war diaries were the '*largest single contribution to knowledge about civilian casualties in the Iraq war'* (Sloboda, EB/48 Tr 17.9.20, xic, p5 – unchallenged). To this day, '*no other public domain force has come forward to corroborate or provide independent evidence about those particular deaths, so the Iraq war logs remain the only source of those deaths'* (Sloboda, EB/48 Tr 17.9.20, xic, p9 – unchallenged).

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

3.23. As Mr Assange himself observed when he spoke on the issue at the UN on 4th November 2010:

(i) There are at least '*42 allegations of serious abuse by US Forces appearing in the Iraq War Logs, including electric shocks, water torture and mock executions. In 30 of these serious cases the reports showed that medical evidence was taken that backs up detainee torture claims. For example, on July 11, 2006, a report states, a detainee stated that after he was flexed up, one person sat on his chest, another on his legs, and the person punched him in the back of the head, picked up his head and slapped*

him, put a plastic pipe in his mouth. Persons conducting the questioning also kicked him in the sides of his body, after the persons threw the bag over his head. The medic working for the US Army concluded the detainee did have injuries through his back which were consistent with the allegations of abuse. The War Log states that a statement was taken from the detainee and pictures were taken to document the abuse. Now we are aware of no prosecution of any alleged case of US torture since Abu Ghraib. And it is not just physical abuse US troops committed, it is also psychological. The report made on January 22nd, 2007, states, Marines grabbed detainee by the neck, took him to a suspected IED, threw him to the ground, kicked him hard in the stomach. The detainee further alleged Marines made him start digging up the suspected IED, pointed a rifle to his neck, while counting 1, 2, 3' (Bundle M2, Tab 352).

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

3.24. In a further comment to Democracy Now (26th October 2010), Julian Assange said of the Iraq War Diaries:

(i) *'We see 284 reports covering torture or other forms of prisoner abuse by coalition forces, covering 300 different people. We see over 1,000 reports of torture and other prisoner abuse by the Iraqi State itself, many or most of those receiving no meaningful investigation. I heard in your introduction that the Pentagon claims that the Iraqi government is responsible for this, but in international law, it is the person or government or organisation that has effective control and is responsible. Certainly, before the technical legal handover from the Coalition Provisional Authority to the Iraq government, it is clear that the US and other coalition forces were the effective, legally responsible group for those'* (Bundle P Tab E49).

3.25. The Iraq war diaries attracted worldwide opprobrium for torture and war crimes committed by or acquiesced in by the US, leading to calls for proper investigations into the conduct of allied troops (see generally Bundle M2, Tab 352):

(i) Amnesty International condemned the US declaring they had committed '*a serious breach of international law when they handed over thousands of detainees to Iraqi security forces who, they clearly knew, were responsible for widespread and systematic torture*' (Bundle P, Tab E8).

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

(iii) Danish Prime Minister, Lars Rasmussen, promised that '*all allegations according to which Danish soldiers may have knowingly handed over detainees in Iraq to mistreatment at the hands of local authorities are regarded as very serious'* (Bundle

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

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

(v) UN High Commissioner for Human Rights, Navi Pillay, also said that '*the US and Iraq should investigate claims of abuse contained in files published on the WikiLeaks website'* (Bundle P, Tabs E52-53).

3.26. Mr Ellsberg reminded the district judge that '*The Afghan war logs and the Iraq war logs...did expose a very serious pattern of actual war crimes...reports of torture and assassination and death squads were clearly describing war crimes....What these reports [also] reveal was that...torture had become so normalised and death squads and assassination that reports of them could be entrusted to a network at the secret level available to a hundred thousand people with low level clearances. In other words, it had become normalised. That is a shocking fact'* (Ellsberg, EB/47 Tr 16.9.20, xic, p46 – unchallenged).

3.27. Speaking at the UN in Geneva following the publication of the war diaries, Mr Assange called on the US to investigate alleged abuses by US troops in Afghanistan and Iraq as evidenced in the material published by WikiLeaks (Rogers, EB/14, §C(iii) / EB/41 Tr 9.9.20, xic, p6 – unchallenged).

> *'...In coming here and presenting to the United Nations on Friday as expert witness on our discoveries in Iraq and Afghanistan, I find myself and our organisation finds itself in the rather unusual issue of being both an expert witness to human rights abuses committed by the United States government in various areas and a victim of some of those abuses ourselves. ....*
>
> *In response to the publication of this material and the material relating to Afghanistan and the assassination actions there and various other abuses, the White House and the Pentagon has taken no publicly revealed means of regress. Their only action to date has been to threaten this organization, to place the alleged military whistle-blower, Bradley Manning, into prison, where he sits now since now in Quantico facing a detention sentence of 52 years. ...*
>
> *Torture is outlawed under US law. But the law means nothing if the law is not upheld by a government. And in this case, we are seeing that laws in the United States are not being upheld by elements of the US government who are tasked to uphold them.* (Bundle M, Section 15, tab 52).

3.28. Material released by WikiLeaks enabled the general public to gain '*for the first time…[a] proper appreciation of the number of the civilians who had been killed in Iraq',* enabled '*true assessment'* of US Government '*misleading'* claims to the contrary, and '*brought about in significant part'* a '*shift in public knowledge'* regarding the reality of the situation in Iraq and Afghanistan (Rogers, EB/14, §30-31 / EB/41Tr 9.9.20, xic, p4-5 – unchallenged). As Mr Assange himself explained publicly in August 2011, WikiLeaks had exposed '*the everyday squalor and barbarity of war, information such as the individual deaths of over 130,000 people in Iraq...which were kept secret by the US Military'* (Rogers, EB/14, §C(vii) / EB/41

Tr 9.9.20, xic. p6-7 – unchallenged). Mr Assange's motivation was manifest: '*if wars can be started by lies, peace can be started by truth'* (Rogers, Tab 40, C(vii). Mr Assange was '*obviously opposed to war crimes and interested in the exposure and rendering accountable for those'* (Rogers, Tr 9.9.20, xic, p7 – unchallenged.

3.29. The disclosures about Iraq and Afghanistan were of '*key importance'* to *'evidence war crimes and human rights violations by the US and its allies'* (Stafford-Smith, EB/22, §83 – unchallenged). WikiLeaks publications, in fact, played '*a part in bringing a formal end to US military involvement in Iraq'* by evidencing '*in an irrefutable way particular criminal acts on the part of US military'* which had been *'deliberately covered up'* (Rogers, EB/14, §30). Daniel Ellsberg drew obvious parallels between the revelations he brought about in the leaking of the Pentagon Papers and their impact upon the approach to the Vietnam war, with the WikiLeaks exposures.[7] He considered the latter to be '*the most important truthful revelations of hidden criminal state behaviour'* in US history (Ellsberg, EB/27, §23 / EB/47 Tr 16.9.20, xic, p44 – unchallenged).

3.30. For his disclosures of state criminality, Mr Assange was awarded, *inter alia*, the Sydney Peace Medal, the Walkley Award for Most Outstanding Contribution for Journalism (Australia's Pulitzer), and has been nominated, year-on-year, for the Nobel peace prize (Rogers, EB/14, §C(v)-(vi) / EB/41 Tr 9.9.20, xic, p6).

[7]. See also (Hager, EB/33, §32 / EB/50 Tr 18.9.20, xic, p9-10 – unchallenged) who draws a similar parallel with the Pentagon Papers.

4. Exposing criminality is a protected political activity under s.81

4.1. It is '*the state of mind of the [US] authorities at the time of making the extradition request [which is required to be assessed] so as to establish whether or not its purpose was to punish for [prohibited] reasons'* (***Slepcik v Czech Republic*** [2004] EWHC 1224 (Admin) at §23).

4.2. The evidence summarised in section 3 above was as overwhelming as it was disturbing. Mr Assange is being prosecuted 'on account of' (in fact, prosecuted for) publications which disclose alleged US Government involvement in crimes of universal jurisdiction. As stated above, the DJ accepted that Mr Assange's disclosures were an attempt by him to bring about the disclosure of crimes and the arrest of its offenders and suspected offenders (Judgment CB/2 §147).

4.3. What the DJ failed to do, however, was to treat that activity as a protected 'political' act for the purposes of s.81.

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

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

> '*…The facts as found by the CRDD show that in this case criminal activity permeates State action. Opposition to criminal acts becomes opposition to State authorities. On these facts it is clear that there is no distinction between the anti-criminal and ideological/political aspects of the claimant's fear of persecution. One would never deny that refusing to vote because an election is rigged is a political opinion. Why should Mr. Vassiliev's refusal to participate in a corrupt system be any different? His is an equally valid expression of political opinion…*'[8]

4.5. These concepts are likewise embedded in the case law of England and Wales, and constitute imputed[9] political opinions. In ***Suarez*** [2002] 1 WLR 2663, the Court of Appeal held at §30 that:

> *…Thus, if the maker of a complaint relating to the criminal conduct of another is persecuted because that complaint is perceived as an expression or manifestation of an opinion which challenges governmental authority, then that may in appropriate circumstances amount to an imputed political opinion for the purposes of the Convention. That is made clear in the Colombian context in Gomez at 560 §22. Although, in the case of Gomez, the acts of persecution of the appellant were those of non-state actors, namely members of the armed opposition group FARC, the decision contains an illuminating discussion, replete with reference to authority, of the problems associated with the notion of imputed political opinion in a society where the borderlines between the political and non-political have been distorted so that it is difficult to draw a distinction between governmental authority on the one hand and criminal activity on the other…In such cases, the political nature of an applicant's*

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

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

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

<u>*Exposing* state criminality is likewise a direct political act/opinion in law</u>

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

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

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

> *'…The exposure of corruption itself is an act, not a belief. However it can be the outward manifestation of a belief. That belief can be political, that is to say a person who is opposed to corruption may be prepared to expose it, even if so to do may bring consequences, although the act may be in disregard of those consequences. If the corruption is itself directed from the highest levels of society or endemic in the political fabric of society such that it either enjoys political protection, or the government of that society is unable to afford protection to those who campaign against it, the risk of persecution can be said to be for reasons of political opinion.*
>
> *It is not necessary in this case to attempt a comprehensive definition of what constitutes 'political opinion' within the meaning of the Convention. It clearly is not limited to party politics in the sense that expression is understood in a parliamentary democracy. It is probably narrower than the usage of the word in connection with the science of politics, where it may extend to almost every aspect of society. <u>It suffices here to say that the holding of an opinion inconsistent with that held by the government of a country explicitly by reference to views contained in a political platform or implicitly by reference to acts (which where corruption is involved, either demonstrate that the government itself is corrupt or condones corruption) reflective of an unstated political agenda, will be the holding of a political opinion.</u> With respect, I agree with the view expressed by Davies J in Minister for Immigration & Ethnic Affairs v Y [1998] FCA (unreported, 15 May 1998, No. 515 of 98) <u>that views antithetical to instrumentalities of government such as the Armed Forces, security institutions and the police can constitute political opinions for the purposes of the Convention. Whether they do so will depend upon the facts of the particular case…'</u>*

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

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

4.9. The same point is recognised by Strasbourg where press reporting on state illegality is protected: ***Dyuldin & Kislov v Russia*** (2007) 25968/02 at §41: '*very strong reasons are required for justifying restrictions on 'political speech*'.

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

The DJ

4.11. All of this law was drawn repeatedly to the attention of the DJ; none appears in her judgment.

4.12. The result was that the DJ confronted the overwhelming – and unchallenged – evidence before her, of Mr Assange exposing US-state-level criminality, in an artificial legal vacuum. She asked herself only whether it engaged potential substantive defences known to Official Secrets Act law, or engaged Article 10 ECHR. She failed entirely to ask herself the critical question – does it engage s.81 of the Act?

The magnitude of what the DJ omitted from s.81

4.13. The *reason* why exposure of state-criminality is (as the above case law makes clear) activity which is protected by s.81 ought to be obvious. Especially exposure of state involvement in crimes of universal jurisdiction.

4.14. It ought not need re-stating that, first, torture is banned by international law and that no derogation is permitted, even in times of armed conflict or terrorist attacks. This is a *jus cogens* prohibition under customary and treaty law, specifically the UN Convention Against Torture ('CAT'), the International Covenant on Civil and Political Rights ('ICCPR') and the 1949 Geneva Conventions.[10] As a *jus cogens* prohibition, no State may enter into agreements for contracting around it, given the fundamental values for which it stands.

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

4.15. Second, under articles 5-8 of the CAT, all States have an obligation to criminalise, investigate, prosecute and punish torture wherever it occurs. Similarly, under the Rome Statute, torture amounts to a war crime or crime against humanity,[11] and '*it is the duty of every State to exercise criminal jurisdiction over those responsible for international crimes'*.[12] There is no discretion to address the breach otherwise.[13]

4.16. Third, failure by States to initiate a prompt criminal investigation into allegations of torture, is itself a *de facto* denial of the rights under the CAT and the ICCPR, as well as customary international law.[14] Failure by States to do so eviscerates the prohibition against torture, and itself violates Article 3 ECHR.[15] Further, as stated by the UN High Commissioner for Human Rights and the Human Rights Council, it is a denial of the related rights to seek truth and accountability in the face of gross and systematic violations of human rights, available to victims and society in the face of institutional policies enabling their occurrence.[16]

4.17. It is therefore the duty of every state (including the UK)[17] to investigate, prevent and (where appropriate) prosecute crimes of universal jurisdiction, including war crimes (Geneva Conventions Act 1957; Geneva Conventions (Amendment) Act 1995; International Criminal Court Act 2001) and torture (s.134 of the Criminal Justice Act 1988).

4.18. These duties engage some of the most firmly entrenched principles of international law and practice, as summarised by the House of Lords in ***A v Secretary of State for the Home Department*** [2006] 2 AC 221 at §33-34 per Lord Bingham:

i. The international prohibition on torture has '*enhanced status'* as a '*jus cogens or peremptory norm'* of international law to which universal jurisdiction attaches (as recognised in *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3) [2000] 1 AC 147, 197–199*);

ii. The special status of torture in international law, as '*authoritatively explained by the International Criminal Tribunal for the Former Yugoslavia in Prosecutor v Furundzija (unreported) 10 December 1998, Case No IT-95–17/T 10',* which arises due to the '*universal revulsion against torture'* and the importance attached by states to its

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11. Rome Statute, Arts. 7, 8.
12. Rome Statute, Preamble.
13. CAT, Arts. 4-8; Rome Statute (2002), Arts. 7(1)(f), 8(2)(c); ICTY, ***The Prosecutor v Tadic***, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, §128-142.
14. CAT, Arts. 12, 14; see also Committee Against Torture, General Comment, no. 3: Implementation of Article 14 by State Parties, paras. 17, 25 (2012) (the right to redress encompasses concepts of an effective remedy and reparation. It further entails entails restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition); ICCPR, Arts. 2 (3), 7; see also Human Rights Committee, General Comment, no. 7, para. 1 (1982); General Comment no. 20, para. 14 (1992); General Comment no. 31, para. 15 (2004).
15. See ECtHR, ***Aksoy v Turkey***, §98 (1996); ECtHR, ***Assenov v Bulgaria,*** §102 (1998). See also ECtHR, ***Labita v Italy,*** §131 (2000); ***Ilban v Turkey*** [GC] (no 22277/93) ECHR 2000-VII, §89-93; IACtHR, ***Bueno-Alves v Argentina*** (2007) Series C No. 164, §88-90 and 108.
16. See, e.g., Report of the UN Office of the High Commissioner for Human Rights on the Right to Truth, E/CN.4/2006/91 (8 February 2006); Human Rights Commission and Human Rights Council (resolution 2005/66 of 20 April 2005 of the Commission; decision 2/105, 27 November 2006; resolutions 9/11, 18 September 2008, and 12/12, 1 October 2009 of the Council). See also Yasmin Naqvi, The Right to Truth in International Law, International Review of the Red Cross, No. 862, 2006.
17. Mr Assange was in the UK at the time of these exposures.

eradication such that a '*cluster of treaty and customary rules on torture'* have led to it '*acquiring a particularly high status in the international normative system*'.

iii. There are three fundamentally important features of the prohibition against torture, as described in *Furundzija,* namely:

(a) There is an obligation on states '*not only to prohibit and punish torture, but also to forestall its occurrence',* such that both actual and potential breaches of the prohibition against torture are barred. International rules prohibit '*(i) the failure to adopt the national measures necessary for implementing the prohibition and (ii) the maintenance in force or passage of laws which are contrary to the prohibition'.* Thus states must '*immediately set in motion all those procedures and measures that may make it possible, within their municipal legal system, to forestall any act of torture or expeditiously put an end to any torture that is occurring',* and are precluded from enacting '*any national legislative act authorising or condoning torture or at any rate capable of bringing about this effect*'.

(b) The prohibition on torture imposes obligations on states owed '*towards all the other members of the international community, each of which then has a correlative right'* such that a breach of the obligation '*simultaneously constitutes a breach of the correlative right ... and gives rise to a claim for compliance'.* International bodies which are charged with '*monitoring compliance with treaty provisions on torture, ... enjoy priority over individual states in establishing whether a certain state has taken all the necessary measures to prevent and punish torture'.*

(c) That the *jus cogens* nature of the prohibition on torture demonstrates that it has '*become one of the most fundamental standards of the international community'* giving a clear indication to all members of the international community and to individuals that '*torture is an absolute value from which nobody must deviate'* and has the effect of de-legitimising '*any legislative, administrative or judicial act authorising torture'* and any rules providing for torture would be '*null and void ab initio'.* Thus '*perpetrators of torture acting upon or benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign state, or in their own state under a subsequent regime'* and regardless of any *'national authorisation by legislative or judicial bodies to violate the principle banning torture, individuals remain bound to comply with that principle.'* Further, *'every state is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction.'*

iv. The prohibition on torture is one of few issues upon which international legal opinion strongly coincides:

> *Offenders have been recognised as the 'common enemies of mankind' (Demjanjuk v Petrovsky (1985) 612 F Supp 544, 566), Lord Cooke of Thorndon has described the right not to be subjected to inhuman treatment as a 'right inherent in the concept of civilisation' (Higgs v Minister of National Security [2000] 2 AC 228, 260), the Ninth Circuit Court of Appeals has described the right to be free from torture as 'fundamental and universal' (Siderman de Blake v Argentina (1992) 965 F 2d 699, 717) and the UN Special Rapporteur on Torture (Mr Peter Koojimans) has said that 'If ever a phenomenon was outlawed unreservedly and unequivocally it is torture' (Report of the Special Rapporteur on Torture, E/CN 4/1986/15, para 3).*

v. The *'jus cogens erga omnes nature of the prohibition of torture requires member states to do more than eschew the practice of torture'* and as described by the UN Human Rights Committee in §8 of *General Comment 20 (1992) on article 7 of the ICCPR,* it is '*not sufficient ... to prohibit such treatment or punishment or to make it a crime*', states must also inform the Committee of what steps have been taken to '*prevent and punish*

acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction'.

4.19. These obligations and duties concerning the investigation, prevention and prosecution of torture are, as the House of Lords made clear, now embodied in domestic law in the provisions of s.134 of the Criminal Justice Act 1988. They are the same obligations and duties which are also embodied in the Geneva Conventions Act 1957; Geneva Conventions (Amendment) Act 1995 and International Criminal Court Act 2001 so far as war crimes and other crimes of universal jurisdiction are concerned. They are, after all, obligations which the UK fully acknowledges in respect of all crimes of universal jurisdiction. According to the UK Government:

> '*...The United Kingdom is committed to upholding international law and holding those who commit the most serious crimes accountable for their actions. It is UK Government policy that the United Kingdom should not provide a safe haven for war criminals or those who commit other serious violations of international law. We are committed to ending impunity for such crimes, and will encourage action to be taken to bring such individuals to justice wherever possible, within the rule of law and depending on the sufficiency of the available evidence...*' [18]

4.20. These investigatory / prosecutorial obligations sit among a developed body of international law principles concerning state-criminality and its prohibition on impunity. There is, for example, an extensive body of international materials concerning the '*right to the truth*' regarding serious human rights violations. The public has a right to know about the existence of such violations and states have a concomitant duty not to conceal them: see e.g. ***El-Masri v Macedonia*** (2013) 57 EHRR 23 at §191-193; ***Al Nashiri v Romania*** (2019) 68 EHRR 3 at §641; UN Commission on Human Rights' (OHCHR) Resolution 2005/66 on the '*Right to the truth*';[19] UN Human Rights Council Resolution 21/7 on the '*Right to the truth*' (27 September 2012);[20] UN General Assembly Resolution 68/165 on the '*Right to the truth*' (21 January 2014);[21] UN Economic and Social Council '*set of principles for the protection and promotion of human rights through action to combat impunity*'.[22]

4.21. The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms, for example, published in 2013 *Framework Principles for securing the accountability of public officials for gross or systematic human rights violations committed in the context of State counter-terrorism initiatives*.[23] This explains that:

> *'The Right to Truth in International Human Rights Law*
>
> *23. The principles of international law that govern accountability for such violations have two complimentary dimensions. Put affirmatively, international law nowadays*

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18. See generally: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/709126/universal-jurisdiction-note-web.pdf.
19. Available at: https://www.refworld.org/docid/45377c7d0.html
20. https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G12/173/61/PDF/G1217361.pdf
21. https://documents-dds-ny.un.org/doc/UNDOC/GEN/N13/449/35/PDF/N1344935.pdf
22. https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf
23. https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-52_en.pdf

protects the legal right of the victim and of the public to know the truth. The right to truth entitles the victim, his or her relatives, and the public at large to seek and obtain all relevant information concerning the commission of the alleged violation, including the identity of the perpetrator(s), the fate and whereabouts of the victim and, where appropriate, the process by which the alleged violation was officially authorised....

...

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

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

4.22. In summary, it is the right, and indeed the duty of every UK resident (as Mr Assange was at the time of these publications) to assist the UK authorities to fulfil these duties to investigate, prevent and (where appropriate) prosecute crimes of universal jurisdiction.

4.23. And, consistently with international law, the law must – and s.81 does - protect those like Mr Assange who do so; from prosecution for that act by the state whose criminality is exposed.

4.24. In September 2013, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression published a report[24] which reiterated amongst other things that: *'Elucidating past and present human rights violations often requires the disclosure of information held by a multitude of State entities. Ultimately, ensuring access to information is a first step in the promotion of justice and reparation'* (§5). To this end, '*International human rights bodies and mechanisms have recognized and developed the right to truth as a distinct right*' (§15). The right to truth '*is closely associated with the right to access information*', which '*is an essential element of the right to freedom of expression*' (§17-18). In this regard: '*A particular dimension of the right to seek and receive information concerns access to information on human rights violations. Such access often determines the level of enjoyment of other rights, is a right in itself and, as such, has been addressed by a number of human rights instruments and documents. It has also been the object of decisions and reports from various human rights mechanisms and bodies'* (§21). Ultimately:

'...there is an overriding public interest in disclosure of information regarding gross violations of human rights or serious violations of international humanitarian law, including crimes under international law, and systematic or widespread violations of

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

the rights to personal liberty and security. Such information may not be withheld on national security grounds in any circumstances...' (§66)

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

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

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

4.25. These are the essential reasons why the case law establishes that exposure of state-criminality is a protected political act, for which extradition cannot be granted.

4.26. None of this was appreciated by the DJ. Had she approached s.81 in the way she should have, it could have given of only one answer: Mr Assange is being prosecuted (and his extradition is being sought for the purposes of prosecuting him) for behaviour (exposure of US state-level involvement in crimes of universal jurisdiction) which is protected by s.81.

5. The chronology which the DJ's error caused her to ignore under s.81

5.1. Because the DJ failed to appreciate that exposure of state-level crime was relevant to, and in fact directly engaged s.81, she thereby also failed to consider any of the following body of evidence against that critical legal backdrop. There was, in short, overwhelming evidence before the DJ that Mr Assange's prosecution is not only '*on account of'* (indeed, in respect of) his exposure of state-level crime, it is also *directly motivated* by (and part of a pattern of) a US Governmental strategy to erect and maintain impunity for those responsible for those crimes.

The chronology the judge ignored

5.2. The chronology the judge failed to have regard to under s.81 was, and is, extraordinary. The relevant chronology that was set out before the DJ, is contained in part 4 of the Applicant's closing submissions and is exhibited hereto.

5.3. To summarise briefly, President Trump and other members of his administration, including CIA director Pompeo and Attorney General Sessions, expressly denounced Julian Assange and WikiLeaks and presented his arrest as '*a priority'* and as a reversal of the approach of the previous administration. The unprecedented attack was accompanied by wider attacks upon criticism and exposure of US government crimes and malpractice, with President Trump referring to journalists as the *"Enemy of the People"* and to the need to eradicate leaks and leakers. Pompeo's description of WikiLeaks as a hostile non-state intelligence service paved the way for sinister and even murderous plans to monitor Mr Assange's every action; to plan his rendition; and even to assassinate him whilst he was sheltering in the Ecuadorian Embassy. The initiation of the prosecution in December 2017 has to be seen against this background. Indeed new evidence not available at first instance states that the initiation and timing of the first criminal complaint arose from pressure to provide for his criminal prosecution in the event of rendition.

The background

5.4. The decision to target and then to prosecute Julian Assange was the direct result of his political stance as a person seeking to expose the full extent of state criminality on the part of the US (see part 4). The underlying motivation for his prosecution arose from a number of overlapping factors:

i. The perceived and actual threat that Julian Assange posed to the secrecy and impunity of unlawful state actions, such as torture, rendition and extra-legal detention. In this regard, the targeting of Julian Assange was an integral part of the overall phenomenon of securing and maintaining US impunity for such international crimes, marching in step with US attacks on the ICC and any other body seeking to call the US to account. The DJ wholly failed to reflect this crucial aspect in her judgment.

ii. The perceived need to punish and deter anybody within or outside the US who sought to expose state criminality on the part of the US, including sources such as Chelsea Manning, publishers such as Julian Assange and WikiLeaks, and furthermore NGOs, lawyers and any ICC personnel who sought to hold the US to account.

iii. The need to disable Julian Assange from his continuing exposure of the misdeeds and criminal modus operandi of the CIA (Vault 7).

5.5. Mr Assange's prosecution forms part of a clear chronology of illegal[25] US Governmental efforts to ensure impunity for those involved in the crimes Mr Assange helped to expose and to prevent their exposure. That chronology discloses a US determination to take '*whatever steps necessary'*, illegal or otherwise, to prevent and frustrate investigations of the crimes Mr Assange helped to expose and to prevent and frustrate subsequent judicial proceedings.[26] Since the DJ almost entirely ignored this aspect of the case) save for one passing reference at CB/2 §173F), it is necessary to recapitulate the key facts in these written submissions, as set out below.

<u>The US approach to the investigation of internationally prohibited crimes including US strategies to maintain secrecy and obtain impunity: 2002-2009</u>

5.6. <u>The ICC</u>: In 1998, the Rome Statute had created the ICC to prosecute international crimes, including crimes against humanity and war crimes. The US was, originally, a signatory.

5.7. In 2002, in the wake of 9/11 and the US interventions in Afghanistan and thereafter in Iraq, the US enacted measures and introduced new definitions providing for covert actions to be undertaken by CIA and military personnel. The actions taken included the use of torture, extreme ill-treatment and unlawful rendition to CIA 'black sites' and in Guantanamo Bay. As one example (the subject matter of a WikiLeaks exposé), in 2002 Abd Al-Rahim Al-Nashiri[27] was captured in 2002 in Dubai, and spent four years in secret CIA black site prisons in Afghanistan, Thailand, Poland, Morocco, Romania, before Guantanamo. His treatment included water-boarding. Gina Haspel (see below) was directly involved in Al Nashiri's treatment.[28] Black sites continued to at least 2006. Guantanamo continues today.

5.8. After the commencement of its 'war on terror' in Afghanistan, President Bush informed the UN Secretary General in 2002 that '*the US did not intend to ratify the Rome Statute or recognize obligations under it'* (Lewis 5, EB/35, §8) (Lewis 5, EB/35 exhibit 3, p4). The US then put in place bi-lateral Article 98 agreements[29] with over 100 ICC states to ensure other states would not '*arrest or turn over US personnel to face ICC prosecution'* (Lewis 5, EB/35, §8) (Lewis 5, EB/35 exhibit 3, p4, 8).[30]

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25. Attempts by the US government to obtain impunity for its war crimes is a separate, egregious, violation of international law. Impunity is, of course, expressly forbidden under the UN Torture Convention.

26. The chronology was provided by Mr Lewis (EB/43 Tr 14.9.20, p6, 14), and was unchallenged.

27. See ***Al Nashiri v Poland*** (2015) 60 EHRR 16; ***Al Nashiri v Romania*** (2019) 68 EHRR 3. See also ***Abu Zubaydah v Lithuania*** (2018) 46454/11.

28. She also, for example, oversaw the torture of Abu Zubayda (described by John McCain as '*one of the darkest chapters in American history*').

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

30. Many of the backdoor diplomatic efforts to procure Article 98 agreements - and obtain impunity for American operatives - were themselves revealed by the Wikileaks cables, and as one cable described, consisted of '*a carrot and stick approach'* being taken by the US '*to help those countries that sign Article 98 agreements and cut aid to those that do not*' (Bundle M2, tab 108, p4-10). The cables reveal '*sustained pressure'*, '*bullying'* and countries unwilling to put them before their own

5.9. The US then passed legislation in the same year which actively prevented US cooperation with the ICC, and a further amendments in 2004 which threatened cuts in aid to foreign states that would not sign Article 98 agreements; aid cuts were in fact implemented against 7 ICC states and two intergovernmental programmes (Lewis 5, EB/35, §8) (Lewis 5, EB/35 exhibit 3, p8).

5.10. Destruction of evidence: In 2005, the CIA destroyed tapes of Al Nashiri's water-boarding, and other acts of torture committed at black sites (on orders given by Gina Haspel).[31] Following press reports, the Senate Intelligence Committee commenced an inquiry into their destruction.

5.11. Also in 2007, after the existence of the use of black sites had been the subject of journalists' investigations, the program was acknowledged by President Bush. Press reports emerged that CIA Director of National Clandestine Service, Jose Rodriguez and his then Chief of Staff Gina Haspel, had further destroyed 100+ hours of video recordings of interrogations[32].

5.12. No US accountability: President Obama was inaugurated in January 2009. On his second day in office, he signed an Executive Order closing the CIA's secret sites and ending use of a number of '*enhanced interrogation techniques*'. At the same time, however, he decreed immunity for any official involved in those techniques: '*This is a time for reflection, not retribution ... Nothing will be gained by spending our time and energy laying blame to the past'*. Under President Obama, the DoJ initiated investigations (under John Durham) into abuses against detainees in CIA custody confined only to abuses *beyond* those which had been authorised by the DoJ.

5.13. As is clear from e.g. the judgment of the ECtHR in ***El-Masri*** at §63, 191, it was rendered impossible to bring cases against US agents in the US due to the government's reliance upon secrecy, which US Courts have upheld (see El-Masri, EB/24, §36-38 – agreed s.9) (Goetz 2, EB/28, §8 – unchallenged).[33] The June 2020 admissibility decision of the Inter-American Commission on Human Rights, regarding the rendition and torture of four petitioners,[34] found

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Parliament because of the US's increasingly notorious conduct in Iraq, with Parliaments then being bypassed (ibid). See generally M11/90-91; 114; 'US War Crimes and the ICC', WikiLeaks Files, pgs.159-180, (Bundle M, 6a).

31. The evidence before the DJ was that **(a)** The CIA had recorded videos of some of its interrogations in Thailand, which '*are thought to have depicted some of the harshest interrogation techniques used by the C.I.A. during the two years after the Sept. 11 terrorist attacks, including the simulated drowning technique called waterboarding*' (Vol L1, tab 46). **(b)** In 2005, '*immediately after the Washington Post reported the existence of the CIA black sites and the New York Times reported that the CIA Inspector General had questioned the legality of the agency's torture program*', the CIA destroyed its recordings of detainees being tortured (Vol L1, tab 47). **(c)** Notably, the destruction of these videos took place after a congresswoman asked the CIA to preserve the tapes (Vol L1, tab 47). **(d)** On 2 March 2009, The New York Times reported that the government '*revealed for the first time the extent of the destruction of videotapes in 2005 by the Central Intelligence Agency, saying that agency officers destroyed 92 videotapes documenting the harsh interrogations of two Qaeda suspects in C.I.A. detention*' (Vol L1, tab 46). This information was released in response to an ACLU FOIA lawsuit.

32 The New York Times, *C.I.A. Destroyed 2 Tapes Showing Interrogations*, Mark Mazzetti, 7 December 2007, https://www.nytimes.com/2007/12/07/washington/07intel.html

33. See also generally (Bundle M2, tab 108).

34. Including two UK residents.

that the US created:

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

5.14. Even though the individual perpetrators of the crimes were clearly identifiable, no one, including those individuals, has been prosecuted by the US (Lewis 5, tab 81, §12, 40). Presidential clemency (and condonement) has been issued in every case in which prosecutions (of junior personal) have been attempted or contemplated for other isolated acts of criminality in Afghanistan (Lewis 5, EB/35, §40-41).

The Manning disclosures

5.15. In sum, up to 2009, no meaningful information was being made known in respect of, and no-one was answerable for, US crimes of universal jurisdiction. In November 2009, Manning started (according to her evidence) to monitor WikiLeaks website as one '*dedicated to exposing illegal activities and corruption'* (Boyle 1, EB/3, exhibit 2, p6751). In January-May 2010, Manning downloaded and passed to WikiLeaks evidence of US criminality; the subject matter of section 3 above. Manning was arrested on 27 May 2010.

5.16. In addition to exposing the predicate criminality itself, the Manning disclosures (in particular the cables) also evidenced the lengths the US government had gone to to secure unlawful impunity for those crimes.[35] For example, the Manning disclosures included:

(i) The abovementioned Article 98 agreements with ICC States Parties, and their provenance (above, fn. 29);

(ii) Evidence of US Governmental active interference in the German and Spanish investigations in Mr El-Masri's case. They revealed '*pressure from the US government [brought upon the German government] not to seek extradition of the rendition team'* and that the US government had *'interfered to block judicial investigation in Germany and similarly intervened in Spain'* where his rendition flight had travelled from (El-Masri, EB/24, §26-28 - agreed s.9) (Goetz 2, EB/28, §4, 10 / EB/46 Tr 16.9.20, xic, p8-10 – unchallenged) (Stafford-Smith, EB/22, §95 / EB/40 Tr 8.9.20, xic, p5 – unchallenged) (Bundle M2, Tabs 89-93). As Mr el-Masri himself

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[35]. In *The WikiLeaks Files: the World According to the US Empire* (Bundle M, Section 6, tab 6a), published in July 2015, Mr Assange described US policy in relation to the International Criminal Court, as '*a rich case study in the use of diplomacy in a concerted effort to undermine and international institutions'* and described the value of analysing the content of individual cables alongside the entire archive: '*Only by approaching this corpus holistically—over and above the documentation of each individual abuse, each localized atrocity—does the true human cost of empire heave into view*'. A chapter from this book, published by Verso, entitled '*US War Crimes Immunity and the International Criminal Court'* was re-published online in 2018 as the US hostility to the ICC progressed (Bundle M Continuation, Section 11, Tab 108) – see below.

describes:

> '*...At each stage of my raising my predicament, governments, both my own and those who played a direct part, have sought to discredit my account and in a number of different ways attempted to silence me. But, at each juncture it has been journalists and investigators informed by WikiLeaks documents that have been able, through their painstaking and diligent work, to corroborate my story and restore credibility to my account...'* (El-Masri, EB/24, §34 - agreed s.9).

(iii) Likewise, in Italy, the only country in the world to prosecute and convict CIA agents for extraordinary rendition (in that case Abu Omar who was kidnapped from the streets of Milan), the cables revealed direct evidence of '*secret and relentless pressures exerted by US diplomacy, which pressured the highest echelons of the Italian governments for years'* to prevent '*the extradition of [the] 26 US nationals convicted'* and appears to have resulted in pardons being issued to them by various Italian political administrations (Maurizi, EB/30, §28-42 - agreed s.9).

(iv) The cables similarly demonstrated US interference with other rendition investigations in Spain and Poland[36] (Stafford-Smith, EB/22, §95-96 – unchallenged).

5.17. In short, Mr Assange also exposed extraordinary (and blatantly unlawful) steps by the US over the years since 2003 to secure impunity for its state actors involved in this serious criminality (in particular the CIA involvement in renditions and torture) from judicial accountability. Even in the face of arrest warrants issued by Germany (El-Masri, EB/24, §26-28 - agreed s.9) (Goetz 2, EB/28, §4, 10-12 / Tab 46 Tr 16.9.20, xic, p8-10 – unchallenged), and by Italy (Maurizi, EB/30, §28-42 - agreed s.9), the US had managed to subvert the international legal order to secure impunity (Stafford-Smith, EB/22, §95-96 – unchallenged) (Bundle M2, tabs 114, 151-158).

After the Manning disclosures US approach of secrecy and impunity continues

5.18. In 2010, DoJ prosecutor John Durham declined to file criminal charges regarding the destruction of interrogation tapes. In August 2012, the DoJ closed the Durham investigation into 101 cases of CIA abuse (including two deaths of detainees) without any criminal charges.

5.19. On 30 July 2013, Manning on the other hand was convicted by Court Martial for exposing those crimes, and sentenced to 35 years' imprisonment.

5.20. On 9 December 2014, a summary of the Senate CIA black-sites report was published, but only in a heavily redacted format.[37] Congressman Pompeo said intelligence agents whose acts were investigated by the senate were '*heroes'* and the publication of the senate report '*today has put American lives at risk*'.

5.21. On the campaign trail in February 2016, Mr Trump said '*Torture works*'. Mr Pompeo said '*Gitmo has been a goldmine of intelligence*'. Both Mr Trump and Mr Pompeo unabashedly

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[36]. The Polish government granted Mr Al-Nashiri victim status and commenced a criminal investigation of Polish officials regarding the CIA black site in 2008.

[37]. See e.g. ***Abu Zubaydah v Lithuania*** (supra) at §70-89; see also https://www.intelligence.senate.gov/sites/default/files/publications/CRPT-113srpt288.pdf

embraced '*torturing folks*' and publicly asserted the entitlement of the US to resort to torture and waterboarding in the '*national interest'*.[38]

Approach of Trump Administration to the investigation and exposures of state involvement in grave criminality

5.22. On 14 November 2016, five days after Trump became President-elect, the ICC Office of the Prosecutor (OTP) announced its decade-long Preliminary Examination had provided '*a reasonable basis to believe that ... members of the US armed forces and the US Central Intelligence Agency ('CIA') resorted to techniques amounting to the commission of the war crimes of torture, cruel treatment, outrages upon personal dignity, and rape ... punishable under articles 8(2)(c)(i) and (ii) and 8(2)(e)(vi) of the Statute [of Rome] ... Members of the CIA appear to have subjected at least 27 detained persons to torture, cruel treatment, outrages upon personal dignity and/or rape on the territory of Afghanistan and other States Parties to the Statute (namely Poland, Romania and Lithuania) between December 2002 and March 2008. The majority of the abuses are alleged to have occurred in 2003-2004 ... These alleged crimes were not the abuses of a few isolated individuals. Rather, they appear to have been committed as part of approved interrogation techniques in an attempt to extract 'actionable intelligence' from detainees ... The Office considers that there is a reasonable basis to believe these alleged crimes were committed in furtherance of a policy or policies ... [The OTP] will make a final decision on whether to request the Pre-Trial Chamber authorisation to commence an investigation ... imminently'*. [39]

5.23. The ICC was focussed on the CIA's so-called 'Enhanced Interrogation Techniques' (EITs) to obtain intelligence from detainees, included stress positions, deprivation of sleep beyond 72 hours, grasp, holding and slapping, confinement in cramped spaces containing insects, and water-boarding. To complement the use of EITs, harsh conditions were imposed in detention, including the use of solitary confinement, hooding, black-out goggles and sound-blocking earphones, exposure to extreme cold and heat, use of dogs, enforced nudity, diapering, sexual humiliation, and so-called '*rectal rehydration'* and '*feeding*'.[40]

5.24. The unchallenged evidence before the DJ was that the ICC's investigation into these crimes

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

[39]. https://www.icc-cpi.int/sites/default/files/iccdocs/otp/161114-otp-rep-PE_ENG.pdf, at §192-230.

[40]. In a declassified 2015 letter to his lawyer, CIA detainee Ammar al-Baluchi, who had been transferred to Guantánamo Bay, Cuba, described what EITs meant in practice: *'...When I was suspended to the cieling (sic) there were 20 or more elements at play but before I get into that let me stop. When you read the list of EIT (There are more stuff which were never mentioned in the list) for example you would find prolonged standing or even suspention (sic) and it misleads to think that the US Gov agents were using one torture method at a time. Now back to suspention (sic), I wasn't just being suspending to the cieling (sic) I was naked, starved, dehydrated, cold hooded, verbally threatened, in Pain from the beating and waterdrowning as my Head smashed by hitting against the wall for Dozen and Dozen of times my ears were exploding from the Blasting harsh music (which is still stuck in my Head) sleep deprived for weeks, I was shacking (sic) and trembling my legs barely supported my weight as my Hands were pulled even higher above my Head after I complained that the Handcuffs were so tight as if cutting through my wrists, then my legs start to swallow (sic) as a result of long suspention (sic) I start screaming and the Doctor came with a taPe measure, wrapped it around my leg and to my utmost shock the Doctor told the Interrogators NO that wasn't enough and my leg should get more swollen !!...'*

was founded on *inter alia* the WikiLeaks disclosures (Lewis 5, EB/35, §9).[41] WikiLeaks' materials, and Mr Assange, would be '*essential'* to any ICC prosecution (Lewis 5, EB/35 §16 / EB/43 Tr 14.9.20, p14 – unchallenged). For example, **(a)** the Prosecutor's public redacted investigation request relies upon the '*CIA cables*' reviewed by the US Senate Select Committee on Intelligence (Bundle Q, tab 11, p155), **(b)** Likewise, Mr el-Masri's complaint to the ICC, for example, relies upon the ECtHR judgment in his case, and the WikiLeaks cables the ECtHR relied upon (El-Masri, EB/24 §43 - agreed s.9). **(c)** The ICC investigation also names Abdul al-Rahim Ghulam Rabbani (Stafford-Smith, EB/22, §59), confirmed by WikiLeaks cables to have been subject to rendition and torture (above, §3.13). In short, Mr Stafford-Smith's evidence (also unchallenged) was that the allegations before the ICC were '*based, in part, on the documentation of torture and abuse that came through WikiLeaks*' (EB/40 Tr 8.9.20, xic, p12).

2017: The intensification of US actions under the new Administration

5.25. In relation to the investigation of war crimes by the ICC, the words and actions of senior Trump Administration appointees are of unprecedented aggression. Both investigators and facilitators of key revelations were the subject of denunciations and attacks. Thus attacks were launched not only on Mr Assange himself but also, extraordinarily, the International Criminal Court and its prosecutors.

5.26. On 20 November 2017, ICC Prosecutor Bensouda submitted a request to the pre-trial chamber to open a formal investigation against the US in respect of the war crimes committed by US troops, and by the CIA, in Afghanistan and elsewhere in connection with the '*war on terror'* in Afghanistan (Lewis 5, EB/35, §13) (Lewis 5, EB/35 exhibit 3, p2-4, 9-10).

