IN THE WESTMINSTER MAGISTRATES' COURT

B E T W E E N:

GOVERNMENT OF THE UNITED STATES OF AMERICA

Requesting State

v

JULIAN ASSANGE

Defendant

DEFENCE REPLY

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1. **Introduction**

1.1. The defence stand by their closing submissions which they will not repeat here.

1.2. This reply is intended to respond on points of law and to correct some of the main ways in which the prosecution approach is fundamentally wrong. It will also address those respects in which the prosecution reply is significantly wrong or misleading on the facts.

1.3. The fact that a particular issue is not addressed here so as to avoid repetition should not, of course, be taken as acceptance of the prosecution's counter-narrative.

1.4. The prosecution make the sweeping assertion in their overview that allegations of '*torture, war crimes, murder, breaches of diplomatic and international law'* are '*non-justiciable'* in these proceedings (US Closing, para 2). They cite no authority for this proposition. It is a fact that extradition courts do regularly have to address allegations that the requesting state has breached international law in order to determine the issues before it. Thus in the case of ***Zakaev v Russian Federation*** the District

Judge made express findings as to the nature of the armed conflict between Russia and Chechnya as part of his determination of whether there was an extradition crime of murder (pg. 2). He then went on to make findings as to the torture of a witness in the case in Russian custody and as to the general practice of torturing Chechen suspects (see pages 7 – 9). Again in the case of ***Government of Rwanda v Ntezirayo and Ors*** [2017] EWHC 1912 (Admin), the Divisional Court at paras 122 – 137 recited and found '*very highly concerning'* the evidence heard and accepted by Senior District Judge Arbuthnot at first instance about a pattern of extrajudicial killings, disappearances and torture practised by the present Rwandan regime on its opponents. Finally in ***Mohammed Fakhar Al Zaman Lodhi v Secretary of State for the Home Department*** [2010] EWHC 567 (Admin) the Divisional Court accepted '*at face value'* allegations of torture and mistreatment of Pakistani nationals in the UAE (see paragraph 71). So this completely refutes the suggestion that the issue of whether the requesting state has breached international law by war crimes, torture or extra-judicial killings is non-justiciable. There clearly are circumstances in which the Court is entitled, indeed obliged to reach a view as to whether there have been, or may well have been, breaches of international human rights law by the requesting state. There are numerous other examples, such as ***Othman v UK*** where the European Court made findings as to the credibility of findings that Mr Othman's alleged accomplices had been tortured into making statements against him.

1.5. More specifically, there are findings from international human rights courts (including the European Court in the ***El-Masri v Macedonia*** (2013) EHRR 25) in relation to some of the unlawful practices of the US that Julian Assange exposed. The Court simply cannot close its eyes to the massive body of evidence that the US has been guilty of war crimes, torture, rendition and violations of the rule of law. To the extent that these matters are necessarily relevant to his submissions on political motivation and the risk of future violations of Article 3 and Article 6, the Court is, it is respectfully submitted, required to engage with these issues. At the very least the Court should, it is respectfully submitted, adopt the formula of the Divisional Court at paragraph 137 in ***Ntezirayo*** and approach the case on the basis that these credible allegations of breaches of international law are '*seriously concerning'* matters which form the necessary background against which the statutory issues are to be determined.

1.6. Since the prosecution have made no further submissions on the Treaty point, we simply stand by our original submissions and our summary of the position in our closing submissions. The prosecution in this case is manifestly one for the 'political offence' of espionage though the Treaty excludes extradition for political offences. The motivation behind the prosecution is manifestly to prosecute for Julian Assange's political opinions which entitles him to protection under section 81(a). And he faces the very real risk of discrimination and disproportionate punishment at the sentencing stage and in his likely allocation to ADX Florence in the US by reason of his political opinions.

1.7. This prosecution and the accompanying request was initiated and developed during a unique period of US history under the Trump administration. During that period, the criminal justice system has been repeatedly abused for political purposes and improper pressures have been brought to bear on the Department of Justice to ensure outcomes required by President Trump and his senior political appointees. These are notorious facts but were amply supported by the evidence of Eric Lewis in his fourth statement and in his evidence at Tr 15.09.2020, pg.42, l 10 – pg.43, l 32, and also by Thomas Durkin and Professor Rogers in their evidence to the Court.

1.8. But we will now deal in turn with the prosecution's reply where they have raised new matters in the light of the oral evidence or in response to our closing submissions.