5.27. Thereafter there was an '*unprecedented string of attacks and threats on the bona fides and legitimacy of the ICC'* (Lewis 5, EB/35 §14). On 8 December 2017, for example, at the Sixteenth Session of the Assembly of States Parties, the US Government issued a statement to the ICC that it would '*regard as illegitimate any attempt by the Court to assert the ICC's jurisdiction of American citizens'*[42].

5.28. These developments coincided with developments in the prosecution of Mr Assange. Thus a provisional request for Mr Assange's extradition was sent on 22 December 2017 and the Grand Jury indictment followed on 6 March 2018 – the full history of the prosecution is dealt with in section 6 below.

5.29. In April 2018, Gina Haspel (Deputy CIA Head March 2017 to April 2018) was nominated by President Trump as Director of the CIA (after Mr Pompeo, CIA Director, moved to become Secretary of State). On 9 April 2018 John Bolton was appointed as the US National Security Adviser.

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[41]. In precisely the same way that the ECtHR's concurrent (and then pending) investigations into the black-site detention and torture of Abu Zubaydah was founded on *inter alia* the WikiLeaks disclosures. See ***Abu Zubaydah v Lithuania*** (supra) at §93-95, 135-141, 147.

[42] https://www.justsecurity.org/wp-content/uploads/2017/12/united-states-statement-international-criminal-court-icc-afghanistan-december-2017.pdf

5.30. On 10 September 2018, John Bolton said the US '*will use <u>any means necessary</u> to protect our citizens and those of our allies from unjust prosecution by this illegitimate court'*, referring to the ICC's investigation (Lewis 5, EB35 §15) (Lewis 5, EB/35 exhibit 3, p11). He threatened retaliation against any ICC staff involved in the Afghan investigation and against any country co-operating with it, including to *'<u>prosecute them in the US criminal system</u>'. 'We will do the same for any company or state that assists an ICC investigation of Americans*' (Lewis 5, EB/35 §15) (Lewis 5, E B/35exhibit 3, p12).[43] What, of course, was let slip there was the US Government's preparedness to use (abuse) the US criminal justice system to '*prosecute'* ICC personnel (and even judges) in order to preserve its impunity from the ICC's judicial oversight.

5.31. Secretary of State Pompeo in a 4 December 2018 speech to NATO, stated that the US would *'take real action to stop rogue international courts...from trampling on our sovereignty…and all our freedoms...We will take all necessary steps to protect our people...from unjust prosecution...'* (Lewis 5, EB/35 §18) (Lewis 5, EB/35 exhibit 3, p13) (Lewis 5, EB/35 exhibit 7).

5.32. This coincided with developments relevant to the prosecution of Julian Assange. Thus Manning, the provider of data relevant to ICC's inquiry, was subpoenaed to testify before a Grand Jury in respect of Mr Assange. On 18 March 2019, she was held in contempt and imprisoned in isolation.[44]

5.33. On 15 March 2019, Mr Pompeo, announced that visas would be denied to all ICC staff investigating US personnel, specifically stating that the US would be *'prepared to take additional steps, including economic sanctions, if the ICC does not change its course'* (Lewis 5, EB/35 §20). '*His remarks were timed as part of a continued effort to convince the ICC to change course'* (Lewis 5, EB/35 exhibit 3, p14) (Lewis 5, EB/35 exhibit 8-9) (Bundle M2, tab 115). The US then did revoke the ICC prosecutor's visa (Lewis 5, EB/35 §19) (Lewis 5, EB/35 exhibit 3, p14) (Bundle F2, tab 31).

5.34. On 11 April 2019, Mr Assange was removed from the Embassy and arrested on a provisional extradition request.[45]

5.35. Two weeks later, on 19 April 2019, the ICC did indeed '*change course'*. Despite finding a reasonable basis to believe that '*members of the US armed forces and the CIA committed the war crimes of torture and cruel treatment, outrages upon personal dignity, and rape and*

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43. On 25 September 2018, President Trump gave a speech to the UN General Assembly at which he stated the US considered that the ICC had '*no jurisdiction, no legitimacy and no authority*' and he would never '*surrender America's sovereignty to an unelected, unaccountable, global bureaucracy*' but rather '*embrace the doctrine of patriotism'* to defend America from '*global governance'*, as well as '*other, new forms of coercion and domination*' (Lewis 5, EB/35 §17) (Lewis 5, EB/35 exhibit 6). Mr Bolton made a further speech in November 2018, stating: '*...The ICC is an illegitimate, unaccountable, and unconstitutional foreign bureaucracy that has the audacity to consider asserting jurisdiction over American and Israeli citizens...'* (Lewis 5, EB/35 §18) (Lewis 5, EB/35 exhibit 3, p13) Bundle F2, tabs 4-6).

44. Following such treatment (condemned as inhuman by the UN Special Rapporteur on Torture) she '*attempted to take her own life on March 10 2020 after nearly one year in prison'* (See Boyle 2, EB/26 §7–12).

45. And his privileged legal papers were seized and conveyed to Ecuador from where they were later transferred to the US (Peirce 2, EB/11).

other forms of sexual violence pursuant to a policy approved by the US authorities' and finding that these incidents fall within the subject matter jurisdiction of the Court as a war crime, the ICC Pre-trial Chamber nonetheless refused the Prosecutor's request to open an investigation as '*not in the interests of justice'* (Lewis 5, EB/35 §22) (Lewis 5, EB/35 exhibit 3, p2, 14) (Bundle F2, tab 28).[46] The Pre-Trial Chamber noted that '*changes within the relevant political landscape both in Afghanistan* ***and in key states****…make it extremely difficult to gauge the prospect of securing meaningful co-operation'*[47].This decision of the Pre-Trial Chamber was widely commented on as a case of the Chamber buckling under US pressure. But it was claimed by the Trump administration to be a '*major international victory'*[48]. The OTP appealed (with significant international support) to the Appeals Chamber[49].

5.36. On 5 March 2020, the ICC's Appeal Chamber unanimously overturned the Pre-Trial Chamber's decision and sanctioned the investigation (Lewis 5, EB/35 §26) (Lewis 5, EB/35 exhibit 12) (Bundle F2, tab 28) (Bundle F2, tab 53). That investigation continues today.

5.37. On 11 June 2020, President Trump issued an executive order asserting that the attempt by the ICC to *'investigate, arrest, detain, or prosecute any United States personnel without the consent of the United States…constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States'*. Announcing the order, US Attorney General Barr stated '*those who assist the ICC's politically motivated investigation of American service members and intelligence officers without the United States' consent will suffer serious consequences. The Department of Justice fully supports these measures'*.[50] The order imposes economic sanctions against anyone who engages in or assists in any way the ICC investigation and blocking entry of those same people into the US, as well as ICC staff, their agents and their families (Lewis 5, EB/35 §28) (Lewis 5, EB/35 exhibit 13) (Bundle F2, tab 43) (Stafford-Smith, EB/22 §60). It reflects a regime previously reserved for *'terrorist groups, dictators and human rights abusers',* turning it instead onto *'international lawyers and human rights defenders'* (Lewis 5, EB/35 §33). It is '*legally outrageous'* (Stafford-Smith, EB/40 Tr 8.9.20, xic, p12). '*Assertions made, for example, that the ICC conducting a proper legal investigation into torture is somehow a threat to national security, the president of the United States has just made that statement in an executive order, I think that is manifestly absurd*' (Stafford-Smith, EB/40 Tr 8.9.20, xx, p21).

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46. https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF
47 https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF
48 https://www.bbc.co.uk/news/world-asia-47912140
49 https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_03060.PDF
50. https://www.state.gov/secretary-michael-r-pompeo-at-a-press-availability-with-secretary-of-defense-mark-esper-attorney-general-william-barr-and-national-security-advisor-robert-obrien/

6. The Events Leading to the Prosecution That the DJ Failed to Appreciate

6.1. When Chelsea Manning was prosecuted and sentenced, no action was taken against Julian Assange.

6.2. And indeed, throughout the Obama administration, Mr Assange was not prosecuted. In fact, the evidence suggests that there was a positive decision taken in 2013 not to prosecute.[51] Clearly this was a recognition of the wider political implications of any such prosecution.

6.3. On 17 January 2017, before leaving office, President Obama commuted Manning's sentence.

6.4. President Trump assumed office on 20 January 2017. He condemned Manning as '*a traitor who should never have been released'* (Boyle 1, EB/3 §23). He appointed Mr Pompeo as Director of the CIA on 23 January 2017.

6.5. Subsequently there were a series of public denunciations of Julian Assange by Mr Pompeo which culminated in April 2017, when he asserted publicly that WikiLeaks was a '*non-state hostile intelligence service'* (Feldstein, EB/10 p19). The full significance of that designation was not appreciated at the time of the hearing before the DJ. But it is tantamount to declaring Julian Assange to be a hostile operative and placing him outside the normal protections of international law.

6.6. At the same time, there was an acrimonious exchange of views between Pompeo and Julian Assange on the pages of the Washington Post (M1, Tab, 10G; Bundle E, Tab 24 (Pompeo CSIS); M1, Tab 10H; Bundle K, Tab 12).

UC Global

6.7. At the same time, the US Government commenced a series of unlawful extra-judicial actions aimed at silencing Mr Assange. These actions bore all the hallmarks of the politically motivated targeting of a perceived enemy of the state as opposed to a bona fide invocation of the criminal justice process. It reveals the true nature and motivations of the subsequent actions taken by the US as an alternative means of punishing and deterring someone who had challenged the secrecy and impunity of US governmental misdeeds.

6.8. Thus, on 24 January 2017, just 4 days after the inauguration of President Trump and the day after Mr Pompeo was appointed Director of the CIA, David Morales, head of the Spanish company UC Global providing security to the Embassy housing Mr Assange, sent a Telegram message to inform employees '*we are being vetted, so everything that is confidential should be encrypted … everything relates to the UK issues … the people vetting are our friends in the USA*' ('Witness 2', EB/2 §5 – agreed s.9). That was, according to the evidence of 'Witnesses 1 and 2' from UC Global,[52] the beginning of a US-intelligence authority-led

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51. (Feldstein, EB/10 §9) (Jaffer, EB/12 §21) (Shenkman, EB/5 §27) (Lewis 2, §15). Former DOJ spokesman Matthew Miller set out the main reason for the decision in 2013: '*If you are not going to prosecute journalists for publishing classified information, which the department is not, then there is no way to prosecute Assange'* (Politico, Bundle K, tab 4; The Washington Post, Bundle K, tab 5).

52. Anonymous witnesses from UC Global who are currently under judicial protection in Spain (and afforded anonymity before the DJ). For example, Spanish police discovered a gun with its serial numbers filed off in the possession of the USA's Spanish operative, David Morales.

program, in operation throughout 2017–2018, to covertly listen to and record Assange's legally privileged communications within the Embassy ('Witness 1'EB/1 §10-18 – agreed s.9). ('Witness 2', EB/2 §7-16 - agreed s.9).

6.9. On 25 January 2017, President Trump released draft Executive Order directing the CIA to re-examine the potential re-introduction of black sites/torture. On 26 January 2017, President Trump used his first TV interview to say torture '*absolutely works*'. In February 2017, President Trump met with James Comey (Director of the FBI) about the issue of intelligence leaks. Comey suggests '*putting a head on the pike as a message'*. Trump recommended '*putting reporters in jail'* (Feldstein, EB/10 p19).

6.10. In February 2017 Gina Haspel was appointed by Pompeo as Deputy Director of the CIA.[53]

6.11. Between March and November 2017, WikiLeaks published disclosures from Vault-7 regarding the CIA's extensive and invasive hacking capabilities, and raising questions about the CIA's activities outside its mandated powers.

6.12. On 13 April 2017, CIA Director Pompeo made a public statement to the Centre for Strategic and International Studies that '*We have to recognise that we can no longer allow Assange and his colleagues the latitude to use free speech values against us ... To give them the space to crush us with misappropriated secrets is a perversion of what our great constitution stands for. It ends now*'. He described WikiLeaks as a '*non-state hostile intelligence service'* and briefed Congress about plans to '*disrupt'* WikiLeaks (Feldstein, EB/10 p19).

6.13. On 19 October 2017, Mr Pompeo stated publicly that the '*CIA are working to take down WikiLeaks'*. [Bundle E, Tab 31]

6.14. What that then meant is described by 'Witnesses 1 and 2'. As intensification of surveillance progressed, including placing microphones throughout the Embassy in fire extinguishers, and initiating live-streaming facilities, '*Morales indicated the purpose ... as per the request of the US ... was ... to record the meetings that Assange has with his visitors, <u>but especially those of his defence attorneys</u>'* ('Witness 1', EB/1 §19 – agreed s.9) ('Witness 2', EB/2 §17-18 – agreed s.9). '*These requests came from the US in the form of a list of targets <u>... special attention had to be given to Mr Assange's lawyers'</u>* ('Witness 2'EB/2 §24, 38 – agreed s.9). Those intrusions included unlawfully accessing lawyers' electronic devices (ibid §24, 26-27), copying their documents (ibid §17, 24), following them (ibid §24, 34-35), photographing their homes (ibid §35) and breaking into their offices (ibid §31). In addition to: obtaining Mr Assange's fingerprints (ibid §21), stealing documents (ibid) and obtaining DNA from his baby's nappy (ibid §22). Ultimately plans to leave the door of the embassy open 'accidentally' to allow him to be kidnapped and '*even the possibility of poisoning Mr. Assange*' were discussed ('Witness 2', EB/2 p7 - agreed s.9)

<u>Prosecution Initiated</u>

6.15. The prosecution of Julian Assange was initiated on December 22nd 2017 via a sealed request to Westminster Magistrates' Court. As is clear, this took place against the background of those unlawful actions targeted against him, and in the context of the broader attacks on

[53]. WikiLeaks actively called for the prosecution of Gina Haspel as a 'CIA torturer'. See e.g. https://twitter.com/wikileaks/status/997221068023697409

investigators of US crimes, and in particular the ICC.

6.16. New evidence, analysed below, confirms that plans were developed by the CIA to render or assassinate Julian Assange whilst in the embassy; and shows that pressure was applied to initiate a prosecution in December 2017, influenced by the need to have a criminal prosecution ready in the event of rendition. This evidence was not before the DJ. But in any event she failed to recognise, even on the evidence before her, that the all the state actions taken against Julian Assange were part of an overall campaign determined by the designation of WikiLeaks as a hostile non-state intelligence agency and part of an overall attack on the international rule of law.

6.17. The initial prosecution was recognised to be unprecedented and alarming in its implications since it was directed at a journalistic enterprise of recording and publishing acts of infamy on the part of the state. A newspaper report from the New York Times, dated 20 April 2017, showed that pressure was put on prosecutors by the Attorney General and '*the new leaders of the justice department'* to bring an indictment, even in the face of '*vigorous debate'* from '*career professionals'* who were '*sceptical'* about its legality [Feldstein 1, EB/10 para 9, p 19].

6.18. Later, in April 2019, a White House spokesperson Sarah Sanders, openly took credit for the Trump Administration as '*the only one that's done anything about Julian Assange'* [Bundle K, tab 40].

The Superseding Indictment

6.19. At the same time as the Trump administration's denunciations of Julian Assange increased, the Superseding Indictment was introduced on 23 May 2019, charging Julian Assange with 17 additional charges of espionage. This too was unprecedented in its scale and its implications, given that espionage has long been recognised to be a classic example of a 'political offence' and one excluded from extradition for that very reason. These unprecedented espionage charges had prompted two senior and long-serving prosecutors, James Trump and Daniel Grooms, to raise *"major questions"* about the constitutionality of bringing espionage charges and advocate against those charges. In addition, it was said by those familiar with the case that the DOJ did not have '*significant evidence or facts beyond what the Obama era officials had'* when they decided not to prosecute [Bundle K, tab 38, p3].

6.20. There was also clear evidence of political pressure being put on the DOJ from the new Attorney General Barr to introduce these charges [Bundle K, tab 39]. This reflects President Trump and Mr Barr's extremely concerning Unitary Executive Theory of presidential power, that '*all prosecutorial discretion rests effectively in the President and it is the President who makes those prosecutorial decisions'* and that it is for the Justice Department *'to implement whatever instructions he chooses to give'* (Lewis, EB/44 Tr 15.09.20, p42).

Overall

6.21. This prosecution was not only '*on account of'* Mr Assange's disclosures of state criminality. It seeks to prosecute the very act of disclosing state criminality. It is now clear that the prosecution itself was pressed for and initiated in anticipation of Mr Assange being

renditioned from the Embassy, to capitalise upon and lend legitimacy to an entirely unlawful measure. Moreover, the clear evidence before the DJ demonstrated that the prosecution (and thus the request) was more broadly *motivated* and infected by a wider policy to prevent and deter exposure of those crimes (and those who exposed them) so as to ensure they were never prosecuted.

6.22. Overall, the chronology revealed by the unchallenged evidence before the DJ was clear and compelling. The evidence showed that the US was prepared to go to any lengths (including misusing its own criminal justice system) to sustain impunity for US officials accused of torture/war crimes, and to suppress those actors and courts willing and prepared to try to bring those crimes to account. Mr Assange was clearly one of those targets.

6.23. As to the relevance of the evidence pertaining to the ICC investigation, none of the following evidence (given by the defence expert Mr Eric Lewis) was challenged in the evidential hearing in September:

(i) That the Manning disclosures contained evidence suggesting the commission of serious state criminality and human rights violations;

(ii) That the US had engaged in unlawful efforts to prevent and frustrate any and all judicial inquiries into the same;

(iii) That the US had specifically engaged in a campaign of interference with, and frustration of, the ICC;

(iv) That the ICC prosecutor applied to open its investigation into the criminality the subject matter of the Manning disclosures in November 2017;

(v) That the US has, since then, continued its campaign of interference with, and frustration of, the ICC.

6.24. Mr Lewis' unchallenged evidence was further that the timings of the US actions in this case, when set against the parallel progression of the ICC investigations that Mr Assange helped bring about, are significant. Mr Lewis stated that '*it is certainly a reasonable inference that concern and reaction to the threat of investigation of US personnel by the ICC through the use of WikiLeaks documents...may well have been a factor in precipitating the request to stigmatize the release of those documents as criminal acts and dissuade their use*' (Lewis 5, EB/35 §9, 16 / EB/43 Tr. 14.9.20, p6).

6.25. In short the evidence before the DJ showed that the decision to prosecute Mr Assange was an integral part of a wider long-standing campaign by the US Government to '*use any means necessary'* to ensure that the crimes he helped expose are never prosecuted, especially by the ICC. Those '*means'*, so far as Mr Assange was concerned, first included kidnapping or else simply assassinating him.

6.26. More broadly, the bringing of the criminal case against him was then influenced by political pressure from the same executive agencies involved in the development of plans to assassinate him, or to kidnap or render him from the Embassy. Evidence of such executive pressure was put before the District Judge, see 6.20-6.21 above. But the new evidence from the Yahoo article and Joshua Dratel, at paragraphs 66-68 and 73-74, demonstrates that the

criminal charges were drafted and expedited to ensure that charges '*were in place if he was brought to the United States*' by forcible rendition. That explains why the charges were novel, unprecedented and controversial and why they bore all the hallmarks of a politically motivated prosecution.

6.27. The whole history of this prosecution, from start to finish, and the broader events of which this narrative forms part points inevitably to the fact that this unprecedented prosecution was political in nature. And that it was intended to punish Julian Assange and deter others who facilitated the exposure of US state criminality. It is this that the DJ failed to recognise and reflect in her judgment.

7. The DJ's decision (Judgment §152-192)

7.1. The DJ did not consider the chronology holistically. Instead, she approached (parts of) it in an atomistic manner, in separate sealed compartments. The result of doing so was that **(a)** swathes of it were omitted entirely from her s.81 analysis, and **(b)** the DJ deprived herself of sight of the broader picture it disclosed.

7.2. First, the DJ seriously underplayed the s.81 submissions advanced. The defence had submitted that:

> '*the administration's obvious hostility to the very fact of Julian Assange's exposure and condemnation of US war crimes and human rights abuses. Trump's 'America First' policy supporting immunity for US crimes, denouncing the investigations by the ICC of US war crimes in Afghanistan, occurred in harmony with the CIA's motivation for targeting Julian Assange'* (Defence Closing CB/4 §4.1)
>
> '*They targeted him because of his exposure of American war crimes'* (Defence Closing CB/4 §4.8)
>
> '*Prosecuting Julian Assange for revealing war crimes is therefore part of an overall agenda of the administration to deter any foreigners from exposing or investigating war crimes by the US. It further demonstrates the political nature of this prosecution and the true nature of the political motivation behind it*' (Defence Closing CB/4 §5.12)
>
> '*Julian Assange's … exposing the human costs of the conflicts in Afghanistan and Iraq and the war crimes committed there brought him into conflict with the Trump administration in ways which led directly to the administration's decision to bring charges against him*' (Defence Closing CB/4 §8.1)
>
> '*There can be no doubt that opposition to and exposure of abuses of governmental authority can qualify as protected political opinions. Thus in Suarez [2002] 1 WLR 2663, the Court of Appeal held at paras 29-30…*' (Defence Closing CB/4 §8.6)
>
> '*The evidence all points to a politically motivated prosecution targeted at Julian Assange because of his … revelation of war crimes and crimes against humanity. The chronology of the case itself … all together point to a politically motivated prosecution for all these reasons, Mr Assange invokes the protection of section 81(a)*' (Defence Closing CB/4 §8.10)
>
> *'as is clear from the decision in Suarez [2002] 1 WLR 2663 (analysed in Defence Closing Submissions, para 8.6) ... an individual who exposes wholescale abuse and war crimes by a state, and thereby attracts prosecution for the very act of such exposure, is entitled to the protection of section 81(a)'* (Reply CB/6 §3.9)

7.3. The only reference to these submissions at all in the judgment is in passing at (Judgment CB/2 §170) where the DJ states that '*They submit that the prosecution against Mr. Assange is … also part of the administration's overall agenda to deter foreigners from exposing or*

investigating war crimes by the US'. As stated above, the DJ's entire approach to the issue fails to recognise the central defence submission, that exposure of state crimes is a political and protected act.

7.4. Secondly, the DJ's conclusion on this issue is located solely within a single paragraph on (Judgment CB/2 §173(f)):

> '*…The defence points to President Trump's 'America First' policy, his views on the entitlement of the US to resort to torture and waterboarding in the national interest and his denunciations of the International Criminal Court (the ICC). The defence argues that Mr. Assange's free speech agenda and his revelation of war crimes put him in the cross hairs of this administration. However, it is pure conjecture to link US policies to improper pressure to prosecute Mr. Assange and there is no evidence to support this theory. It is speculation…*'

7.5. The DJ approaches the evidence as limited to '*US policies'*. The DJ considers none of the chronology detailed above regarding the sustained US efforts to obtain/maintain impunity for, and silence judicial inquiry into, its crimes.

7.6. Thirdly, the only aspect of the chronology that the DJ addressed was (some of) the evidence concerning the Embassy (and UC Global). Her review of UC Global evidence omitted entirely the plots to kidnap/murder Mr Assange it disclosed. Those feature nowhere in her decision on that issue (at Judgment CB/2 §183-192).[54]

7.7. Fourthly, even the limited Embassy evidence the DJ did address was approached by her as a discrete separate issue (Judgment CB/2 §181-192). She failed entirely to examine how it fitted into the broader 'impunity' chronology outlined above, or consider at all evidence that the plans to kidnap / poison might be an(other) manifestation of the US efforts to obtain/maintain impunity for, and silence judicial inquiry into, its crimes.

7.8. Fifthly, as for the various threats issued by the CIA which the DJ did consider, the DJ concluded that '*although the intelligence community have spoken in hostile terms about Mr Assange and WikiLeaks, the intelligence community do not speak for the Administration*' (Judgment CB/2 §156, 174). Again, with respect, that decision is entirely bereft of evidential basis. The CIA is an arm of the US Government and the clear evidence before the DJ was (had she looked at the chronology holistically), the CIA was acting at all times in concert with '*the Administration'* in its efforts to obtain/maintain impunity for, and silence judicial inquiry into, its crimes.

7.9. Sixthly, the DJ declined to act upon any of the UC Global evidence she did consider (unlawful surveillance) on the basis that it was '*partial and incomplete evidence'* (Judgment CB/2 §183). That decision, with respect, was unsustainable in circumstances where the evidence of 'Witnesses 1 and 2' was unchallenged before her. It was read to her as agreed evidence.

7.10. What was required of the DJ was **(a)** an overall assessment of the import of the whole

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[54]. In fact, the only time they feature in the DJ's reasoning is in the context of whether the CIA might trigger SAMs for Mr Assange in prison (at Judgment §293). They she says '*I merely note here that if the allegations are true, they demonstrate a high level of concern by the US authorities regarding Mr. Assange's ongoing activities'*.

chronology detailed above, **(b)** against a recognition that exposing state criminality is, as a matter of law, a protected conduct for the purposes of s.81. The DJ did neither.

7.11. Instead the DJ relied heavily in her judgment on the integrity of the prosecution process at §§173F and at §§175-180, and on the asserted independence of the US prosecutor Mr Kromberg. But, in doing so, she ignored and minimised[55] the powerful evidence of political pressures exerted by the Attorney General and the executive – shown by the timing of the prosecution under the Trump administration, the unprecedented nature of the prosecution, the dramatic escalation of the charges in 2019, and all the surrounding circumstances – as well as the specific evidence that pressure was put on the prosecutors and that the Superseding Indictment provoked strong protests from experienced prosecutors within the DOJ.

Fresh evidence

7.12. Moreover, fresh evidence, available only after the DJ's decision,[56] puts beyond doubt the import of the above chronology, and in particular the extraordinary plans to kidnap/render/murder Mr Assange.

7.13. On 26 September 2021, Yahoo News published[57] the findings of an investigation into the events of 2017, having interviewed more than 30 including former US officials including members of the CIA, some of whom are named. The reporters who conducted the investigation and wrote the article are all three impressive and reputable journalists.[58] In fact, the article itself was a finalist for the SPJDC Dateline Award for investigative reporting. That report assists this Court (and would have assisted the DJ) in four principal ways.

7.14. First, the DJ was aware that, in April 2017, Mr Pompeo asserted publicly that WikiLeaks was a '*non-state hostile intelligence service'* (Feldstein, EB/10 p19). On 22 August 2017, the Senate Intelligence Committee's Intelligence Authorisation Act for fiscal year 2018 recorded a '*sense of Congress*' that WikiLeaks and its leadership '*resemble a non-state hostile*

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55 For example, at CB/2 §§173B, the DJ mistakenly concludes that Mr Trump's statement on 2 December 2010 that "*I think there should be like a death penalty or something*" in reference to Mr Assange is "related to the "leaking of taxes" rather than to national security breaches". The typed transcript of the interview is incorrect and should in fact have read "*You had nothing to do with the leaking of those documents*" not "You had nothing to do with the leaking of those taxes". Given that the interview occurred shortly after the Cablegate publication on 28 November 2010, it is clear that the interviewer and Mr Trump are referring to the Cablegate publications, not his tax returns. Therefore the DJs conclusion is incorrect and contributes to her minimisation of Mr Trump's hostility towards Mr Assange and WikiLeaks.

56. And thus admissible under the principles in ***Hungary v Fenyvesi*** [2009] 4 All ER 324.

57. https://uk.news.yahoo.com/kidnapping-assassination-and-a-london-shoot-out-inside-the-ci-as-secret-war-plans-against-wiki-leaks-090057786.html.

58. The article was authored by Zach Dorfman, Sean D. Naylor and Michael Isikoff.
Zach Dorfman is a former Senior Staff Writer at the Aspen Institute's Cyber and Technology program and a Senior Fellow at the Carnegie Council for Ethics in International Affairs. In 2019 he was co-awarded the Prize for Distinguished Reporting on National Defense
Sean D. Naylor is the National Security Correspondent for Yahoo News. Previously covered intelligence and counterterrorism for Foreign Policy. He has freelanced for *The New York Times* and *Newsweek* and is the author of two books
Michael Isikoff is Chief Investigative Correspondent for Yahoo News. Previously, he was the national investigative correspondent for NBC. His co-authored column 'Terror Watch' won the 2005 award from the Society of Professional Journalists for best investigative reporting online.

intelligence service often abetted by state actors and should be treated as such a service by the United States'. What was not obvious, on the evidence then available, was the meaning of all this.

7.15. The report now shows that '*hostile intelligence agency'* was a deliberate and legal term of art; such designation enabling the CIA to engage in direct action against Mr Assange without Congressional approval:

> '*The CIA's fury at WikiLeaks led Pompeo to publicly describe the group in 2017 as a 'non-state hostile intelligence service.' More than just a provocative talking point, the designation opened the door for agency operatives to take far more aggressive actions, treating the organization as it does adversary spy services, former intelligence officials told Yahoo News'* (p2)

> '*The immediate question facing Pompeo and the CIA was how to hit back against WikiLeaks and Assange. Agency officials found the answer in a legal sleight of hand. Usually, for U.S. intelligence to secretly interfere with the activities of any foreign actor, the president must sign a document called a 'finding' that authorizes such covert action, which must also be briefed to the House and Senate intelligence committees. In very sensitive cases, notification is limited to Congress's so-called Gang of Eight — the four leaders of the House and Senate, plus the chairperson and ranking member of the two committees. But there is an important carveout. Many of the same actions, if taken against another spy service, are considered 'offensive counterintelligence' activities, which the CIA is allowed to conduct without getting a presidential finding or having to brief Congress, according to several former intelligence officials'* (p13-14)

> *'Intelligence community lawyers decided that it could. When Pompeo declared WikiLeaks 'a non-state hostile intelligence service,' he was neither speaking off the cuff nor repeating a phrase concocted by a CIA speechwriter. 'That phrase was chosen advisedly and reflected the view of the administration,' a former Trump administration official said'* (p14)

> *'Soon after the speech, Pompeo asked a small group of senior CIA officers to figure out 'the art of the possible' when it came to WikiLeaks, said another former senior CIA official. 'He said, 'Nothing's off limits''* (p15).

> *'At the CIA, the new designation meant Assange and WikiLeaks would go from 'a target of collection to a target of disruption,' said a former senior CIA official'* (p16)

7.16. As commentators have subsequently observed[59] '*The Administration also sought and won legislative language and backed up the claim for the extended power'* through the Intelligence Authorization Act for Fiscal Year 2018. The implications of this were '*meaningless to the public'* at the time but the designation in fact '*allowed Pompeo and his lieutenants to think more creatively about how to target Assange'* [60] and '*As we now know,*

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[59]. Intercept 28 September 2021 article '*Kidnapping plot casts new light on 2018 Senate Intelligence maneuver'.*

[60]. The relevance of the fact that the same speech referred, for example, to Iranian General Soleimani; later to assassinated by US drones in Iran in January 2020, is now also obvious.

Pompeo responded to this challenge by ordering the CIA to draw up plans to kidnap'.

7.17. Had the DJ been aware of these matters, she could not conceivably have concluded that describing Wikileaks as a '*non-state hostile intelligence agency'* had no particular relevance (Judgment CB/2 §174(a)).

7.18. Neither, had the DJ been aware of these matters, could she conceivably have concluded that '*the intelligence community do not speak for the Administration*' (Judgment CB/2 §§156, 174). According to the report '*the proposals to kill Assange ... was just Trump being Trump ... said a former senior counterintelligence official briefed on the discussions about 'kinetic options' regarding the WikiLeaks founder*'.

7.19. Secondly, the report provides further, corroborative, evidence (not available to the DJ) of the fruit of the resulting '*no limits'* discussions. Namely, the emergence of US Governmental plans about which Witness 2 (EB/2) gave evidence to the DJ to:

(i) Kidnap Mr Assange:

> '*This Yahoo News investigation, based on conversations with more than 30 former U.S. officials — eight of whom described details of the CIA's proposals to abduct Assange'* (p2)
>
> '*Pompeo and [Deputy CIA Director Gina] Haspel wanted vengeance on Assange. At meetings between senior Trump administration officials after WikiLeaks started publishing the Vault 7 materials, Pompeo began discussing kidnapping Assange'* (p18)

(ii) In order to rendition Mr Assange to the US:

> '*Pompeo and others at the agency proposed abducting Assange from the embassy and surreptitiously bringing him back to the United States via a third country — a process known as rendition. The idea was to 'break into the embassy, drag [Assange] out and bring him to where we want,' said a former intelligence official'* (p18)

(iii) Or else murder Mr Assange:

> '*Some senior officials inside the CIA and the Trump administration even discussed killing Assange, going so far as to request 'sketches' or 'options' for how to assassinate him. Discussions over kidnapping or killing Assange occurred 'at the highest levels' of the Trump administration, said a former senior counterintelligence official. 'There seemed to be no boundaries''* (p1)
>
> *'Some discussions even went beyond kidnapping. U.S. officials had also considered killing Assange, according to three former officials. One of those officials said he was briefed on a spring 2017 meeting in which the president asked whether the CIA could assassinate Assange and provide him 'options' for how to do so'* (p20)
>
> 'agency executives requested and received 'sketches' of plans for killing Assange … said a former intelligence official. There were discussions 'on whether killing Assange was possible and whether it was legal,' the former official said' (p20).

7.20. Had the DJ been aware of these matters, she could not conceivably have concluded that the (agreed) evidence of 'Witness 2' was '*partial and incomplete evidence'* (Judgment §183). Or that '*there is little or no evidence to indicate hostility by President Trump towards Mr. Assange or Wikileaks'* (Judgment CB/2 §156, 173, 192).

7.21. Thirdly, the report discloses that the US charges were (only) put in place in December 2017 in anticipation of (and in preparation for) Mr Assange being kidnapped and renditioned to the US:

> '*The Justice Department expedited the drafting of charges against Assange to ensure that they were in place if he were brought to the United States'* (p3)
>
> National Security Council lawyers '*worried about the timing of the potential Assange kidnapping. Discussions about rendering Assange occurred before the Justice Department filed any criminal charges against him, even under seal — meaning that the CIA could have kidnapped Assange from the embassy without any legal basis to try him in the United State. [They] urged Justice Department officials to accelerate their drafting of charges against Assange, in case the CIA's rendition plans moved forward, according to former officials'* (p21-22)
>
> The National Security Council lawyers were '*concerned about the legal implications of rendering Assange without criminal charges in place, according to a former national security official. Absent an indictment, where would the agency bring him, said another former official who attended NSC meetings on the topic. 'Were we going to go back to 'black sites'?*' (p22)

7.22. Had the DJ been aware of these matters, she could not conceivably have concluded that it is *'pure conjecture to draw inferences from the timing of these charges'* (Judgment §156); that '*there is insufficient evidence that prosecutors were pressurised into bringing charges by the Trump administration'* (ibid); and *'it is pure conjecture to link US policies to improper pressure to prosecute Mr. Assange'* (Judgment CB/2 §173(f)).

7.23. Fourthly, the evidence before the DJ could not directly explain why the US Government's kidnap/rendition/murder plans had stalled and been replaced in late 2017 with a decision to pursue prosecution/indictment/extradition instead. The fresh evidence provides that explanation.

7.24. Fifthly, Mr Pompeo has gone on record confirming that parts of the Yahoo article are accurate and that those US officials who spoke to Yahoo News should be prosecuted *'for speaking about classified activity'* and even prosecuted under the Espionage Act.[61]

7.25. Had the DJ been aware of these matters, she could not conceivably have simply omitted consideration of the US kidnap/rendition/murder plans altogether from her s.81 decision in the way that she did.

7.26. Mr Assange further relies upon the new evidence from Witness 2 and Joshua Dratel.

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[61] https://news.yahoo.com/pompeo-sources-for-yahoo-news-wiki-leaks-report-should-all-be-prosecuted-234907037.html

Conclusion on s.81(a)

7.27. For all these reasons, it is submitted that there is an overwhelming case that this prosecution was not initiated, maintained, and extended (by the Superseding Indictment) for legitimate criminal justice reasons. On the contrary, it was profoundly influenced by extraneous considerations and the desire to punish and neutralise Julian Assange in the light of his exposure of US state criminality, as well as to deter others from a similar course.

PART B: THE PROSECUTION

8. Introduction

8.1. The prosecution which was eventually launched in respect of Mr Assange at the end of (and on account of) that extraordinary chronology was legally strained, evidentially contrived and unsustainable.

8.2. Collectively, the problems with the prosecution, described in what follows, speak (and ought to have spoken to the DJ) volumes about its origins having nothing to do with the normal pursuit of criminal justice.

8.3. However, some of the multifarious problems with the prosecution are so stark, so unusual, and so egregious, that they operate to bar extradition in their own right. The detailed evidence before the DJ distils into the following core issues concerning the belated prosecution that was eventually launched in late 2017:

(i) **Section 7 (Ground of Appeal 2)**: It is legally unprecedented and unforeseeable. In 2010 publishing leaked US national security information was legal and commonplace. Rendering it criminal violates the core precepts of Article 7 ECHR.

(ii) **Section 8 (Ground of Appeal 3)**: Publishing leaked national security information was (and is) legal and commonplace *because* it is conduct protected by entrenched principles of free speech, principles which are as familiar to the First Amendment as they are to Article 10 ECHR.

(iii) **Section 9 (Ground of Appeal 4)**: It is, moreover, a prosecution designed to secure a guilty verdict from a flagrantly unfair trial;

(iv) **Section 10 (Ground of Appeal 5)**: To avoid the implications of Articles 6, 7, 8 and 10 ECHR) and their US Counterparts in the First, Fourth, Fifth and Sixth Amendments), this prosecution is one that the US proposes should occur outwith their protections.

(v) **Section 11 (Ground of Appeal 6)**: with the result that Mr Assange is placed permanently out of reach of the ICC or any other judicial body that might investigate/prosecute the crimes he exposed, the US have ratcheted the counts in the indictment in order to expose Mr Assange to a Guideline sentence in excess of his remaining natural life.

8.4. It is to these individual problems that these Grounds now turn.

9. Article 7 ECHR

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

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

9.3. In ***SW v United Kingdom*** (1995) No. 20166/92 the ECtHR also explained at §34 that:

> *'...The guarantee enshrined in Article 7 (art. 7), which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 (art. 15) in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment...*'[62]

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

9.5. An individual must be able to '*know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable*' (***SW*** at §35). While Article 7 does not prohibit '*the gradual clarification of rules of criminal liability through judicial interpretation from case to case*', the resultant development must be *'consistent with the essence of the case and could reasonably be foreseen*' (***SW*** at §36; ***Vasiliauskas v Lithuania*** (2015) 35343/05 at §55).

The evidence before the DJ

9.6. A detailed study by Columbia University in 2013 found that '*thousands upon thousands of national security-related leaks to the media'* have occurred; leaking to journalists is a practice that has become '*routinized'* in Washington (Feldstein 1, EB/10 §5). As Prof. Feldstein told the DJ, unchallenged, the practice in the US of classified information being leaked to publishers:

> *'...happens with abandon... there are so many of them: thousands upon thousands ... It is routine. Every government study in the last 60 years has said that it is widespread, you know, and it means they shed light on decision-making by the government and inform the public policy, but they also expose government deceit, corruption, illegality, abuse of power... And they go back to the George Washington presidency...'* (EB/38 Tr 7.9.20, xic, p44).

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

9.7. The practice of obtaining and publishing of leaks of the most important classified national security information in the US has been regularly documented (see Feldstein 1, tab 18, §5). There even exist reporters in Washington who have made careers out of receiving and publishing leaked classified information; '*Pulitzer prize winners, some of the most respected journalists in the nation...They use [leaks of classified information] to inform the public...on a daily basis*' (Feldstein, EB/38 Tr 7.9.20, xic, p44-45 – unchallenged).

9.8. '*In the US, newspapers have published excerpts of secret or classified documents ever since the nation's founding'* without prosecution, the examples of which are legion (Feldstein, EB/10 §5) (Jaffer, EB/12 §16 - agreed s.9). '*There is a rich history of reporters of all stripes from major newspapers all over the country reporting on sensitive national security of foreign policy issues, which the government considers classified'* (Timm, EB/42 Tr 9.9.20, xic p52 – unchallenged). '*There are national security leaks into the newspapers every day and they are not prosecuted*' (Lewis, EB/44 Tr 15.9.20, xx, p28). Such publications, <u>never</u> prosecuted, have brought to light, for example, Bush administration torture policies, unlawful NSA surveillance practices, and Obama administration armed drone extra-judicial killings (JafferEB/12 §16 - agreed s.9).

9.9. Max Frankel famously wrote in the Pentagon Papers case that '*...Without the use of secrets there could be no adequate diplomatic, military, political reporting of any kind, the kind that people take for granted, either abroad or in Washington, and there could be no mature system of communication between the government and the people...*' [ref]. According to Mr Timm, executive director of the Freedom of the Press Foundation, '*this was written more than 40 years ago but could not be truer today'* (Timm, EB/42 Tr 9.9.20, xic, p52-53). As investigative journalist Mr Hager put it before the DJ, '*we need classified information. It is essential if we are going to allow journalism to perform its role of informing the public, enabling democratic adequate decision making and deterring wrongdoing...there are simply no realistic and effective alternatives'* (Hager, EB/50 Tr 18.9.20, xic, p5 – unchallenged).

9.10. While the *leakers* of such materials have been prosecuted albeit selectively,[63] no prosecution for the act of <u>obtaining or publishing</u> state secrets has <u>ever</u> occurred. '*...Because the First Amendment protects the free press and it is vital that the press expose rather than ignore...not because journalists are somehow privileged but because the citizenry has a right to know what is going on...*' (Feldstein, EB/38 Tr 7.9.20, xic, p45).

9.11. The prosecution of Mr Assange '*crosses a new legal frontier'* (Jaffer, EB/12 §21 - agreed s.9). It '*breaks all legal precedents'* (Feldstein 1/, EB/10 §9). The '*indictment of a publisher for the publication of secrets under the Espionage Act has no precedent in U.S. history'* and in particular, there has been '*no known prior attempt to bring an Espionage Act prosecution against a non-U.S. publisher'* (Shenkman, EB/5 §32 / EB/49 Tr 17.9.20, xic, p29).

9.12. The attorney for the Reporter's Committee for Freedom of the Press considers the prosecution of Assange to represent a '*profoundly troubling legal theory, one rarely contemplated and never successfully deployed…to punish the pure act of publication of newsworthy government secrets under the nation's spying laws'* (Feldstein 1, EB/10 §9(d)).

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[63]. The Obama administration increased prosecutions of media sources or leakers, with more prosecutions being initiated '*than under all previous administrations combined'* (Shenkman, EB/5 §23).

The Act

9.13. Those who obtain / publish classified information (as opposed to Government officials who leak it) were never, according to unchallenged evidence the DJ heard, the intended targets of s.793 of the Espionage Act:

(i) When enacting the Espionage Act, Congress expressly rejected provisions and powers to censor publishers (Shenkman, EB/49 Tr 17.9.20, xic, p28). '*There is a lot of legislative history that indicates that section 793 was never intended to apply to publishers of information. That is clear from the censorship provisions that were rejected that the Wilson administration proposed in the law'* (Shenkman, EB/49 Tr 17.9.20, p49).

(ii) Moreover, '*Congress was quite careful not to use the word 'publish' in [s.793 of] the Espionage Act'* instead choosing '*communication not publication'* whereas *'if lawmakers wanted to control publication [by the press] they had to say so specifically'* (Feldstein 1, EB/10 §8) (Shenkman, EB/5 §18 / EB/49 Tr 17.9.20, xx, p49). For example, '*another provision of the Espionage Act, section 798, specifically refers to publication as one of the criminalised forms of conduct'* (Shenkman, EB/49 Tr 17.9.20, xx, p49). '*It was never intended to apply to publication, which [was a point made by] one of the Supreme Court justices in the Pentagon Papers decision'* (Shenkman, EB/49 Tr 17.9.20, xx, p51).

(iii) When the Act was amended in 1950, the implementing ('McCarran') Act expressly provided that '*nothing in the Act shall infringe upon the freedom of the press*', and Attorney General Tom Clark '*suggested that prosecutorial discretion would safeguard against [any] prosecution of the press'* contrary to these words (Shenkman, EB/5 §19, 42 /EB/49 Tr 17.9.20, xic, p31).

Practice

9.14. The DJ heard unchallenged evidence that one category of persons who have never therefore been the subject of prosecution in the US is those outside government who obtain and publish state secrets (ShenkmanEB/5 §32, 41-42 / EB/49 Tr 17.9.20, xx, p41) (Feldstein, EB/10 §8 / EB/38 Tr 7.9.20, xic, p45-46) (Lewis, EB/44 Tr 15.9.20, xx, p21) (Jaffer, EB/12 §3, 13 - agreed s.9) (Timm, EB,32 §13, 32-35, 41 / Tr 9.9.20, xx, p72). '*The Espionage Act had never been used in over a century to prosecute the publication of information by a person other than the leaker...Mr Kromberg does not dispute that the Espionage Act has never been used in this manner before; nor does he explain this departure'* (Lewis 4, EB/34 §5, 11, 13). This is a '*230-year-old precedent'* (Feldstein 1, EB/10 §11).

9.15. In practice, there has always been a *'distinction between leaker and leakee'* which has been '*consistently upheld'* due to government fears of '*running afoul of the free press clause of the First Amendment'* (Feldstein 1, EB/10, §8 / EB/38 Tr 7.9.20, xic, p45-46).

9.16. There have, of course, been prior isolated political *threats* to prosecute reporters for publishing classified information, usually those at odds with the respective administration, but all these have consistently failed on grounds relating either to concerns over press freedoms. The examples over the years are set out at (Shenkman, EB/5 §33-34 and Feldstein 1, EB/10 §8 and Timm EB/32 exhibit 19). Three such threats involved the convening of

Grand Juries; and in all three cases the Grand Jury declined to indict. The remainder simply involved political threats which were never carried beyond the stage of politically-driven investigation (Shenkman, EB/49 Tr 17.9.20, xic, p29-31 / xx, p53-54).[64] Mr Timm explained, by reference to these examples, that over '*the past half-century...various administrations have either threatened to use the Espionage Act against reporters, or attempted to do so...but in each and every case the government ultimately concluded, or was forced to conclude, that such a prosecution would be unconstitutional'* (Timm, EB/42 Tr 9.9.20, xic, p53-54 – unchallenged).

9.17. Various witnesses also drew the DJ's attention to the obviously political context of all of those attempts / threats: '*those are actually very telling about demonstrating both how rare it is for this to even be considered, but also how even in those instances there were extraordinarily political efforts to punish presidential enemies*' (Feldstein, EB/38 Tr 7.9.20, xic, p46 – unchallenged). These were all '*very high level political decisions. In each of these cases they involved the President of the United States and the Attorney General*' (Shenkman, EB/49 Tr 17.9.20, xic, p29-31). Their '*common theme has been [threats] against press outlets that are in political opposition to the sitting administration, or that are revealing misconduct, or are revealing policies contrary to the ones that the sitting administration wishes to pursue'* (Shenkman, EB/49 Tr 17.9.20, re-x, p65).

9.18. '*The reasons [for none of these threats ever having been carried through] were ultimately First Amendment concerns'* (Shenkman, EB/49 Tr 17.9.20, xic, p31). As Mr Shenkman pithily put it: *'but there is also the US Constitution'* (EB/49 Tr 17.9.20, xx, p40). In these '*politically charged cases'* the desire of the government to prosecute journalists always '*foundered on First Amendment grounds and the longstanding precedent that publishing secret records is not a crime'* (Feldstein 1, EB/10 §9).

9.19. Thus, no Grand Jury had <u>ever</u> returned an indictment such as this (Feldstein, EB/38 Tr 7.9.20, xic, p45-46 – unchallenged).

<u>Case law</u>

9.20. That '*unbroken line of practice of non-prosecution'* reflects and confirms the '*clear'* general thrust of the principles underlying centuries of First Amendment jurisprudence in '*related cases'* (Lewis, EB/44 Tr 15.9.20, xx, p28).

9.21. In 1971, the US Supreme Court held in the Pentagon Papers case (***NY Times Co v US*** (1971) 403 US 713) that publishers (the NY Times and Washington post) could <u>not</u> be prevented from publishing classified information (there a top secret Vietnam War study contradicting President Nixon's public justification for the war, leaked to publishers by military analyst Daniel Ellsberg without government authorisation) (Jaffer, EB/12 §23 - agreed s.9) (Ellsberg,

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64. Although, as Mr Shenkman observed, the mere threats nonetheless served their political purpose: '*the press in the 1980s was extraordinarily nervous as shown in the fact that resulted in stories being held off for months. In the cases of The Chicago Tribune and Beacon Press, they devoted significant resources to their legal defence and, particularly, Beacon, they nearly went bankrupt. Even the presence of these investigations has deleterious effects on their ability to gather news and the propensity of other publishers to risk - to risk reporting on the same matters. So it has had a significant chilling effect... the records in the Nixon tapes show that these investigations were actually used to send a message...successful prosecutions is not all you need to limit freedom of press'* (Shenkman, Tr 18.9.20, xx, p53-54).

EB/27 §10). Whilst some members of the Court commented (*obiter*) on the breadth (vagueness) of the Espionage Act and thus the theoretical possibility of prosecution of publishers under it, no member of the Court suggested that such a prosecution would be Constitutionally *permissible* under the First Amendment (Shenkman, EB/49 tr 17.9.20, xic, p31-32 / 18.9.20, xx, p41, 43) (Lewis, EB/44 Tr 15.9.20, xx, p27). The underlying premise of ***NY Times*** is that restrictions on freedom to publish classified materials are unconstitutional.[65]

9.22. Of course, the New York Times newspaper did actively recruit and solicit and assist its whistle-blower: it '*worked closely with [Ellsberg] to get the documents in the first place...Clearly, the Times played a very active, not passive, role in that case. As in most journalistic endeavours that is what journalists do...the New York Times even physically copied the report for Mr Ellsberg'* (Feldstein, EB/39 Tr. 8.9.20, re-x, p63). Which is why it is so revealing (and so inconsistent with the present prosecution) that the NY Times was never prosecuted.

9.23. As Mr Shenkman also told the DJ (EB/49 Tr 17.9.20, xic, p32), in ***US v Morison*** (1988) 844 F.2d 1057, the Court of Appeals (4th Circuit) was at likewise pains to highlight that Morison's conviction related only to his role as a source (leaker) and that '*press organizations…are not being, and probably could not be, prosecuted under the espionage statute'* (per Wilkinson J at §79). '*Investigative reporting is a critical component of the First Amendment's goal of accountability in government. To stifle it might leave the public interest prey to the manifold abuses of unexamined power. It is far from clear, however, that an affirmance here would ever lead to that...I question whether the spectre...is in any sense real...the political firestorm that would follow prosecution of one who exposed an administration's own ineptitude would make such prosecutions a rare and unrealistic prospect'* (per Wilkinson J at §95). '*It is important to emphasize what is not before us today. This prosecution was not an attempt to apply the espionage statute to the press for either the receipt or publication of classified materials*' (per Wilkinson J at §97). '*The parties and amici have presented to us the broader implications of this case...that an affirmance here presents a vital threat to newsgathering and the democratic process. On the other side of the argument lies the commonsense observation that those in government have their own motives, political and otherwise, that ensure the continuing availability of press sources. 'The relationship of many informants to the press is a symbiotic one.' Branzburg, 408 U.S. at 694, 92 S.Ct. at 2663. Problems of source identification and the increased security risks involved in discovery and trial make proceedings against press sources difficult...What Justice Potter Stewart once said in an address to the Yale Law School has meaning here: So far as the Constitution goes, the autonomous press may publish what it knows, and may seek to learn what it can'* (per Wilkinson J at §98-100).

9.24. Russell J concurred at §106 and added expressly that '*Judge Wilkinson expresses the view that...these statutes can properly be applied to press leakers (whether venally or patriotically or however motivated) without threatening the vital newsgathering functions of the press. He supports this with a convincing discussion of the practical dynamics of the developed relationship between press and government officials to bolster his estimate that this use of the statute will not significantly inhibit needed investigative reporting about the workings of*

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[65]. That is why, for example, NY Times is specifically held out by Lord Hope in ***Shayler*** at §50 as authority for the proposition that a publisher could not be implicated by (i.e. prosecuted pursuant to) its interpretation of the OSA (as Lords Bingham and Hutton had also made pellucidly clear at §37 and 111).

government in matters of national defense and security...By concurring in his opinion, I accept that general estimate, which I consider to be the critical judicial determination forced by the first amendment arguments advanced in this case...' (§109-110).

The position in 2010/2011

9.25. In 2010-2011, the relevant time under consideration, it was wholly unforeseeable that such an indictment could or would be issued against a publisher for obtaining, receiving or publishing leaked classified information (Feldstein, EB/39 Tr 8.9.20, re-x, p62-63). Mr Timm concurred: When asked '*if I had come to you in 2009 and said, 'I am planning to do something like this [solicit a whistle-blower to leak classified information unlawfully]. Am I at risk of criminal prosecution?' What would you have told me?*'. Mr Timm said '*I would have said that you know, that is protected speech under the First Amendment'* (Timm, EB/42 Tr 9.9.20, xic, p58).

9.26. Mr Shenkman also concurred. When asked '*would there be anything to indicate to me, as a member of the press in 2010, that publishing classified information would be liable to end up in an indictment against me under the Espionage Act?*', he replied '*this type of publication is routine in the US media...given the amount of time that has passed since cases like the Pentagon Papers and cases like Morrison, there is a customary practice that the Justice Department would not use the Espionage Act to indict the press or publication or for activities (inaudible) source*s' (EB/49 Tr 17.9.20, xic, p33). In cross-examination he reiterated '*did I anticipate ever that there would be an indictment that looked like this? No. I never thought based on history we would see something like this. I think a lot of scholars absolutely surprised. It is truly extraordinary, I mean this extent of the use of the Espionage Act'* (Tr 17.9.20, xx, p53). '*I think it was completely unforeseeable'* (Shenkman, EB/49 Tr 17.9.20, re-x, p65).

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

9.28. In short, this prosecution was unprecedented, '*crosses a new legal frontier'*, '*breaks all legal precedents'* and cuts across '*230-years'* of precedent and state practice. It does not represent some gradual clarification of rules of criminal liability through judicial interpretation from case to case, it '*completely unforeseen'* and, as such, profoundly violates the principles which underlie Article 7 ECHR. Extradition is according prohibited by s.87 of the 2003 Act.

The DJ's decision (Judgment §244-266, 177-180)

9.29. First, the DJ ruled that Mr Assange needed to establish a '*flagrant violation'* of Article 7 (Judgment §245). ***Ullah*** is not binding authority for the proposition that the '*flagrant violation'* threshold applies to Article 7 in the extradition context. The observations of Lord Steyn (who was the only member of the Appellate Committee to address Article 7) were *obiter* and unreasoned. Since, like Article 3, Article 7 is within that small class of protections which are both absolute and non-derogable, it follows that the test that applies to possible violations of Article 3 should also apply to threatened violations of Article 7. In ***Arranz v Spain*** [2013] EWHC 1662 (Admin) Sir John Thomas P stated that there was '*some force in the argument*' that the approach under Article 7 should be the same as the approach under Article 3 (i.e. that an extradition will be unlawful if there are substantial grounds for believing

there is a real risk that '*it must be for the Supreme Court to determine whether it should reconsider the guidance given by Lord Steyn in a case where Article 7 is actually in issue*' (§38).'

9.30. In any event, even if the '*flagrant violation'* threshold is the applicable test, it is passed.

9.31. Secondly, the DJ held that '*the flagrant denial threshold has not been reached in this case ... primarily because Mr. Assange's Article 7 rights are protected in America by the US Constitution and, in particular, by the Fifth Amendment'* (Judgment CB/2 §252). The DJ then offered ***Morison*** (supra) as an example of the US Court applying the Fifth Amendment (Judgment CB/2 §254-262). According to the DJ, the US Court will assess in substance whether Mr Assange's Article 7 ECHR rights have been violated, and there is thus '*no need for an extradition court to embark on the detailed discussion on ... foreseeability*' (Judgment CB/2 §262). The DJ has thereby abnegated her s.87 duties:

(i) The duty of the judge under s.87 was to determine, for herself, whether Mr Assange's extradition was compatible with Article 7 ECHR. She cannot abrogate that responsibility to another court, in another country, applying different laws.

(ii) Neither (even if she could do so), could she in this case reliably conclude that a US Court will, by coincidence, fulsomely apply the requirements of Article 7. The Fifth Amendment might have similarities with Article 7 but it is governed by a different body of principles and case law (which are unknown to this Court and were unknown to the DJ). Nothing in the limited Fifth Amendment caselaw to which the DJ referred, for example, suggests that a US court would distinguish (legitimate) '*gradual clarification of the rules of criminal liability through judicial interpretation from case to case'* from (illegitimate) development of the law inconsistently with the essence of the offence and which could not reasonably be foreseen (per ***SW*** etc.). On the contrary, the Fifth Amendment focusses instead, it seems, on the breadth of the statute and whether it could or should apply to the scenario in question. Thus '*one to whom the statute clearly applies, irrespective of any claims of vagueness, he has no standing to challenge successfully the statute under which he is charged for vagueness'* (Judgment §257). Section 793 is undoubtedly a broad provision on its face. The witnesses before the DJ described its breadth as '*a loaded gun pointed at newspapers and reporters who publish foreign policy and defense secrets'* (Jaffer, tab 22, §8-9 - agreed s.9) (Shenkman, EB/5 §29). Narrow focus on the breadth of the statute is not, however, how Article 7 operates. Article 7 asks a different question. Namely, whether an (admittedly broad) statute did at the time foreseeably apply to the scenario in question; based on prevailing precedent and practice. The two protections are not, as the DJ appears to have thought, interchangeable. One appears to ask the question from the perspective of the legislature. The other looks from the perspective of the defendant.

(iii) It is striking that the example chosen by the DJ for analysis of the Fifth Amendment was ***Morison***; in which (although the DJ doesn't cite this), the Court of Appeals said that publishers fell outside the scope of the espionage statute, based on prevailing precedent and practice.

9.32. In short, if the DJ was of the view that a US would or could *uphold* a Fifth Amendment claim in this case, then extradition was barred. If on the other than the DJ was of the view that a US

could or would or could *reject* a Fifth Amendment claim in this case, she was duty-bound to consider whether, on its merits, Article 7 nonetheless barred surrender. The DJ failed to undertake the necessary Article 7 analysis.

The decision the DJ would have reached had she considered Article 7

9.33. The DJ had, however, earlier discussed the topic of '*the unprecedented nature of the prosecution'* in the section of her judgment which discussed bad faith at (Judgment CB/2 §177-180). From that discussion, it would seem that the DJ would likely have rejected the Article 7 challenge had she addressed it. For the reasons which follow, she would have been wrong.

9.34. First, the DJ observed that '*The US denies that the prosecution is unprecedented. Mr. Kromberg pointed out that the DOJ has long viewed the intentional outing of intelligence sources as generally outside the protection of the First Amendment and provided a summary of the US caselaw to support this*' (Judgment CB/2 §178). That is simply incorrect. The US reply evidence offered no factual or legal precedent for this indictment (Kromberg 1, CB/12 §9). According to counsel for the Government *'we can agree, I do not think it is contentious...that there has not actually been a prosecution'* (Tr 18.9.20, p54).

9.35. The DJ observed that Mr Kromberg '*cited the opinions of the Department's Office of Legal Counsel from 1980 and 1981 [concerning the] Intelligence Identities Protection Act'* (Judgment CB/2 §178). Self-evidently, 40-year old internal DoJ memoranda concerning different legislation, and which are not aimed at publishers anyway, is no answer to the First Amendment analysis, let alone Article 7 ECHR (Lewis 4, EB/34 §5, 11).

9.36. Secondly, the DJ observed that '*[c]ases which raise novel issues of law are not uncommon'* (Judgment §180). Of course they are not. But Article 7 prohibits prosecutions which are premised upon upon '*novel'* legal theories that could not have been reasonably anticipated according to the law and practice then in force: ***SW*** (supra) at §34; ***Kafkaris v Cyprus*** (2009) 49 EHRR 35 at §142. Article 7 demands that '*the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, [that his] acts and omissions will make him criminally liable'* (***SW*** (supra) at §34). The unambiguous evidence before the DJ was that that was that no publisher could have foreseen prosecution in 2010.

9.37. Thirdly, the DJ cites ***Bartnicki v. Vopper,*** 532 U.S. 514 2001, as an example of a case *'which raise[d] novel issues of law'* (Judgment §180). The point is a completely undermining of the DJ's position. As discussed in detail in section 10 below, the US Supreme Court in ***Bartnicki*** reiterated '*The right of the press [to] publish information of great concern obtained from documents stolen by a third party*'.[66] In short, ***Bartnicki*** is part of the long line of precedent which showed that the activity now prosecuted by the US was not thought to be illegal in 2010.

9.38. Fourthly, the DJ said '*In 2006, a court considered the position of Mr. Rosen (and his co-defendant Weissman) who were prosecuted for passing classified information from a whistle-*

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[66]. According to the Supreme Court, publishers only engage in criminal activity when they engage themselves in separate criminal acts (there stealing or wire-tapping) in order to obtain that material. See e.g. (Jaffer, EB/12 §24 - agreed s.9).

blower to the press (US v Stephen Rosen [2006] 455 Supp 2d 602)' (Judgment CB/2 §180). This was, with respect, another false attempt to find legal precedent where none existed (according to the unanimous evidence of every legal professional who gave evidence before the DJ).

9.39. Despite not appearing in its served evidence, the first instance 2006 District Court opinion of DJ Ellis in ***US v Stephen Rosen*** (2006) 455 Supp 2d 602 was put to some (but not all) witnesses in cross-examination as some sort of precedent or authority for this indictment. All those witnesses confirmed that it is nothing of the sort:

(i) Rosen (and his co-defendant Weissman) were <u>not</u> publishers. They were intermediaries (lobbyists) acting for a whistle-blower (Franklin), who passed classified materials from Franklin <u>to</u> the media. The case '*concerned an oral transition to an intermediary. It did not involve the media at all'* (Shenkman, EB/49 Tr 17.9.20, xx, p42-43). The '*facts were completely distinct...information forwarded to the press...rather the publication and then to the public*' (Shenkman, EB/49 Tr 17.9.20, re-x, p64).

(ii) Accordingly, anything said in relation to the position of publishers by the judge in the ***Rosen*** case was *obiter*, as Shenkman stated: '*that was not the issue before the court*' (Shenkman EB/49 17.9.20, xx, p42-43.

(iii) By a first instance judge: '*a court of first instance...there is no court below'* (Shenkman, EB/49 17.9.20, re-x, p63).

(iv) In fact, the Judge in ***Rosen*** wrongly amalgamated third party intermediaries (such as Rosen) and publishers into a single category of persons for consideration. '*This type of analysis [insofar as it concerns publishers] is not occurring in [such] a vacuum, it is subject to the First Amendment'* (Shenkman, EB/49 Tr 17.9.20, xx, p42).

(v) Even Rosen / Weissman's prosecution as intermediaries to a leaker was ultimately abandoned (Shenkman, EB/49 Tr 17.9.20, xx, p43 / re-x, p64).

(vi) The opinion is '*not precedential*' (Shenkman, EB/49 Tr 17.9.20, xx, p43); even a District Court would be '*welcome to disagree'* (Shenkman, EB/49 Tr 17.9.20, re-x, p64).

(vii) The notion that Mr Assange ought to have been on notice, from that first instance *obiter* opinion, that (contrary to the clear statutory intent, observations from the Court of Appeals in ***Morison***, and a century of practice) his actions potentially placed him at risk of indictment under the Espionage Act, is ludicrous. It was a notion roundly rejected by <u>every</u> witness to whom ***Rosen*** was put.[67] And

(viii) Any competent lawyer to whom Mr Assange might have turned in 2010/2011 to ask the effect of ***Rosen***, would have immediately also observed that the publishers in that

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

case, who did receive the classified information from Rosen and publish it, were not prosecuted in that case (Shenkman, EB/49 Tr 17.9.20, re-x, p64).

9.40. Fifthly, it is accordingly simply inaccurate to characterise this prosecution, as the DJ did at (Judgment CB/2 §180), as one which merely '*grapple[s] with the boundaries of free speech in relation to sensitive information in the age of the internet ... [and] tests these boundaries'*. That was not the effect of the evidence before her. The clear evidence before the DJ was that this prosecution was '*completely unforeseeable'* as a matter of established US law and practice in 2010.

9.41. Later prosecutorial practice only serves to reinforce the position:

(i) The question was also confronted during the criminal investigation into Chelsea Manning; as part of which the question of prosecuting Mr Assange was directly considered and not undertaken (Timm, EB/42 Tr 9.9.20, xic, p53 – unchallenged).

(ii) Even the Obama administration, which aggressively pursued leakers in an unprecedented fashion in the 21st century,[68] likewise declined to attempt to prosecute FOX News publisher James Rosen as a co-conspirator in the case against leaker Stephen Kim (Shenkman, EB/5 §25-27 / EB/49 Tr 17.9.20, xic, p33-34). President Obama, discussing the case in the wake of a public outcry ('*firestorm'*) at the mere suggestion in an affidavit in the Kim case that Rosen was an unindicted co-conspirator, said he was '*troubled by the possibility that leak investigations may chill the investigative journalism that holds government accountable'* and affirmed that '*[j]ournalists should not be at legal risk for doing their jobs'* (Shenkman, EB/5 §26 / EB/49 Tr 17.9.20, xic, p34)

(iii) Likewise, and as discussed further below, New York based Cryptome and other websites that published the unredacted cables (ahead of WikiLeaks) were never prosecuted (Grothoff 1, EB/20 §9 / EB/51 Tr 21.9.20, xic, p11-12) (EB/20 ex 9, p9). The unredacted cables hosted by those US-based sites are *still* hosted there (Grothoff 1, EB/20 ex 14) and Crytome confirms that the US has never requested their removal (Young, EB/25 - agreed s.9).

Conclusions on Article 7

9.42. The evidence in this case was all one way. The US took no issue with the evidence (and fact) that a prosecution of a publisher for solicitation, receipt and/or publication of classified materials was (and is) completely unprecedented. It has never been attempted before in US legal history. Yet, Mr Assange is said to have been able to foresee (to the standard required by Article 7) that his (alleged) conduct would have precipitated it; because, it seems, '*the law may be developed by the Courts and applied to circumstances not foreseen when a provision was enacted'* (US Closing CB/5 §306).

9.43. The '*circumstances'* of this case are not novel in the slightest; as the unchallenged evidence demonstrated, **(a)** the active and knowing solicitation, receipt and publication by a publisher of national security materials has occurred every day in the US for decades and has never

[68]. Samuel Morison was the only person ever convicted under the Espionage Act for leaking to a publisher in the 20th Century – and was ultimately pardoned (Jaffer, tab 22, §18 - agreed s.9).

been prosecuted, and **(b)** they were moreover '*circumstances'* that were '*foreseen'* when the Espionage Act was drafted, again when the Act was amended in 1950, and through prosecutorial practice over the past 100 years. Yet, they have nevertheless never been the subject of prosecution.

9.44. This prosecution is, in truth, a clear violation of Article 7 ECHR and the DJ erred in suggesting otherwise.

10. Article 10 ECHR

10.1. Freedom of expression is:

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

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

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

10.3. The disclosure and publication of State-held information plays a very important role in a democratic society because it enables civil society to control the actions of the government to which it has entrusted the protection of its interests. It promotes greater transparency and responsible public administration and enables the public to scrutinise whether public functions are being performed adequately (see *Claude Reyes et al. v. Chile* case before the Inter-American Court of Human Rights (19 September 2006, Series C no. 151), [58], [84], [86] as quoted in ***Stoll v Switzerland*** at [43].

10.4. With regards to the freedom of publishers in particular:

> *'...the primary function of the press in a democracy is to act as a 'public watchdog'...'* (***Times Newspapers v United Kingdom*** (2009) 3002/03, §45).

10.5. The watchdog role of publishers – and their freedom of speech protected under Article 10 – assumes even greater importance given the nature of the disclosures in this case:

> '*Press freedom assumes even greater importance* ***in circumstances in which State activities and decisions escape democratic or judicial scrutiny on account of their confidential or secret nature.*** *The conviction of a journalist for disclosing information considered to be confidential or secret may discourage those working in the media from informing the public on matters of public interest. As a result, the press may no longer be able to play its vital role as "public watchdog" and the ability of the press to provide accurate and reliable information may be adversely affected'* (***Goodwin v. the United Kingdom***, 27 March 1996, § 39, *Reports* 1996-II; ***Stoll*** §110 (emphasis added))

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

> *'...Genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals...'* (***Gündem v Turkey*** (2001) 31 EHRR 49, §43-45).

10.7. As the UN Human Rights Committee (HRC) has confirmed, freedom of speech protections apply to 'all forms of expression and their means of dissemination' which includes books, newspapers and electronic or internet-based publications.[69] Importantly, the HRC also recognises that:

> *"Journalism is a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self- publication in print, on the internet or elsewhere."*[70]

10.8. The application of Article 10 is subject to the proviso that the publisher has acted '*in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism'*, which must be considered in light of present-day conditions (***Stoll v Switzerland***, §§103-104) – and in this case, the digital and internet-based mode of publication and journalism at issue, where the publication of the full text of documents (as practised by Mr Assange in this case) is preferred to ensure accuracy and to enable the public to form their own opinion (per ***Stoll v Switzerland***, §147) and where there are evolving ethical standards in the digital age (including, for example, the use of drop box technology, encryption and other technological methods to protect sources, as well as providing advice to sources about digital detection).

10.9. A basic condition of press freedom and a key ethical obligation of journalists that must be considered in this context is the protection of sources. Publishers and journalists have an obligation, set out in professional ethical codes, to protect the identity of their source in order to ensure that sources are not discouraged from providing public interest disclosures (***Goodwin v United Kingdom*** (1996) 22 EHRR 123, §39; ***Sanoma Uitgevers B.V. v. the Netherlands [GC],*** no. 38224/03, § 50). Journalistic activity to protect sources and to disseminate confidential information is engaged by Article 10 (***Görmüş and others v Turkey***, §39).

10.10. The concept of responsible journalism, as a professional activity which enjoys the protection of Article 10:

> *'...is not confined to the contents of information which is collected and/or disseminated by journalistic means. That concept also embraces the lawfulness of the conduct of a journalist, and the fact that a journalist has breached the law is a relevant, albeit not decisive, consideration when determining whether he or she has acted responsibly'* (***Gîrleanu v Romania*** §84)

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[69] GC 34, at paragraphs 12.
[70] GC 34, at paragraph 44.

10.11. In considering the test under Article 10, the courts should always make a distinction between the obligations of the journalist and their source, who has obligations of secrecy to the state (***Gîrleanu v Romania*** §90; see also ***Pasko v Russia*** §87).

10.12. The criminal prosecution of a publisher constitutes an interference with Article 10. In order for that interference to be justified, the court must consider the following test:

(i) *Whether the interference is prescribed by law*: a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his or her conduct and that he or she must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail and that it be compatible with the rule of law (***Perinçek v. Switzerland*** [GC], § 131);

(ii) *Whether the interference is for a legitimate aim*: in this case to protect national security, which is an express category of legitimate aims;

(iii) *Whether the interference is necessary in a democracy society:* the "necessity" for any restriction on freedom of expression must be convincingly established and the measure must be strictly proportionate to the aim pursued ((***Sunday Times v. the United Kingdom*** §50). This includes considering whether there is a '*pressing social need'* for the measure in order to protect national security and the reasons adduced by the national authorities to justify it are '*relevant and sufficient'* and are based on '*an acceptable assessment of the relevant facts'* (***Stoll v Switzerland*** §101). Relevant considerations include: the conduct of the publisher and the means by which the information was obtained, whether the penalty sought to be imposed is proportionate and the wider context of media reporting (***Stoll v Switzerland*** §112; §118).

10.13. This test must be applied on a case-by-case basis, considering all the relevant circumstances and the case as a whole, so there can be no blanket acceptance that prosecution under a particular statute meets this test. It also requires 'the most careful scrutiny' because:

> *'…there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate of questions of public interest…The most careful scrutiny on the part of the Court is called for when, as in the present case, the measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern'* (***Stoll v Switzerland*** §106).

10.14. States do not have unlimited discretion to take any measure '*for punishing illegal conduct intertwined with expression'* and '*must exercise the utmost caution'* where the measure, as in this case, criminal prosecution, will *'dissuade the applicants and other persons from imparting information or ideas contesting the established order of things'* (***Stomakhin v Russia***, §126).

10.15. In relation to the Article 10 analysis, the case law establishes the following principles of relevance to this case:

(i) Journalists should not be held liable for publishing classified or confidential information where they have not themselves committed a wrong in obtaining it (***Stoll v Switzerland*** §39);

(ii) Given the risk of criminal trials for breaching state secrecy being prone to abuse for political purposes, a number of principles are vital for fairness, including that information which is already in the public domain cannot be considered a state secret and cannot be punished as espionage (***Stoll v Switzerland*** §40; see also discussion about the prosecution of the first person to publish, as opposed to those who publish afterwards or re-publish ***Stoll v Switzerland*** §159);

(iii) Once information that ought to be secret has lost its secret character (including by publication in another jurisdiction), the damage is done and any measures to protect the information becomes unnecessary and therefore an unjustified interference with Article 10 (***Sunday Times v United Kingdom,*** §55);

(iv) In the balance between freedom of the press and the protection of confidential or secret information, publicity of documents is the rule and their classification the exception (***Stoll v Switzerland*** §111);

(v) While the confidentiality of both diplomatic material and matters related to the armed forces are justified in principle, '*such confidentiality cannot be protected at any price'* and any 'absolute exclusion' from public debate is unacceptable (***Stoll v Switzerland*** §128 on diplomatic material and ***Görmüş and others v Turkey*** §62 on matters related to the armed forces). What must be shown is that the disclosure and/or publication of the relevant material '*would cause 'considerable harm' to the country's interests'*: ***Hadjianastassiou v Greece*** §45) and this damage and/or threat must be verified (***Gîrleanu v Romania*** §95). The fact the documents are 'outdated' and unlikely to cause harm is also relevant (***Gîrleanu v Romania*** §98).

(vi) The balance must be considered in light of the public interest in the publications and the importance in contributing to a public debate (see, for example, ***Stoll v Switzerland*** §24);

(vii) Considerations related to the fairness of proceedings need to be taken into account when examining an interference with Article 10(2) (***Stoll v Switzerland*** §137);

(viii) The means and manner in which the publication takes place is relevant, but '*it is not for [the courts] to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists"* (***Stoll v Switzerland*** §146);

(ix) In considering the proportionality of the penalty imposed, the court will look not just to the sentence, but also to the effect of the conviction itself as well as the length of the sentence on investigative journalism and its deterrence for other publishers and journalists in participating in debates of public importance and performing its important watchdog role (***Stoll v Switzerland*** §154).

<u>This Case</u>

10.16. As stated above, this legally unprecedented prosecution seeks to criminalise the application of ordinary journalistic practices of obtaining and publishing true (and classified) information of the most obvious and important public interest.

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

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

10.18. The evidence before the DJ was clear, and largely agreed. The indictment:

(i) Seeks to criminalise the '*soliciting, receiving and publishing of national defense information',* which '*from a journalistic standpoint'* essentially '*boils down to newsgathering'* (Feldstein, EB/10 §9) (Cockburn, EB/23 §14-15 - agreed s.9). It has '*triggered an outcry from human rights and civil liberties organisations but most of all from journalists – not because of affection for Assange but because, as one wrote 'it characterizes everyday journalistic practices as part of a criminal conspiracy'...'* (Feldstein, EB/10 §9).

(ii) As Harvard professor emeritus Alan Dershowitz observes, while he might *'think there's a difference between the New York Times and Assange from a practical point of view…from a constitutional point of view, it's hard to find that difference'* because '*They're both publishing classified, stolen material'* (Feldstein, EB/10 §9).

(iii) The focus of the indictment is *'almost entirely on the kinds of activities that national security journalists engage in routinely and as a necessary part of their work'* including '*cultivating sources, communicating with them confidentially, soliciting information from them, protecting their identities from disclosure, and publishing classified information'* (Jaffer, EB/12 §3, 25-26 - agreed s.9) (Timm, EB/32 §7-31, 41).

(iv) The '*indictment of Mr Assange poses a grave threat to press freedom'* because the '*indictment's implicit but unmistakeable claim is that the activities integral to national security journalism are unprotected...and even criminal'* (Jaffer, EB/12 §3, 25-26 - agreed s.9).

(v) Per conservative scholar Gabriel Schoenfield, the '*indictment seems to have been tailored in a way that will do a lot of collateral damage, if not the maximum possible amount'* to the freedom of the press (Feldstein, EB/10 §10). It '*portrays standard journalistic tradecraft as nefarious, akin to espionage'* (Feldstein, EB/10 §9).

10.19. If publishers were to stop publishing official secrets '*there could be no adequate diplomatic, military and political reporting of the kind our people take for granted, either abroad or in Washington'* (Jaffer, EB/12 §13 - agreed s.9).

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

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

The US reply

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

(i) Assange 'aided and abetted' Manning in her (illegal) activity of leaking; or

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

(iii) WikiLeaks and Assange '*deliberately put lives at risk'* by disclosing unredacted materials which, it is said, takes this case outside the protections of the First Amendment.

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

10.23. Taking each in turn (and assuming for present purposes that the allegations are or may be true).

'Aiding and abetting' a whistle-blower's crime

10.24. The present indictment seeks to cast as criminal the suggestion that Mr Assange '*explicitly solicited…restricted material of political, diplomatic or ethical significance'* and that the WikiLeaks website was designed by Mr Assange to focus on such '*information restricted from public disclosure by law, precisely because of the value of that information'* (Indictment, §2). It refers to the publication of the '*draft most wanted list'* of such documents, and to various steps allegedly taken by Mr Assange characterised as being '*to encourage Manning to steal classified documents'* such as providing a confidential dropbox, or using the phrase '*ok great'* on an online chat service when she was discussing her attempts to obtain particular documents (Indictment, CB/12 p1043 §15, 18, 25).

10.25. In short, the theory of liability underpinning the indictment is that it is unlawful for Mr Assange to '*ask, encourage, aid or abet a serving soldier to break the law by disclosing classified information'* (Tr 8.9.20, EB/39, p51). Every witness to whom this theory was put told the DJ that it represented a completely misconceived view of the First Amendment.

10.26. '*The right of the press [is to] publish information of great concern obtained from documents stolen by a third party*' (per ***Bartnicki v Vopper*** (2001) 532 US 514, 528). According to the Supreme Court, illegality only arises (and the protection of the First Amendment ends) when the publisher is involved in criminal activity in connection with the underlying data theft

(Jaffer, EB/12 §24 - agreed s.9). In that way, '*journalists are not above the law*' (Feldstein, Tr 8.9.20, xx, p51). That means, according to the clear evidence the DJ heard, criminal activity separate from the (criminal) act of whistle-blowing. i.e. the commission of a criminal act such as burglary or theft (Feldstein, EB/39 Tr 8.9.20, xic, p51-52 / re-x, p64) (Lewis, EB/44 Tr 15.9.20, xx, p29), or illegal wire-tapping (as in ***Bartnicki***).

10.27. *Non sequitur*, as every witness explained, that soliciting, encouraging, even helping, whistle-blowers in the act of whistle-blowing is outwith the protection of the First Amendment (i.e. unlawful) (Feldstein, EB/39 Tr 8.9.20, xx, p53). To reason that, because the whistle-blower herself commits an Espionage Act offence by leaking classified information to publishers, anyone (including the publisher) who encourages, facilitates, solicits that act is legally liable as a conspirator in that crime (leaking to the publisher), is a theory of criminality liability without foundation or precedent:

(i) It is '*not at all'* how the First Amendment operates: '*absolutely not, no'* according to Prof. Feldstein (EB/39 Tr 8.9.20, re-x, p61-62).

(ii) Mr Timm confirmed that it is '*absolutely not'* a coherent view or theory of how the criminal law works. It would, he said, criminalise '*news gathering'*. Journalists '*are often talking with sources, potentially asking them for documents. Once they get documents, they are asking for clarification and potentially more information. This is not out of the ordinary at all. In fact, it is standard practice when we are talking about how journalists operate...many of the counts in the [Assange] indictment essentially would criminalise this behaviour, but it would not just criminalise this behaviour. It would criminalise the mere act of having this material with you, the charges that relate to 793(c) of the Espionage Act...so, this would criminalise every single reporter who has ever received any document, whether they asked for it or not, from a source that potentially broke the law'* (Timm, EB/42 Tr 9.9.20, xic, p54).

(iii) Mr Timm added that '*this is almost a consensus opinion among First Amendment experts, media law lawyers, anybody who has studied the issue extensively. It is why virtually every newspaper in the United States has vehemently condemned the charges before the court today as a potential clear and present danger to press freedoms in the United States. Many of these papers I might add have partially criticised Mr Assange and WikiLeaks in the past, but they nevertheless see the extreme dangers in the case that a journalist would face if this case was to go forward*' (Timm, EB/42 Tr 9.9.20, xic, p55).

(iv) Mr Timm told the DJ that routine journalistic behaviours that would be criminal under the Government's novel theory of liability, include soliciting classified information from whistle-blowers, and providing them with tools to do so, such as dropbox facilities. '*This is common journalist practice...On each of [over 80] news organisations' websites, they have instructions for how sources can submit information in to them...You can look at, for example, icij.org, an international consortium for investigating journalists...which famously published the Panama Papers investigation which was based off of a leak from an unidentified source, by an organisation that is very well respected around the world. They are explicitly saying on their page, 'Leak to us.*'' (Timm, EB/42 Tr 9.9.20, xic, p56-58). Mr Timm provides multiple examples of such routine journalistic activity (Timm EB/32 exhibits

2 & 4-11). '*News organisations have even taken out advertisements targeting potential whistle-blowers...even billboards'* (Timm, EB/42 Tr 9.9.20, xic, p57).

(v) When asked specifically about the WikiLeaks 'draft most wanted list' and '*positively asking people for classified information, is that something that is criminal?'* Mr Timm replied '*No...this is firmly entrenched in the free speech rights of anybody in the US'* (Timm, EB/42 Tr 9.9.20, xic, p58). It is something Mr Timm has done himself (Timm, EB/42 Tr 9.9.20, xic, p58-60) (Timm EB/32 exhibits 12-14). '*That is often what journalists do'* (Timm, EB/42 Tr 9.9.20, xic, p60).

(vi) Mr Timm was asked whether, when he personally solicited classified information from whistle-blowers, '*was it ever suggested to you then or since that that is criminal activity on your part?'.* He answered '*No, absolutely not. I mean, this is First Amendment protected speech and again, this is not just my opinion it is the consensus opinion of virtually every person and lawyer or 6 media lawyer in the country...this indictment is clearly unconstitutional. WikiLeaks, just like anybody else, has First Amendment rights. That is to say that we would like to receive documents that potentially show corruption or abuse or illegality, just like every newspaper in the United States does. And if this were to go forward it would potentially criminalise all of those other news organisations'* (Timm EB/42 Tr 9.9.20, xic, p60).

10.28. Mr Timm was <u>not challenged</u> on any of this in cross-examination;

(i) But he did reiterate to the DJ that '*everybody is and should be fearful of this case... there were many other reporters who were saying 'send this information to me in person' foremost, that potentially would lead to them being criminally liable if this case went forward. And there is a urgent need in the media community to prevent that from happening'* (Timm, EB/42 Tr 9.9.20, xx, p62). Assisting or soliciting or encouraging a whistle-blower to disclose classified information is '*certainly not'* criminal under the First Amendment. '*Speaking with sources, asking them for clarification, even asking them for more documents, is behaviour that journalists engage in on a daily basis and it would be incredibly unprecedented and dangerous for this practice to be criminalised'* (Timm, EB/42 Tr 9.9.20, re-x, p80-81).

(ii) Likewise, Mr Lewis. When asked whether it was correct that '*third parties are not allowed to help government employees break the law in obtaining classified information to leak*', Mr Lewis categorically said '*no'* and explained that '*that's core journalist activity and in that sense every national security reporter from Bob Woodward could be'* prosecuted (Lewis, EB/44 Tr 15.9.20, xx, p29). The theory is a straightforward '*overstatement'* of the law (Lewis, EB/44 Tr 15.9.20, xx, p29).

(iii) Mr Shenkman volunteered the same analysis: '*Bartnicki tells us...that the press cannot engage in separate criminal activity to obtain classified information...[Bartnicki does not suggest that] engaging in news gathering practices to assist a government employee liberate classified information...would be criminal conduct'* (Shenkman, EB/49 Tr 18.9.20, re-x, p62).

10.29. Well known examples, which would have been the subject of prosecution had the theory been correct, but which have never been prosecuted, are legion. For example, in the Pentagon Papers case itself, New York Times '*worked closely with [the whistle-blower, Ellsberg] to*

get the documents in the first place...Clearly, the Times played a very active, not passive, role in that case. As in most journalistic endeavours that is what journalists do... the New York Times even physically copied the report for Mr Ellsberg' (Feldstein, EB/39 Tr 8.9.20, re-x, p63). Yet no prosecution was brought against the NY Times. Some newspapers even pay whistle-blowers money, yet never have been charged (Feldstein, EB/39 Tr 8.9.20, re-x, p63-64).

10.30. Further still, as Mr Shenkman confirmed, it is a flawed theory of liability which has in fact repeatedly been rejected by the US courts over the years. For example, it underpinned the 1945 'Amerasia' threat to utilise the Espionage Act against the press; and was explicitly rejected by the Grand Jury in that case '*due to First Amendment implications and the history is clear on that*' (Shenkman, EB/49 Tr 17.9.20, xic, p30 / 18.9.20, xx, p54-56). '*It is a theory that is sometimes pedalled but has it [n]ever, before this case, produced an indictment...and one of the key reasons for that are the First Amendment concerns and the impact on news gathering*' (Shenkman,EB/49 Tr 18.9.20, re-x, p62-63).