Division of Reply into Parts

1.9. We will adopt the same order as in the Defence Closing Submissions, with the issues divided between Parts A – D.

PART A

2. The Prosecution's Reply to the Defence's History of this Prosecution

2.1. The prosecution dispute the basic defence narrative that there was a de facto decision not to prosecute under Obama in 2013; a decision under the Trump DOJ to prosecute for political reasons in 2017; an abuse of prosecutorial discretion in the introduction of the 17 counts of espionage in May 2019; and the late introduction of the second superseding indictment in the summer of 2020. At times they suggest that it is **not even possible to question** Mr Kromberg's assertion that the motivation for the prosecution was solely '*founded on objective evidence of criminality and focused upon Assange's complicity in criminal conduct'* (US Closing, para 68). As a matter of law, the defence is perfectly entitled to demonstrate that the dominant motive of the prosecution was political. And, as a matter of fact, the Court is entitled to infer such a motive from the unprecedented nature of the case, the suspect and tendentious nature of the allegations, and the specific history of the prosecution to which we now turn to briefly respond to the prosecution's counter-narrative.

2.2. First, the prosecution, at paragraphs 38 – 94 of the US Closing, attack the evidence that there was a decision not to prosecute under the Obama administration. The evidence that there was such a decision is overwhelming and is fully set out in the Defence Closing Submissions (paras 3.7 – 3.14). The defence rely upon the statements of Matthew Miller and Eric Holder; the Washington Post articles of November 2013 and 24 May 2019 referring to the fact that the US DOJ had all but decided not to prosecute; and the fact that there was no official contradiction of these very public statements. We also rely upon the expert evidence of Eric Lewis, Thomas Durkin and Professor Mark Feldstein summarised in the closing submissions.

2.3. In any event, it is self-evident that there was intense scrutiny of this case at the time of Manning's prosecution in 2012-2013 and that all the pertinent evidence was known. Kromberg actually recognises this fact in the Second Supplemental Declaration, paragraph 12 (see Defence Closing Submissions, para 3.2). Yet despite that, no prosecution did take place throughout the Obama administration. This calls

for some explanation and none has been provided by the prosecution. By contrast, the political reasons for both the original non-prosecution and the prosecution under Trump were fully explained by Professor Roger, Lewis, Durkin and Feldstein.

2.4. The key points are as follows:

(i) The relevant facts relied upon by the prosecution were known in 2011 as Kromberg himself asserted at paragraph 12 of the Second Supplemental Declaration (Defence Closing Submissions, para 3.2).

(ii) Manning was prosecuted and convicted in 2013 (Defence Closing Submissions, para 3.3 – 3.5).

(iii) There was no prosecution of Julian Assange at that time or at any time during the Obama administration (Defence Closing Submissions, paras 3.13).

(iv) There was a specific reason for that non-prosecution – the 'New York Times problem' - which was identified by Miller and Holder and reported by the Washington Post in its article on 25th November 2013 (Defence Closing Submissions, paras 3.7 - 3.12 and Bundle K, Tab 5).

(v) It is true there was no <u>formal communication</u> of a <u>finalised decision</u> not to prosecute. The prosecution have almost entirely focused on this single rather technical point in their closing submissions e.g. at paragraph 60.

(vi) But there is good evidence that the DOJ had '*all but decided'* not to prosecute. This was expressly recorded in the Washington Post article of 25th November 2013 on the basis of what sources had told them on the record (Defence Closing Submissions, para 3.9).

(vii) Thomas Durkin explained that there probably had been an actual 'Declination Decision' (Tr. 15.09.20, pg.68 ll 29 – 34, pg.69 ll 1-2). Both he and Eric Lewis made the point that Mr Kromberg was in a perfect position to confirm or deny this but had not done so. The Court is referred to the evidence of Eric Lewis (Tr. 14.09.2020, pg.11) who stated '*Mr Kromberg knows what happened in 2013'* and also to the evidence of Thomas Durkin that the prosecution are the only ones who can answer the question of what their files reveal (Tr. 15.09.2020, pg.69, ll 9 – 10).

(viii) The prosecution rely heavily on the fact of a judicial finding by Judge Rothstein on 4th March 2015 that there was a continuing investigation of some sort involving WikiLeaks (US Closing, paras 57 – 61). But the exact nature of

any continuing investigations has never been identified. More importantly, it never led to any action at all under Obama. In fact his only action was to commute the sentence of Chelsea Manning (Defence Closing Submissions, para 3.6).