10.31. All this history is why:

(i) As Professor Feldstein stressed (EB/39 Tr 8.9.20, re-x, p62-63), these '*routine'* activities (encouraging and actively assisting whistle-blowers to leak) are '*not only consistent with standard journalistic practice, they are its lifeblood'* – every investigative journalist has '*solicited sources for confidential or restricted information',* it is a skill taught '*in every journalism school worthy of the name'* and the most prized result of such efforts is '*information with the highest 'value''* (Feldstein, EB/10 §9(a)). If such activity is criminal, then the *'world's greatest journalists'* have all '*conspired with, and aided and abetted whistle-blowing sources'* (Feldstein, EB/1- §9(a)). '*The government's attempt to draw a distinction between passive and active newsgathering – sanctioning the former and punishing the latter - suggests a profound misunderstanding of how journalism works. Good reporters don't sit around waiting for someone to leak information, they actively solicit it...When I was a reporter, I personally solicited and received confidential or classified information, hundreds of times*' (Feldstein 2, EB/21 §2). In evidence, Prof. Feldstein said '*soliciting information, gathering information [is a] standard thing that all journalists do, the standing operating procedure, and we teach it in journalism schools, we have conferences, and, you know, the things that we discussed are in newsbeats, they are all sort of routinized and the ideas is to share tips, show how to acquire secret documents, secret information, and so that is actually standard. So, too, is asking our sources for evidence, for documents to back up what they say, and in working with them to find documents, directing them in a manner of speaking as to what it is we need as proof, 1 making suggestions of what they should look for and try to find out for us... my entire career virtually was soliciting secret information and records'* (EB/39 Tr 8.9.20, xic, p34-35- unchallenged).

(ii) As Mr Timm wrote, the idea underlying the US indictment '*borders on fantasy...[asking for classified evidence] is a common practice for journalists in the US and around the world. If this is a crime, thousands of journalists would be committing crimes on a daily basis...*' (Timm, EB/32 §11-13). '*I myself have advocated for leaks in cases where the US secrecy system is hiding abuse, corruption, or illegal acts. In 2014, I published an article specifically calling for the leak of the*

classified version of the Senate Committee report on CIA Torture and tweeted about it, as did others' (TimmEB/32 §17-23).

(iii) So far as the 'draft most wanted list' is concerned, Mr Goetz wrote: '*I for one, can confirm that [interrogation videos and Rules of Engagement for US forces in Afghanistan and Iraq] were part of a 'most wanted' list for many investigative journalists at the time who were trying to uncover unlawful American conduct after September 11, 2001'* (Goetz EB/28 §16 – unchallenged). WikiLeaks was '*not the only organisation involved in the development of such a ['draft most wanted'] list at that time. The Center for Democracy and Technology maintain a similar list and did so in 2009'* (Timm, EB/32 §27-28) (Timm EB/32 exhibit 16). See generally (Bundle L, section F).

10.32. Ultimately, the Court can assess the whole issue for itself by reference to the detailed discussion of it in ***Levine, Siegel and Bead*** (2011) NYLS Law review (Timm EB/32exhibit 3). Mr Timm told the DJ '*I would encourage the court to read this paper in full. I believe it is actually the best explanation that I have read in detail of (inaudible) law in the United States and how it affects the press. This paper makes the assuringly important point...that many journalists who the public has known well for many years likely would have been found in violation of the law if this idea that they can conspire with a source to break a law was actually in effect. So, for example, the two most famous reporters in the US history, Bob Woodward and Carl Bernstein, could have all been charged in the wake of persistently asking and receiving information from the FBI Deputy Director, Mark Felt, better known as 'Deep Throat' during the Watergate investigation. There are many more examples'*, including the potential criminalisation of Pulitzer Prize-winning investigative journalism (Timm, EB/42 Tr 9.9.20, xic, p55-56 / xx, p77). According to Mr Timm, it is '*the crux of the entire law review article about how it is a journalist's job to not just publish information but to gather the news or engage in news gathering which courts for decades have talked about in the United States*' (Timm, EB/42 Tr 9.9.20, re-x, p81).

10.33. Unsurprisingly, the (globally lawful) practice of cultivating, encouraging, soliciting and actively assisting whistle-blowers is not confined to the USA. New Zealand investigative journalist Hager told the DJ that the notion or suggestion that such conduct is criminal '*is based on a fundamental misunderstanding of the work that someone like me does...that is not the way that it works. In fact, it is a regular business of me and my colleagues around the world as we fulfil out the role of society that we not only actively work with our sources, we go out and find our sources. We encourage our sources to produce evidence that will back up the things that they are telling us and sometimes that evidence might be a page of paper and sometimes it might be a memory stick, a USB drive...sources are whistle-blowers who actually produce the important information which helps to change the world and play our role in maintaining democratic societies as stuff where we work with people who in most cases are breaking the law when they help us and we have to talk through with them how can they look after themselves'* (Hager, EB/50 Tr 18.9.20, xx, p12).

Article 10 ECHR

10.34. Most importantly for the purpose of the DJ's functions, criminalisation of the active *'gathering of information'* from a law-breaking whistle-blower offends the core notions of Article 10 within the Council of Europe.

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

> *'...In view of the interest protected by article 10, the law cannot allow arbitrary restrictions which may become a form of indirect censorship should the authorities create obstacles to the gathering of information. For example, the latter activity is an essential preparatory step in journalism and is an inherent, protected part of press freedom. The function of the press includes the creation of forums for public debate … an essential element of informed public debate...'*

10.36. Insofar as Article 10 protects involves gathering or soliciting materials, ***Stunt v Associated Newspapers*** [2018] 1 WLR 6060, the Court of Appeal recognised that:

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

10.37. See, for example, ***Girleanu v Romania*** (2019) 68 EHRR 19:

> *'...68. The Court has consistently held that the press exercises a vital role of 'public watchdog' in imparting information on matters of public concern...It is also well established that the gathering of information is an essential preparatory step in journalism and an inherent, protected part of press freedom....*
>
> *70. The Court further observes that the applicant was arrested, investigated and fined for gathering and sharing secret information.*
>
> *71. In previous cases concerning gathering and disclosure by journalists of confidential information or of information concerning national security, the Court has consistently considered that it had been confronted with an interference with the rights protected by Article 10 of the Convention...Moreover, the Court reached a similar conclusion also in cases which, as the present case, concerned the journalistic preparatory work before publication...*
>
> *72. In these circumstances, the Court is satisfied that Article 10 of the Convention is applicable in the present case and that the sanctions imposed on the applicant constituted an interference with his right to freedom of expression...'*

10.38. This all explains why ***R v Shayler*** [2001] 1 WLR 2206 concerned only the prosecution of the acts of a state official in leaking classified materials to a publisher. In that arena, as the House of Lords explained, Article 10 provides latitude to states. But no publisher has ever been prosecuted under the OSA for the act of obtaining or receiving or publishing leaked information, undoubtedly because of Article 10. The Mail on Sunday, for example, was never prosecuted for obtaining or publishing Shayler's leaks, despite having obtained them from him by paying him to leak them to the newspaper.

The DJ's decision (Judgment §96-118)

10.39. The DJ's decision on this is difficult to discern:

(i) On the one hand, she appears to accept that '*the mere encouragement of a whistle-blower'* is protected by Article 10 (Judgment CB/2 §96). On the other hand, the DJ proceeds to cite telling a whistle-blower that '*curious eyes never run dry'*, or providing a drop-box facility, as '*activities [that go] beyond the mere encouragement of a whistle-blower'* (Judgment CB/2 §98, 102).

(ii) On the one hand, the DJ appears to accept that the above ECtHR authorities '*support'* the proposition that '*the criminalisation of the gathering of information offends the core notion of Article 10'* (Judgment CB/2 §115). On the other hand, she purports to have located an authority to contrary effect (Judgment CB/2 §116).

(iii) Ultimately, the DJ appears to conclude that encouraging whistle-blowers ought to be criminal (i.e. outwith the protections of Article 10) because '*The scheme of the OSA would be undermined if the disclosures made by a Crown servant, in this case by Ms. Manning to Mr. Assange, were treated differently to the disclosures of her co-conspirator. To find otherwise would be to provide a route to disclosure by a Crown servant which Parliament through the scheme of the Act has expressly denied'* (Judgment CB/2 §118).

10.40. The DJ's apparent conclusion, that the mere encouragement of a whistle-blower is capable of being criminalised consistently with Article 10, is a plain legal error.

10.41. First, telling a whistle-blower that '*curious eyes never run dry'*, or providing a drop-box facility to her, are the stuff of every-day investigative journalism; are in fact mild examples of it, are plainly within Article 10 and have never (as a result) been prosecuted in the last 200 years, in any Western country. '*Gathering of information'* from whistle-blowers is squarely '*protected'* under Article 10 *(**Tarsasag; Stunt; Girleanu*** etc). The contrary suggestion by the DJ is unsupportable in law.

10.42. Secondly, ***Brambilla*** (journalists involved in illegal wire-tapping to obtain newsworthy materials) is plainly a (different) ***Bartnicki***-type case. It does not concern or consider the legality of merely encouraging or assisting the act of whistle-blowing. It does not assist the DJ's analysis.

10.43. ***Stoll v Switzerland*** (2008) 47 EHHR 59 on the other hand, is very relevant. ***Stoll*** did concern the active obtaining of confidential governmental materials by S (a publisher) from a state whistle-blower. Importantly, that conduct (what the ECtHR terms '*The manner in which the applicant obtained the report'*) was found by the ECtHR to be protected by Article 10: see judgment §140-144. As the ECtHR held at §144 '*...the applicant did not act illegally in that respect'*...'. The violation in Stoll's case came about by reason of his subsequent publication of *misleading and untrue* claims about the content of the materials he had obtained (because the lawful manner in which the applicant obtained the report was *'not necessarily a determining factor in assessing whether or not he complied with his duties and responsibilities'*). ***Stoll*** supports the defence case. Assisting the act of whistle-blowing is neither unlawful nor indicative of an Article 10 violation.

10.44. Thirdly, it ought to come as no surprise that, consistently with the position that prevails in Strasbourg, no UK prosecution of a publisher for assisting or encouraging the act of whistle-blowing has ever happened. That is so even though the Mail on Sunday paid ***Shayler*** for his

materials. Of course, the reason for this is that the UK is bound by Article 10 and cases such as ***Stoll***.

10.45. Specifically, nothing in ***Shayler*** supports the conclusion that the mere encouragement of a whistle-blower is capable of being criminalised consistently with Article 10 (cf. Judgment CB/2 §110-114). ***Shayler*** only concerns the position of the whistle-blower. It does not (because the Mail on Sunday was never prosecuted) concern the position of publishers or those that encourage whistle-blowers. In fact, the House of Lords in ***Shayler*** was at pains to emphasise that '*this appeal calls for decision of no issue directly affecting the media'* (per Lords Bingham and Hutton at §37, 117) and that the role of publishing such materials could not be '*a ground for criticism'* because '*only a free and unrestrained press can effectively expose deception in government. Its role is to act as the eyes and ears of the people*' (per Lord Hope at §50). Notably, the House of Lords cited the US Supreme Court's First Amendment Pentagon Papers ruling in support of these propositions.

10.46. Fourthly, there is nothing inherently surprising or problematic, from the perspective of the OSA, in the law as it stands (and as it should have been applied by the DJ). The act of whistle-blowing is criminal (***Shayler***). So is receiving / publishing secret materials if brought about by separate criminality (***Brambilla*** / ***Bartnicki***). Those dual protections are sufficient to serve the public interest in secrecy. That interest neither requires nor (per Article 10) permits the erecting of a further barrier to publication, namely criminalising the act of encouraging whistle-blowing.

10.47. Stepping back, were the DJ's concerns real, publishers would have been prosecuted. That recruitment / solicitation / assisting the act of whistle-blowing is protected / lawful conduct is, however, the only explanation the DJ heard for the (otherwise inexplicable, but unchallenged) evidence of the routine unprosecuted practice of the same. It is, in the final analysis, conspicuous and striking that the US has been able to offer no single US or UK or European authority which purports to criminalise the recruitment / solicitation / assisting of the act of whistle-blowing. That, to state the obvious, is because, for over 200 years, such conduct has been (and must have been) acknowledged to be protected by the First Amendment / Article 10. Put otherwise, it is plainly nonsensical that '*criminal'* activity has been committed daily in the US / UK / Europe by investigative journalists for decades and has, inexplicably, gone unprosecuted.

The passcode hash

10.48. Alternatively, the US suggests that the 'passcode hash' allegation is an example of ***Bartnicki***-prohibited separate criminality (such as to take Mr Assange outside the protection of the First Amendment / Article 10, per ***Brambilla*** / ***Bartnicki***), despite none of the documents contained in the indictment having been obtained this way.

10.49. On its face, whether under Article or the First Amendment, '*a journalist [is not] entitled to hack into computers to get newsworthy material'* (Feldstein EB/39 Tr 8.9.20, xx, p52-53 / re-x, p64).

The DJ's decision (Judgment §96-118)

10.50. The DJ concludes that the 'passcode hash' allegation was such an attempt to '*hack'* into Government computers '*to obtain protected information and publish it'*.

10.51. But, as both Mr Timm and Mr Shenkman reminded the DJ, that is not what is alleged against Mr Assange (Shenkman, EB/49 Tr 17.9.20, xx, p57-58).

10.52. The alleged purpose of the 'hash code value' conspiracy is outlined by Kromberg 4 at CB/12 §10-15:

> '*...the United States has not alleged that the purpose of the hash-cracking agreement was to gain anonymous access to the Net Centric Diplomacy database or, for that matter, any other particular database. Instead ... Manning may have been able to log onto computers under a username that did not belong to her' and '[s]uch a measure would have made it more difficult for investigators to identify Manning as the source of disclosures of classified information'*...'
>
> *'Each step in this process can leave behind forensic artefacts on the computers or computer accounts used to accomplish the crime. Therefore, the ability to use a computer or a computer account not easily attributable to Manning could be a valuable form of anti-forensics'*
>
> *'If Assange had successfully cracked the password hash to the FTP account, however, Manning could have used that account for the theft and Army investigators might have missed such forensic artefacts or, even if they found them, might not have been able to attribute them to Manning'.*

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

(i) Mr Timm said '*even the government is not alleging that Manning and Assange were conspiring to break a password to steal more documents, as far as I understand it. The only alleged motive was to potentially keep Miss Manning more anonymous, and in general journalists are often attempting to keep our sources anonymous. That is why they use encrypted messaging applications and that is why they often made promises to sources to keep them confidential so that they can do their job*' (Timm, EB/42 Tr 9.9.20, xx, p69 / re-x, p82-83).

(ii) Likewise, according to prof. Feldstein, once directed to Kromberg 4, told the DJ that '*trying to help protect your source as a journalist is an obligation....we use all kinds of techniques to try to help them, you know, from pay phones, to anonymity to code words, encryption, removing fingerprints, digital or otherwise, from documents that might reveal them, misdirecting suspicion. These are all things that I have done'* (Feldstein, EB/39 Tr 8.9.20, xic, p35). '*Protecting sources, as I mentioned, is considered a moral obligation...Journalists, if you will, inspire sources every day. They work with their sources, they cajole their sources, they direct them to what information they need. They will send them back sometimes to get more information if the information they have is not sufficient. So if that becomes criminalised, if that becomes conspiring, then most of what journalists do, investigative journalists on national securities, would be criminal'* (Feldstein, EB/39 Tr 8.9.20, re-x, p64-66).

(iii) So too Mr Shenkman: '*the important thing to keep in mind about Bartnicki and I think it is quite relevant here, is whether or not the alleged criminal conduct is linked to the act of news gathering and a part of that process [or] part of effectively [source] protection...there are certain allegations [here] that are inextricably tied to the news gathering process and some of them entail things like [source] protection...the full indictment...is not just about accessing government database...there are certainly many other elements and some of those have components that are on the exercise of freedom of speech and the first amendment...that is the whole point of everything I have been saying'* (EB/49 Tr 17.9.20, xx, p56-58).

10.54. The scheme of the ECHR is exactly the same. Providing whistle-blowers with anonymity is what publishers do. It is what their professional standards require. It is an integral part of the process of national security news gathering and it is explicitly protected by the Article 10 jurisprudence: '*Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms*' (***Goodwin v United Kingdom*** (1996) 22 EHRR 123, §39).

10.55. The 'passcode hash' allegation thus stands in the same position as other measures alleged in the indictment as being designed to '*prevent the discovery of Manning as ASSANGE's source, such as clearing logs and use of a 'cryptophone''* (Indictment, §26): - all of which are the '*kind of protection of confidential sources'* which is '*not only standard practice but crucial to the professional and moral responsibility for reporters'* (Feldstein, tab 18, §9(d)) (Timm, EB/32 §31) (Maurizi, EB/30 §7-9 - agreed s.9). Just as the use drop boxes to protect whistle-blowers' anonymity are '*a journalistic staple, employed by leading outlets around the world, including the New York Times'* and are '*the kind of solicitations for information that journalists routinely post on social media sites'* (Feldstein, EB/10 §9(a)). '*News organisations commonly issue detailed instructions like this'* (Tigar, EB/13 p5 - agreed s.9) (Ellsberg, EB/27 §29 – unchallenged) (Timm, EB/32 §8-16, 31) See generally (L, section E).

10.56. Finally, the DJ appears to regard it as relevant that, by the time of the 'passcode hash' conversation in March 2010, the Manning materials the subject of this request (war diaries Guantánamo Detainee Assessment Briefs, Rules of Engagement, and some cables) had largely already been provided by Manning (Judgment CB/2 §103). It is indeed relevant. It means that the Government's attempt to use the passcode hash conversation to remove the Manning allegations from the protection of Article 10 cannot succeed (for this reason also).

Count 2

10.57. The DJ's analysis of this issue is peppered with reference to the wider 'hacking' allegations contained within count 2. Those have no relevance at all to the legality or otherwise of the Manning allegations (the war diaries, Guantánamo Detainee Assessment Briefs, Rules of Engagement, and cables). That is to say that the DJ obfuscates the issue that the defence *have* raised and called evidence on (whether the Manning allegations are compatible with Article 10) by reference to different issues which have not been the subject of evidence or argument (whether the wide-ranging new hacking allegations comport with Article 10). If the Court concludes (as it clearly must) that prosecution of the Manning conduct offends Article 10, then extradition for count 2 (alone) can only occur if that aspect of count 2 is excised from the request (per ***Osunta v Germany*** [2008] QB 785 at §22-29). It is not the law that an ECHR

violation can be saved by the fact that other, different, conduct in the same charge might not violate.

Unredacted names (counts 15-17 only)

10.58. The prosecution in this case finally attempts to suggest that Mr Assange's acts of publishing unredacted materials containing names of informants (counts 15-17 only)[71] can be maintained compatibly with Article 10 on the basis that his extradition for these counts is not sought *'in respect of any responsible journalistic treatment of the material provided by Chelsea Manning'.* Assuming again for the purposes of argument the allegations to be true, in reality if the publisher's entitlement to protection under Article 10 turned on whether the government believed the publisher had exercised editorial discretion appropriately, or in a way that others agree with, the protection would be unavailable precisely in the cases publishers need it most (Lewis 4, EB/34 §11-12). Unsurprisingly therefore, no authority is cited in support of this bizarre theory.

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

(i) *'...going back to the 'patriot' printing presses that urged the overthrow of British colonialism in the 1770s...Activist publications have been a staple of American journalism…championing radical causes such as the abolition of slavery, women's suffrage, labor unions, pacifism, socialism and other unpopular movements. Like WikiLeaks, America's editorial activists published unfiltered documents with minimal contextualising…Then and now, they exposed and opposed government authorities. Then and now, they were scorned and vilified…But they were often ahead of their time; for just as yesterday's heresy is tomorrow's orthodoxy, yesterday's radical journalist is tomorrow's distinguished publisher...'* (Feldstein, EB/10 §3).

(ii) '*Nobody needs, you know, the New York Times to issue them a press pass to act as a journalist or to receive First Amendment rights. This goes all the way back to the country's founding with famous pamphleteers who were writing anonymously. Whether or not anyone considers Julian Assange a journalist is beside the point. He was engaging in journalistic behaviour, he was acting as a publisher, and that is the right of everybody'* (Timm, EB/42 Tr 9.9.20, xx, p62-63).

(iii) For example, Beacon Press '*was the publishing arm of the Unitarian Universalist Association. These were often not mainstream news outlets at all. They were often outlets that had political views that were perceived to be contrary to the administration or that were exposing either secrets or policies that were - that were deemed - that were deemed in opposition to prevailing policies'* – but Grand Juries declined to indict on First Amendment grounds (Shenkman, EB/49 Tr 18.9.20, xx, p54).

10.60. Various witnesses confirmed that they would not personally have published informant's names in the exercise of their professional judgment (Feldstein, EB/39 Tr 8.9.20, xx, p54-56) (Timm, EB/42 Tr 9.9.20, xx, p73) (Hager, EB/50 Tr 18.9.20, xx, p13). But that, as those

[71]. All other counts are not limited in this way all and allege as criminal the obtaining / receipt by publishers of classified information not containing names.

same witnesses repeatedly pointed out, is not the point so far as legality is concerned. The point is that First Amendment cannot prohibit it (Feldstein, EB/39 Tr 8.9.20, re-x, p66).

10.61. There are numerous examples of such conduct having occurred in the US, without suggestion of criminality or prosecution (see, e.g. Bundle L, tabs D28-31, 34). As Mr Timm explained:

(i) '*You know, with respect, to me the idea of a responsible journalist, or who is or who is not a responsible journalist, is entirely different than what is legal and what is illegal conduct, and in this case, you know, no court has ever said that the publication of names in this matter would be potentially illegal. And, in fact, Congress debated this very issue after WikiLeaks published information in 2010 there was a proposed bill called the SHIELD Act introduced by Senator Joe Lieberman at the time, which was aimed at specifically making it a crime to publish so-called human intelligence. That bill failed to pass and so that tells me two things. Number one, this was not illegal to begin with in the eyes of Congress, and that Congress decided that it was not worth making it illegal then as well, and so the idea whether I agree or disagree, or whether I would have published particular names I think is beside the point. The point is whether this is illegal or not and in my mind, and in the mind of many First Amendment scholars, this conduct is protected by the First Amendment'* (Timm, EB/42 Tr 9.9.20, xx, p70).

(ii) '*I am not saying that WikiLeaks had perfect editorial judgment, just like I have never said that the Guardian or the New York Times has had perfect editorial judgment. Sometimes newspapers make mistakes, but that does not mean that differences of opinion of editorial judgment means that something should be illegal...The question before us is not, you know, do we agree with Julian Assange's decision to publish these names? The decision is whether or not this is illegal, and it is my opinion, as it is the opinion of many, many other First Amendment scholars and media lawyers, that this publication was not illegal, and that the indictment to try to make it illegal would potentially criminalise a lot of other publications that news media members do every day. And I should mention that all of the newspapers...have also issued statements vociferously condemning this prosecution. They have all stated that this prosecution, even if it includes charges involving these people's names, or these sources' names, is a direct threat to press freedom and they themselves are worried about the liability they have because of it*' (Timm, EB/42 Tr 9.9.20, xx, p71).

(iii) *'The First Amendment has never been in the United States a balancing act between harm and benefit. The First Amendment sometimes allows for odious speech, for speech that is unpopular and, you know, frankly it is possible that in some cases, in some types of speech, some harm might result, but in the United States, you know, our people have made the determination [through the First Amendment] that...for journalists to cover matters of public opinion, or a public import, makes it vital that they are protected from prosecution'* (Timm, EB/42 Tr 9.9.20, xx, p72).

(iv) *'I did not say that I thought it was right to publish these names, or that I agreed with the decision, I said merely that it would be unconstitutional for Mr Assange to be prosecuted under the Espionage Act for this act'* (Timm, EB/42 Tr 9.9.20, xx, p73).

(v) Likewise, Mr Shenkman: *The First Amendment does not make any such distinction'* (Shenkman, EB/49 Tr 18.9.20, xx, p55). Even for press outlets in the business of publishing 'top secret' materials (Shenkman, EB/49 Tr 18.9.20, re-x, p60).

10.62. The witnesses are undoubtedly correct. ***Levine, Siegel and Bead*** (2011) NYLS Law Review (Timm EB/32 exhibit 3) expressly confirms (at p1020) that '*The Supreme Court has expressly disavowed any test of whether particular 'speech' falls within the protections of the First Amendment that is premised on ad hoc determinations of its 'value' in comparison with the 'harm' it is alleged to have perpetrated. Instead, the Court has constructed a handful of narrow, precisely defined categories of expression that are not protected by the First Amendment at all, including obscenity, defamation, and 'fighting words,' and has rejected the notion that constitutional analysis of otherwise protected expression should depend on judicial assessment of its comparative worth. As the Ninth Circuit has explained: [T]he first amendment is as close to an absolute as we have in our jurisprudence: Speech shielded by the amendment's protective wing must remain inviolate regardless of its inherent worth. The distaste we may feel as individuals toward the content or message of protected expression cannot, of course, detain us from discharging our duty as guardians of the Constitu*tion' (p1020). Mr Timm told the DJ '*I would encourage the court to take a look at'* ***Levine, Siegel and Bead***, which demonstrates that attempts to criminalise the publishing of names of human sources '*would be a radical [re-write] of the First Amendment'* (Timm, EB/42 Tr 9.9.20, re-x, p84).[72]

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

(i) It is only the 'publishing' charges (counts 15-17) that are restricted to documents containing informants' names. All other charges would criminalise the obtaining and receiving, by a journalist, of classified materials, including (potentially exclusively) those that did <u>not</u> reveal names. '*He is not only charged with 15, 16, and 17, there are you know, 15 or 20 other counts... that involve holding, retaining other documents as well* ' (Ellsberg, EB/47 Tr 16.9.20, xx, p50 / re-x, p66). '*That is why I probably look slightly puzzled when I see that it is said that they were not part of the charges'* (Hager, EB/50 Tr 18.9.20, re-x, p20). As Mr Timm made clear when the issue was put to him '*The other charges relate all to documents...[these other charges are] essentially saying that by merely possessing these documents that Julian Assange was committing a crime and if Julian Assange is committing a crime by possessing those documents so is any other journalist who possesses the same documents or similar...So the [suggestion that only publications containing names are being prosecuted] is a very warped issue and it worries me and any First Amendment scholars greatly, which would actually be a rewriting of First Amendment law*' (Timm, EB/42 Tr 9.9.20, xx, p66-67). The breadth of the other charges '*are as worrying or more worrying*' from a First Amendment perspective and '*criminalise common journalistic practice, whether you believe Julian Assange is a journalist or not*' (Timm, EB/42 Tr 9.9.20, xx, p67). *'I do not think it is an exaggeration to say that this would criminalise national security journalism in the US'* (Timm, EB/42 Tr 9.9.20, re-x, p85-86).

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[72]. Mr Ellsberg confirmed, for example, that the Pentagon Papers deliberately revealed the identity of a clandestine CIA officer (Ellsberg, EB/47 tr 16.9.20, xx, p53-54 / re-x, p67), yet no publisher was prosecuted.

(ii) And, as Mr Stafford-Smith also observed, it would be '*very wrong'* to assume that the prosecution of even counts 15-17 will in reality be constrained to documents containing names (Stafford-Smith, EB/40 Tr 8.9.20, xx, p16-20, 25 / re-x, p28-29).

Article 10 ECHR

10.64. ***Girleanu v Romania*** (2019) 68 EHRR 19, the ECtHR held:

> *'...84...the protection afforded by Article 10 of the Convention to journalists is subject to the proviso that they act in good faith in order to provide accurate and reliable information in accordance with the tenets of responsible journalism...'*

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

The DJ's decision (Judgment §122-137)

10.66. The DJ accepted that '*Mr. Assange's Article 10 rights are engaged. Section 5 of the OSA 1989 must be read and given effect to in a way that is compatible with Convention rights'* (Judgment CB/2 §124).

10.67. Even if the allegations were true, then the essential choice faced by anyone considering publishing these materials was between **(a)** the creation of an unknown and theoretical risk to a small number of informants and **(b)** the prevention of ongoing risks to the world at large by reason of US state-level crimes of torture, murder etc. The witnesses to whom this issue was put in evidence told the DJ that they would have regarded the striking of the balance between revealing names and revealing torture as '*horrifyingly difficult'* (Stafford-Smith, EB/40 Tr 8.9.20, p25).

10.68. The DJ's assessment is, however, that secrecy prevailed, and no balancing was or is permissible, especially by those '*like Mr Assange'*. According to the DJ:

(i) The White Paper which preceeded the OSA is of relevance (Judgment CB/2 §125);

(ii) ***Stoll*** and ***Girleanu*** are authorities supportive of her view (Judgment CB/2 §126-127);

(iii) ***Shayler*** holds that secrecy must prevail because '*Parliament has [struck the] balance between these competing interests*' (Judgment CB/2 §128-130);

(iv) Unlike '*the traditional press'*, those '*like Mr Assange'* have no '*right'* to make the choice (Judgment CB/2 §131-135).

10.69. Those reasons are seriously flawed. Respectively:

10.70. First, reliance on the 1988 White Paper that preceded the OSA (or the OSA itself) to suggest that a prosecution of a publisher could survive Article 10 is misconceived. The White Paper says no such thing. The House of Lords in ***Shayler*** made clear that *'[t]he fact that the White*

Paper did not mention article 10 Convention rights leaves one with the uneasy feeling that, although the right of individual petition under article 25 had been available to persons in this country since 1966, the problems which it raises were overlooked' (per Lord Hope at §41). The same is true of the passage of the OSA itself.

10.71. Secondly, ***Stoll*** is, as stated above, authority against the DJ's position. The only aspect of Stoll's prosecution which was held not to violate Article 10 was his act of publishing *misleading and untrue* claims about the content of the materials he had obtained. Publishing otherwise was protected by Article 10. In fact, in ***Stoll,*** the Court explicitly stated that it would be more accurate (and therefore attract greater Article 10 protection) if the publisher published the document in its entirety to ensure accuracy and so the public could form their own view (see ***Stoll,*** cited above). Likewise in ***Girleanu***, where sharing secret Government documents was held to be protected by Article 10.

10.72. Thirdly, ***Shayler*** is not authority for the proposition that the Article 10 balance is foreclosed by the OSA, in this and every OSA case. The House of Lords was not confronted with publication of materials which could serve to halt and prevent large-scale and ongoing US acts of torture and murder. ***Shayler*** was not even concerned with the issue of publication (as opposed to leaking) at all. In fact, Lord Hope said at §44: that it is '*hard to accept that there could be no circumstances in which a public interest in disclosure would outweigh the possible damage that might be caused by it'*.

10.73. In any event, the DJ's treatment of ***Shayler***, in which secrecy automatically and always prevails (even over the disclosure of state criminality) because '*Parliament has [struck the] balance between these competing interests*', is directly contrary to ***Stoll*** at §101-139. According to the Grand Chamber, there '*must be'* a weighing by the domestic court of the interest in the publication against that in state secrecy. A domestic legal system which in which the courts are '*prevented from taking into consideration the substantive content of the secret document in weighing up the interests at stake'* is one which '*act[s] as a bar to their reviewing whether the interference with the rights protected by Art.10 of the Convention had been justified'* (§137). In ***Stoll***, Swiss law '*allowed the court to weigh up the interests at stake...and also to accept a possible extra-legal justification based on the protection of legitimate interests*' (§138). '*Given that the Federal Court verified whether the 'confidential' classification of the ambassador's report had been justified and weighed up the interests at stake, it cannot be said that the formal notion of secrecy [in Swiss law] prevented the Federal Court, as the court of final instance, from determining in the instant case whether the interference at issue was compatible with Art.10*' (§139).

10.74. ***Stoll*** is part of a long line of Strasbourg authority since ***Shayler***. In ***Guja v Moldova*** (2011) 53 EHRR 16 for example the ECtHR recognised that there might be a '*strong public interest'* in the disclosure of information concerning '*illegal conduct or wrongdoing… [where] the employee or civil servant concerned is the only person, or part of a small category of persons, aware of what is happening at work and is thus best placed to act in the public interest by alerting the employer or the public at large'*.

10.75. It is also notable also that the Law Commission has recently recommended an overhaul of ***Shayler*** as being contrary to modern Strasbourg case law.[73] In Part III (chapters 8 - 11), the Law Commission concludes, by reference to ECtHR case law, that '*we cannot be certain that*

73. '*Protection of Official Data Report'*, 1 September 2020, HC 716, Law Com No 395.

the current legislative scheme, in the OSA 1989, affords adequate protection to Article 10 rights under the ECHR' (§8.6). In particular, the scheme does not and cannot be made to '*operate effectively in the case of a journalist or other citizen who is in possession of material protected by the OSA 1989. We therefore also recommend a public interest defence which would be available to those charged with offences under the OSA 1989'* (§8.6). '*We conclude that we are unable to state with confidence that the current regime...will, in all cases of unauthorised disclosure, afford adequate protection to Article 10 rights [and] it is clear from the development of both domestic and European jurisprudence that...there is, in any case, a real possibility that Shayler would be decided differently today*' (§9.6). '*It suffices to conclude that, on the basis of existing ECHR case law, it is a real possibility that the ECtHR would hold that certain public disclosures by journalists would warrant protection by a specific statutory defence to offences under the 1989 Act*' (§9.90).[74]

10.76. Fourthly, it is flatly inconsistent with her position on ***Shayler*** for the DJ to suggest that the '*traditional press'* were permitted to '*strike a balance'*, and that their choice not to publish was the only available (or even correct) one. As discussed below, various other non-'*traditional press'* likewise decided that the balance lay in publishing the unredacted cables containing informants' names in September 2011. Yet none of those bodies (including websites based in the US) have been the subject of prosecution.

10.77. The Government bore the burden of establishing, to the criminal standard, that extradition for counts 15-17 was compatible with Mr Assange's Article 10 rights (i.e. it is necessary under Article 10(2)). None of the reasons articulated by the DJ for finding that (unstated) burden satisfied bear proper scrutiny.

Proportionality of Potential Sentence

10.78. Further or in the alternative, the massive sentence that Julian Assange potentially faces, is tantamount to a whole life sentence – see part 13 below. Inevitably, this exposes him to the real risk of a flagrant denial of his Article 10 rights, by reason of the disproportionate penalisation of the exercise of the right to freedom of expression.

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74. If, as a matter of precedent, the DJ were correct, and ***Shayler*** rather than the contrary decisions of the ECtHR were binding on the issue of publication, then the appropriate course would be to grant permission to appeal in order that the matter may be re-considered by the Supreme Court: per ***Kay v Lambeth Borough Council*** [2006] 2 AC 465. For the avoidance of doubt, the position is not saved by the DJ's subsequent ruling that the US court can consider '*similar'* issues upon surrender under the First Amendment (Judgment §274-275). The evidence before the DJ was that the First Amendment likewise operates contrary to ***Stoll, Guja*** etc. It affords no '*justification defense…permitting a jury to either balance the information's significance against its importance for public understanding and debate, or to consider possible dereliction of duty by the employee's superiors'* (Shenkman, tab 4, §13). The Espionage Act is in fact '*indifferent to the defendant's motives and indifferent to whether the harms caused by disclosure were outweighed by the value of the information to the public'* (Jaffer, tab 22, §7 - agreed s.9). '*[T]he lack of proportionality or public interest defense available under the Act [means] Defendants have no opportunity to argue that disclosures of information subject to the Espionage Act can be mitigated at all by intent to serve the public interest. This is true even where the underlying information exposes corruption, abuses, or even violations of international law or war crimes...*' (Shenkman, EB/5 §28).

10.79. As set out in ***Stoll***, while criminal sanctions can be acceptable, the nature and severity of the penalty imposed are further factors to be taken into account when assessing the proportionality of interference (at §153). Further:

> *'…the Court must be satisfied that the penalty does not amount to a form of censorship intended to discourage the press from expressing criticism. In the context of a debate on a topic of public interest, such a sanction is likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, it is liable to hamper the press in performing its task as purveyor of information and public watchdog. In that connection, the fact of a person's conviction may in some cases be more important than the minor nature of the penalty imposed.'* (at §154)

10.80. Relevant to the consideration of the proportionality of the sanction is the fact that Mr Assange is a publisher and journalist who made the disclosures in the context of a journalistic investigation, which is to be distinguished from a case where the person facing prosecution is a member of the military with obligations of secrecy to the state (***Gîrleanu*** §96).

10.81. In ***Stoll,*** 'a relatively small fine', but no prison sentence, was deemed to be proportionate in the circumstances. However, in ***Gîrleanu***, in the case of a journalist who received but did not publish confidential information, the fact the journalist faced ten days pre-trial detention, an administrative fine, and was indicted but sanctioned with a fine, was considered '*not reasonable proportionate…in view of the interests of a democratic society in ensuring and maintaining freedom of the press'* (at §99).

10.82. In ***Hadjianastassiou v Greece,*** the Court considered a situation where the applicant had a duty of confidence to the state and had disclosed military secrets and received a suspended sentence of five months in prison, with four months and 14 days spent on remand deducted. The court found that, in the circumstances of the case, and due to his obligation of secrecy to the state, the sanction was proportionate and permitted by Article 10.

10.83. Mr Assange is a publisher who has won journalism awards the world over for these very publications given their immense public interest. A sentence of two years - as permitted under the OSA - would be considered, in the context of this case, disproportionate; yet in the United States he faces sentences of 10 years per charge and cumulatively 175 years. The specific evidence before the DJ was that, in light of the multiplicitous expansion of the lone indictment, the US Sentencing Guidelines alone now produce a likely sentence in excess of Mr Assange's remaining natural life, namely 30-40 years (Durkin, Tr. 15.9.20, p57-60) or else life (Lewis, Tr. 14.9.20, p12 and 15.9.20, p50-53). Such a potential sentence would be clearly and wholly disproportionate. There is ample evidence from journalists, media organisations and free speech organisations that this prosecution – and his conviction – is deterring and chilling investigative journalism, before even considering the length of his sentence and the nature of the sanction he will face. The sanction and penalty alone, in this case, is grossly disproportionate and could alone enable the court to find a flagrant violation of Article 10 before considering the other factors in the Article 10 balancing exercise.

10.84. By way of summary, the DJ fundamentally misunderstood and mischaracterised what is protected journalistic activity and failed to undertake the proper balancing exercise required by Article 10. When the test is properly considered, it is clear that Mr Assange's extradition would result in a flagrant violation of his Article 10 rights for the following reasons:

(i) It must be a flagrant violation of his rights to extradite him in circumstances where there is a risk the US will argue – and the courts could accept – that he has no rights under the First Amendment. This means he would be accorded no protection of freedom of expression *at all*, which is not only a clear violation of Article 10, it means he would be accorded by right at all;

(ii) Even if free speech rights will be accorded to him, his extradition will result in the flagrant violation of his Article 10 rights because the law under which he is to be prosecuted are not prescribed by law (see discussion above with respect to Article 7) and because the criminal prosecution and the sanctions he will face are clearly disproportionate in light of the fact that:

(a) He faces prosecution for journalistic activity, which is protected by the ethical rules of journalism, and his conduct in publishing the information accorded with responsible journalism in the digital era;

(b) Immense public interest in the material (see §2.2 – 2.9 above)

(c) The questionable and spurious claims of damage to national security seen in the light of the US's own evidence in the Manning trial and based on the statements of its prominent national security figures at the time of the release (see below at §15.50 – 15.64)

(d) The political and selective nature of this case in view of the fact Mr Assange is being selectively targeted (compared to other media, Young, EB/25 - agreed s.9);

(e) The fact some of the material was in the public domain before Mr Assange published it, meaning it had lost its secret nature and, as such, the damage was done and prosecution is unnecessary;

(f) The fact the state has failed to provide an accurate and reliable assessment of the facts of the case in order to justify the measures sought (section 15 below)

(g) The fact Mr Assange will not receive a fair trial (Section 9)

(h) The wholly disproportionate sanctions Mr Assange faces (175 years in prison), which is on its own disproportionate and fails to distinction between him as a publisher and the sentence sought against his alleged source with obligations to the state.

11. Articles 5 and 6 ECHR

11.1. The US Federal System operates to secure guilty pleas through coercive plea-bargaining powers; fuelled by swingeing potential sentences and overloaded indictments designed to increase sentence exposure. All those factors are being exploited by the US in Mr Assange's case, and multiple witnesses warned the DJ about their combined coercive effect (Lewis 1, EB/4, §36-48) (Durkin 1, EB/6, §17-18; EB/45 Tr. 15.09.20, p57-60). This is particularly so where, as a result of the Superseding Indictment, Mr Assange faces a sentence of up to 175 years and was predicted by defence experts to be as high as 30-40 years (Durkin, EB/45 Tr. 15.9.20, p57-60) or even life (Lewis, EB/43 Tr. 14.9.20, p12 and EB/44 15.9.20, p50-53).

11.2. Various witnesses also attested that those pressures to plead guilty are intensified in cases such as this, by the effects of pre-trial detention in solitary confinement in a '*cage the size of a parking space, deprived of any meaningful human contact'* (Lewis 1, EB/4 §12-23) (Ellis 1, EB/7 §7-8). The result is a system in which the plea rate is over 97%; higher than any other country, including Russia (Lewis 1, EB/4 §40) (Durkin 1, EB/6 §18).

11.3. Mr Assange's trial will, moreover, be before a jury drawn from a pool that has a high concentration of defence and intelligence employees and ex-employees, contractors, and their relatives (Prince 1, EB/8), in a courthouse just fifteen miles away from the CIA headquarters.

11.4. If not already influenced by reason of their occupation, jurors in Mr Assange's case will prejudiced irretrievably by public denunciations of him made by a series of administration officials from the President downwards of the sort that have characterised this matter to date. For example, the US Secretary of State has denounced Mr Assange as someone who '*has as [his] motive the destruction of America'*. Such intemperate public denunciations violate the presumption of innocence (***Allenet de Ribemont*** (1996) 22 EHRR 582).

11.5. Mr Assange will then be liable to be tried on the basis of evidence obtained from Chelsea Manning by inhuman treatment (cf. ***Othman v UK***). The fact that Chelsea Manning was exposed to inhuman treatment is established, both in relation to her pre-trial detention by the UN Special Rapporteur, and her post-commutation incarceration for civil contempt by expert Mr Boyle (Boyle 1, EB/3 exhibit 1; Boyle 2, EB/26, exhibits 1 and 3).

11.6. He will in any event be deprived of the supporting evidence of Chelsea Manning because of coercion by the contempt proceedings, as described by grand jury expert Robert Boyle (EB/3). It is also foreseeable that the prosecution seek to pressure Mr Assange to cooperate and further to identify other sources of the WikiLeaks publications.

The DJ's decision on flagrant unfairness of trial (§225-234, 240-242)

11.7. With regards to the practice of coercive plea-bargaining in the United States, the DJ wrongly focused on the fact that there was '*no evidence that a plea agreement has been offered to*' Mr Assange and on the existence of procedural rules which in theory require a court to be satisfied pleas are entered voluntarily [Judgment CB/2 §232]. The crux of the issue is that defendants in cases like the present one only have a Hobson's choice between an unknown, exorbitant sentence or a known, slightly more reasonable one. Thus they may willingly pleading guilty, and a Court may well be satisfied of this, but only in circumstances where a trial is not a real option. The 97% plea rate in the US speaks for itself.

11.8. Equally, while it might be correct that there was no evidence before the judge of any attempted plea discussions with the US prosecutors, what the judge did have before her was a heavily overloaded indictment as well as other factors, such as punitive detention conditions, which will represent the foundation of the prosecution's unfair bargaining power when plea discussions inevitably arise. For the DJ to find that there was no evidence of an overloaded indictment, because she '*had no reason to find that federal prosecutors have improper motives for bringing these charges'* or that they were acting '*contrary to their obligations and responsibilities of impartiality and fairness',* was to ignore that this is a well-known and accepted practice in the US, with the US Supreme Court admitting that the US Criminal Justice system is '*a system of pleas, not trials'* [Lewis 1, EB/4 §40]. It was also to ignore the clear inference to be drawn from the chronology of the criminal case in the US of charges piled upon charges for the same conduct mostly all dating back to 2010, as well as the patent political influence and improper motives for the bringing of the charges in the first place.

11.9. The judge was correct to note that the issue of coercive plea bargaining was considered by the ECtHR over a decade ago, in the admissibility decision in *Babar Ahmad v United Kingdom* (2010) 51 E.H.R.R [§230]. However it is an issue which merits reconsideration given the evidence that has become available since that time and the many factors which combine in this case to place particular and almost irresistible pressure on Mr Assange to forego his right to a trial by jury.

11.10. One of those factors is the make-up of the jury itself, drawn from a pool of government military and intelligence contractors, and their families. The DJ wrongly relied upon the evidence of Mr Kromberg about the size of the local population and the procedures in place to '*ensure the impartiality of the jury'* [Judgment CB/2 §§227, 228] but this ignores the fact that the trial location ensures the deck is very much stacked against Mr Assange by holding the trial in Alexandria.

11.11. Any trial of Mr Assange would likely involve evidence from Ms Manning. The judge erred in stating there was no evidence before her that Ms Manning gave evidence as a result of torture [Judgment CB/2 §241], given the evidence of her mistreatment from the UN Special Rapporteur, and defence expert Mr Boyle (Boyle 1, EB/3 exhibit 1; Boyle 2, tab 49, exhibits 1 and 3). She further erred in finding no evidence that he would be deprived of Ms Manning's evidence at his own trial, given that this was the clear inference from the evidence of Mr Boyle.

11.12. The learned judge erred overall in finding that '*none of the issues raised by the defence either individually or cumulatively would result in contravention of Article 6'* [Judgment CB/2 §242]. This is precisely the finding she ought to have made.

<u>The Flagrant Unfairness of the Sentencing Process</u>

11.13. For the avoidance of doubt, the issues developed in section 3 of Mr Assange's Perfected Grounds of Appeal under s108 against the SSHD, also implicate Articles 5 and 6 ECHR. A sentence on the basis of unproven allegations, even allegations on which a person has been acquitted:

(i) Violates Article 5 ECHR (for all of the reasons outlined in Mr Assange's s.108 appeal). Unlike the SoS (for whom article 5 is relevant as an aid to statutory construction of s.95) the DJ had a direct duty to give effect to article 5.

(ii) Also constitutes a flagrant denial of justice.

The DJ's decision on the sentencing issue (§235-239)

11.14. The DJ was wrong to conclude otherwise.

11.15. First, ***Welsh and Thrasher*** (Judgment CB/2 §236-237) did not consider Articles 5 or 6 ECHR at all.

11.16. Secondly, the suggestion that this (clear) ECHR violation '*would render ALL extradition requests by the US doomed to failure'* (Judgment CB/2 §237) is neither correct nor relevant. It is incorrect because, as with any prospective systemic ECHR violation in any country, it is capable of being met by assurances. None are offered here. It is irrelevant because ECHR violations can and do '*render ALL extradition requests by [a given country] doomed to failure'*; witness Russia and Article 3 ECHR for example.

11.17. Thirdly, the remarks of Dobbs J in ***MacKellar*** (Judgment CB/2 §238) were expressly *obiter*. Permission to appeal was granted on this very issue on 25 September 2020 by Sir Ross Cranston in the case of ***Jabir Saddiq (aka Motiwala) v USA***, where there was a real risk of a 'terrorism enhancement' for a defendant not charged with any terrorism offence. The issue is thus (according to that decision) an arguable one, and remains undecided by this Court because that request was ultimately withdrawn by the USA.

11.18. Fourthly, it is plainly and demonstrably wrong to suggest that '*the defence has not identified any particular conduct outside the conduct in the request which would result in a court 'upwardly enhancing' Mr. Assange's sentence'* (Judgment CB/2 §239). Mr Lewis provided multiple examples of conduct in Mr Assange's case which could operate to trigger an increased sentence under these laws (EB/34 §17):

> *'...Other Wikileaks' publications could form part of this 'relevant conduct' including **[a]** publication of the Detainee Policies in 2012, **[b]** revelations of US espionage against European leaders including Chancellor Merkel and President Sarkozy, **[c]** the 2015 revelations of espionage against the European Commission, the European Central Bank and French industry, and **[d]** the 2017 publication of US spying during the French presidential election campaign. **[e]** The publication of the DNC emails during the 2016 US presidential election may also be considered. If the US government believes that publishing leaked documents is a crime, as is evident from its indictment of Mr Assange, then it seems reasonably likely that it will seek to enhance his sentence with evidence of similar conduct...'.*[75]

11.19. Another - obvious - candidate would be WikiLeaks' decision in 2017 to publish 'Vault 7'; detailing classified activities and capabilities of the CIA to perform electronic surveillance

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[75]. The DJ's observation (at judgment CB/2 §239) that '*With reference to this specific case, the defence has not identified any particular conduct outside the conduct in the request which would result in a court 'upwardly enhancing' Mr. Assange's sentence'* – was plainly and demonstrably wrong.

and cyber warfare, which The New York Times called '*the largest loss of classified documents in the agency's history and a huge embarrassment for C.I.A. officials*'. Joshua Schulte is, after all, currently awaiting sentence for leaking Vault 7 to Mr Assange. Joshua Schulte is, after all, currently awaiting sentence for leaking Vault 7 to Mr Assange. Federal prosecutors in Schulte's trial asserted that it was '*the single biggest leak of classified national defense information in the history of the CIA*'.

12. Denial of Rights as an 'Alien'

12.1. Section 87 of the 2003 Act required the DJ to be sure that Mr Assange's extradition is compatible with his ECHR rights. Whether those rights (especially Articles 6, 7, 8, 10 ECHR) are fully reflected in the US Constitution (respectively its Sixth, Fifth, Fourth and First Amendments) and its associated jurisprudence, is the subject of discussion above. However, there exists in this case a predicate - and even more fundamental - problem. That is the risk, established on the evidence, that the prospective US trial may not be governed by certain fundamental rights in the US Constitution at all because of Julian Assange's status as an 'alien'.

12.2. Mr Kromberg has attested on oath that the US prosecution may attempt to argue at trial that the US Constitution will not apply to this prospective trial, and to Mr Assange, because he is not a US citizen: '*foreign nationals are not entitled to protections under the First Amendment'* (Kromberg 1, CB/12/pg.947 – 948, §71).

12.3. The notion that US criminal *jurisdiction* attaches to foreign conduct such as in play here, but the *First Amendment* does not likewise attach, is a surprising one, to put it mildly. The DJ certainly thought so (Judgment, CB/2, §263).

12.4. It is obvious that extradition to any trial which may not even consider the rights embodied by the ECHR is fundamentally contrary to both the scheme of the 2003 Act, and offensive to the HRA 1998. As the US itself acknowledged (US Closing Submissions, CB/5/pg.498, §99), '*There is an obvious difference between a legal process that will judge the availability of certain rights to defendants and [one which contemplates] those rights being removed for prejudicial reasons like nationality'*.

12.5. It is doubly problematic where the DJ's central reasoning for rejecting various human rights arguments in this case centre around the suggested existence of corresponding Constitutional rights available to Mr Assange in the US.

The Position of the US below

12.6. The US did not resile from its proposal. Instead, it advanced two misconceived arguments to seek to justify the alarming situation that has emerged.

12.7. First, it argued (US Closing Submissions CB/5/pg.PG.582, §398) that the non-availability of human rights protections may be '*objectively'* justified by reference to nationality; by analogy with ***Pomiechowski v Poland*** [2012] 1 WLR 1604. That, with respect, is patent nonsense. ***Pomiechowski*** concerns extradition proceedings. Their conduct is not governed by Article 6 ECHR because they are not proceedings which determine guilt or innocence (per Lord Mance at §27 - 31). No authority exists for the proposition that, in a trial, i.e. in the determination of guilt or innocence, human rights can be '*removed for prejudicial reasons like nationality*' in the way that US law apparently does.[76]

12.8. Secondly, the US suggests (US Closing Submissions, CB/5/pg.583, §399) that the HRA 1998 would operate in the '*same'* way because '*the protection of the Human Rights 1998 is*

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76. ***Al-Rawi*** (also cited by the US) is also not such an authority (it concerned the exercise of the right of diplomatic protection by means of state-to-state claims, not a trial).

restricted to those within the physical territory of the UK, subject to very limited exceptions'. That is, again, plain and elementary legal error. The suggestion appears to be that, in a trial at Snaresbrook Crown Court, of a non-UK citizen, accused of conduct committed outside the UK, a Crown Court judge would be permitted (or required) to ignore the HRA (and hold that the defendant does '*not possess rights*' under the ECHR).

12.9. Of course, the true position is **(a)** that the ECHR applies to decisions in the UK concerning the rights and actions of non-UK citizens abroad (***R (Carlile) v SSHD*** [2015] AC 945 per Lady Hale at §90, concerning the article 10 rights of an Iranian in Paris to visit the UK to speak[77]) and **(b)**, on any view, if that decision involves the assertion of UK's criminal jurisdiction (i.e state agent authority and control), that jurisdiction is most certainly governed by the ECHR / HRA: see ***Al-Skeini v UK*** (2011) 53 EHRR 18 at §137 ('*whenever the state through its agents exercises control and authority over an individual, and thus jurisdiction, the state is under an obligation under art.1 to secure to that individual the rights and freedoms under s.1 of the Convention that are relevant to the situation of that individual*'). Put otherwise, it is the UK's exercise of criminal jurisdiction over foreign conduct, not the conduct itself, which engages (and is required to comport with) the HRA.

12.10. In sum, any UK trial of a non-UK citizen (even for conduct allegedly committed abroad) would be governed by the ECHR / HRA. The DJ has however sent Mr Assange to face a trial in which no human rights protections may exist, at all. Such a decision was, it is respectfully submitted, extraordinary. It is certainly unprecedented.

12.11. Take Article 10 / the First Amendment, for example. If the prosecutor is correct, no US court will, apparently, enforce or protect Article 10's principles in this case. That would be a paradigm flagrant denial of Article 10. It is an especially significant breach where the conduct in question was undertaken from *within* the sphere of protection of the Council of Europe (i.e. the UK). Extradition in these circumstances will not only retroactively nullify the lawful exercise of those Article 10 rights within the Council of Europe, but will be on terms that envisage that the US court will consider no similar protections. It is akin to sending an ***ex parte Bennett*** [1994] 1 AC 42-type kidnapping abuse case to the US for prospective trial under ***United States v Alvarez-Machain*** (1992) 504 US 655 principles.

12.12. It ought also to go without saying (and the DJ was reminded) that, differential treatment such as is proposed by the US prosecutor in this case, on grounds of nationality, is plainly also discriminatory within the terms of s s.81(b).[78] So the prosecution's indication that they may seek to rely on his 'alien' status to exclude certain protections **also gives rise to a real risk of prejudice on the grounds of nationality.** That further justifies discharge under s.81(b).

The decision of the DJ (Judgment §195, 263-265, 272)

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77. *'...No one doubts that article 10.1 of the Convention is involved…This covers the right of Mrs Rajavi and of the parliamentarians both to receive and to impart information and ideas without state interference. And they have this right regardless of frontiers….These are hugely important rights. Freedom of speech, and particularly political speech, is the foundation of any democracy...'*

78. For example, in ***Pomiechowski*** (supra), Lady Hale expressly stated that the selective application of Article 6 (even outside the context of a trial) '*discriminates between nationals and aliens'* (§52) and was unsatisfactory. It led in fact led to the introduction of legislation which removed the discrimination.

12.13. The DJ – rightly - gave no credence whatsoever to the US's facile attempts to justify a prospective trial shorn of Constitutional (and thus ECHR) protections. None are accepted, adopted, or even mentioned, in her judgment.

12.14. Instead, the DJ concluded that the US was wrong; and that it could never happen. That, with respect, is equally difficult to justify.

12.15. First, the US are positively asserting that it can happen. That is not '*immaterial'* (Judgment, CB/2, §195). There was simply no evidential basis whatsoever for the DJ to attempt to reach her own conclusion on US law.

12.16. Secondly, there is high and recent US authority which supports the suggestion that it can happen (cf. Judgment, CB/2 §195). The DJ concluded that the Supreme Court's recent decision in ***USAID v Alliance for Open Society*** (2020) 140 SC 2082 is '*No authority ... which supports the notion that a US court would remove the protections of the US Constitution'* (Judgment §263). Yet the US told her that '*The Supreme Court referred in the course of its judgment to it being long settled, as a matter of American constitutional law that foreign citizens outside U. S. territory do not possess rights under the U. S. Constitution'* (US Closing Submissions §399). There was, in the end, no dispute between the parties as to the legal veracity of the US threat. It is real as a matter of US law. It was simply not open to the DJ to form her own contrary view about foreign law, without expert evidence.

12.17. The US prosecutor is not in fact the only US official to have propounded '*the notion'* of a trial for Mr Assange bereft of Constitutional protections. Senior government officials have also asserted it (Lewis, Tr 14.9.20, EB/44, xic, p9). In April 2017, the future US Secretary of State had also asserted that Mr Assange '*has no First Amendment freedoms*' because '*he is not a US citizen'* (Bundle K, tab 11). Thus it was that '*prosecutors had struggled with whether the Australian is protected from prosecution by the First Amendment, but now believe they have found a path forward*' (Bundle K, Tab 11). That '*path'*, it transpires, was a trial outside of the protections of the Constitution. The DJ simply dismissed this evidence without explanation as '*immaterial'* (Judgment, CB/2, §195).

12.18. Thirdly, neither was there any evidential basis for the DJ's decision (Judgment, CB/2 §265) that, if the US make and sustain the extraordinary argument they propose, it will infect only the application of the First Amendment; leaving in place for example Mr Assange's Fifth Amendment rights in relation to Article 7 ECHR (Judgment §265). '*The Supreme Court referred in the course of its judgment to it being long settled, as a matter of American constitutional law that foreign citizens outside U. S. territory do not possess rights under the U. S. Constitution'* (US Closing Submissions, CB/5/pg.583, §399).

13. Followed by a grossly disproportionate sentence

13.1. Having put in place an unprecedented, legally suspect prosecution, and ensured its progression through a particular jury pool, bereft of Constitutional guarantees, the US then set about ensuring the resulting sentence would bury Mr Assange in concrete for the rest of his natural life.

13.2. In May 2019, the US decided to multiply the counts on the indictment by 18, adding 17 counts of 'espionage', and thereby increasing Mr Assange's sentence exposure 35-fold. The prospective sentence for the offences on the indictment in the US is now 175 years' imprisonment.

13.3. The evidence before the DJ was that, in light of the multiplicitous expansion of the lone indictment, the US Sentencing Guidelines alone now produce a likely sentence in excess of Mr Assange's remaining natural life, namely 30-40 years (Durkin, Tr. 15.9.20, EB/45, p57-60) or else life (Lewis, Tr. 14.9.20, EB/43, p12 and 15.9.20, p50-53). There is no parole under the federal system.

13.4. By ordinary notions of fairness, such a sentence (indeed any sentence) is grossly disproportionate to disclosing rank state-criminality.

13.5. ECHR extradition jurisprudence has long been clear to the effect that extradition to face a disproportionate sentence is capable of raising issues under Article 3 ECHR (***Altun v Germany*** (1983) 36 DR 209 at p233; ***A v Switzerland*** (1986) 46 DR 265 at p271; ***Soering v UK*** (1989) 11 EHRR 439 at §104). In ***R (Wellington) v SSHD*** [2009] 1 AC, 335, HL, it was observed that *'...In extradition, however, one is concerned with whether in this case the sentence would be grossly disproportionate. The fact that it might be grossly disproportionate in other cases is irrelevant...'* (per Lord Hoffman at §35).

13.6. Of course, in these proceedings, the Court is not concerned with the general Article 3 compatibility of the US sentencing law. But it *is* required to determine whether in *this case* the sentence that US law permits would be grossly disproportionate:

> *'...The fact that a life sentence without parole is mandatory in Missouri is relevant only in enabling the English court to predict the punishment which the appellant will receive if he is convicted of first degree murder. The question then is whether such a sentence would be obviously disproportionate for the crime of which this appellant is accused...*' (Lord Hoffman at §36)
>
> '*...It would, I think, do so if the sentence were to appear so grossly disproportionate to the circumstances of the crime as to offend ordinary notions of fairness and justice...*' (Lord Scott at §45).

13.7. ***Ahmad v UK*** (2013) 56 EHRR 1 applies these principles. In that case, the second Applicant (Aswat) faced a maximum 50-year sentence in respect of serious allegations of terrorism;

> '*...the maximum sentence the second applicant faces is one of fifty years' imprisonment...The Court notes that the second applicant is thirty-five years of age….the Court is prepared to accept that, while he is at no real risk of a life*

sentence, the sentence the second applicant faces also raises an issue under Article 3...' (§154).

13.8. The potential sentence in this case is a '*disproportionate sentence'* (***Altun***); a '*long and severe sentence*' (***A***) and '*disproportionate to the gravity of the crime committed*' (***Soering***).

The DJ's decision

13.9. The DJ failed entirely to address this issue.

PART C: THE EXTRADITION REQUEST ON FOOT OF THE ABOVE PROSECUTION

14. The request is prohibited by the treaty

14.1. The prosecution is not just unprecedented and legally indefensible. The extradition request necessary to give effect to it is likewise unlawful and extraordinary. It is a fundamental violation of Article 4(1) of the Anglo-US Extradition Treaty which expressly prohibits extradition for '*political offences'*.

14.2. In accordance with long and well-established Anglo[79] and US[80] practice, Article 4(1) provides that '*extradition shall not be granted if the offence for which extradition is requested is a political offence'*.

14.3. The offences with which Mr Assange is charged, and for which his extradition is sought, are, on the face of the extradition request, '*political offences'* as a matter of universally recognised law.

14.4. As stated above, Mr Assange was arrested under the Extradition Act on 11 April 2019. Six weeks later, in May 2019, the indictment underpinning the extradition request was 'superseded' to add 17 counts of 'espionage'. The offences thus alleged in the current (second superseding) US indictment that now forms the basis of the extradition request are a series of offences, cumulatively punishable with 170 years' imprisonment, under the Espionage Act 1917 (now codified in Title 18, USC chapter 37 '*espionage and censorship'*), namely:

(i) Conspiracy to obtain, receive and disclose national defence information (Count 1);

(ii) Unauthorised obtaining and receiving of national defence information (Counts 3 to 9);

(iii) Unauthorised disclosure of national defence information (Counts 10 to 18).

14.5. There is also an offence[81] (punishable with 5 years' imprisonment) of '*conspiracy to commit computer intrusion'* with intent to '*facilitate Manning's acquisition and transmission of*

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79. The prohibition on extradition for political offences has venerable historic importance. It is one of the most fundamental protections recognised in international and extradition law. It features in Article 3a of the United Nations Model Treaty on Extradition. It features in Article 3 of the Interpol Convention. It is enshrined in the substantive law of numerous Western democracies including Canada, Argentina, Belgium, Spain, Italy, and Germany. It is one of the most universally accepted rules of international law governing extradition. It is secured in the Trade & Cooperation Agreement with the EU. Part 1 of the 2003 Act is (by reason of Article 602 TCA and s.29 of the EU (Future Relationship) Act 2020 as interpreted by ***Lipton v BA City Flyer*** [2021] 1 WLR 2545 at §78) – now modified so far as 12 EU Member States are concerned (Belgium, Croatia, Cyprus, Czech Republic, Denmark, France, Italy, Poland, Slovakia, Finland and Sweden) to incorporate the prohibition.

80. The prohibition on extradition for political offences is contained within nearly all US extradition treaties. Some of the first treaties to contain the political offences exception were signed by the US, dating as far back as 1856. More recently, the US signed an extradition treaty with Kosovo in 2016. Article 3.1 of this treaty contains, in materially similar terms to the 117 other US extradition treaties, that: '*Extradition shall not be granted if the offense for which extradition is requested is a political offense'*. The accompanying letter to the draft UK/US Extradition Treaty affirmed that as '*is customary in extradition treaties, … extradition shall not be granted if the offense for which extradition is requested constitutes a political offense'* (https://www.congress.gov/108/cdoc/tdoc23/CDOC-108tdoc23.pdf, pVI).

classified information related to the national defence of the United States' (Count 2; Second Superseding Indictment, CB/12/pg.1043 – 1091).

14.6. The gravamen (and defining legal characteristic) of each of the charges[82] is thus an alleged intention to obtain or disclose US state secrets in a manner that was damaging to the security of the US state.

14.7. These are all *'political offences'* and extradition is prohibited and unlawful in respect of all such offences under the 2003 Anglo-US Extradition Treaty.

'Pure political offences'

14.8. The concept of a '*political offence'*, or an offence '*of a political character',* has featured in successive Extradition Acts and in numerous bilateral treaties over the last century and a half. It is a concept which carries a particular meaning under international law.

14.9. As a starting point, the authorities, both in England and abroad, first identify certain offences that are, by definition, paradigm or '*pure'* political offences because they are clearly offences against the state. In ***Schtraks v Government of Israel*** [1964] AC 556 the first case to address this distinction. Lord Reid identified certain offences as obviously of a political character, namely '*treason, sedition, or any other offence of that kind'* (Lord Reid at p581).

14.10. The distinction between '*purely political crimes*' and '*relative political crimes which are common crimes with a political overlay*' was reiterated in ***T v Immigration Officer*** [1996] AC 742 per Lord Mustill at p761D. Treason is, for example, per Lord Mustill, a '*purely political crime'* because it is a crime that, by definition, is '*directed at the sovereign and his apparatus of state'*. ***Oppenheim's International Law*** identifies as clearly within this definition '*certain offences against the state only, such as high treason, lese-majeste and the like'* (at p964). These are '*offences obviously of a political character...treason, sedition, or any other offence of that kind'* (***Schtraks*** per Lord Reid at p581). They are '*crimes such as treason or sedition'* (***Cheng v Governor of Pentonville Prison*** [1973] AC 931 per Lord Hodson at p941E). They are '*on the face of them political offences*' (per Lord Diplock at p943G, 944F). They are '*the type of political offence which is necessarily committed against the state seeking extradition'* (per Lord Simon at p949F-G).

Espionage is a 'pure political offence'

14.11. The offence of espionage is understood under UK law, common law and international law, to be a paradigm example of a '*pure political offence*', because it is not an ordinary crime and it is, by definition, directed against the political order of the state itself. ***Bassiouni*** on International Extradition speaks in terms of '*purely political offences'* as offences against the state itself in his analysis at pp677-679 and identifies '*treason, sedition and espionage'* as paradigm examples belonging to this category. See also, to like effect, ***Shearer***, Extradition in International Law, 151 (1971)

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81. Originally the only offence charged.

82. Including charge 2: the Computer Fraud and Abuse Act is described in the evidence as '*an extension of the Espionage Act – with its serious flaws – to the digital age'* (Shenkman, EB/5, §35).

14.12. ***R v Governor of Brixton Prison, ex parte Kolczynski*** [1955] 1 QB 540 concerned potential allegations of '*spying, weakening of the armed forces; going over to the enemy'*. That '*is an offence of a political character'* per Cassels J at p547. Even the allegations of mutiny on a merchant ship, as Lord Mustill observed in ***T v Immigration Officer*** (supra) at p766D, '*were in reality 'pure' political offences, such as sedition'*.

14.13. In ***Minister for Immigration and Multicultural Affairs v Singh*** [2002] HCA 7, the High Court of Australia identified '*offences such as treason, sedition, and espionage*' as pure political offences (per Gleeson CJ at §15, 21). '*Crimes designated as 'purely political' would involve such offences as high treason, capital treason, activities contrary to the external security of the State and so on'* (ibid., per Kirby J at §103).

14.14. Likewise ***Dutton v O'Shane*** [2003] FCAFC 195 the Full Federal Court (Finn and Dowsett JJ) said at §185-186:

> *'...It is well accepted, though the terminology is not used in the Act itself, that there are two analytically distinct kinds of political offence, the one being 'the pure political offence', the other, 'the relative political offence': see Aughterson, at 90ff; Stanbrook and Stanbrook, at 69; 31A Am Jur 2d 'Extradition' §44...*
>
> *...Illustrative of pure political offences are offences such as treason, espionage, sabotage, subversion and sedition. Such are offences 'directed solely against the political order': Shearer, Extradition in International Law, 151 (1971). Their purpose has been described, variously, as to protect the political institutions of the State: Aughterson, 91; the State itself; 34A Am Juris 2d §44; or the sovereign or public order: Bassiouni, International Extradition 512 (3rd ed)...'*

14.15. In short, espionage is a 'pure political offence' in the same category as treason, sabotage and sedition. See also, for example:

(i) The US Court of Appeals in ***McMullen v Immigration and Naturalization Service*** (1986) 788 F.2d 591, at p596 ('*...'pure' political crimes, such as sedition, treason, and espionage*');

(ii) Per Piersol CJ in the US District Court in ***Arambasic v Ashcroft*** (2005) 403 F Supp 2d 951 at p956 ('*A purely political offense involves conduct directed against the sovereign or its political subdivisions but does not have any of the elements of a common crime. Treason, sedition and espionage are examples of purely political offenses*'); and

(iii) Per North J in the Australian Federal Court in ***Santhirarajah v Attorney-General for the Commonwealth of Australia*** [2012] FCA 940 at §103, 107, 111, 123, 145 (recording *inter alia* the Government's assertion that '*pure political offences [encompass] treason, sedition, and espionage'*).

14.16. The principle that espionage is a '*pure political offence'* for which extradition is forbidden, is so entrenched in international law and practice that Interpol's General Assembly Resolution AGN/53/RES/7 (1984) provides that '*offences...by their very nature political...e.g. espionage...come within the scope of Article 3'* of Interpol's Constitutional prohibition on

extradition for political offences (at §II.i). Interpol's Repository of Practice concerning Article 3 further states that (at §3.4):

> *'...Offences committed against the internal or external security of the State, such as the offences of ... espionage, have traditionally been viewed as pure political offences under extradition law.[83] INTERPOL has therefore consistently considered that such crimes fall within the scope of Article 3 of the Constitution.[84]*
>
> *Current practice*
>
> *As a general rule, and in accordance with INTERPOL's practice, data relating to cases of offence against the security of the State may not be processed via the Organization's channels. Nonetheless, analysis on a case-by-case basis is required to ascertain that the facts of the case are purely political in nature. INTERPOL's practice shows that, while in a requesting country an offence may be defined as 'espionage' or an 'act against the security of the State', the facts of the particular case may include aspects of ordinary-law crime – such as violence against persons or property – which may lead to a conclusion that the case is of a predominantly ordinary-law nature in the context of Article 3.*
>
> *Examples*
>
> *Pure political offence: treason/espionage/disclosure of government secrets*
>
> *...*
>
> *Case 3: A diffusion was issued by an NCB, seeking the arrest of an individual for 'disclosure of government secrets'. As a member of a military unit in the country, he took keys used for encrypting and decrypting messages and tried to sell them for money to foreign entities. It was determined that the case was of a purely political nature within the meaning of Article 3. The fact that the individual requested a monetary reward did not affect the political nature of the case, since crimes such as treason and espionage are often conducted for pecuniary gain. Accordingly, the data were not registered.*
>
> *Case 4: A red notice request was sent by an NCB. The individual was alleged to have engaged in espionage. As a former high-ranking official, he disclosed classified information on subjects likely to affect the security and foreign relations of the country. He then fled the country using a false passport provided by an official of another country. It was concluded that the case was of a purely political nature and thus fell within the scope of Article 3. Accordingly, the red notice was not published.*
>
> *Case 5: A red notice request was sent by an NCB. The individual was charged with espionage. According to the facts, the individual – a national of another country – was alleged to have revealed State secrets concerning the requesting country, as well as confidential information about international organizations affiliated with that*

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83. See M. Cherif Bassiouni, International Extradition: United States Law and Practice (fifth edition), p. 660.

84. Resolution AGN/53/RES/7 (1984); Resolution AGN/63/RES/9 (1994).

country. It was concluded that the charge and facts provided were of a purely political nature. The case therefore fell under Article 3 and the red notice was not published...'

14.17. In sum, espionage is, without more, an offence directed against the state itself and therefore well established as a '*pure political offence'*, for which extradition is prohibited under the terms of the Treaty.

The conduct underlying all charges is that of 'pure political offences' in any event

14.18. This is not an argument about mere labels. Even if one ignores (which one cannot) the juridical label of the Espionage Act, the alleged conduct which underlies all charges is unquestionably one of a '*pure political offence'*. That is because his alleged conduct satisfies the established test of conduct directed against '*the apparatus of the state'* [***Schtraks v Government of Israel*** [1964] AC 556 at p588, and ***T v Immigration Officer*** [1996] AC 742 at p716D]. Mr Assange is alleged to have sought, obtained and published official state secrets. That is an allegation of an activity '*contrary to the external security of the state or, the state itself'* and the rationale of the prosecution is that it is supposedly '*designed to protect the political order of the USA'*.

14.19. As the extradition request states, the case levelled against Mr Assange by the US government itself is of alleged involvement in a:

> *'...scheme to steal classified documents from the United States and publish them...knowing that the documents were unlawfully obtained classified documents relating to security, intelligence, defense and international relations of the United States of America...The disclosure of these documents was damaging to the work of the security and intelligence services of the United States of America...it damaged the capability of the armed forces of the United States of America to carry out their tasks; and endangered the interests of the United States of America abroad; and ASSANGE knew publishing them on the Internet would be so damaging...'* (Dwyer affidavit, CB/12/pg827-828, §4).

14.20. Thus:

(i) Under Count 1: '*...the objective of the conspiracy charged in Count 1 of the Superseding Indictment was to obtain, receive, and disclose national defense information...*' (Dwyer, CB/12/pg.851 – 852, §61-62) '*...which were classified up to the SECRET level...*' (Second Superseding Indictment, CB/12/pg.1043 – 1091, p28);

(ii) Counts 3-9: require proof of the purposeful obtaining / receiving of information '*...connected with the U.S. national defense...*' (Dwyer, CB/12/pg.853 – 855, §66-68) '*...classified up to the SECRET level...*' (Second Superseding Indictment, CB/12/pg.1043 – 1091, p32-38);

(iii) Counts 10-18: require proof of the wilful obtaining / receiving of information '*...relating to the national defense...*' (Dwyer, CB/12/pg.853 – 855, §66-68) '*...classified up to the SECRET level...*' (Second Superseding Indictment, CB/12/pg.1043 – 1091, p39-47);

(iv) That is equally true of Count 2 (conspiracy to commit computer intrusion). Count 2 is not an allegation of common computer hacking; it is (and is predicated upon) a legally necessary allegation that Mr Assange planned *'...to obtain information that has been determined by the United States Government...to require protection against unauthorized disclosure for reasons of national defense and foreign relations, namely, documents relating to the national defense classified up to the 'Secret' level...'* (Dwyer, CB/12/pg.864, §85) (Second Superseding Indictment, CB/12/pg.1043 – 1091, p30). In sum, s.1030 USC as alleged here requires that (and is only engaged where) the '*conspiracy'* is directed at state secrets as defined by Executive Order.

14.21. According to the Government's Opening Note:

> '*...By this conduct, Mr Assange caused damage to the strategic and national security interests of the United States...*'. It is '*...specifically alleged that Mr Assange knew (as must have been obvious) that the disclosure of this information would be damaging to the work of the security and intelligence services of the United States; would damage the capability of the United States armed forces; and would endanger the interests of the United States abroad...*' (§3).

14.22. The conduct alleged against Mr Assange is therefore, by analysis as well as by label, also that of '*espionage'*. That is, on the authorities, a '*violation of laws designed to protect the political institutions*' or '*protecting the political order'* of the USA (***Dutton***). It is activity '*contrary to the external security of the [USA]'* (***Singh***). It is '*conduct directed against the sovereign or its political subdivisions'* (***Arambasic)*** and '*against the state itself'* (***Bassiouni***).

14.23. It is conduct *'on [its] face political' (**Schtraks**), 'necessarily committed against the state' (**Cheng**),* or *'directed at the sovereign and his apparatus of state' (**T**).* It is conduct equivalent to say, sedition, and is certainly a great deal more '*obviously of a political character*' than political caricaturing or handing out political pamphlets *(**Schtraks**).*

14.24. It is ultimately no different to the extradition request concerning MI5 agent David Shayler, prosecuted under the Official Secrets Act 1989 for passing top secret documents to The Mail on Sunday in 1997 (including disclosing the names of agents).[85] That extradition request was rejected by the French Cour d'Appel on 18 November 1998 as being a '*political offence'* (under Article 3(1) of the European Convention on Extradition 1957).[86]

14.25. In addition to alleging the commission of political conduct, the motivation and purpose attributed to Mr Assange (which constitutes a core aspect of the criminal allegation against him) is to damage '*the work of the security and intelligence of the US'* and to '*damage the capability of the armed forces of the USA to carry out their tasks; and endanger the interests of the United States of America abroad'* (Dwyer affidavit, CB/12/pg.827 – 828, §4). For example:

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[85]. Shayler disclosed that MI5 kept files on prominent politicians, including Labour ministers, that the bombings of the City of London in 1993 and the Israeli embassy in London in 1994 could have been avoided, and that MI6 were involved in a plot to assassinate Libyan leader Colonel Gaddafi.

[86]. *'...Extradition shall not be granted if the offence in respect of which it is requested is regarded by the requested Party as a political offence or as an offence connected with a political offence...'*

(i) *'...ASSANGE knew the disclosure of these classified documents would be damaging to the work of the security and intelligence services of the United States of America...'* (Dwyer, CB/12/pg.829 – 830, §8);

(ii) *'...ASSANGE was the public face of 'WikiLeaks,' a website he founded with others as an 'intelligence agency of the people.' To obtain information to release on the WikiLeaks website...for distribution to the public...'* (Dwyer, §11) (Second Superseding Indictment, CB/12/PG.1043 – 1091, §1);

(iii) *'...As the website stated, 'WikiLeaks accepts classified, censored, or otherwise restricted material of political, diplomatic, or ethical significance...'* (Dwyer, §12) (Second Superseding Indictment, CB/12/PG.1043 – 1091, §2);

(iv) *'...the WikiLeaks website...stated that documents or materials...must '[b]e likely to have political, diplomatic, ethical or historical impact...*' (Dwyer, §14) (Second Superseding Indictment, CB/12/PG.1043 – 1091, §3);

(v) '*...ASSANGE and WikiLeaks repeatedly sought, obtained, and disseminated information that the United States classified due to the serious risk that unauthorized disclosure could harm the national security of the United States...*' (Second Superseding Indictment, CB/12/PG.1043 – 1091, §2);

(vi) '*...ASSANGE designed WikiLeaks to focus on information, restricted from public disclosure by law, precisely because of the value of that information...*' (Second Superseding Indictment, CB/12/PG.1043 – 1091, §2).

14.26. The indictment which originally accompanied the request was even more naked in its assertions. For example:

(i) '*...ASSANGE, Manning, and others shared the objective to further the mission of WikiLeaks, as an 'intelligence agency of the people,' to subvert lawful measures imposed by the United States government to safeguard and secure classified information, in order to disclose that information to the public and inspire others with access to do the same...*' (First superseding indictment, CB/12/pg.872 – 908, §29);

(ii) '*...this shared philosophy...*' (First superseding indictment, CB/12/pg.872 – 908, §30);

(iii) '*...this mission...'* (First superseding indictment, CB/12/pg.872 – 908, §31);

(iv) *'to publish the classified documents...damaging to the United States'* (First superseding indictment, CB/12/pg.872 – 908, §31).

14.27. Thus:

(i) Count 1: specifically alleges that Mr Assange's knowing objective and purpose '*...was to obtain, receive, and disclose national defense information...*' (Dwyer, §62), with '*reason to believe that the information was to be used to the injury of the United States or the advantage of any foreign nation*' (Second Superseding Indictment, CB/12/PG.1043 – 1091, p28) (USC Title 18, s.793(b)-(e));

(ii) Count 2: alleges that one purpose of Mr Assange's alleged conspiracy to commit '*computer intrusion'* was likewise to enable Manning to '*steal classified documents from the United States'* (Dwyer, CB/12/pg.865, §87) and was carried out '*...with reason to believe that such information so obtained could be used to the injury of the United States and the advantage of any foreign nation...*' (Dwyer, CB/12/pg.864, §85) (Second Superseding Indictment, CB/12/PG.1043 – 1091, p30).

(iii) Counts 3-9 (unauthorised obtaining and receiving of national defence information) specifically allege that Mr Assange wilfully aided or abetted Manning acting '*with intent or reason to believe that the information was to be used to the injury of the United States or the advantage of any foreign nation'* (Dwyer, CB/12/pg.853 – 854, §66-68) (Second Superseding Indictment, CB/12/PG.1043 – 1091, p32-38) (USC Title 18, s.793(b)-(c));

(iv) Counts 10-18 (unauthorised disclosure of national defence information) specifically allege that Mr Assange wilfully aided or abetted Manning disclosing '*to all the world'* with '*...reason to believe [the disclosure] could be used to the injury of the United States or to the advantage of any foreign nation...*' (Second Superseding Indictment, CB/12/PG.1043 – 1091, p39-47) (USC Title 18, s.793(d)-(e)).

14.28. The reason offences such as espionage are pure political offences, per the government before the Australian Federal Court in ***Santhirarajah v Attorney-General for the Commonwealth of Australia*** [2012] FCA 940 at §103, 107, 111, 123, 145, is that '*The elements of pure political offences such as treason, sedition, and espionage contain a requirement that the offender intend to harm the government of the state. For this reason pure political offences do not require the demonstration of purpose by the alleged offender*'.

14.29. US government officials moreover freely, publicly and regularly ascribe motives *'hostile'* to the USA to Mr Assange. For example:

(i) '*...WikiLeaks walks like a hostile intelligence service and talks like a hostile intelligence service. It has encouraged its followers to find jobs at CIA in order to obtain intelligence. It directed Chelsea Manning in her theft of specific secret information. And it overwhelmingly focuses on the United States, while seeking support from anti-democratic countries and organizations. It is time to call out WikiLeaks for what it really is – a non-state hostile intelligence service often abetted by state actors...*' (Mike Pompeo, US Secretary of State and former CIA Director, 13 April 2017);[87]

(ii) '*We can no longer allow Assange…to use free speech against us...To give them the space to crush us with misappropriated secrets is a perversion of what our great constitution stands for'* (Mike Pompeo, Aspen Security Forum 13th April 2017.

(iii) '*...WikiLeaks will take down America any way they can and find any willing partner to achieve that end...I mean you can go – you only need to go to WikiLeaks' Twitter*

[87]. https://www.cia.gov/news-information/speeches-testimony/2017-speeches-testimony/pompeo-delivers-remarks-at-csis.html. In the same speech, Mr Pompeo emphasised that the CIA is '*engaged solely in foreign espionage. We steal secrets from our foreign adversaries, hostile entities and terrorist organisations. And we're damn proud of it'*.

account to see that every month they remind people that you can be an intern at the CIA and become a really dynamite whistleblower...free range chickens [who] run around the world with resources to spare, and who don't intend well for the United States of America...' (Mike Pompeo, Aspen Security Forum in July 2017);[88]

(iv) '*...guilty of treason...*' (Mick Huckabee, Republican candidate for the 2010 Presidential election);[89]

(v) '*...He's waging cyberwar on the United States...'* (KT McFarland, deputy national security advisor, 2017);[90]

(vi) '*...a conduit for...some other adversary of the United States just to push out information to damage the United States...*' (FBI Director, James Comey, testifying before the Senate Judiciary Committee on FBI oversight, May 2017);[91]

(vii) '*...Section 623 provides a Sense of Congress that WikiLeaks and its senior leadership resemble a non-state hostile intelligence service, often abetted by state actors, and should be treated as such...*' it is '*...part of a direct attack on our democracy...*' (s.623 in the Intelligence Authorization Act for Fiscal Year 2018, approved by the U.S Senate Intelligence Committee on 18th August 2017);[92]

(viii) '*...Under the guise of transparency, Julian Assange and Wikileaks have effectively acted as an arm of...'* foreign intelligence services (Richard Burr, Chairman of the Senate Select Committee, 11 April 2019: the day of Mr Assange's arrest).[93]

14.30. In short, Mr Assange faces precisely the same sort of accusation (of wilful disclosure of state secrets harmful to the state) that the UK brought against Katherine Gunn under the Official Secrets Acts (and which was ultimately discontinued in the face of a defence plea of justification / preventing illegality). Of course, in the domestic context, the political nature of the charge is no defence (***Castioni*** at p162 per Hawkins J) but, as ***Shayler*** shows, such conduct is never properly the subject of extradition. Had Alfred Dreyfus fled to Germany (or anywhere), for example, he could never have been extradited to France (and the scandal that has come to symbolise modern injustice throughout the French speaking world would never have played out).

'Relative political offences'

14.31. Even in cases where a common crime is alleged (such as computer misuse; count 2), if it is plain from the context of the allegation itself, and the motivation ascribed to (or claimed by)

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88. https://www.denverpost.com/2017/07/20/mike-pompeo-cia-aspen-security-forum-2017/
89. https://www.theguardian.com/world/2010/dec/01/us-embassy-cables-executed-mike-huckabee
90. https://www.telegraph.co.uk/news/worldnews/wikileaks/8172916/WikiLeaks-guilty-parties-should-face-death-penalty.html
91. https://www.washingtonpost.com/news/post-politics/wp/2017/05/03/read-the-full-testimony-of-fbi-director-james-comey-in-which-he-discusses-clinton-email-investigation/
92. https://www.intelligence.senate.gov/publications/report-accompany-s1761-intelligence-authorization-act-fiscal-year-2018-september-7-2017
93. https://thehill.com/homenews/senate/438456-top-senate-republican-assange-put-millions-of-lives-at-risk

the offender, that the conduct is directed against the interests of the state, it will nonetheless be regarded as constituting a '*political offence*':

> *'...Relative political offences, in contrast, are common crimes which acquire their political character from the political purpose sought to be achieved by an offender in committing them...For this reason it is conceivable that the commission of the common crime of fraud on the State could, because of the offender's purpose, constitute a 'political offence' for the purposes of the Act...'* (***Dutton*** (supra) at §186).

14.32. The greater part of the English law relating to '*political offences'* has concentrated on this broader concept of '*relative political offence'* in the context of '*ordinary crimes'*. The current state of law in respect of 'relative' political offences are that they include any offences alleged to be committed in furtherance of attempts to influence, alter or change governmental policy. For the assistance of the Secretary of State, we trace the evolution of the modern law on this topic below.

14.33. In ***R v Governor of Brixton Prison, ex parte Kolczynski*** [1955] 1 QB 540, Lord Goddard CJ stated at p551 that it was now *'...necessary, if only for reasons for humanity, to give a wider and more generous meaning to the words we are now construing, which we can do without in any way encouraging the idea that ordinary crimes which have no political significance will thereby be excused...'*. The Divisional Court thus recognised that the mere '*expression of political opinions*' (even if articulated through the medium of an ordinary criminal act, such as mutiny on a merchant ship) is a '*political offence*' if it becomes the subject of prosecution.