(ix) Against that background, the Trump administration expressly presented themselves as taking a wholly new and aggressive approach to Julian Assange (Defence Closing Submissions, paras 4.11, 4.18 and 4.19). They denounced the Manning commutation; denounced WikiLeaks for its publications; and then demanded and instigated action against Julian Assange himself by both legal and extra-legal means. That was as a result of their view that Julian Assange and WikiLeaks by their publications posed a threat to the reputation of US officials and agencies, and a threat to their ability to act with secrecy and impunity (Defence Closing Submissions, paras 4.11 and 4.14).

(x) Accordingly officials, including President Trump and Mike Pompeo, denounced Julian Assange and called for action (Defence Closing Submissions, paras 4.1, 4.11 and 4.14 – 4.17).

(xi) They then pressured the DOJ to bring a prosecution in 2017 (Defence Closing Submissions, para 4.18). Subsequently, in May 2019, Attorney General Barr exerted further pressure to bring the unprecedented First Superseding Indictment with its 17 counts of espionage (Defence Closing Submissions, paras 4.31 – 4.33).

(xii) The First Superseding Indictment of 23rd May 2019 prompted strong protests by career prosecutors including James Trump and Daniel Grooms, as reported the following day in the Washington Post (Defence Closing Submissions, para 4.33).

(xiii) Moreover, the pressure to prosecute was accompanied by alarming breaches of the rule of law in the Trump ordered surveillance of Julian Assange and his lawyers in the Ecuadorian Embassy, and the theft of his legally privileged materials (Defence Closing Submissions, paras 4.24 – 4.29).

(xiv) When all those facts are taken together, they are amply sufficient to justify, and indeed compel, this Court to draw the inference that this prosecution is motivated more by a desire to punish and deter Julian Assange for his political

conduct and political opinions than out of a concern for upholding the criminal law.

2.5. The prosecution rely at paragraph 58 of their closing submissions on the views expressed by Julian Assange's spokesperson **in 2013** that the investigation was not closed. But those statements are the product of understandable fears and understandable caution on the part of his lawyers. The important point is that it is now possible to look back in possession of all the facts and with a retrospective historical overview. Viewed from this perspective, it becomes highly significant that there was in fact no attempt to prosecute up until 2017; that Chelsea Manning's sentence was commuted in 2017; that there were then the denunciations of the Obama administration's inactivity by Trump officials; that pressure was then put on the prosecution to bring the limited, initial indictment in March 2018 (Defence Closing Submissions, para 4.18); and thereafter extreme disquiet was expressed by career prosecutors in the DOJ at the later 2019 decision to bring the 18 count Superseding Indictment (Defence Closing Submissions, para 4.33). With that historical overview, the Court can now readily identify an historical timeline in which there was a decision not to prosecute for principled reasons under the Obama DOJ, and in which that decision was reversed for political reasons under the Trump DOJ. Recent events have only served to confirm that overall perspective and the extent to which President Trump and Attorney General Barr are ready to use the criminal justice system for political purposes.

2.6. As to the prosecution's **reliance on prosecutorial integrity** (Closing Submissions, paras 63 – 71), this in the end reduces to an insistence that the Court must simply accept Kromberg's ritual assertions to this effect. However, in this case these ritual assertions can have little weight. That is <u>firstly</u> because Kromberg has not in any way set out the history of the prosecution so as to explain to the Court the long delay in bringing a case and the massive coincidence that a case was only brought under Trump, Pompeo and Barr who had explicitly called for his prosecution for political reasons. And <u>secondly</u>, it is because the Court and the whole world knows that the DOJ has not been immune from blatant political influence and interference under the Trump administration and particularly under Attorney General Barr. To take but one

notorious recent example, at Trump's direct prompting he issued an extraordinary directive to all DOJ prosecutors to find examples of '*election fraud*'[1].

2.7. The fact that a number of defence witnesses, in passages cited at paragraphs 63 – 69 of the US Closing, held back from expressly alleging bad faith against Mr Kromberg as an individual is a sign of those defence witnesses' reasonable and commendable restraint. For example, Mr Timm declined to offer a view on the prosecutor's bad faith because prosecutorial norms were beyond his expertise (See full quote, partially quoted at paragraph 67 of the US Closing at Tr. 09.09.2020, pg.78, ll 17 – 22); Professor Feldstein is not a lawyer and made that clear himself; and Professor Rogers made it clear that what he was concerned about was not the bad faith of any individual, but the pressure from higher up politicians to bring a prosecution on the basis of no new evidence (see Tr. 09.09.2020, pg.29, ll 3 – 18). Despite their reluctance to condemn Mr Kromberg the individual, the key defence witnesses on the issue of political motivation – including Professor Rogers, Eric Lewis, Thomas Durkin and Professor Feldstein maintained throughout that the prosecution was politically motivated and expressly said so; and Eric Lewis characterised the bringing of the Superseding Indictment as an abuse of '*fair law enforcement power'* on the part of Attorney General Barr (cited in Defence Closing Submissions at para 4.32). One has to look at the conduct of the US as a whole in this case rather than focusing simply on the actions of one individual; and one has to look at the history of this prosecution in the overall context of the more general abuse of the criminal justice system for political purposes under the Trump administration in high profile cases of this nature.