14.34. A number of core principles emerged from ***Schtraks v Government of Israel*** [1964] AC 556.

14.35. First, the House of Lords confirmed that it is <u>not necessary for the defendant to be seeking political power, or the overthrow of government</u> (despite suggestions to the contrary in the earlier case law). Whilst the concept of a political offence is limited to opposition between citizen and government in power (i.e. it is not enough to be in contest with a political force not in power, per Viscount Radcliffe), the House of Lords rejected the necessity for open insurrection or for an intention to change the composition of the government:

> *'...I do not think that the application of the section can be limited to cases of open insurrection...And I do not see why the section should be limited to attempts to overthrow a government. <u>The use of</u> force, or it may be other <u>means</u>, to compel a sovereign to change his advisers, or <u>to compel a government to change its policy</u> may be just as political in character as the use of force to achieve a revolution. And I do not see why it should be necessary that the refugee's party should have been trying to achieve power in the State. It would be <u>enough if they were trying to make the government concede some measure of freedom</u> but not attempting to supplant it...'* (per Lord Reid at pp583 and 584).

14.36. <u>Secondly</u>, Lord Reid reiterated (at p583):

> *'...We cannot inquire whether a 'fugitive criminal' was engaged in a good or a bad cause. A fugitive member of a gang who committed an offence in the course of an unsuccessful putsch is as much within the Act as the follower of a Garibaldi. But not every person who commits an offence in the course of a political struggle is entitled to protection. If a person takes advantage of his position as an insurgent to murder a*

man against whom he has a grudge I would not think that that could be called a political offence. So it appears to me that the motive and purpose of the accused in committing the offence must be relevant and may be decisive. It is one thing to commit an offence for the purpose of promoting a political cause and quite a different thing to commit the same offence for an ordinary criminal purpose...

14.37. Viscount Radcliffe thus summarised '*the idea that lies behind the phrase 'offence of a political character'*" as that:

'*...the fugitive is at odds with the State that applies for his extradition on some issue connected with the political control or government of the country. The analogy of 'political' in this context is with 'political' in such phrases as 'political refugee,' 'political asylum' or 'political prisoner.' It does indicate, I think, that the requesting State is after him for reasons other than the enforcement of the criminal law in its ordinary, what I may call its common or international, aspect... It is not departed from by taking a liberal view as to what is meant by disturbance or these other words, provided that the idea of political opposition as between fugitive and requesting State is not lost sight of...'* (p591).

What is required is evidence to '*...suggest that the appellant's offences, if committed, were committed as a demonstration against any policy of the Government...itself or that he has been abetting those who oppose the Government...'* (p592)

14.38. ***Schtraks*** was confirmed in ***Cheng v Governor of Pentonville Prison*** [1973] AC 931:

'*...Political character in its context, in my opinion, connotes the notion of opposition to the requesting state...taking political action vis-à-vis the American Government...*' (per Lord Hodson at p943A-B);

'*...it was no part of his purpose to influence the policy of the Government of the United States...*' (per Lord Diplock at p943C);

'...'Political' as descriptive of an object to be achieved must, in my view, be confined to the object of overthrowing or changing the government of a state or inducing it to change its policy or escaping from its territory the better so to do. No doubt any act done with any of these objects would be a 'political act'...' (per Lord Diplock at p945C), and if the government in question was the one seeking extradition, it would be a '*political offence'* (per Lord Diplock at p945E);

'...even apart from authority, I would hold that prima facie an act committed in a foreign state was not 'an offence of a political character' unless the only purpose sought to be achieved by the offender in committing it were to change the government of the state in which it was committed, or to induce [the government] to change its policy, or to enable him to escape from the jurisdiction of a government whose political policies the offender disapproved but despaired of altering so long as he was there...' (per Lord Diplock at p945E-F);

'...I would not hold that an act constituted 'an offence of a political character'...if the only 'political' purpose which the offender sought to achieve by it was not directed

against the government or governmental policies of that state within whose territory the offence was committed...' (per Lord Diplock at p945F-G);

'*...the most exacting relevant test, namely...[is] his crime was committed both from a political motive and for a political purpose...*' (Per Lord Simon at p952C);

It is not part of the '*political offence'* exception that *'...the courts of this country [should] inquire into the merits of those who have committed crimes against the requesting state or to pass judgment upon the political acts or policy of the government of that state...'* if *'...a man who has committed a crime directed against the régime of the requesting state and which, in that sense, was a crime of a political character...'* (per Lord Salmon at p961C-G).

14.39. See also ***Prevato v the Governor, Metropolitan Remand Centre*** [1986] 8 FCR 358. Italy. Prevato was a member of the Ronde Armate Proletarie (Proletarian Armed Patrols) which opposed a system called the selection in schools program. He was charged with various offences involving damage to schools and threats to teachers and other officials, committed in furtherance of the Ronde Armate Proletarie's '*long and bitter campaign to induce a change in education policy in government schools in Padua*'. Extradition was refused on the ground that the offences were political offences. Per Wilcox J at §71-72:

'...71...the object of changing government policy...may...be sufficient to institute an offence of a political character. [The contrary view] would be inconsistent with the speeches in both Schtraks and Cheng.

72....The early debate upon the necessity for there to be a campaign to change the government itself was decisively resolved in the negative in Schtraks; it is enough that there be a concerted campaign to change government policy. Not every offence committed in the course of opposition to government policy is a political offence. There must be, at least, an organized, prolonged campaign involving a number of people. The offence must be directed solely[94] to that purpose; it must not involve the satisfaction of private ends. And the offence must be committed in the direct prosecution of that campaign; so an assault upon a political opponent in the course of the campaign may be a political offence but an assault upon a bank teller in the course of a robbery carried out to obtain funds for use in the campaign would not be...'

14.40. In ***T v Immigration Officer*** [1996] AC 742, Lord Mustill reiterated at p761D-E the:

'...broad division, established by a series of bi-lateral treaties and a handful of decisions into (a) 'common' crimes, (b) purely political crimes such as treason, and (c) 'relative' political crimes which are common crimes with a political overlay...'. That is to say that *'there was a need for certain of such crimes to be exempt, when impressed with a political character.*

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94. In fact, it is an '*error of law'* to regard political motivation and revenge as mutually exclusive (***Minister for Immigration and Multicultural Affairs v Singh*** [2002] HCA 7 per Gleeson CJ at §§18-20).

14.41. According to Lord Mustill, a '*relative political offence'* will '*look to the connection between the motive and political content of the crime and the criminal act itself'* (p764D). '*The general proposition, which I believe is binding on this House as a matter of English law, is known in the literature as the 'incidence' theory. The essence of this is that there must be a political struggle either in existence or in contemplation between the government and one or more opposing factions within the state where the offence is committed, and that the commission of the offence is an incident of this struggle*' (p764F-G). That is to say (p764G-765A): '*the fugitive is at odds with the state that applies for his extradition on some issue connected with the political control or government of the country'* (per Viscount Radcliffe in ***Schtraks***) and that '*the only purpose sought to be achieved by the offender in committing it'* is *'to change the government of the state in which it was committed, or to induce it to change its policy'* (per Lord Diplock in ***Cheng***). '*This principle underlies the major English decisions on extradition law'* (p765B).

14.42. The law, as formulated by Lord Mustill, covers an individual or organisation in conflict with the governmental policies of the requesting state who seeks to alter, influence or bring about a change in them. The unambiguous evidence in this case is that Julian Assange's actions were precisely intended to *'have an effect on US government policy and its alteration'* (Ellsberg, tab 55, §24). According to the White House itself '*it's worth noting that WikiLeaks is not an objective news outlet but rather an organization that opposes US policy in Afghanistan*' (NY Times, 25 July 2010). At the time of publication, Mr Assange himself said WikiLeaks' purpose was the achievement of '*the maximum political impact possible'* (Vol P, tabs D32, E48). Independent observers commented at the time that '*Assange's position as the global spokesman for what is (loosely) an Internet-based international political movement in opposition to the United States has never been stronger, almost like a member of the opposition party…Clearly, WikiLeaks embraces policy goals and political outcomes – not solely a commitment to telling stories and releasing data…In the past, Assange has talked of using information to 'bring down many administrations that rely on concealing reality—including the US administration. That is unquestionably a political goal'* (Forbes, 30 June 2013).[95]

14.43. It is entirely obvious that the exposure of detainee abuse in Guantanamo and of war crimes in Afghanistan and the Iraq war was politically motivated and designed to induce a change in government policy. Indeed (a) The district judge accepted (judgment, CB/2, §156) that these were Mr Assange's political opinions as '*outlined and explained to the court by defence witnesses including Professor Rogers, Noam Chomsky and Daniel Ellsberg',* and **(b)** Professor Rogers' evidence was that his actions did in fact have the of inducing a change in government policy (Tr 9.9.20, EB/41, p5, ll 26-32).

The exceptions to the exemption: violent offences

14.44. All this would, of course, in theory also offer protection to acts of political assassination, or terrorism. In the nineteenth century that was acceptable. But in view of the societal shift described by Lord Mustill in ***T v Immigration Officer*** (supra), such means are no longer regarded as tolerable: '*certain acts of violence, even if political in a narrow sense, are beyond the pale'* (p755H). For this reason (and at the same time recognising and reinforcing the

95. https://www.forbes.com/sites/tomwatson/2013/06/30/is-wikileaks-now-an-international-political-party

breadth of the definition of '*political offence'*),[96] international law has moved to exclude certain violent offences from qualifying as '*political offences'*.

14.45. In the asylum context, under article 1F(b) of the Refugee Convention, no international rules exist which govern how to identify such cases and thus the Courts have sought to articulate and erect rules which exclude acts of terrorism and the like (***T v Immigration Officer*** (supra)); ***Minister for Immigration and Multicultural Affairs v Singh*** (supra)).

14.46. In extradition law, by contrast, as Lord Mustill observed in ***T v Immigration Officer*** at p753G, 761B-763A, 765G-H, the limits are set instead by Treaties which '*depoliticise'* certain violent offences.[97]

14.47. For example, following Lord Simon's plea in 1973 in ***Cheng*** '*for governments in international conclave*' to set the applicable limits, the Council of Europe's Convention on the Suppression of Terrorism 1977,[98] excludes certain listed violent offences from being regarded as '*political'* for the purposes of extradition between Convention states. Those exclusions were, in turn, given effect to by s.1 of and Schedule 1 to the Suppression of Terrorism Act 1978.[99]

14.48. As with other Treaties elsewhere, the UK/USA Supplementary extradition Treaty 1985 also erected a similar (but narrower) list of excluded offences. Accordingly, the 1978 Act was applied to extradition with the USA (with relevant omissions designed to reflect the more limited exclusionary list).[100]

14.49. Neither the USA list, nor the wider Council of Europe list, nor even the EU list now contained within Article 602(2) TCA, have ever excluded espionage[101] or computer

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96. See e.g. ***Santhirarajah*** (supra) per North J at §250: *'...the fact that Parliament has expressed limitations on what amounts to a political offence recognises that the ordinary meaning of that term covers a range of conduct which today is viewed as inappropriate for exclusion from the process of extradition...'.* Put otherwise (per North J at §242) '*...Such violent activity was undertaken in aid of political campaigns. It is difficult to argue that offences arising out of such conduct are not political. The means used are designed to advance political ends. In the words of Lord Mustill [in T v Immigration Officer at p762C-D] which bear repeating: Those who struggle against odious regimes have now come to seem, by their aims and methods, scarcely less odious than their oppressors. Yet it was (and still is) hard to see why their crimes, however distasteful and heartless, are any the less 'political' than those of the heroes of the Risorgimento. International terrorism must be fought, but the vague outlines of the political exception are of no help...'.*

97. See also ***Santhirarajah*** (supra) per North J at §250 '*...Any further limitation to be imposed on the ordinary scope of the term political offence is a matter for Parliament...*'

98. And now its 2003 Protocol.

99. For offences excluded from the ambit of '*political'* by the Convention, the UK is also obliged to establish extra-territorial or universal jurisdiction (see article 6 of the 1977 Convention, s.4 of the 1978 Act) so that if, for some other reason, extradition is not granted, the UK will be in a position to prosecute itself (*aut dedere aut judicare*). See ***T v Immigration Officer*** (supra) per Lord Mustill at p763.

100. See Schedule 2 to the Suppression of Terrorism Act 1978 (Application of Provisions) (United States of America) Order 1986 (1986/2146).

101. No doubt because it is a pure political offence.

misuse.[102] The USA exclusionary list is now contained in Article 4(2) of the 2003 UK / USA Treaty. It still does not include espionage or computer misuse.

14.50. ***Santhirarajah*** is an example of a '*relative political offence'* disclosed by the face of a USA extradition request. It concerned an allegation of purchasing night vision goggles (in the USA) to provide to the Tamil Tigers to support their cause for independence in Sri Lanka. Common crimes were alleged (conspiracy to violate export control laws, conspiracy to provide material support to a terrorist organisation, money laundering). All, however, were exempt from extradition as '*relative political offences'* because:

> *'...252...the applicant was a member of the LTTE. That organisation had been engaged in a civil war in Sri Lanka since 1983. The charged conduct involved a conspiracy to supply weapons for use against government forces in that civil war. It was a critical factor that the charged conduct was in relation to the LTTE which was expressly designated by the US Secretary of State as the object of the offences. In designating the LTTE the Secretary of State formed the view that the LTTE was a foreign organisation engaged in terrorist activity which threatened the security of the US or nationals of the US.*
>
> *253. No doubt the struggle in Sri Lanka was a political confrontation. The contending parties were seeking the power to govern Tamils in Sri Lanka.*
>
> *254. The designation of the LTTE by the US Secretary of State was directed to that struggle. It made some dealings in support of one side of the political struggle illegal. When the US criminalised dealing with the LTTE it took a political stand.*
>
> *255. When the applicant took the actions alleged against him it should be inferred from the circumstances that he did so in support of the political struggle of the LTTE. That is to say, he was at odds with the US over the political issue of support for the LTTE against the government of Sri Lanka in the civil war. These circumstances fall within the ordinary understanding of the expression 'political offence'.*
>
> *256...The alleged conspiracy to provide weapons to the LTTE is an incident in the political struggle no less than was the arming of Mr Castioni in preparing for his assault on the municipal buildings. If the applicant had acquired the weapons to advance the cause of the LTTE and they had been used to kill and maim innocent civilians indiscriminately the conduct would have been atrocious. However, because the actions were in furtherance of a political cause the offences are properly described as political. No satisfactory definition has been formulated in the cases that would exclude the conduct from that characterisation. That is recognised by Parliament in expressly excluding certain terrorist activities from the purview of the political exception. It is common ground that Parliament has not expressly excluded the offences with which the applicant has been charged...'*

14.51. In sum, Mr Assange's extradition '*shall not be granted'* under the applicable Treaty because it concerns a '*political offence*':

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[102]. Which is why, for example, neither espionage or computer misuse committed in the USA are offences which the UK has extra-territorial jurisdiction to prosecute (see above, fn. 22).

(i) Espionage (counts 1 and 3-18) is self-evidently a paradigm political offence. It is a '*pure political offence*'.

(ii) Even if stripped of nomenclature, the conduct underlying charges 1 and 3-28 (and indeed charge 2) is a *prima facie* political offence directed against the state. It is an allegation of a '*pure political offence*'.

(iii) Even if regarded as '*common crimes'*, all charges nonetheless allege a '*relative political offence*'. The alleged conduct is, on the face of the extradition request, incidental to a '*political'* struggle to influence governmental policy, and alleged to be motivated as such.

14.52. Extradition for all of the offences alleged against Mr Assange are, on the face of the extradition request itself, squarely prohibited by Article 4 of the Treaty.

14.53. In the end, that was not seriously contested before, or by, the DJ.

The DJ's decision (Judgment §41-63)

14.54. The DJ rightly observed that '*it is obviously desirable for both governments to honour the terms of a treaty they have agreed*' (judgment, CB/2, §61).

14.55. In the present case, it is particularly pertinent that the UK / USA Treaty containing the '*political offence'* exception was ratified, and came into force, in 2007; after the 2003 Act had been passed. Both governments must therefore have regarded Article 4 as a protection for the liberty of the individual, whose necessity continues (at least in relations as between the USA and the UK).

14.56. The DJ declined to halt this extradition, however, because she perceived she lacked jurisdiction to act upon that. She was wrong.

14.57. The DJ cites public law jurisprudence on the status of treaties (***Rayner***; Judgment §42-47), and ***Norris v USA*** [2006] EWHC 280 (Admin) (Judgment, CB/2, §48-49), and applies those general principles to the '*clear intention'* of Parliament contained in the 2003 Act (Judgment, CB/2, §50-55) in order to conclude that she lacks jurisdiction under the Act to consider the treaty.

14.58. None of that assists, however, with the (different) issue of whether the pursuit of criminal proceedings in the teeth of the jurisdiction-providing treaty is compatible with Article 5 ECHR, or is abusive. Parliamentary intention is not located solely within the four corners of the 2003 Act. When enacting the 2003 Act, Parliament was aware that its operation was also impacted and governed by Convention Rights (the HRA 1998) and principles surrounding abuse of process (***Bermingham***). None of the cases considered at (Judgment, CB/2, §42-55) consider the implications of either.

Article 5 ECHR

14.59. Historically, it was well recognised that where the governing extradition treaty did provide protections additional to those found in the statute, and its provisions had to be given effect to by the magistrate. See, e.g. ***R v Governor of Pentonville prison, ex parte Sotiriadis*** [1975]

AC 1, per Lord Diplock at p33H-34C '*...The treaty between the United Kingdom and Germany is a contract, whereby the parties 'engage to deliver up to each other...under the circumstances and conditions stated in the present treaty'...the question on this contract, as it seems to me, is whether under the circumstances and the conditions stated in the treaty the United Kingdom is obliged to carry out the terms of the contract...which limit, for the protection of a fugitive, the obligations imposed upon the party called upon to surrender him...*'; ***In re: Nielsen*** [1984] AC 606 per Lord Diplock at p616B-C '*...the magistrate's jurisdiction and powers under the Acts are subject to such limitations, restrictions, conditions, exceptions and qualifications as may be provided for in the extradition treaty with the particular foreign state. The jurisdiction conferred upon the Bow Street magistrate by the Acts of 1870 to 1932 is the widest that he may lawfully exercise upon applications for extradition of fugitive criminals from foreign states. His jurisdiction cannot be extended beyond that maximum but it may be limited, in the case of fugitive criminals from a particular foreign state, by the terms of the extradition treaty with that state...'*.

14.60. In ***R v Governor of Pentonville prison, ex parte Sinclair*** [1991] 2 AC 64, that jurisdiction was transferred from the court to the SSHD: '*monitoring the provisions of the Treaty is an executive, and not a magisterial, function*' (per Lord Ackner at pp89E and 91H). On that analysis, the defendant who asserts that his extradition is prohibited by the Treaty must issue habeas corpus proceedings directed to the Secretary of State's decision to initiate proceedings under the Act (p81E, 82G). The point was reiterated in ***R (Guisto) v Governor of Brixton Prison*** [2004] 1 AC 101 where Lord Hope spoke at §36-37 about the '*basic point'* that '*...It is the function of the Secretary of State to see that the provisions of the treaty have been satisfied...*'.[103]

14.61. ***Sinclair*** however precedes (and has been overtaken by) the incorporation of the ECHR by the Human Rights Act 1998. By reason of the HRA, and Article 5 ECHR, the jurisdiction has however transferred back to the DJ.

14.62. Detention for the purposes of extradition is now governed by (and must therefore comply with) Article 5 ECHR: see Article 5(1)(f). Article 5(4) ECHR requires an independent impartial '*court'* (in adversarial proceedings) to determine the '*lawfulness'*[104] of detention for the purposes of extradition. In this context, that means that (contrary to ***Sinclair***) the legality of detention pending extradition cannot be determined by the executive. ***Sinclair*** was held to be unsustainable under the HRA in ***R (Kashamu) v Governor of Brixton Prison*** [2002] QB 887 at §27-36:

> '*... It is, in my judgment, plain that article 5 expressly requires the lawfulness of the detention of a person detained with a view to extradition under paragraph (1)(f) to be decided speedily by a court. It is equally plain to my mind that, in the extradition context, the Secretary of State lacks the qualities of independence and impartiality required of the court-like body by the Strasbourg jurisprudence...*' (per Rose LJ at §27)

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[103]. The SSHD has declined to recognise the ***Sinclair / Guisto*** power. On his s.108 appeal, Mr Assange maintains that the SSHD was wrong and that ***Sinclair / Guisto*** are good law. If, however, that is wrong, and the SSHD has no power to give effect to the treaty, then he submits that the power must lie instead with the DJ. It simply cannot be the case that no UK public authority has power to give effect to the treaty.

[104]. Which includes arbitrariness: ***R v Governor of Brockhill Prison, ex parte Evans*** [2001] 2 AC 19 at p38B-E.

'*Having regard, as this court must, to the Strasbourg jurisprudence, it seems to me to be clear that a court and not the Secretary of State is the appropriate forum for a decision as to the lawfulness of a fugitive's detention*' (§29)

'*Furthermore, as it seems to me, the district judge's obligation under section 6(1) of the Human Rights Act 1998 to act compatibly with Convention rights requires him to make a determination under article 5(4)...he must consider whether the detention is lawful by English domestic law, complies with the general requirements of the Convention and is not open to criticism for arbitrariness'* (§32).

14.63. Specifically, the High court held that ***Sinclair***:

'*...does not now, in the light of the provisions of article 5(4), provide a rationale for excluding the courts from exercising abuse jurisdiction in relation to the lawfulness of detention...*' (§29-30).

14.64. ***Kashamu***, the HRA, and their combined implications for the location of the duty to monitor Treaty compliance (per ***Sinclair***), was not considered in ***Guisto*** (or ***Norris***).

14.65. ***Kashamu*** was however approved and applied by the Privy Council in ***Fuller v Attorney-General of Belize*** (2011) 32 BHRC 394 per Lord Phillips at §37; again having expressly considered ***Sinclair***. The ***Kashamu*** principle was in fact extended to encompass:

'*...Both the lawfulness of the detention and the lawfulness of the extradition [which] are a matter for the courts and not the executive...'* (§50).

'*...For the reasons given by the Administrative Court in* ***Kashamu****...[it is not lawful] to confer on the executive rather than the courts the determination of any issue that goes to the legitimacy of extradition or of detention pending possible extradition...'* (§51).

14.66. The Human Rights Act accordingly requires (and ***Kashamu*** and ***Fuller*** confirm) the transference from the executive to the judiciary of determination of compliance with Article 4 of the Treaty.

14.67. The DJ's analysis of the implications of Article 5 is, with respect, seriously lacking. It is contained at (Judgment §61). It rejects Article 5 solely on the basis that '*Parliament has made its intentions clear'* in the 2003 Act. As stated above, Parliamentary intention is not located solely within the four corners of the 2003 Act. The DJ fails to acknowledge much less consider the implications of the HRA, ***Kashamu*** or ***Fuller***.

14.68. In any event, violation of Article 5 is regarded by Parliament as a bar to extradition: section 87.

Abuse of Process

14.69. It is, in any event, an abuse of process for the USA to request extradition for conduct prohibited by the terms of the relevant Treaty. Article 1 provides that '*the Parties agree to extradite to each other, pursuant to the provisions of this Treaty*'.

14.70. As Laws LJ observed in ***R (Bermingham and others) v SFO*** [2007] QB 77 at §118, a proposed extradition must be '*properly constituted according to the domestic law of the sending state and the relevant bilateral treaty*'. At §127 Laws LJ refers to Lord Bingham's reference to '*the great desirability of honouring extradition treaties*'. The public interest in honouring extradition arrangements is, of course, not a one-way street. There is as much value in not allowing extradition where the treaty prohibits it as in permitting it to go ahead when the conditions have been met. Laws LJ went on to cite the words of Hale LJ in ***R (Warren) v SSHD*** [2003] EWHC 1177 §40 regarding the strong public interest in respecting '*treaties involving mutually agreed and reciprocal commitments*'.

14.71. Extradition detention pursuant to an abuse of process is arbitrary within the meaning of Article 5 ECHR: ***Kashamu***. In ***Pomiechowski v Poland*** [2012] 1 WLR 1604, Lord Mance stated at §24-26:

> '*...As the Board [in **Fuller**] made clear the abuse alleged went, in that case also, to the extradition as much as to any prior detention...Where detention and the extradition proceedings as a whole stand and fall together, according to whether or not they involve an abuse of process, then **Fuller** suggests that article 5.4 may be an effective means by which a root and branch challenge to extradition may be pursued...*'

14.72. Thus it is that this Court has implied power to restrain the requesting state from abusing the process: ***R (Government of the USA) v Bow Street Magistrates' Court*** [2007] 1 WLR 1157.

14.73. The DJ's decision addresses none of these authorities.

14.74. It is, more generally, an abuse of process to prosecute in breach of the terms of the provisions of a Treaty or Convention that confers rights on the citizen. In ***R v Uxbridge Magistrates Court, ex parte Adimi*** [2001] QB 667, Simon Brown LJ suggested that '*the abuse of process jurisdiction*' would '*provide a sufficient safety net'* for those wrongly prosecuted in a manner that breached Article 31 of the Refugee Convention, even though the Convention was not incorporated into English law (at p684E-F). Whilst the DJ was entitled to observe that those comments were focussed on the law of legitimate expectation, and as such have subsequently been doubted (at Judgment §57), and that other case law likewise rejects the application of any doctrine of legitimate expectation (Judgment §58-59), that was not the end of the analysis.

14.75. The principle that it is an abuse of process to prosecute in breach of the terms of the provisions of a Treaty or Convention, has been upheld and applied by the House of Lords in ***R v Asfaw*** [2008] 1 AC 1061, in the case of a prosecution that bypassed the protections of the Refugee Convention (at §31-34 per Lord Bingham, §70-71 per Lord Hope, §118 per Lord Carswell). The DJ mentions ***Asfaw*** in passing (Judgment, CB/2. §57; where it is referred to as 'Afwar') but fails entirely to explain why it is inapplicable here. ***Asfaw*** is binding authority from the House of Lords.

14.76. Neither, for the avoidance of doubt, is ***Asfaw*** the only authority which has found that unincorporated international treaties can create rights and impose duties, enforceable through the doctrine of abuse. The DJ was referred, for example, to:

(i) ***R v Mullen*** [2000] QB 520 at p535E and 537G (there, a deportation bypassing proper extradition procedures through British authorities '*acting in breach of public international law'*); illustrating that the abuse of process jurisdiction can be invoked where extradition or a prosecution resulting therefrom would involve a violation of the principles of public international law.

(ii) In ***Thomas v Baptiste*** [2000] 2 AC 1, the Privy Council found that the due process clause of the Trinidad Constitution '*invokes the concept of the rule of law itself'* and thus the Inter-American Convention on Human Rights (an unincorporated treaty) conferred the right of petition to the Inter-American Commission and Court.

(iii) In ***Neville Lewis v Att. Gen. Jamaica*** [2001] 2 AC 50 at p84G – 85C, the Privy Council followed ***Thomas v Baptiste***. The constitutional concept of '*the protection of law'* extended to protect a prisoner's right of petition to the supranational court even though the source of that right was an unincorporated treaty. Moreover, the court implicitly questioned the assumption that a '*ratified but unincorporated treaty only creates obligations for the state under international law'* (per Lord Slynn at p84H).

14.77. The DJ's decision addresses none of the relevant authorities on abuse of process and, as a result, propounds a binary (and erroneous) account of the status of unincorporated treaty provisions. The DJ's decision is contrary to authority, and wrong.

15. Zakrzewski abuse

Introduction

15.1. In addition to being politically motivated, unprecedented, and outwith the treaty, this is also a request marred and undermined by significant and serious (and deliberate) factual misstatement with regard to each of its three central allegations; namely:

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

(ii) The '*passcode hash'* allegation: As stated above, it was necessary, per ***Bartnicki***, for the US to make that factual allegation here (Kromberg 1, CB/12/pg.823-918, §19). But it was contrived knowing (yet concealing from the DJ) that it was flatly contradictory to the evidence given by US government witnesses before the Manning Court Martial. The passcode hash was never even decoded nor was anything ever received as a result of any attempted de-coding.

(iii) The allegations that WikiLeaks '*deliberately put lives at risk'* by purposely disclosing unredacted materials (Kromberg 1, CB/12/pg.823-918, §8-9, 20-22, 71) (Kromberg 2, CB/12/pg.996 – 1008, §10), i.e. the allegation of '*intentional outing of intelligence sources'* - is also factually inaccurate.

15.2. All of these assertions, thought by the US to be (but which for the reasons detailed above are not) material to the operation of Article 10 ECHR, are in reality deliberate factual misstatements. The DJ manifestly erred in concluding otherwise.

The Law

15.3. It has long been the case that a prosecutor or judge requesting extradition could be held to be abusing the court's process in the ***Tollman*** sense where '*he knew he had no real case'* but continued to seek extradition for another motive and '*accordingly tailored the choice of documents accompanying the request'* (***Bermingham*** at §100).

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

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

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

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

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

15.8. The WikiLeaks '*draft most wanted list'* ('the list') (Bundle L, tab 2) was a public collaboration, a living document edited by the public in the way that Wikipedia is (Bundle L, tab 7 p5) (Timm, EB/32, §24-30 / Tr 9.9.20, EB/42, xic, p58 – unchallenged) (Timm, EB/32, exhibits 15, 17) (L, section D7, D32-33, D35-36). That evidence was not challenged.

15.9. Nonetheless, as detailed above, the request alleges that Mr Assange, through WikiLeaks, was complicit in Manning's '*theft'* of the materials she provided because he encouraged and '*solicited'* her illegal provision of classified documents to the website, including through the 'list' (Dwyer, CB/12/pg.823 – 918, §5-6, 12-16), and that Manning directly responded to these solicitations (Dwyer, CB/12/pg.823 – 918, §19-21).[105] See (Judgment, CB/2, §13-15).

The true facts

15.10. The allegation firstly conceals completely the fact that WikiLeaks, and its '*draft list'*, was not even online at all at the time manning uploaded any of the materials the subject of this prosecution. It was offline completely from at least 28 January (Bundle L, tab 16) to at least 17 May 2010 (Bundle L, tab 18). If Manning was '*responding'* to the 'list', she must have been doing so from memory.[106]

15.11. Moreover, even if it had been available to Manning (which it was not), the request conceals that:

(i) The 'list' was not linked to from the WikiLeaks submission page (Bundle L, tab E1). Nor could the 'list' be navigated to from within the WikiLeaks site (Mander, H9, p8126-8129).

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[105]. For what it is worth, Manning's evidence to her Court Martial was otherwise. She stated that her disclosures were the result of her own actions and decisions. She was hoping to *'spark a domestic debate on the role of the military and …foreign policy, in general, as well as [how] it related to Iraq and Afghanistan'* (Boyle 1, 3B/3, §16 – agreed s.9). Thus in early 2010 she transferred classified material onto a memory card which she took with her when she left Iraq to go on leave in Maryland, with the intention of releasing it to the press and general public (Boyle 1, tab 5, §17 – agreed s.9). She contacted both the *Washington Post* and the *New York Times* but received no real response from them (Boyle 1, EB/3, §17 – agreed s.9). So she visited the WikiLeaks website and on 3 February 2010 uploaded the Iraq and Afghan war diaries (Boyle 1, EB/3, §18 – agreed s.9). She then uploaded the Iceland cable (First Indictment, https://www.justice.gov/opa/press-release/file/1153486/download §35-40), and the so-called '*collateral murder'* video, and then she began conversing with a person alleged to be Assange (Boyle 1, EB/3, §18-20 – agreed s.9). According to Manning, none of this was solicited from her (Boyle 1, EB/3, §21 – agreed s.9). Her account was not challenged in the Court Martial. Yet, the Indictment nonetheless alleges that all this was all connected to, and '*solicited by'*, the WikiLeaks *'draft most wanted list'*.

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

(ii) Examination of Manning's computer therefore (unsurprisingly) showed no access to the 'list', and no suggestion was made at her Court Martial that she had accessed the 'list'.

(iii) Manning and Assange never discussed the 'list', whether in the March 2010 alleged Jabber chat (below) or otherwise;

(iv) Manning's online 'confession' in 2010 (Bundle M2, tab 499) made clear that her decision to disclose to WikiLeaks the materials the subject of this indictment was because she herself determined they showed '*incredible things, awful things…things that belonged in the public domain...things that would have an impact on 6.7 billion people*' (p11) '*horrifying...its important that it gets out...it might actually change something*' (p14);

(v) With one exception (the Rules of Engagement addressed below) the 'list' requested none of what Manning actually sent to WikiLeaks; and Manning sent none of what the 'list' did request (despite having access to it).

15.12. Thus:

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

- Were never on the 'list': Neither the Sigacts, nor the CIDNE databases, were ever on the 'list' (Bundle L, tabs 2, 4).[107]

- Were provided by Manning for reasons entirely unrelated to the 'list': US involvement in Iraq and Afghanistan was a topic of fierce public debate at the time. For example, the non-release of Iraqi and Afghan detainee photos had been the subject of recent public debate in November 2009 (Bundle L, tabs 40-45); as had the destruction of detainee CIA interrogation tapes depicting torture techniques (Bundle L, tabs 46-47). WikiLeaks had published multiple categories of material relevant to the issue (Bundle L, tab 6) (M, continuation tab 11).

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

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

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

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

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

- Were never on the 'list': [Bundle L, tabs 2, 4].

- Were provided by Manning for reasons entirely unrelated to the 'list': The public debate surrounding Guantánamo will be well known to the Court. It was no less prevalent in 2010 (see Bundle M, tab 12). At the time in question, the Congressional report of the inquiry into the treatment of Guantánamo detainees confirming the use of torture techniques including waterboarding etc had been issued in November 2008 (Bundle L, tab 67); the Senate had blocked funding for its closure in May 2009 (Bundle L, tab 60); Congress was in the process of debating the merits of its closure in November 2009 (Bundle L, tab 62); in December 2009 Human Rights Watch had called for release of investigation reports surrounding inmate deaths there (Bundle L, tabs 63-64); in January 2010 the final report of the Joint Task Force had been released concerning the status of Guantánamo's remaining 240 detainees (Bundle L, tab 65).

- As part of that global debate WikiLeaks had published myriad materials concerning Guantánamo (Bundle L, tabs 6, 40-48) (Bundle M, tab 12). '*WikiLeaks had a long-standing interest in exposing the abuses in the US rendition system and in Guantanamo Bay, and had been doing so since 2007 long before Chelsea Manning had ever been heard of*' (Maurizi, EB/30, §25 - agreed s.9). For example, the camp's Standard Operating Procedures had been published since 2007 (Bundle L, tabs 24-25), the abovementioned 2008 Senate investigation report since April 2009 (Bundle L, tab 38); ongoing special investigations materials revealing torture at the camp since May 2009 (Bundle L, tab 48); all of which had been accompanied by detailed journalistic analysis (Bundle L, tabs 26-28, 30-38), which was in turn informing proceedings pending before the US Supreme Court (Bundle L, tabs 29, 32). See generally (Bundle M2, tabs 118-149).

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

- As explained more fully above, and as confirmed by WikiLeaks' contemporaneous analysis of them (Bundle L, tabs 49-59), the DABs discovered by Manning were disturbing. They suggested, by reference to the intelligence used to justify their detention, that the US was holding individuals indefinitely that it believed or knew to be innocent (H17 p6776).

- Manning copied them on 5 and 7 March 2010 (H10, 11). She did this before she offered them to WikiLeaks (Shaver, H9, p7977-7982) (H10) (H11) (Jabber chat logs attached to original criminal complaint).

- Having commenced downloading / downloaded the DABs - because, she maintained, she had seen that WikiLeaks held other, general, Guantánamo

materials (H17 p6752) - Manning asked on the Jabber chat whether WikiLeaks would be interested in them (H17 p6777; Dwyer §31(a)).[108]

- They were then uploaded on 8 March (H17 p6778).

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

- Other Guantánamo materials were, by contrast, on the 'list' but were not sent by Manning (Bundle L, tab 2, p13), despite having access to them including the Intellipedia database (Bundle L, tab 2 p12).

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

- Were never on the 'list': No cables were ever on the 'list' (Bundle L, tabs 2, 4). Neither was the NetCentric database.

- Were provided by Manning for reasons entirely unrelated to the 'list': Manning had first copied and uploaded the '*Rekyavik'* cable on 15 February 2010 (H17 p6763). IceSave (Kaupthing) bank had been a topic of global debate, including on WikiLeaks (Bundle L, tabs 6, 15). The public interest in the cable was obvious (H17 p6762-3). Manning's upload was unilateral; the 'list' had never sought Kaupthing materials (Bundle L, tabs 2, 4).

- The public interest in the content of the remaining cables in Manning's possession, the subject of this indictment, was in her view even more glaring (H17 p6781-3), '*horrifying'* (Bundle M2, tab 499, p14). As explained more fully above, they revealed for instance, US spying on UN diplomats; previously denied US involvement in the conflict in Yemen, including drone strikes; UK training of death squads in Bangladesh; CIA and US forces involvement in targeted, extra-judicial killings in Pakistan; complicity of European states in CIA rendition, and have informed human rights litigation ever since their release. It was Manning who appreciated that the cables contained '*...all kinds of stuff like everything from the buildup to the Iraq War during Powell, to what the actual content of 'aid packages' is: for instance, PR that the US is sending aid to Pakistan includes funding for water/food/clothing… that much is true, it includes that, but the other 85% of it is for F-16 fighters and munitions to aid in the Afghanistan effort, so the US can call in Pakistanis to do aerial bombing instead of Americans potentially killing civilians... it affects everybody on earth...everywhere there's a US post… there's a diplomatic scandal that will be revealed'* (Bundle M2, tab 499, p13-15). Manning wanted her disclosure to provoke '*worldwide discussion, debates, and reforms. If not… than we're doomed as a species*' (Bundle M2, tab 499, p50).

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

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

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

- The 'list': This is the only category of materials subject to the indictment which might[109] have been on the 'list' (Bundle L, tab 2).

- Were provided by Manning for reasons entirely unrelated to the 'list': Manning explained the strong and obvious public interest in unilaterally wishing to provide these materials to the public (H17 p6764-8). Her decision to do so was inextricably linked to her unilateral desire to publicise the '*collateral murder'* video (which showed the footage from an Apache helicopter showing the killing of a dozen innocent people, including two Reuters news staffers (Bundle L, tab 69) - in turn fuelled by governmental lies and secrecy surrounding those deaths (H17 p6767)[110] - which Manning read in the NY Times; '*it humanized the whole thing… re-sensitized me'* (Bundle M2, tab 499, p37). *'i want people to see the truth'* (Bundle M2, tab 499, p50). The WikiLeaks 'list' never contained reference to that video.

- To understand and assess the circumstances of the extraordinary video, one had to know the Rules of Engagement for Iraq (Bundle L, tabs 69-70). WikiLeaks had published versions of the Rules in the past (H17 p6752),[111] so Manning uploaded the versions (2006-2008) pertinent to the time of the video (H17 p6768; L69-71).

- They were copied by Manning on 15 February 2010 (H17 p6768) and uploaded either (or both) on 21 February (H17 p6768) and/or on 22 March.[112]

- Both the video and the Rules were published by WikiLeaks on 5 April 2020 simultaneously and together as part of the Collateral Murder publication (Bundle L, tab 69). The Rules were necessary for the interpretation and evaluation of the video, and this is reflected uniformly in the stories by journalists about and discussions of the video after their simultaneous release.

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

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109. The 'list' changed over time. Compare (Bundle L, tab 2) at 4 November 2009 before Manning's first upload with (bundle L, tab 4) at May 2010 after Manning's last upload. The entire '*military and intelligence'* section of the list disappeared at some point during that period. The DJ *assumes*, without evidence, that the most expansive version of the list (Bundle L, tab 2) was the version available to Manning.

110. See. e.g. (Bundle L, tabs 72-74).

111. See (Bundle L, tab 6 p5) and (Bundle L, tabs 19-21, 23).

112. Cf. Dwyer §33.

- No reference at all to that context is disclosed by the extradition request. Instead the request seeks to link the disclosure of the Rules of Engagement to a 'list' which was not even online at all at this time.

15.13. The evidence before the DJ clearly and uncontrovertibly showed that the *'draft most wanted list'* correlation allegation, upon which it is apparently alleged that Mr Assange was involved in the original '*data theft'*, was and is completely misleading.

The DJ's decision (§370-376)

15.14. The DJ's conclusion, that these are '*contentions ... to be determined at trial'*, was plainly wrong. The DJ's flawed analysis begins by misdescribing the - essentially uncontested - evidence adduced by Mr Assange as '*particulars which the defence allege are wrong*' (judgment, CB/2, §371). It then proceeds to offer the following unreal and intellectually strained possible justifications for the unfair, improper and inaccurate allegation.

15.15. First, the DJ suggests that '*bulk databases'* were listed and that (it is suggested) is what Manning provided (Judgment, CB/2, §373).[113] That is simply factually wrong. The '*bulk databases'* that the 'list' described were in fact specified by name (L2, p12-13), and did not include any of what Manning provided.

15.16. Secondly, the DJ suggests that '*the materials identified in the indictment'* (namely the war diaries, Guantánamo briefs or cables) were '*consistent with the list'* (Judgment, CB/2, §373).[114] That is also not accurate. None featured on the 'list' at all.[115]

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113. This is the assertion made by (Kromberg 2, §13) (Kromberg 4, §22-23). See (Judgment, CB/2, §13).

114. See also (Judgment, CB/2, §15).

115. If the DJ is in fact here referring to the US assertions that, in the course of her online searches (not her interaction with WikiLeaks or Assange), Manning accessed other materials which featured on the 'list', namely '*detainee abuse'*, '*retention of interrogation videos'*, and queries related to '*Guantanamo Bay detainee operations, interrogations, and standard operating procedures'* (Judgment §14, 370): asides having no relevance to this indictment at all, the fact which emerges from these searches is that, despite having access to them, Manning did not supply the materials in question to WikiLeaks. That is flatly undermining of the US case (that Manning's disclosures to WikiLeaks were '*solicited'* by the 'list').
In fact, the evidence before the DJ also showed the US case - that these other (unrelated) searches were triggered by the WikiLeaks 'list' - to be every bit as misleading. For example, regarding Manning's 28 November 2009 search query '*retention of interrogation videos'* (Indictment,§11), the evidence before the DJ was that detailed above at §5.10 On 24 November 2009, the ACLU received additional information about the destruction of the CIA interrogation tapes through their FOIA lawsuit, '*including the precise date the tapes were destroyed and evidence that the White House was involved in early discussions about the proposed destruction*' (Vol L1, tab 47). 24 November 2009 was just four days before Manning searched for '*retention of interrogation videos*' on 28 November 2009. Notably, Manning did not search for '*interrogation videos*' (per the draft most wanted 'list'), but rather '*retention of interrogation videos*', and at a time when the destruction of such videos had become a major political scandal. The US knew all this, yet deliberately omitted it from the extradition request (whilst at the same time advancing a contrary case).
Precisely the same can be demonstrated in relation to the other searches. For example, Manning searched for '*detainee abuse'* on 29 November 2009, just the day before the Supreme Court was due to rule on the ACLU's high-profile FOIA lawsuit requesting the release of 2,000 detainee abuse photos following Abu Ghraib. The US case, that these (factually irrelevant) searches (for matters that

15.17. Thirdly, inconsistently, the DJ next suggests that it is '*not relevant'* that the materials Manning supplied were not on the 'list' (Judgment §374) because the contrary is '*not alleged'*. That, with respect, is an extraordinary conclusion. The entire premise of this allegation in the extradition request is that the materials were solicited from Manning via the 'list'. What the extradition request does is to allege that Mr Assange solicited Manning's disclosures through the 'list'; whilst at the same time concealing from the request its own knowledge that the materials in question were not in fact ever on the 'list'. That is a straightforward ***Zakrewszki*** abuse, and the DJ clearly erred in not recognising it as such.

15.18. The same is true of the DJ's suggestion that the US does '*not allege'* that Mr Assange was the author of the 'list' (Judgment, CB/2, §374).

15.19. Fourthly, the DJ dismisses the copious evidence which discloses Manning's actual reasons for providing the materials as a '*claimed alternative motivation*' which is '*disputed'* and '*not incontrovertibly true'* (Judgment, CB/2, §371(d), 375), despite receiving no contrary evidence whatsoever.[116] None of the above was challenged in evidence. These were matters which accordingly stood as '*clear beyond legitimate dispute'* (per ***Zakrzewski***). To make the allegation that the US does, for example, in relation to the source of the Rules of Engagement, whilst concealing the accompanying '*collateral murder video'* from the request on the basis that it is a *claimed alternative motivation'*, was and is straightforwardly misleading.

15.20. Fifthly, the '*remaining facts'* – which must be a reference to the 'fact' that the 'list' was not online at the material time, that it was never accessible within the WikiLeaks site at any time, that Manning had never searched for it, or even discussed it[117] – are all said by the DJ to be '*defence rebuttal allegations [for] trial'* (Judgment, CB/2, §376). That is a further clear error. All are uncontested facts; concealment of which from the request show the Government's bare allegation of '*solicitation'* using the 'list' to be knowingly misleading, per ***Zakrzewski, Murua, Castillo*** etc.

15.21. ***Eason v USA*** [2020] EWHC 604 (Admin) holds, per Leggatt LJ at §12 that '*there is in my view no possible reason to treat extradition proceedings any differently from other court proceedings, whether criminal or civil, in that where a party wishes to challenge evidence given by a witness and contend that that evidence is that either untruthful or inaccurate for reasons that would be within the knowledge of the witness, they are expected to put that case to the witness in cross-examination. If they do not do so, the inference may be drawn that the evidence is accepted as accurate'*.

15.22. Lastly, the DJ suggests that '*the prosecution relies on the Most Wanted Leaks list in a much more general way [that soliciting the Manning disclosures, because the US] identifies examples in which Mr. Assange used the list to encourage the theft of data'* on other occasions (Judgment, CB/2, §373).[118] Soliciting Manning to provide materials other than the

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are not the subject of the indictment in any event) were '*solicited'* by an offline inaccessible 'list', rather than the raging political debate then surrounding them, is as absurd as it is misleading.

116. And knowing that this evidence was not '*disputed'* or challenged in Manning's court martial.

117. See Judgment, CB/2, §371(a)-(c).

118. Following receipt of the defence evidence the 'draft most wanted list' allegation indeed morphed (despite the clear terms of the US charges) into a '*general'* allegation that soliciting '*classified,*

war diaries, Guantánamo briefs, rules of engagement or cables, is not however the conduct alleged to underlie counts 1-18, nor any of the notional UK charges for dual criminality purposes.[119]

15.23. In sum, the DJ's analysis of the issue was seriously flawed. The US allegation that Manning's disclosures were '*solicited'* by Mr Assange via the 'list' was, on the evidence before the DJ, neither fair, proper nor accurate (per ***Castillo / Murua / Zakrzewski***).

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

15.24. The request separately alleges that Mr Assange assisted Manning to '*steal'* classified documents by agreeing to help to decrypt a '*passcode hash'* value (Dwyer, §7, 25-30). See (Judgment, CB/2, §16).

15.25. The March 2010 Jabber chatlog (in which the 'passcode hash' agreement is said to have been hatched) was provided in the US government's application for provisional arrest. Discussion of the '*hash'* value issue amounted to 16 of the total 587 messages. The messages betray no discussion whatever of the use to which the decrypted hash value might be put, much less any plan to disguise Manning's access to documents or cover her tracks (Eller, EB/9, §63 / Tr 25.9.20, xic, p25 – unchallenged). They do not even suggest that the hash related to a Government computer (Eller, Tr 25.9.20, EB/52, xic, p25 – unchallenged).

15.26. Moreover, the US government is aware that, as at 2010[120] the encrypted hash value which Manning shared was, without the encryption key, '*insufficient to be able to crack the password in the way the government have described'.* Manning did not have the System file, or the relevant portions of the SAM[121] file, to reconstruct the key (Eller, EB/9, §29-36 / Tr 25.9.20, xic, p25-26). '*At the time, the time being 2010...it would not have been possible to crack an encrypted password hash, such as the one Manning obtained'* (Eller, Tr 25.9.20, re-x, p51-52), '*and my opinion again aligns with the opinion of the government's expert in the court martial'* (Eller, Tr 25.9.20, EB/52, re-x, p52) (see Shaver, H3 p8538). This would be known to anyone with '*basic technical knowledge'* (Eller, tab 17, §63-65). As at 2010, what was being suggested was, according to Microsoft, '*computationally infeasible'* (Eller, Tr 25.9.20, EB/52, xx, p42 / re-x, p51). Mr Eller confirmed that not even a '*skilled hacker'* could at that time achieve what is computationally unfeasible unless '*all the [missing] data is provided'* (Eller, Tr 25.9.20, EB/52, xx, p43 / re-x, p51). Even the '*government's own expert witness in the court-martial stated that that was not enough for them to actually be able to do it'* (Eller, Tr 25.9.20, EB/52 xx, p43).

15.27. Nevertheless, and without revealing any of this, it is baldly alleged in the request that decrypting the passcode hash value was being undertaken by Assange and Manning to allow the latter to log onto military computers '*under a username that did not belong to her'* which

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censored or otherwise restricted material of political, diplomatic or ethical significance' is criminal (Kromberg 4, CB/12/pg1009 – 1030, §22).

119. Nor could it possibly survive any meaningful Article 10 ECHR analysis. As detailed above, '*journalists routinely post'* general solicitations such as this (Feldstein, tab 18, §9(a)). '*News organisations commonly issue detailed instructions like this'* (Tigar, EB/13, p5 - agreed s.9) (Ellsberg, EB/27, §29 – unchallenged) (Timm, EB/42, §8-16, 31).

120. Years later, in 2016, '*doubts began to emerge about vulnerability of the Microsoft software, such that it was removed from service in 2019'* (Eller, Tr 25.9.20, EB/52, xx, p39, 41-42 / re-x, p52).

121. Security Accounts Manager database (Eller, EB/9, §31).

'would have made it more difficult for investigators to identify Manning as the source of disclosures' to WikiLeaks (Dwyer, CB/12/pg/837, §29) (Kromberg 1, CB/pg.919-995, §168).

The allegation that accessing the 'FTP user' account would have provided anonymous access to the relevant databases

15.28. This allegation presents an entirely misleading picture of the available evidence and is directly contradicted by the evidence heard during the Court Martial proceedings. What the extradition request conceals, in broad summary, was summarised to the DJ by Mr Eller:

(i) First, accessing documents by logging in using the 'FTP user' account[122] *'would not have provided her with more access than she already possessed'* (Eller, tab 17, §37). By March 2010, Manning had already downloaded significant quantities of classified material *from her own computer account* (Eller, tab 17, §24, 59 / Tr 25.9.20, xic, p27 – unchallenged). Namely, (a) the Guantánamo Detainee Assessment Briefs, (b) the Iraq and Afghan War diaries, (c) the Iceland cable, and (d) the collateral murder video.

(ii) Secondly, it is impossible for Manning to have downloaded any data '*anonymously'* from any government database using the 'FTP user' account, because:

- Access to the databases referred to in counts 3, 6, 7, 9, 10, 12 and 18 on the indictment (Net Centric Diplomacy (cables) and Intelink (Guantánamo briefs)) required no accounts, or login information at all. Rather they were accessible to anyone who, like Manning, had SIPRNet[123] access (Eller, tab 17, §39-41 / Tr 25.9.20, xic, p29-30 – unchallenged); and anyway;

- Manning *'could [not] have downloaded materials from those sites without possibility of being traced'* (Eller, tr 25.9.20, EB/52, xic, p30), because, as the US Government agreed in evidence (Tr 25.9.20, EB/52, p43), the tracking system used to identify computer users of Net Centric and Intelink databases was via IP addresses (not account identities) which '*provided an electronic location for the user'* even if Manning *had* logged on using a different user account (Eller, EB/9, §42-50 / Tr 25.9.20, EB/52, xic, p30 / re-x, p52)[124];

- Other databases (namely Active Directory or T drive) required domain accounts, not the local accounts that Manning was discussing (Eller, tab 17, §53-55 / Tr 25.9.20, xic, p27, 29 – unchallenged / re-x, p53).

15.29. In short, it is straightforwardly wrong to suggest that gaining access to another local computer account could ever have given Manning '*anonymous access to [any] databases'*. It would have been '*useless'* and '*impossible'* (Eller, EB/9, §55, 60-61). '*Forensic evidence of activity on the FTP account...would be available in the image of the computer itself'* (Eller,

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

123. Secret Internet Protocol Router Network (Eller, EB/9, §6).

124. The IP address would attach to the specific computer, and the timing of the activity would then serve to identify which specific user (day shift or night shift) was responsible (Eller, Tr 25.9.20, EB/52 re-x, p53-54).

Tr 25.9.20, EB/52 xx, p46-47). This is a matter of '*basic technical knowledge'* (Eller, EB/9, §63 / Tr 25.9.20, EB/52, xx, p30).

15.30. According to Mr Eller's evidence, all of the foregoing emerges from the evidence called by the Government at Manning's Court Martial, including evidence given by a number of senior army officers. It is information that was known to the US government, yet concealed from the DJ.

15.31. In more detail, Mr Eller gave unchallenged evidence that:

(i) The Guantánamo Detainee Assessment Briefs (counts 1, 6, 9, 12, 18): emanated from US Southern Command (H17 p6775) located on Intelipedia (Eller, EB/9, §41) (Motes, H8 p8734) accessible on the SIPRNet (Eller, §39), open to thousands of military and non-military personnel (H17 p6744),[125] all of whom had unlimited access (H17 p6745) and was navigated using the 'Intelink' search engine (Eller, EB/9, §41, 45-46) (Buchanan, H5 §1) (H10-11);

- Manning already had access to, and had uploaded these on 8 March 2010 (Eller, tab 17, §24, 37, 59; Dwyer §31(d)); before the '*passcode hash'* conversation on 8-10 March 2010; and

- Because they were accessible via the SIPRNet, it is nonsense to suggest that Manning was contemplating gaining future *anonymous* access to them using a different local computer user account (Eller, Tr 25.9.20, EB/52, xic, p31) - because SIPRNet and Intelink **(a)** required no account or login information or password (Eller, tab 17, §39, 41, 60) (Buchanan, H5 §9) '*at the time, users were not required to have Intelink Passport accounts to use most intelink services, including the SIPRNet internet search and browsing. a SIPRNet Intelink passport account is a username and password....*', **(b)** were tracked instead via IP addresses not user accounts (Eller, tab 17, §42-46) (Buchanan, H5 §6-8) (H10-11);

(ii) Likewise, the cables (counts 1, 3, 7, 10, 13, 17): were on the NetCentric Diplomacy Portal database (Eller, EB/9, §39) (H17 p6761), accessible via the SIPRNet (Eller, EB/9, 39) (H17 p6744-5) by all analysts (H17 p6761, 6781-2) (Capt. Lim, H18 p9885-7):

- Manning already had access to the cables, and had uploaded some on 15 February 2010 (Eller, EB/9, §24-25, 37); before the '*passcode hash'* conversation on 8-10 March 2010; and

- Because they were accessible via the SIPRNet it is nonsense to suggest that Manning was contemplating gaining future *anonymous* access to them using a different local computer user account (Eller, Tr 25.9.20, EB/52, xic, p31-32) - because, access to NetCentric on SIPRNet and Intelink **(a)** required no account or login information or password (Eller, tab 17, §39-40, 47-48, 60) (Capt. Lim, H18 p9887), **(b)** were tracked instead via IP addresses not user accounts (Eller, EB/9, §42-47) (Buchanan, H5 §6-8) (Janek, H16, §2, 6);

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[125]. In the region of 2½ or 3 million people (Grothoff, CB/20 ex 3). '*Probably millions'* (Eller, EB/52Tr 25.9.20, re-x, p52).

(iii) The Rules of Engagement (counts 1, 4, 8, 11, 14): These and the accompanying 'collateral murder' video were available on Active Directory within the T-Drive (H17 p6764-7) (Bundle M2, tab 499, p37):

- Manning already had access to, and had uploaded these before the '*passcode hash'* conversation on 8-10 March 2010 (Eller, EB/9, §24-25, 37, 59); and

- That database was not accessible at all without a domain account invitation (Capt. Cherepko, H8 p8643-4, 8668-9, 8672-3) (Chief Rouillard, H12 p8910-2) (Sergeant Madaras H9 p8041). Using a different local computer user account would not give access to the T Drive / Active Directory at all, let alone anonymous access (Eller, EB/9, §53-55 / Tr 25.9.20, EB/52 xic, p27, 32).

(iv) Likewise, the Iraq and Afghan War diaries (counts 1, 15, 16): these are the 'Sigacts'[126] (H17, p6741-3) published on the 'CIDNE'[127] database (H17, p6743) on Active Directory within the T-Drive (Eller, Tr 25.9.20, EB/52 xic, p30):

- Manning already had access to, and had uploaded these on 3 February 2010 (Eller, EB/9, §24, 37, 59; Dwyer, CB/12/pg.837, §30); before the '*passcode hash'* conversation on 8-10 March 2010; and

- As with the Rules of Engagement, the CIDNE database on the Active Directory was inaccessible without a domain account. Using a different local computer user account would not give access to it at all, let alone anonymous access (Eller, Tr 25.9.20, EB/52, xic, p30, 32).

15.32. Applying ***Zakrzewski*** §13:

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

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

(iii) The error or omission is finally '*material to the operation of the statutory scheme*'. With the allegation, the prosecution are able to seek to equate Mr Assange (publisher) to Manning (leaker), and other whistle-blowers to whom the UK courts have held that the Official Secrets Act ('OSA') applies. But without this (and the other false allegations discussed below), Mr Assange is (even on the US Government's analysis) a publisher protected by Article 10 ECHR. No precedent, or even academic commentary, exists for applying the OSA to mere publishers of leaked information. It is the everyday stuff of investigative journalism.

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126. Significant Activity Reports.

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

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

15.33. The court will also note that the US also offered no challenge to the defence evidence adduced to the effect that US evidence (which was also concealed from the DJ)[128] also reveals the true use to which cracking of this password hash could actually have been directed (Eller, EB/9, §8-11), namely installing programs to play movies and music:

(i) In addition to the instillation of other unauthorised programs (Eller, tab 17, §69-72 / Tr 25.9.20, xic, p34) (Capt. Cherepko, H8 p8642-3) (Sgt. Madaras H9 p8028-42) (Chief Warrant Officer Ehresman H13 p9848-50) (H19 p139-141, 145);

(ii) Unauthorised use of computers for listening to music or watching films was '*commonplace'* amongst Manning and her colleagues (Eller, tab 17, §67-69, 79-82 / Tr 25.9.20, xic, p34) (multiple US witnesses, H19 p252-3, 269) (Sgt. Madaras, H1 p112, H9 p8034) (Milliman, H8 p9705-6);

(iii) The cracking of administrator passwords in order to install programs was a '*common occurrence*' (Eller, EB/9, §73-74 / Tr 25.9.20, xx, p47) (Milliman, H8 p8707, 8711);

(iv) Manning was known to have a keen interest and skill in this respect. She assisted colleagues to, for example, install unauthorised programs (Eller, EB/9, §79-82) (Sgt. Madaras, H9 p8028) (Showman, H15 p7754), and had done so even at the request of her own superior (Capt. Fulton, H19 p142-3, 145, 252);

(v) Manning had even been openly discussing decrypting passcode hashes with her colleagues (Eller, EB/9, §77-78) (Stadtler, H13 p9854);

(vi) Mere days before the Jabber conversation on 8-10 March 2010, Manning's computer had been re-imaged (wiped and re-set with a fresh operating system), and to re-install programs for music and films, the administrator access thus needed to be bypassed (Eller, EB/9, §83-88 / Tr 25.9.20, xic, p35-36 / xx, p48) (Shaver, H20, p130) (Sgt. Madaras, H9 p8040-1).

(vii) As Mr Eller told the DJ, the 'FTP user' account could have provided such administrator access; '*it is a file transfer protocol account that is typically used by administrators that that account could possess administrator privileges...the FTP user account would provide you access to the local system to be able to install [unauthorised programs, film] files'* (Eller, Tr 25.9.20, EB/52, xic, p35 / xx, p48). '*I am explaining that...the local accounts on this system looks like it did have administrative privileges...based on [my] experience as an expert forensic examiner'* (Eller, Tr 25.9.20, EB/52, re-x, p55).

The concession

15.34. The US Government finally (belatedly) disavowed any suggestion that Manning was attempting to decrypt the passcode hash in order to access any of the databases with which

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[128]. Seemingly on the basis that these issues are said to be '*for a jury'* (Kromberg 1, CB/12/pg.998, §172). The suggestion, apparently, being that the US is intending to present a case contrary to its own evidence next summarised.

this indictment is concerned (namely, those containing the war diaries, Guantánamo briefs, rules of engagement or cables). It was now '*...not alleged that the purpose of the hash-cracking agreement was to gain anonymous access to the NetCentric Diplomacy database or, for that matter, any other particular database'* (Kromberg 4, CB/12/pg1009 – 1030, §10-17).

15.35. It is accepted that withdrawal of a misleading allegation can cure a ***Zakrzewski*** abuse, and that should have been the end of the issue.

The DJ's decision (§377-385)

15.36. The US Government however suggested (and the DJ wrongly held) that the passcode hash allegation continued to have 'relevance' to a jury in the case.

15.37. First, the DJ suggests that decrypting the passcode hash value (and gaining access to a local 'FTP user' account) could have somehow concealed '*forensic evidence'* of the exfiltration of the war diaries etc. to a non-government computer (Judgment §381, 379).

15.38. The DJ has fundamentally misunderstood the evidence on this issue. It is flatly incorrect that '*The defence has not disputed that ... important forensic evidence was found by army investigators on the FTP user account in [Manning's] name'*. (Judgment, CB/2, §381). Manning never accessed (and - the point is - could never access) any 'FTP user' account, because the passcode hash was impossible to decrypt. Mr Assange is not '*offer[ing] an alternative explanation'* for *'these facts'* (Judgment CB/2, §381); they did not occur.

15.39. Neither (even if she had properly understood it) was the suggested concealment of '*forensic evidence*' fair, proper or accurate (or logically coherent) in any event.

15.40. Mr Kromberg details (at Kromberg 4, CB/12/pg.1015, §12) four separate stages the overall 'conspiracy' had to surmount, namely **(a)** '*extract[ing] large amounts of data from the database*', **(b)** '*mov[ing] the stolen data onto a government computer (here, Manning's SlPRNet computer)*', **(c)**, '*exfiltrating the stolen documents from the government computer to a non-government computer (here, Manning's personal computer)*', and **(d)** '*ultimately transmit[ting] the stolen documents to the ultimate recipient (here, Assange and WikiLeaks)*'.

15.41. As Mr Eller comprehensively showed – in evidence that was not challenged - having anonymous access to a different SIPRNet computer account could not conceivably further either of the first two of those stages. '*Stages [a] and [b] could not have been achieved anonymously*' (Eller, Tr 25.9.20, EB/52, xic, p33 – unchallenged). Mr Eller accepted that '*using the FTP user account would have provided some anonymity for the task of exfiltrating materials from the government machine onto a non-government machine, stage [c] of Mr Kromberg's analysis*' (Eller, Tr 25.9.20, EB/52, xx. p46-47 / re-x, p54). But, he told the DJ that:

(i) Manning already had the facilities to do just that, anonymously, using the Linux CD in her possession. In fact, she had used the Linux CD for that very purpose (Eller, tab 17, §64 / Tr 25.9.20, xic, p34). The CD already afforded Manning '*access to all of the files on the computer by bypassing all of the Windows security features...and we know that that was done [by her previously] based on that is how the [SAM] file was accessed using that exact method'* (Eller, Tr 25.9.20, EB/52, xic, p34). '*And [this is] something that the Government's own experts spoke about in detail in the court*

martial' (Eller, Tr 25.9.20, EB/52, xic, p34). '*The capability could have been provided by the Linux CD as well...So the benefit that Mr Kromberg suggests could have been obtained from getting into the FTP user account was already available...to Chelsea Manning because she had the Linux Live CD*' (Eller, Tr 25.9.20, EB/52, re-x, p54). Manning obtained this access to all files on the computer via the Linux CD independently and before the hash decryption conversation.

(ii) More importantly still, using the 'FTP user' account (or even the Linux CD) would have left the original download from stages **(a)** and **(b)** still traceable to Manning's own computer. Thus, all the '*forensic artifacts'* that Mr Kromberg details (at Kromberg 4, §13-14), and which were put to Mr Eller in evidence (Tr 25.9.20, xx, p46), relating to stages **(a)** and **(b)** would remain on her computer. '*If Chelsea Manning had used the FTP user account to move materials from her SCIF computer onto her personal laptop and then used the personal laptop to upload it to WikiLeaks...the original download onto the SCIF computer still be traceable to her'* (Eller, Tr 25.9.20, EB/52, xic, p33). '*Would [using the FTP user account] have achieved anything by way of disguising the activity of accessing documents from the databases originally? ... No, it would not...because the IP trail would have led...back to the same computer'* (Eller, 25.9.20, EB/52, re-x, p54).

15.42. That evidence was unchallenged. So the true position, '*clear beyond legitimate dispute'* (per ***Zakrzewski***), is that using the 'FTP user' account would not (and could not) have enabled Manning to '*avoid detection'* in carrying out the (anyway impossible) 'purpose' now ascribed by the US to the passcode hash conversation. The (new) suggested '*relevance'* of the passcode hash allegation is thus every bit as misleading as the original 'purpose' previously alleged and withdrawn. The DJ nowhere addresses this (unchallenged) evidence. Instead, she dismisses the entire issue as '*in reality it offers an alternative explanation for these facts'*. There were, with respect, no '*facts'* to explain.

15.43. Secondly, the defence are likewise not '*ask[ing] the court to conclude that a better and more logical explanation for Ms. Manning's request was that provided by Ms. Manning herself, to install unauthorised programmes to play movies and music*' (Judgment, CB/2, §381). Mr Eller told the DJ (in evidence which was not challenged) that it was the Government's own evidence in Ms Manning's proceedings which showed this. ***Castillo***, ***Murua*** and ***Zakrzewski*** all show that an extradition request which misrepresents a government's own evidence cannot be dismissed as a matter to '*ventilate before a jury'* (Judgment, CB/2, §381).

15.44. Thirdly, the DJ suggests that, even if of no possible relevance to the obtaining of the war diaries, Guantánamo briefs, rules of engagement or cables; the US might nonetheless still allege that the passcode hash allegation was '*to facilitate Ms. Manning's theft of protected information more generally'* (Judgment, CB/2, §382).

15.45. That was a plain legal error. The indictment contains no allegation whatsoever (even in the now expanded count 2) that Mr Assange conspired with Manning to '*thieve'* protected information *'more generally'* than the war diaries, Guantánamo briefs, rules of engagement or cables. It cannot '*have contributed to the broad criminal purpose alleged in count [2]*' because count 2 makes no such allegation. Neither is it (for the same reason) the conduct that underlies any of the notional UK charges for dual criminality purposes (including for count 2). A suggested plan with Manning to steal '*protected information more generally'* was (and is) absolutely irrelevant to the issues before the DJ.

15.46. In fact, the desperate search for some - any - relevance for the discredited passcode hash allegation even led the US to suggest (and the DJ to accept) that '*there may be other'* unspecified non-indictment allegations to which the passcode hash evidence might have '*contributed to'* (Judgment, CB/2, §379). The legal error inherent in this approach ought, with respect, to be obvious. Mr Assange was entitled to have his ***Zakrzewski*** abuse submissions addressed by reference to the extradition request, not ignored because the US allegations could be relevant to some other, unspecified, unrelated, uncharged, matter.

15.47. Fourthly, for the avoidance of doubt, even if a plan with Manning to steal other '*protected information more generally'* did feature in this indictment (which it does not), the unchallenged evidence before the DJ showed that it was impossible for Manning to have downloaded any data anonymously from the 'FTP user' account. Eller's evidence was not merely that Manning could not use the 'FTP user' account to access the databases the subject of the indictment (those containing the war diaries, Guantánamo briefs, rules of engagement or cables); rather she could not access any data anonymously.

15.48. The DJ addresses this by suggesting that there is somehow a '*matter for trial'* whether Windows XP in 2010 might have retained a security flaw patched by Microsoft in 1999 (Judgment §383-4). The notion that a security issue from 1999, in a predecessor version of Windows, cured by Microsoft in 1999 to '*eliminate the vulnerability and [making] it computationally infeasible*' to decode (Eller, Tr. 265.9.20, EB/52, xx p42), nonetheless persisted in Windows XP (Tr. 25.9.20, xic, p26 / xx p40) in 2010, is arrant desperation. Speculation such as that cannot conceivably elevate an unfair, improper, inaccurate allegation into a *'matter for trial'.* So fantastical is the notion that it was not even suggested to Mr Eller in evidence (Tr 25.9.20, EB/52, xx p42).

15.49. In sum, **(a)** the US had been caught lying about the evidence underlying its passcode hash conspiracy allegation. Mr Eller's evidence was not '*an alternative narrative'* (Judgment §380) to that allegation; it brought to the DJ's attention the content of the US Government's own (concealed) evidence. That ought to have been met by a stay of proceedings for abuse. **(b)** But the US retreated from its allegations before the DJ's ruling was due. That ought to have been the end of the matter. **(c)** Yet the US then sought to resuscitate its lying allegations with absurd alternative suggestions and speculation. Clinging to a misleading allegation in this way ought to have left the DJ with no choice but to invoke ***Zakrzewski***. Instead, the DJ wrongly regarded that as raising '*a matter for trial'*.

The third *Zakrzewski* abuse: The alleged approach to sources

15.50. The US charges require proof that Assange obtained, received and/or published classified information '*wilfully'* and '*knowingly'* and '*with reason to believe'* that the information was to be used to the injury of the US. The US seek to meet that burden in this prosecution, *inter alia*, through the assertion that Mr Assange '*wilfully'* and '*knowingly'* disclosed (or obtained/received for publication) war diaries and cables containing unredacted names of intelligence sources. It is also an allegation relevant to the Article 10 / First Amendment assessment the DJ had to make, because the US Courts have held that the '*wilful [or] intentional public disclosure of the names of intelligence agents and sources*' is outwith the protection of the First Amendment (Kromberg 1, EB/12/pg.919-995, §8-9).

15.51. A third core assertion contained within the request (and the general public statements surrounding this case made by myriad US officials that Mr Assange is *'no journalist'*) is therefore that he *'wilfully'* and '*knowingly'* published classified materials without redaction, and by doing so '*created a grave and imminent risk [to] the people he named*' (Dwyer, CB/12/pg. 823-918, §4, 8) through publication of the war diaries (Dwyer CB/12/pg.823-918, §39, 41, 44, 45) and the Cables (Dwyer CB/12/pg.823-918, §36, 39, 42, 44). The US request materials are therefore replete with assertions that Assange '*purposely publish[ed] the names of individuals'*, or engaged in the '*intentional outing of intelligence sources'* (e.g. Kromberg 1, CB/12/pg.919-995, §8-9, 22) (Kromberg 2, CB/12/pg.996-1008, §10), or '*knowingly putting their lives at risk*' (Dwyer CB/12/pg.823-918, §44; Kromberg 5, CB/12/pg.788-822, §78). See (Judgment, CB/2 §19). The Government's arguments below were, accordingly, devoted almost entirely to this issue.

15.52. Yet the factual allegation of wilful data-dumping of classified materials is known to the US Government to be completely and utterly misleading.

The true picture concealed

15.53. What the US knew (not least because the White House and the State Department had been party to them), but concealed from its request, was that Mr Assange had engaged in all-embracing redaction efforts to prevent the disclosure of sensitive sources, including the creation of unique collaborative media alliances. The truth is that WikiLeaks was in possession of the material referred to in the request for a considerable period before publication and went to extraordinary lengths to publish classified materials in a responsible and redacted manner; and that publication of the cables in unredacted form on 1 September 2011 was undertaken by third-parties unconnected to WikiLeaks (and despite WikiLeaks substantial efforts to prevent it).

15.54. WikiLeaks held back information while it formed media partnerships with prominent organisations including with the Guardian, the New York Times, Der Spiegel and the Telegraph (Goetz, EB/17, §6 / Tr 16.9.20, EB/46, xic, p4 – unchallenged) (Worthington, tab 33, §4 - agreed s.9), as well as local operations '*all around the world'* selected for their local knowledge (Goetz, EB/17, §25 / Tr 16.9.20, EB/46, xic, p10-11 – unchallenged), such as L'espresso in Italy (Maurizi, EB/30, §16, 45 - agreed s.9), or the New Zealand Star-Times (Hager, EB/33, §15-17; Tr 18.9.20, EB/50, xic, p8 – unchallenged); all of whom were able to assign numerous dedicated staff members who were immediately familiar with the people and places mentioned in the files to make decisions on what to publish and what to redact. These organisations, often in competition, formed unprecedented alliances in order to *'find constructive ways of managing the data'* to ensure *'its publication in a responsible way'* (Hager, EB/33, §28). '*I can tell you from my experience that the material I was reading was – I was comfortable that there were not risks to [sources] and I am experienced in this*' (Hager, Tr 18.9.20, EB/50, xx, p19).

15.55. As Mr Hager, one of the local media partners, told the DJ '*the idea that WikiLeaks had come up with to try to have a more rigorous process of publication, and simultaneously vetting their documents to make sure that there were no people who were harmed by the publication of them and that the right redactions were made, was, first of all, to bring in some very large media outlets, major world news media, but also for an area like Australasia and New Zealand and Australia to invite people like me, who knew the area and could...be the local eyes that would recognise where the risks were and what areas should be redacted...the*

deliberate strategy was to not just have every country in the world that all the cables came out at once, but to go from region to region and countries that had the capability as WikiLeaks to hear - to hear what documents needed to be redacted, redact them and then move on to the next area. So it was a deliberately slowed down process...[it was a thoroughly] careful and diligent process...My experience of it was that they were very serious about what they were doing, that they were being careful and responsible. In fact, my - my main memory of my time with them working on the project, and this gives a picture of it, was just people working hour after hour in total silence because they were so concentrated on the work' (Hager, Tr 18.9.20, EB/50, xic, p8).

15.56. Thus, the DJ received evidence that:

(i) The Iraq and Afghan war diaries (counts 1, 15, 16):

- Were materials assessed by Manning to be historical non-sensitive data (H17 p6742-3).

- WikiLeaks nonetheless took the issue of redaction seriously.[129] Any contrary suggestion is '*bluntly false'* (Ellsberg, Tr 16.9.20, EB/47. xx, p56). The media partners' work on the Afghan diaries to ensure they were vetted to prevent harm was '*constant'* (Goetz, EB/17, §5-17 / Tr 16.9.20, EB/46, xic, p5-6 – unchallenged). The process even included the partnership communicating with the White House directly in advance of releasing them, and in July 2010 Wikileaks entered into a dialogue with the White House about the redaction of names (Goetz, EB/17, §14-15 / Tr 16.9.20, EB/46, xic, p6 – unchallenged). On 25 July 2010, WikiLeaks therefore held back the publication of 15,000 documents, even after media partners had published their respective stories, to ensure its *'harm minimisation process'* (Goetz, EB/17, §15-16 / Tr 16.9.20, EB/46, xic, p6) (Maurizi, EB/30, §45 - agreed s.9). Mr Assange even '*requested help from the State Department and the Defence Department on redacting names and they refused'* (Ellsberg, Tr 16.9.20, EB/47, xx, p56) (Goetz, Tr 16.9.20, EB/46, xic, p6 – unchallenged).

- Redaction of the Iraq War diaries was likewise '*painstakingly approached'* and involved the development of specially devised redaction software (Sloboda, EB/31, §4 / Tr 17.9.20, EB/48, xic, p7-8). '*It was impressed upon us from very early in our encounter with Mr Assange and WikiLeaks that the aim was the very, very stringent redaction of the logs before publication...That was the aim of Mr Assange and WikiLeaks... to ensure that no information which could be damaging to living individuals, including those involved, or others, would be present in the version of the logs which was made public'* (Sloboda, Tr 17.9.20, EB/48, xic, p7). This included guarding against '*jigsaw risk'* and thus involved the redaction of other information from which identities could be inferred (Sloboda, Tr 17.9.20, EB/48, xx, p12). Publication was even delayed in August 2010, for redaction processes, despite this bothering some media partners (David Leigh), because Mr Assange *'did not want to rush'* and the WikiLeaks team required more time *'to redact bad stuff'* (Goetz, EB/17, §19 / Tr 16.9.20, xic, p8 – unchallenged). '*There were considerable pressures on the co-founder of WikiLeaks to hurry up because*

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

the partners wanted to publish and those pressures were consistently and clearly rejected. They could not be published before a redaction had been agreed with which everyone was satisfied, and that was stuck to completely consistently with no equivocation' (Sloboda, Tr 17.9.20, EB/48, xic, p8). WikiLeaks '*stood firm by the principle...to ensure that the released information could not cause danger to any persons...showed consistent understanding of and commitment to the...principles of rigour and adherence to responsible publication*' (Sloboda, EB/31, §4).

- WikiLeaks was even criticised at the time for *'over redaction'* of materials (Sloboda, Tr 17.9.20, EB/48, xic, p8 – unchallenged), even redacting more than the Government did. '*There was a Freedom of Information Act request and more information was released by the department of defence FOIA than actually had been in the WikiLeaks redaction process'* (Goetz, EB/31, §20 / Tr 16.9.20, EB/46, xic, p7 – unchallenged). The over-redaction meant that allied governments could not review their own actions in Iraq: WikiLeaks had to provide the Danish military with a less redacted copy to enable their investigation of possible complicity in US wrongdoing (Bundle P, tab E54).

- WikiLeaks ultimately published the Afghan War Diary <u>after</u> the media partners (both Der Speigel and Guardian) first published the Afghan materials (Goetz, EB/17, §17 / Tr 16.9.20, EB/46, xic, p6-7 – unchallenged).

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

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

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

- Were old and unclassified (H17 p6777) and are not suggested by the US government to have contained sensitive names or '*put lives at risk'*.

- Were also nonetheless the subject of media partnership (Goetz, EB/17, §26 – unchallenged) designed to publish '*without risking damage to persons who could not be protected*' (Worthington, EB/19, §3, 11-12 - agreed s.9);

(iv) <u>The cables</u> (counts 1, 3, 7, 10, 13, 17):

- Were classified on SIPRNet as '*SIPDis*' (suitable for release to a wide number of individuals), rather than '*NoDis'* (H17 p6781-2), and were mostly unclassified and non-sensitive (H17 p6761, 6782) (Eller, EB/9, §48-50) (Janek, H16 §3). Around half were not classified at all, and only 6% (15,652 cables) were classified secret (Grothoff, EB/20, ex 3).

- Nevertheless, the media partner redaction process (outlined above) was robust, lengthy and operated effectively (Goetz, EB/17, §21-25 / Tr 16.9.20, EB/46, xic, p11 – unchallenged) (Maurizi, EB/30, §24, 45 - agreed s.9). See generally (Bundle P, tabs C1-154).

- The US State Department even *'participated in the redaction process'* prior to the publication of State Department cables and WikiLeaks implemented redactions required by the US State Department *'exactly as requested'* (Goetz, EB/17, §22 / Tr 16.9.20, EB/46, xic, p11 – unchallenged) (Augstein, EB/15, p2 - agreed s.9).

- *'It was a very rigorous redaction process and, as far as I know, no names came out of that period'* (Goetz, Tr 16.9.20, EB/46, re-x, p21). It was a process that was in place right up to September 2011 and, so far as WikiLeaks was concerned, was going to continue being operated for another year thereafter as the – responsible, redacted, '*rollout'* of the cables continued (Goetz, Tr 16.9.20, EB/46, xx, p17 / re-ex, p24).

- Note the extended discussion of steps taken and context in the state department call of 26 August 2011 [Bundle P, tab C277].

15.57. The true picture, known to the US, and now '*clear beyond legitimate dispute'* (per ***Zakrzewski***), is that Mr Assange had been striving to prevent the release of any sensitive names. If they emerged at all during this time,[130] it was, and was known to the US to be, unwanted and unintended.[131]

The 250,000 cables in September 2011

15.58. The US therefore focussed on the '*public[cation of] over 250,000 [cables]'* a year later *'in September 2011, in unredacted form*' (Dwyer CB/12/pg.844 – 845, §44, 36). These cables, by contrast, apparently did contain names. On this issue, however, the US knowingly concealed everything about the circumstances of the publication of these cables.

15.59. The US government knows well (but withheld from its request) that this release of un-redacted materials on 1 September 2011 was done by others and came about as a result of *'a series of unforeseeable events'* outside of the control of Mr Assange or indeed WikiLeaks, and despite Mr Assange's '*strong attempts to prevent'* it (Goetz, EB/17, §31 / Tr 16.9.20, EB/46, xic, p12 / xx, p14).

15.60. Prof. Grothoff's evidence was completely clear. Counsel for Assange was prevented from even re-examining Prof Grothoff based on the assertion from the US that the chronology he described was *'not disputed'* (Tr. 21.9.20, EB/51 re-x, p55). The following facts were evidenced before the DJ by Prof Grothoff, are in the public domain, and are known to the US government:

(i) The material which is the subject of these charges had been held in an encrypted format as a '*ciphertext'*, which could only be accessed with a '*key'* or passphrase (Grothoff 1, EB/20, §1 / Tr 21.9.20, xic, p4). In order to access encrypted data, it would be necessary to know both the location of the ciphertext on the internet and the password key – in the same way that a house key found on the street would not enable

130. It was not Assange who confirmed that 300 sensitive names, said by the DoD to have been published, had been redacted in the version of the documents published by WikiLeaks (Judgment CB/2, §401) – it was the DoD Pentagon spokesman (Vol Q, tab 2).

131. And, on the evidence, done by the other media partners (Goetz, tab 31,§25 / Maurizi, EB/30,§45 / Hager, EB/33,§16).

a burglary to take place absent the address of the respective house (Grothoff 1, EB/20, p3 / Tr 21.9.20, xic, p4). Encryption of sensitive data online in this way is '*common practice'*, routine, '*perfectly acceptable'* (Grothoff 2, EB/29, §12/ / Tr 21.9.20, xic, p4 / re-x p48).

(ii) The secret – and robust - key to this 'obscurely' located file (accessible only to someone who knew the exact URL) had been '*reluctantly'* shared by Mr Assange with one of the media partners, David Leigh of the Guardian (Grothoff, Tr 21.9.20, EB/51, xic, p3-4 / xx, p19, 22-23 / re-x, p47-48). In doing so, Mr Assange had written down only part of the key, and verbally informed Mr Leigh of the additional portion (Grothoff, Tr 21.9.20, EB/51, p48). Only David Leigh received the key (Grothoff, Tr 21.9.20, EB/51, re-x, p46-47).

(iii) During late 2010, it had become necessary to '*mirror'* or replicate the WikiLeaks site in numerous locations across the internet as a result of cyberattacks made against the website (Grothoff 1, EB/20, §2-4 / Tr 21.9.20, xic, p5-6) (tab 47, ex 4-7). See generally (Bundle P, tabs C2, C169-173, C185-197).

(iv) WikiLeaks' mirroring instructions did <u>not</u> include, and did not lead to the duplicating of, the ciphertext file (the encrypted cache of cables) (Grothoff, Tr 21.9.20, EB/51, xic, p10 / xx, p25-26 / re-x, p49). However, a small number of mirrors, created independently by internet users and using different software, did include the ciphertext file (Grothoff, Tr 21.9.20, EB/51, xic, p6-8 / re-x, p50), perhaps because these mirrors unintentionally captured hidden directories or archive files (Grothoff, Tr 21.9.20, EB/51, xx, p19-20 / re-x, p50).

(v) The mirrored file remained encrypted and was '*useless'* (Grothoff, Tr 21.9.20, EB/51, xic, p8).

(vi) In February 2011, David Leigh inexplicably (Grothoff 2, EB/29, §13), and for his '*own reasons'* (Hager, Tr 18.9.20, re-x, p22),[132] <u>unilaterally</u> published the entire encryption key to the ciphertext in a book (Grothoff 1, EB/20, §5 / Tr 21.9.20, xic, p8 / xx, p24) (tab 47, ex 2, p135, 138-9) (Bundle P, tab C201). David Leigh's book also '*explained that this was the password he had been given by Julian Assange to decrypt the cables, so a very revealing publication*' (Grothoff, Tr 21.9.20, EB/51, xic, p8).

(vii) WikiLeaks now had no means of removing a file that appeared on third party mirrors: *'WikiLeaks was not in control of the many mirrors of [the ciphertext] already online'* (Grothoff 1, EB/20, §5 / Tr 21.9.20,EB/51 xic, p8-9). Neither did WikiLeaks have the power to change the passcode; once created it *'never changes'* (Grothoff 1, EB/20, §1 / Tr 21.9.20, xic, p9) (Grothoff 2, EB/29, §11 / Tr 21.9.20, xic, p4).

(viii) The 'secret' lay dormant for months until 25 August 2011 when Der Freitag reported that it had *'discovered a copy of the full [cables] archive 'on the internet' and was able to decrypt it using a passphrase also found 'on the internet'* (Augstein, EB/15 - agreed s.9) (tab 47, ex 8-9) (Bundle P, tab C203) - which revelation therefore drew

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[132]. Whose relationship with the media partners had broken down by this point (Goetz / Tr 16.9.20, EB/46 xic, p13), '*I am very aware through a list of journalism networks that there was bitter animosity between David Leigh and Julian Assange by this time*' (Hager, Tr 18.9.20, EB/50 xx, p15).

'public attention to David Leigh's information leak' (Grothoff 1, EB/51, §6 / Tr 21.9.20, EB/51, xic, p9). '*The story in Der Freitag, which is still accessible today, is crucial because it was the first published story to put these things together'* (Grothoff, Tr 21.9.20, EB/51 xx, p14, 30).

(ix) Prior to the publication of the Der Freitag article, Mr Assange had contacted the paper's editor to prevent the revelation (Augstein, EB/15, p3 - agreed s.9), but the article was published anyway. Assange was '*trying to get the Freitag article not to appear. They made great efforts to stop this from happening'* (Goetz, Tr 16.9.20, EB/51, re-x, p25).

(x) Now, the '*cat was forever out of the bag'* and internet users immediately began the search for both the file and password (tab 47, ex 9, p8) (Grothoff, Tr 21.9.20, EB/51, xic, p9).

(xi) Mr Assange, now '*acutely troubled'* by the prospect of unintended unredacted publication (Maurizi, EB/30, §45-46 - agreed s.9), then set about immediate steps to try to prevent or minimise it:

a. On 25 August 2011 (the date of the Der Freitag publication), Mr Assange contacted the US Ambassador in the UK (Bundle P, tabs C221-223);

b. And then the US State Department itself to warn the US Secretary of State personally of the potential ability of the public to access the unredacted cables (Goetz, EB/17, §31 / Tr 16.9.20, xic, p12 – unchallenged) (Peirce 4, EB/18, §11 - agreed s.9). The DJ had the transcript of this call at (tab 37, attachment 1).

c. Mr Assange's attempts to warn the US government continued over the following days and were personally witnessed by Ms Maurizi (Maurizi, EB/30, §49 - agreed s.9) (Bundle P, tabs C221-227).

d. The DJ had a transcript of Mr Assange's 75-minute call to the State Department on 26 August (Bundle P, tab C227). In that call, for example, Mr Assange explains that he has attempted legal action against individuals in Germany to prevent the imminent third party uncontrolled dissemination of the unredacted cables, but these attempts have failed. In light of that, WikiLeaks had commenced the release of all of the <u>un</u>classified cables as a means of distracting the public from the Der Freitag revelation. Assange tells the State Department lawyer: '*we release cables slowly, to media partners, and went through every cable and redacted source identities accordingly...journalists and human rights activists reading cables, redacting them and putting them out through us, which is what has been happening...we have written legal demands [...] through our German lawyers [...] to not publicly reveal the key information that would permit them to spread...What we want the State Department to do is to step up its warning procedures which it was engaged in earlier in the year, like last year, to State Department sources mentioned in the cables...in case they are any individuals who haven't been warned that they should be warned. Insofar as the State Department can impress upon people within Germany to encourage them to desist that behaviour that would be helpful'.*

e. Likewise, on 29 August, WikiLeaks' attempted to further deflect the public by suggesting that the Der Freitag article was '*false'* (Grothoff, Tr 21.9.20, EB/51 xx, p31).

(xii) By 31 August 2011, however, spurred by the Der Freitag hint, *'well known'* US-based Cryptome.org published the text of the *'specific passphrase and [the exact name of] which file it decrypts'* online (tab 47, ex 9, p9) (Grothoff, Tr 21.9.20, EB/51, xx, p34, 38, 40) (Bundle P, tabs C205-207, 228)[133].

(xiii) By 10pm on 31 August, others, such as Nigel Parry, had also published the same password (Grothoff, Tr 21.9.20, EB/51, xx, p38-40) (tab 47, ex 9, p8).

15.61. The chronology of what happened over the next 48 hours (i.e. the publication of the unredacted cables themselves) was the subject of detailed questioning of Prof. Grothoff, and is the subject of detailed evidence - but in the end was '*not disputed'* by counsel for the Government (Tr 21.9.20, EB/51 p55) to include:

(i) By or before 11.27pm on 31 August 2011: [134] an internet user named Nim 99 '*uploaded the unredacted cables onto the internet'* (tab 47, ex 9, p8) (Grothoff, Tr 21.9.20, EB/51, xx, p40);

(ii) By or before 12.27am on 1 September 2011:[135] the cables were available on Cryptome: *"I published on Cryptome.org unredacted diplomatic cables on September 1, 2011 under the URL https://cryptome.org/z/z.7z and that publication remains available at the present."* (Young, EB/25 - agreed s.9) (Grothoff, Tr 21.9.20, EB/51 xx, p40-41) (Maurizi, EB/30, §48 - agreed s.9);

(iii) By 5.05am on 1 September, '*the full database [was already] downloadable from hundreds of sites*' (Grothoff, Tr 21.9.20, EB/51 xx, p42-43; citing a WikiLeaks tweet posted at 5.05am on 1 September).

(iv) By 11.23am on 1 September 2011, the Pirate Bay website contained a BitTorrent link (posted by 'yoshima') to the unredacted cable archive (Grothoff, Tr 21.9.20, EB/51 xx, p41);

(v) By 1.09pm, the Pirate Bay website contained another BitTorrent link (posted by 'droehien') to the unredacted cable archive (Grothoff 1, EB/21, §8 / Tr 21.9.20, xx, p41) (tab 47, ex 11) (Bundle P, tabs C211-212);

(vi) The US Government even obtained a copy from Pirate Bay on 1 September 2011 (Grothoff 2, EB/29, §10).

(vii) At 7.58pm on 1 September 2011: mrkva.eu published *'the first searchable copy of the cables'* (Grothoff 1, EB/21, §7 / Tr 21.9.20, EB/51 xx, p34-37) (Grothoff 2, EB/29, §7-8) (Bundle P, tab C209).

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133 *The unredacted cables hosted by those US-based sites are still hosted there (Grothoff 1, EB/21, ex 14) and Crytome confirms that the US has never requested their removal (Young, EB/25 - agreed s.9).*

134. '*Within an hour'* of the WikiLeaks statement at 10.27pm on 31 August (EB/21, ex 9, p8).

135. '*Within a couple of hours'* of the WikiLeaks statement at 10.27pm on 31 August (EB/21, ex 9, p8).

(viii) By 1 September 2011, the cables were now available to anyone able to operate a computer (Grothoff 1, EB/21, §9) (Grothoff 2, EB/29, §6).

15.62. These *'were unpredicted actions by others that resulted in publication against [Mr Assange's] wishes'* (Goetz, tab 31, §32 / Tr 16.9.20, xic, p12). '*Every possible step had been taken for over a year to avoid it'* (Maurizi, EB/30, §48 - agreed s.9).

15.63. The actions of WikiLeaks the subject of this US prosecution, namely their *public[cation of] over 250,000 [cables] in September 2011, in unredacted form*' the next day on 2 September (Dwyer, §44), which founds the allegation of '*intentional outing of intelligence sources'* (Kromberg 1, CB/12/pg.919-995, §8-9, 20-22) (Kromberg 2, CB/12/pg.996 – 1008, §10) - was, in truth, and uncontrovertibly, the re-publication of the now-public database which had *'already been published by others'* (Grothoff 1, EB/20, §9 / Tr 21.9.20, EB/51, xic, p12 / xx, p43) (EB/20, ex 12) (Maurizi, EB/30, §50 - agreed s.9) (Goetz, CB/17, §31 / Tr 16.9.20, xic, p12 / xx p14 / re-x, p24-25) (Hager, Tr 18.9.20, EB/50, xx, p14 / re-x, p21).

15.64. It is '*very much...wrong...it is unfair...to accuse Mr Assange of having published the unredacted, ... cables'* (Grothoff, Tr 21,.9.20, EB/51, xx, p17). It is, in short, a ***Zakrzewski*** abusive allegation to advance, because it is not a fair, proper or accurate reflection of the true facts known to the US Government.

The DJ's decision (Judgment §386-402)

15.65. Despite the above being '*not disputed'*, the DJ nonetheless ruled that these issues are all '*for the trial court to consider'*, based upon suggestions that they are '*capable of legitimate dispute'* per ***Zakrzewski*** §13. The DJ's search for bases on which the above might be '*legitimately disputed'* by the US government was flawed at almost every turn. Taking the DJ's reasons in chronological order:

The redaction process throughout 2011-2011 (Judgment §398-399)

15.66. According to the judge, there is firstly an issue for '*any trial court to determine'* about whether '*Mr. Assange was reckless in the way he handled this sensitive information*' during the redaction procedures in 2010-2011.

15.67. This was, with respect, an extraordinary position to adopt. The facts described above were unchallenged (and more often than not, read to the DJ as agreed evidence). Counsel for the US government even confirmed that '*I am not talking about any cables or documents which were published during the period of collaboration between The Guardian, The New York Times and Der Spiegel and WikiLeaks before late August and early September 2011*' (Tr 16.9.20, EB/46, p17).

15.68. No single witness suggested what the DJ does: '*the WikiLeaks people...invited me into a process of great care and protection and trying to redact and to avoid any damage to any people when the data was being looked...I do not believe that Julian Assange or the others somehow changed their minds later and did not care anymore... I was part of the process of redaction*' (Hager, Tr 18.9.20, EB/50, re-x, p21). Mr Ellsberg was even more clear in telling the DJ that Mr Assange's actions were '*[un]answerably antithetical to the notion that he*

purposefully revealed such names since he took major important actions to redact' (Ellsberg, Tr 16.9.20, EB/47, xx, p62).

15.69. Ultimately, the Government does not dispute that Mr Assange did initiate such processes, and that the resulting cables released from November 2010 to August 2011 were properly and responsibly redacted. The US request acknowledges that '*Assange published...the cables in redacted form beginning in November 2010'* (Dwyer §44, CB12/pg 844). The complex processes Mr Assange put in place to avoid harm being caused by publication were '*careful and responsible'* (Hager, EB/33, §16). It was '*a process of great care and protection and trying to redact and to avoid any damage to any people when the data was being looked at'* (Hager, Tr 18.9.20, EB/50 re-x, p21). '*It was a cautious process'* (Maurizi, EB30, §45 - agreed s.9). The evidence concerning WikiLeaks' tireless efforts, throughout 2010 and 2011, to redact was legion. Their efforts extended to, for example, the desperate calls to the State Department on 25 and 26 August 2011 when *others* were poised to reveal the names of sources.

Implicated in Leigh's password revelation? (Judgment §396)

15.70. According to the judge, there is next an issue to '*be determined by a jury'* about '*whether Wikileaks was implicated in the initial publication of the unredacted materials [by] David Leigh'*. Of course, Leigh did not publish '*the unredacted materials'*; he published the password to the cyphertext which held them. Presumably, this is what the DJ means.

15.71. The evidence before the DJ on this issue was equally unambiguous and unchallenged. As stated above, the key to the 'temporary website' had been '*reluctantly'* shared by Mr Assange only after Mr Leigh insisted (Grothoff, Tr 21.9.20, EB/51, xic, p3-4 / xx, p19, 22-23 / re-x, p47-48). In doing so, Mr Assange had written down only part of the key, and verbally informed Mr Leigh of the additional portion (Grothoff, Tr 21.9.20, EB/51 p48). Only David Leigh received the key (Grothoff, Tr 21.9.20, EB/51, re-x, p46-47).[136] Encryption of sensitive data online[137] in the way WikiLeaks provided it to Mr Leigh is routine (Grothoff 2, EB/29, §12). '*Keeping passwords private is very basic'* (Maurizi, EB/30, §22-23 - agreed s.9). The media partnerships were formed upon the basis of clearly stipulated security procedures and guidelines for handling and publishing the material securely (Maurizi, EB/30, §17-22 - agreed s.9), which were according to Goetz '*more extreme measures taken'* than he had *'ever observed as a journalist'* to *'secure the data'* (Goetz, tab 31, §13 / Tr 16.9.20, xic, p5, 11 – unchallenged). WikiLeaks pioneered methods for secure communications which have *'become the norm amongst investigative journalists'* (Goetz, tab 31, §28 / Tr 16.9.20, xic, p5 – unchallenged).

15.72. The basis for the 'dispute' perceived by the DJ appears to be David Leigh's own assertions about whether he (Leigh) is to '*blame'* for what occurred (Judgment, CB/2, §396; cited to her by Kromberg 4, §39, CB/12/pg1027). Whatever the value of those self-serving statements (for which Mr Kromberg expressly declines to vouch), neither Mr Leigh, nor Mr Kromberg, actually dispute the facts and events described by Prof. Grothoff which led to the publication of the unredacted cables.

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136. Ms Maurizi, for example, described an entirely different means of receiving the US diplomatic cables from WikiLeaks in January 2011: an encrypted USB stick for which she received a password upon arrival in Italy (Maurizi, EB/30, §17 - agreed s.9).

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

15.73. In any event, Mr Leigh's protestations are patent nonsense and show extreme misunderstanding of the technical issues involved. There is no such thing as a '*temporary'* encryption key.[138] Once set, an encryption key *'never changes'* (Grothoff 1, EB/20, §1). There is no '*factual dispute'* for a US jury to decide and the DJ's contrary decision is completely unsupportable (Judgment, CB/2, §396)

133,887 cables in August 2011 (Judgment §397)

15.74. The DJ next cites the suggested release of 133,887 '*classified'* cables by WikiLeaks during the last week of August (before the entire unredacted database was made public by Cryptome, PirateBay etc) (Kromberg 4, §38, CB/12/pg1027) as a matter '*for any trial court to determine'* on the allegation of intentional outing of intelligence sources (Judgment, CB/2 §397).

15.75. This suggestion is utterly outrageous. These were the unclassified portion of the cables (see Bundle P, tabs C233-234). They were, by definition, incapable of revealing the names of intelligence sources. '*Those are different'* (Goetz, Tr 16.9.20, EB/46, xx, p16). '*It was unclassified material that was released then'* (Goetz, Tr 16.9.20, EB/46, re-x, p23-24). '*They decided to release unclassified cables early'* (Grothoff, Tr 21.9.20, EB/51, xx, p28).

15.76. The US government knew (not least because the State Department was forewarned) that this release contained unclassified cables (and the US knew the reason that release was made). As stated above, on 26 August 2011 following the Der Freitag publication, speaking to a lawyer from the US State Department (about the feared spread of the unredacted classified cables and asking for help in stopping/slowing it down), Mr Assange explained this recent WikiLeaks publication of unclassified cables (being released he said in an attempt to distract those moving to post the full set of documents online immediately):

> *'...we have in the past 24 hours released a some 100,000 unclassified cables as an attempt to head off the incentives for others to release the entire archive, but I believe that nonetheless while we may have delayed things a little by doing that they will do so unless attempts are made to stop them ... We have been trying to suck the oxygen out of the market demand by releasing all the unclassified cables*' (Bundle P, tab C227).
>
> '*...WikiLeaks has not released the names of any 'informants'. The material is unclassified and previously released by mainstream media...*' (Bundle P, tab C233).

15.77. It is not a mere '*defence ... claim'* that these cables were unclassified (Judgment §397). Prof. Grothoff told the DJ that he had verified (what the US knew all along) and confirmed that the cables were unclassified. That evidence was not challenged. 133,887 is the exact number of unclassified cables in the total WikiLeaks archive (Bundle P, tab C234).[139] Prof. Grothoff personally '*verified against the archive developed from Cryptome that those were unclassified cables...I specifically checked that the mark was unclassified...if you go through*

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[138]. His own book refers to a '*temporary website'*, not a '*temporary password'* (Grothoff, Tr 21.9.20, EB/51, re-x, p48).

[139]. See (Bundle P, tab C157) for verification. And also (Bundle P, tabs C235-244) for verification of the individual embassy figures.

the database and look for unclassified you find 133,887 unclassified cables...[also] the numbers released by country or by embassy...they correlate to the number of unclassified cables within the store referable to that country or embassy...I checked dozens of embassies and they always matched' (Grothoff, Tr 21.9.20, EB/51, xx, p29 / re-x p51-52).

15.78. It is ultimately telling that the DJ's search for a legitimate basis to dispute the fact that these cables were unclassified (and thereby irrelevant) led her to no more than media articles (the '*accuracy'* of which the US prosecutor expressly declined to '*vouch for'*),[140] which purport to suggest that names contained were those of sources because they were marked '*strictly protect*'. As the US prosecutor well knows, 'strictly protect' was not a marking which denoted risk to lives; it denoted political sensitivity: *'it was more about the political content'* (Goetz, Tr 16.8.20, EB/46, re-x, p22). '*There were quite a few places where it said 'sensitive,' 'protect,' and words like that, but...there was no threat to the people. There was just a political embarrassment factor, not a risk to their lives'* (Hager, Tr 18.9.20, xx, p19). That is why cables containing 'strictly protect' were routinely deemed suitable and safe for publication by the media partners (Goetz, Tr 16.8.20, EB/46, re-x, p22) (Grothoff. Tr 21.9.20, EB/51, xx, p33).

15.79. In the end, it is patently ridiculous to suggest that unclassified materials could nonetheless contain the sensitive names of intelligence sources. Moreover, and relatedly, unclassified materials are not (and cannot be) the subject of any charge in this case.

Responsibility for the release of 250,000 unredacted cables (Judgment §388)

15.80. The DJ next adopts a chronology of events leading to 2 September 2011 which purports to imply that Mr Assange was somehow responsible for the release of the unredacted cables (Judgment. CB/2, §388). The chronology relevant to the unredacted cable release is summarised above. Almost every stage of the alternative chronology summarised by the DJ at (Judgment, CB/2, §388) is seriously incomplete or wrong according to the unchallenged evidence she heard. For example:

(i) §388(a): Omits all of the security steps undertaken in relation to David Leigh, such as the website being temporary (per Leigh's book: Vol P, tab C201), protected by strong encryption (above §15.60(i)-(ii)), with the written password being partial only with an additional word given orally (above §15.60(ii)) (Vol P, tab C201). The DJ also had evidence of the written agreement Guardian chief (Rusbridger) signed at the beginning to help ensure the data would be secure (Vol P, tab C1).

(ii) §388(b): Means that the release of carefully and responsibly redacted cables began on that day (according to expert evidence in Manning's Court Martial, 272 cables were published on that date: Vol P, tab C159, p13838), and then continued in the same careful, responsible manner for the next nine months.[141]

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140. Which themselves emanate from a CIA co-operator, Ken Dilanian (Bundle P, tabs C229-232). '*He was fired from the Los Angeles Times for having discussed his stories with the CIA in advance*' (Goetz, Tr 16.9.20, EB/46, re-x, p23).

141. During which the redaction process was strengthened through the incorporation of local media partners with the necessary local knowledge to effect redactions (Maurizi, EB/30, §16) (Goetz, EB/17, §25). Eventually, at least 89 media organizations in 50 countries were involved in the redaction process (Vol P, tab C2). Unlike the initial set of five media partners, which '*had access to the cables relevant to all the world*', the local media partners added had more restricted access to just the cables

(iii) §388(c): **(a)** '*Online attacks'* is an understatement. In November and December 2010 WikiLeaks was the subject of distributed denial of service (DDoS) attacks (Vol P, Tabs C169 - C171, C173), censorship attempts (Vol P P, Tabs C174 - 175), and '*calls by public officials for illegitimate retributive action*' (Vol P, tab C183). The UN High Commissioner for Human Rights expressed the view that '*taken together, the measures could be interpreted as an attempt to prevent WikiLeaks from publishing, thereby violating its right to free expression'* (Vol P, tab C184). In response to the technical attacks and political pressure, people around the world began to mirror the WikiLeaks website and publications in order to ensure that they continued to be available online (e.g. Vol P, tab C199). **(b)** §388(c) does not mention that the mirrors '*encouraged'* by WikiLeaks would not and did not include the cables file (above §15.60(iv)), **(c)** Nor does §388(c) mention that the cables file only emerged in mirrors created by others using different software (above §15.60(iv)) (Vol P, Tabs C203, 205, 214). **(d)** Nor does §388(c) mention that, in any event, all mirrors were outside of the control of WikiLeaks / Assange (above §15.60(vii)).

(iv) §388(d): **(a)** Mr Assange does not '*assert'* that the password published by Leigh to the (now mirrored) cables file could not be changed; that was the unchallenged expert evidence of Prof. Grothoff (above §15.60(vii) & 15.73). **(b)** Neither (the US having not challenged that evidence) was it open to the DJ to seek to rely on Leigh's contrary (unevidenced) assertions. **(c)** In any event, it is flatly inaccurate to assert that Leigh '*asserts that he had always been told it was a temporary password'* – he talks (in his book) about a '*temporary website'* (above §15.73).

(v) §388(e): **(a)** Mr Assange does not '*claim'* that the 133,887 cables released in August were unclassified; that is what the statistics show (above §15.75, 77) (Vol P, Tabs C157, C234 - 244); it is what the State Department transcripts show (Vol P, tab C227); it is what WikiLeaks announced at the time (Vol P, tab C233, 217); and ultimately it was the unchallenged expert evidence of Prof. Grothoff who has independently verified the same (above §15.77).

(vi) §388(f): **(a)** Omits Mr Assange's communications with Der Freitag (Augstein) to prevent their publication (above §15.60(ix)). And **(b)** Der Freitag did reveal '*the means by which the file might be accessed*': it revealed that the password was online and easy to locate (above §15.60(viii)) (Vol P, tab C203). It revealed (i) that '*the password to this file is openly available and can be identified by those who know the subject*'; and (ii) a detailed description of the password handover to David Leigh, namely '*The mysterious password, which is necessary to decrypt the data, is said to have been passed on by Assange himself. The person who claims to have received the password from Assange and has published it in the meantime claims to have no knowledge of the file in the possession of Freitag. He assumed that the phrase given by Assange was a temporary password that would lose its validity after a while'* – all of which would be recognizable to those who had read David Leigh's description of it in his book.

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that pertained to their country or region (Goetz, tab 31, §21). Stefania Maurizi, for example, was given access to only 4,189 cables (Maurizi, EB/30, §16).

(vii) §388(g): **(a)** Omits all reference to Mr Assange's communications with, *inter alia*, the State Department and the involvement of lawyers to try to prevent the publication (above §15.60(xi)) (Vol P, Tabs C221 - 227).

(viii) §388(h): **(a)** Omits all reference to Cryptome publishing the text of the '*specific passphrase and [the exact name of] which file it decrypts'* online on 31 August (above §15.60(xii)). Cryptome even posted an online offer to mail copies of the descripted database on request (Vol P, tab C206). **(b)** It also significantly downplays what Parry tweeted: he advertised the *page number* of Leigh's book which contained the password and *the name* of the file it decrypted (above §15.60(xiii)).[142]

(ix) §388(i): Despite the prior revelations above, WikiLeaks did not reveal the password, nor its location, or even mention that the encrypted cables were available online (Vol P, tab C218).

(x) §388(k): It is not accurate to say that '*Parry claims'* that Nim_99 uploaded the cable database on 31 August or that that '*claim'* is '*unsubstantiated'*. Prof Grothoff had shown, from contemporaneous materials (Parry's blog) that Parry confirmed, contemporaneously, that that is what occurred (above §15.61(i)). Whether or not Prof. Grothoff can now recreate the Nim_99 event from the wayback machine is completely irrelevant.[143]

(xi) §388(l): The evidence before the DJ was in fact that the cables were already online long before yoshimo[144] / Pirate Bay: at '*hundreds of [other] sites*' by 5.05am (above §15.61(iii)), including at Cryptome by 12.27am (above §15.61(ii)) and at Nim_99 before that (above §15.61(i)).

(xii) §388(m): The evidence before the DJ was that Cryptome posted the cable database online at or before 12.27am on 1 September (above §15.61(ii) (Vol P, tab C206)).

(xiii) §388(n):[145] Omits the fact that the US army themselves obtained a copy of the database from Pirate Bay on 1 September (above §15.61(vi)).

(xiv) §388(o): mrkva.eu published '*the first searchable copy of the cables'* at cables.mrkva.eu and tweeted the location of its publication on 1 September (above §15.61(vii)) (Vol P, tab C209).

15.81. In short, the question whether '*there has been a prior publication*' is not – on proper analysis - an issue capable of legitimate dispute (per ***Zakrzewski***) and thus a '*question of fact to be determined by the jury'* (Judgment §395). Even on the US' own selective and partial chronology, by the time they were released by WikiLeaks on 2 September 2011 the unredacted cables had been published by multiple sites (including Cryptome, Pirate Bay and elsewhere) and, even by 5.05am on 1 September (24 hours previously) '*the full database [was already] downloadable from hundreds of sites*'. It is '*clear beyond legitimate dispute'*

142. For the avoidance of doubt, Parry separately wrote a detailed blog post in which included a link to the encrypted file and the decryption passphrase needed to open it. He even posted a screenshot of the website from which he download the z.gpg file (Vol P, tab C213).

143. In fact, as it happens, Nim_99's twitter post from 10.08pm on 31 August is still available online.

144. It is yoshimo, not yoshima.

145. It is droehein, not draheem.

that all this occurred[146]. Yet none of this, of course, was discernible from the face of the extradition request.

Re-publication (Judgment §392-395)

15.82. The misleading description of conduct contained within the extradition request was '*material to the statutory scheme'* (per ***Zakrzewski***) because, *inter alia*, as a matter of UK law, re-publication of material already in the public domain is not a criminal offence in this jurisdiction, and for the purposes of the DJ's dual criminality assessment, because it does not occasion damage, pursuant to the principles in: ***Attorney-General v Guardian Newspapers*** (No 2) [1990] 1 AC 109 (Spycatcher). Proof that the disclosure is or is likely to be damaging is a necessary ingredient of the OSAs in the UK.[147] The true facts here (per ***Zakrzewski***) – namely the republication of material already in the public domain – would fail the dual criminality assessment.

15.83. The DJ's conclusion on this is that prior publication is no defence in UK law, and US criminal law '*seems [to] have the same effect*' (Judgment §394). That was another serties of clear errors:

(i) UK law is clear. As Lord Brightman put it in Spycatcher '*...The Crown is only entitled to restrain the publication of intelligence information if such publication would be against the public interest, as it normally will be if theretofore undisclosed. But if the matter sought to be published is no longer secret, there is unlikely to be any damage to the public interest by re-printing what all the world has already had the opportunity to read. There is no possible damage to the public interest if Tom, Dick or Harry, or 'The Sunday Times' reprints in whole or part what is already printed and available within the covers of Spycatcher. Therefore it seems to me that no injunction should be granted to restrain further serialisation. I think it would be particularly inappropriate to prohibit 'The Sunday Times' from serialising a book which every other newspaper proprietor in the land is at liberty to serialise or publish...*'. Whilst Spycatcher is a civil case, Lord Hope held in ***Shayler*** at §81-83 by reference to Spycatcher '*There is parity on this point between the two systems'* (the OSA criminal system and the civil pre-publication injunction system).

(ii) What US law is, or may be, is irrelevant. ***Zakrzewski*** required the DJ to apply dual criminality to the true facts (re-publication of material already in the public domain). US law is irrelevant to the issue of dual criminality (***Dabas v Spain*** [2007] 2 AC 31 per Lord Hope at §52-55).

(iii) In any event (and even if it were relevant, which it is not), the unchallenged evidence before the DJ was that US law operates differently on this issue (Jaffer, tab 22, §6 - agreed s.9). Under US law there is no requirement even to show *intention* to cause

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146 See in particular Young, tab 68, agreed s.9: *"I published on Cryptome.org unredacted diplomatic cables on September 1, 2011 under the URL https://cryptome.org/z/z.7z and that publication remains available at the present."*

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

damage (Shenkman, tab 4, §23, 28-29) (Jaffer, tab 22, §7 - agreed s.9); mere reason to believe that damage *may* be caused is sufficient (Dwyer). For that reason too, US law was irrelevant.

Reach (Judgment §395)

15.84. Lastly, the DJ suggests that '*If there has been a prior publication of the materials, as the above chronology suggests, a US court will have to decide whether the Wikileaks disclosures nevertheless caused damage*' because of the '*the wide reach of Wikileaks'* (Judgment, CB/2 §395).

15.85. Again, the DJ's search for some residual area of potential 'legitimate dispute' on the (patent) falsity of the allegation intentional outing of informants, per ***Zakrzewski*** was flawed. **(a)** Prior to 2 September, the '*reach'* of the database published by others was such that the US itself had downloaded it (Grothoff 2, EB/29, §10, ex 10). **(b)** Cryptome (one of many sites that published the database before 2 September) for example had website traffic only marginally less than WikiLeaks (Grothoff 2, EB/29, §9). But **(c)** regardless of Cryptome's popularity, publication of informants' names on Cryptome specifically has previously been recognized as sufficient prior publication to allow UK-based media organizations to re-publish the names. In May 2003, Cryptome published the name of Stakeknife, an undercover British agent who worked for the IRA. This publication by Cryptome was sufficient, in UK law, to allow multiple newspapers to re-publish:

> '*...Ten days ago, however, the Sunday People and the Sunday Herald, a Scottish newspaper, are said to have asked the D-Notice committee - the voluntary MoD body that advises editors on intelligence matters - if the injunction would still apply if Stakeknife's real name appeared on the internet, or was published in the Republic of Ireland. The newspapers are said to have been advised that in such circumstances they would be free to publish. On the evening of Saturday, May 10, Stakeknife was duly identified as Scappaticci on the unofficial intelligence website, cryptome. It gave other newspapers the opportunity they had been looking for. The Sunday People was evidently not taken by surprise by the publication on the internet: it had prepared eight pages on the story...*' (Vol L2, tab D10).

15.86. Whatever US law might regard as relevant for a jury, there was no room for 'legitimate dispute' on the third ***Zakrzrewski*** abuse so far as dual criminality (i.e UK law) was concerned. The true facts (re-publication of materials already circulating on the internet) were concealed from the request, and are central to the operation of the statutory scheme. The DJ was in plan error in holding otherwise.

Conclusion

15.87. It is neither permissible nor lawful to mischaracterise conduct or offences: ***Castillo v Spain*** [2005] 1 WLR 1043. Those principles were approved under the 2003 Act in ***Spain v Murua*** [2010] EWHC 2609 (Admin), and have been confirmed (although re-categorised as abuse of process rather than validity) by the Supreme Court in ***Zakrzewski*** 4 per Lord Sumption at §8-13.[148]

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[148]. For the avoidance of doubt, the same consequences also flow from Article 5 ECHR; a Requesting State which causes a misleading arrest warrant to be executed in another country is liable under

15.88. This is a paradigm example of ***Zakrzewski*** abuse. It is, pursuant to ***Zakrzewski***, neither permissible nor lawful to mis-describe conduct as that which it is not.

15.89. The misstatements detailed above are material (indeed, central) to the operation of the statutory scheme. As matters presently stand, the '*conduct'* by which the Court must undertake, e.g. the dual criminality assessment under s.137(3) is, per s.137(7A), the conduct as described in the request. The ***Zakrzewski*** jurisdiction enabled the DJ to ascertain the true facts, and to feed those true facts into the dual criminality machinery of s.137. Had she undertaken that task correctly, no offending emerges for any of three alternative reasons:

(i) The '*draft most wanted list'* is the stuff of everyday journalism, was not compiled by WikiLeaks and was not, in any event, referable to that which Manning supplied to them;

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

(iii) The '*public[cation of] over 250,000 [cables] in September 2011, in unredacted form*' was the re-publication of publicly available data, acts which are entirely lawful pursuant to ***Attorney-General v Guardian Newspapers***.

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

> *'...It is in my view very important that a state requesting extradition from the UK fairly and properly describes the conduct alleged, as the accuracy and fairness of the description plays such an important role in the decisions that have to be made by the Secretary of State and the Court in the UK. Scrutiny of the description of the conduct alleged to constitute the offence alleged, whereas here a question is raised about its accuracy, is not an enquiry into evidential sufficiency; the court is not concerned to assess the quality or sufficiency of the evidence in support of the conduct alleged, but it is concerned, if materials are put before it which call into question the accuracy and fairness of the description, to see if the description of the conduct alleged is fair and accurate...'*

15.91. Neither is bad faith required; ***Murua*** (at §59) and ***Zakrzewski*** (at §13). Of course, the misstatements here were deliberate, calculated and evidence of the malign purposes behind this request. But bad faith is not legally necessary, and is irrelevant, to the existence of ***Zakrzewski*** abuse**.**

Article 5 for that unlawful detention abroad; see, for example, ***Stephens v. Malta (No. 1)*** (2010) 50 EHRR 7 at §52; ***Toliono v San Marino & Italy*** (2012) App No. 44853/10 at §56.

PART D: SECTION 81 AGAIN

16. The DJ should have returned to s.81

16.1. The Appellant's primary submission is that, for the reasons set out in detail in Part A above, s.81 was amply made out on an examination of the materials which led up to the commencement of this prosecution in late 2017. This prosecution was 'on account of' Mr Assange's exposure of US state criminality. It was moreover commenced as part of a US campaign to obtaining/maintain impunity for its criminal actors.

16.2. If the DJ disagreed, it was nonetheless incumbent upon her to return to s.81 at the conclusion of her examination of the various substantive complaints concerning the nature of that particular prosecution. That is because, as the case law recognises, the *conduct or content* of a prosecution can tell the court volumes about its illegitimate *motivation* for the purposes of s.81.

16.3. In order to make out a case under section 81(a), it is not necessary to show that political acts are the state's only motives (***Suarez*** (supra) at §29: '*When dealing with the motivation of a persecutor, it has to be appreciated that he may have more than one motive. However, so long as an applicant can establish that one of the motives of his persecutor is a Convention ground and that the applicant's reasonable fear relates to persecution on that ground, that will be sufficient'*).

16.4. In order to make out a case under section 81(a), it is also not necessary to show that there is no *prima facie* case (see e.g. ***Cabal v Mexico*** [2001] FCA 427). But it is always of relevance to s.81 if the case is novel, tendentious, lacking in substance, or being progressed in ways that usual cases are not: ***R (Saifi) v Government of Brixton Prison*** [2001] 1 WLR 1134 at §64-66.[149] In the end the question under s.81(a) will always be a matter of judgement and inference by the Court from all the circumstances, since no prosecution will likely expressly admit that their motivation is improper.

16.5. In the present case,

(i) the legally unprecedented nature of the prosecution (even if the DJ was correct that Article 7 ECHR was not thereby engaged) spoke to its extraordinary motivation;

(ii) the selective nature of the prosecution (i.e. its focus upon activities - the publication of leaked national security information - that occur daily in the USA as elsewhere without prosecution) spoke to its motivation;

(iii) the apparently deliberate choice of Alexandria as a venue for this trial (even if the DJ was correct that Article 6 ECHR was not engaged) spoke to its motivation;

(iv) the outrageous – and unretracted - prosecutorial intention to prosecute outwith the protections of the Constitution (even if the attempt might not ultimately succeed) spoke to the motivations behind this prosecution/request;

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[149]. There are numerous first instance decisions which have turned on this. See e.g. ***Russia v Maklay and Makarov*** (2009) at §11-14, 20; ***Russia v Maruyev and Chernysheva*** (2005) at p3 and 5.

(v) the knowing violation of the treaty inherent in this request made in the teeth of international law (even if the DJ was correct that she was powerless to act on it) spoke to the motivations behind this prosecution/request; and

(vi) the obvious divergence between the conduct alleged in the request and what the evidence before the DJ showed to be fair, proper and accurate, spoke to the motivations behind this prosecution/request.

16.6. All provided, collectively at least at lowest, evidence supportive of the conclusion (which was in any event evident from the content of the Manning disclosures, and the s.81 chronology) that this prosecution is motivated by matters other than the proper and usual pursuit of criminal justice. It is motivated instead by a concerted intent to destroy or inhibit the publishers of evidence of state criminal ability, and thereby put a stop to the process of investigating, prosecuting and preventing such international crimes in the future.

16.7. Respectively:

(i) The DJ considered '*the mere fact that the prosecution tests [the] boundaries [of the criminal law], does not demonstrate that they are brought in bad faith'* (Judgment , CB2, §179-180). On the contrary, this ought to have been a factor in the DJ's s.81 analysis of whether it was improperly motivated.

(ii) The DJ observed (at Judgment, CB2, §173(f)) that US '*policies [on torture etc] did not lead to the prosecution of other internet publishers that disclosed the same 'Manning' materials, such as New York based Cryptome'* as somehow supportive of her decision on s.81.[150] On the contrary, the selective nature of this prosecution ought to have been a factor in the DJ's s.81 analysis of whether it was improperly motivated.

(iii) The DJ restricted her examination of the apparently deliberate choice of Alexandria as a venue for this prosecution, to s.81(b) (Judgment, CB2, §196) – and failed to consider whether spoke to whether it was improperly *motivated* under s.81(a);

(iv) The DJ likewise restricted her examination of the outrageous unretracted prosecutorial intention to prosecute outwith the protections of the Constitution, to s.81(b) (Judgment, CB2, §193-195) – and failed to consider whether it spoke to whether it was improperly *motivated* under s.81(a);

(v) The DJ failed entirely to examine whether the knowing violation of the treaty inherent in this request made in the teeth of international law spoke to whether it was improperly motivated under s.81; and

[150]. This is a reference to - obviously telling – evidence in this case that none of those who actually published the unredacted cables before WikiLeaks did on 2 September 2011, including those based in the US such as Cryptome, have been prosecuted (Grothoff 1, EB/20, §9 / Tr 21.9.20, EB/51, xic, p11-12) (tab 47, ex 9, p9). The unredacted cables hosted by those US-based sites are *still* hosted there (Grothoff 1, EB/20, ex 14) and Cryptome confirms that the US has never requested their removal (Young, EB/25- agreed s.9).

(vi) So far as concerned the obvious divergence between the conduct alleged in the request and what the evidence before the DJ showed to be fair, proper and accurate, the DJ concluded that '*Mr. Kromberg … states unequivocally that this prosecution is founded on objective evidence of criminality. I have been given no reason to believe that Mr. Kromberg or his colleagues have acted in bad faith and contrary to these obligations and responsibilities'* (CB/2, §175(c)); despite holding under the ***Zakrzewski*** abuse procedure that these were live matters to be addressed at trial.

16.8. In the end, the DJ failed in her duty to step back and examine what the nature of this prosecution told her about its motivation for the purposes of s.81.

16.9. To take another example, despite the pains the DJ took to justify her conclusion that there had been no prosecutorial decision in this case before 2017, the DJ never then stood back and asked herself *why* this matter had not been prosecuted for 7 years until December 2017, in the absence of any adequate explanation from the US.

16.10. The DJ failed entirely to factor this or any of the other issues in this case into her s.81 analysis and the issue of whether Mr Assange's prosecution is, in truth, part of a Governmental campaign to maintain impunity for its own criminal actors. No doubt the DJ omitted to undertake this analysis because her s.81 analysis failed to recognise at all, and at root, that exposure of state criminality is protected by s.81.

16.11. An individual who exposes wholescale abuse and war crimes by a state, and thereby attracts prosecution for the very act of such exposure, is squarely entitled to the protection of s.81(a). Had Mr Assange been exposing the war crimes or crimes against humanity committed by a state such as the Russian Federation, there can be no doubt that his prosecution for such revelations would be regarded as both a political offence (within the Treaty) and an impermissible prosecution motivated by a desire to punish him for his political opinions/acts (within the Act).

<u>The Second Superseding Indictment</u>

16.12. In fact, the hallmarks of a political desire to silence Mr Assange, '*by whatever means necessary'*, continued to imprint themselves on this case to the very end.

16.13. No doubt conscious that the espionage prosecution for the Manning disclosures was liable to be rejected, in June 2020, four months after opening submissions were heard, and 10 weeks before the evidential stage of the Extradition Hearing was listed to commence, the US superseded the indictment again, now adding a series of new factual allegations which were not served on the defence until mid-August 2020, with Mr Assange being re-arrested pursuant to *this* request on the first date of the evidential hearing. These new allegations were unrelated to the Manning disclosures, and concerned allegations of general encouragement and solicitation of persons to steal ('hack') US unclassified information. In so doing they attempted to reconstruct the case under a wider "hacking" umbrella.[151]

16.14. As one would anticipate (if politically driven), the new allegations constitute a transparent last-ditch, last-minute, attempt to continue the US Government's hold on Mr Assange:

[151] See primarily new §4-6 and 35-92.

(i) They were inexplicably late. The US offered no explanation for the absence of these allegations from the first (or even second) indictment, despite the allegations dating from 2009.

(ii) The US withheld from the DJ essential details that would have provided a true history of prosecutorial actions (and non actions). By deliberate omission the DJ was being provided with a singularly distorted picture of the cogency and efficacy of the "new allegations" levelled in the new indictment.

Conclusion

16.15. In sum, wherever she looked, this case was shot-through with indicators that the criminal justice system was being misused for ulterior motives. Those underlying motives were obvious – to protect '*by whatever means necessary'* those US officials implicated in crimes by Mr Assange from exposure, investigation and prosecution. In law, that is 'political' motivation within the meaning of s.81.

16.16. The DJ failed to act upon any of the multiple indicia of political motivation. She did so, as stated above, by approaching the issues in the case atomistically, failing to step back at any time and ask herself what all of the various factors in this case told her, cumulatively, about the motivations behind this prosecution. No doubt because she failed to recognise the breadth and import of s.81 so far as exposing criminality was concerned.

16.17. To the extent that the prosecution was motivated by improper and indeed political imperatives, the prosecution is also an abuse of process. This further point is not solely dependent on establishing that the prosecution is actuated by a desire to punish Julian Assange for 'political opinions' within the express terms of s.81(a). It arises from the general common law recognition that the initiation and pursuit of a prosecution for ulterior and improper motives is of itself abusive. In considering this point, the Court is entitled to have regard to all the cumulative factors invoked above in support of the s.81(a) argument and each of the separate challenges based on the novel, unprecedented and constitutionally dubious nature of the criminalisation of Mr Assange's conduct, the accompanying violations of the rule of law in the targeting of Julian Assange at the embassy, the hidden agenda in the bringing of the indictment to provide cover for an anticipated rendition, and the improper reliance on the 2007 Extradition Treaty though that same treaty expressly prohibits extradition for political offences.

17. New Article 2 and 3 Grounds Raised by the Fresh Evidence

17.1. The new evidence provided by the Yahoo article gives rise to a fresh argument not considered by the DJ that there is a real risk of treatment contrary to Article 2 and/or Article 3 if Julian Assange is extradited. This risk arises in the light of the evidence as to fact that the CIA, with the approval of the US executive, did seriously consider assassination or forcible rendition, in order to deal with Mr Assange, whilst in the Embassy. If these state agencies were prepared to go to these lengths whilst he was under the protection of an embassy and located in the UK, there must be a real risk of similar extra-judicial measures or reprisals if he is extradited to the US. This justifies refusal of extradition on both Article 2 and Article 3 grounds. Moreover, even if not prepared to resort to assassination or kidnap, there is obviously a real risk, that these agencies would resort to the abuse of existing regimes in order to silence or incapacitate Mr Assange. In this context it is significant that detention under SAMs or in maximum security have not been ruled out and could be resorted to in bad faith with very limited oversight.

17.2. This is not a repetition of the arguments advanced and rejected by the High Court on the US's appeal, heard on 27 and 28 October 2021. The new Yahoo evidence was contained in an article only published on the 26 September 2021. The simple fact is that could not be investigated and deployed in the High Court in answer to the US's appeal, which focused on the Section 91 ruling of the District Judge. But the new evidence gives rise to a separate basis for refusing extradition on grounds of Article 2 and 3.

18. New Evidence

18.1. The Appellant further applies to the Court to admit the fresh evidence set out in the application. There is, in brief summary, first the Yahoo article referred to above, the statement of Witness 2 in the Spanish proceedings, and finally the expert evidence of Joshua Dratel setting the Yahoo article in context. These are relevant both to the political motivation argument under Section 81(a) and to the new article 2 and 3 grounds, raised by the fresh evidence. There is, in addition, fresh evidence that addresses the second superseding indictment and the prosecution's reliance on the position of the Guardian in relation to Article 10.

19. Conclusions overall

19.1. In all the circumstances, it is respectfully submitted that each Ground of Appeal detailed above is reasonably arguable, and leave to appeal should be granted.

Friday, 26 August 2022

Edward Fitzgerald QC
Mark Summers QC
Florence Iveson