2.8. At paragraphs 70 – 72 of the US Closing, **they place reliance on the fact that the actual decision to indict was made by the 'independent' Grand Jury.** But this reliance on the Grand Jury as a real protection was emphatically exposed as fallacy by Thomas Durkin in his evidence. He made the point that the Grand Jury refuses to

1. See The Guardian, 9th November 2020, 'Barr tells prosecutors to investigate 'vote irregularities' despite lack of evidence': https://www.theguardian.com/us-news/2020/nov/09/william-barr-vote-irregularities-donald-trump-election Attorney General Barr's Memorandum can be accessed here: https://beta.documentcloud.org/documents/20403380-barrelectionmemo110920 This resulted in the resignation of another career prosecutor who held the role of director of election crimes in the Department of Justice: https://edition.cnn.com/2020/11/09/politics/william-barr-voting-irregularities/index.html

bring an indictment recommended by the US Attorney *'maybe once every 4 or 5 years'* (Tr. 15.09.20, pg.62, ll 3 – 15). Professor Feldstein told this Court that it is a well-known US truism that a jury will '*indict a ham sandwich'* because they are '*just are so malleable and always do what prosecutors want',* a point on which '*there has been a lot of scholarship'* (Tr. 08.09.2020, pg.69, ll 29 – 33). In fact, it was the United States Court of Appeals for the 9th Circuit which acknowledged in ***United States v Navarro-Vargas*** in 2005 that there was a well-founded complaint that a Grand Jury would indeed '*indict a ham sandwich'* (see quotation at Boyle 1, Tab 5, para. 26).Finally, the Grand Jury procedure affords no hearing whatsoever to the indicted defendant, no representation for the proposed defendant and is not even presided over by a Judge (see Boyle 1, Tab 5, paras 24 – 27).

3. **Political Motivation and the test laid down in Section 81(a)**

3.1. The prosecution address the test for political motivation or, more precisely, prosecution on grounds of political opinions at paragraphs 38 – 44 of their closing submissions.

3.2. The first point the prosecution make is that it must be shown that the request is *'made in bad faith and would not have been made if the person did not have the political opinions he holds'* (US Closing, para 39). We respond that the defence can indeed show that the prosecution was a result of improper pressure and an abuse of prosecutorial power, and that it was in fact caused predominantly by the Trump administration's hostility to his political stance and the political opinions he expressed.

3.3. The key test is in fact whether the **dominant motive** for the prosecution is to punish a defendant for his political opinions: see ***Cabal v United Mexican States*** [2001] FCA 427 (dealt with in full in Defence Closing Submissions, para 8.2). The defence have provided overwhelming evidence that the dominant motive in this case is a political one.

3.4. In order to make out a case under section 81(a), it is not necessary to show that there is no *prima facie* case. However it is always of relevance if the case is novel,

tendentious or lacking in substance: see ***Russian Federation v Maklay and Makarov*** (2009) at paragraphs 11 – 14, 20, and ***Russian Federation v Maruyev and Chernysheva*** (18 March 2005) at pages 3 and 5 (and Defence Closing Submissions, para 8.2). The Court is further referred to ***R (Saifi) v Government of Brixton Prison*** **[2001] 1 WLR, 1134** where the Court inferred that the accusation was not made in good faith because of the suspect nature of the case against the requested person (see paras 64 – 66). It is also significant that, as in this case, there are successive inconsistent decisions as to whether to prosecute, and the actual case brought is **twice** changed significantly by way of the two superseding indictments and to the detriment of the defendant without any proper explanation. In the end the question under s81(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.

3.5. The Court is therefore **entitled to infer political motivation** here from the striking chronology itself, the self-evidently political import of Julian Assange's revelations, the novel and unprecedented nature of the charges, the misleading nature of the prosecution case, and the very fact of a reversal of the previous administration's approach, under a stridently hostile administration, with a demonstrated history of political interference in the criminal justice system. If an overall judgment is made in the light of these factors, then **the Court is both justified, and indeed obliged**, to infer a prosecution directed at Julian Assange because of his political opinions and the political effect of his publications. It is no answer to the political motivation charge for the prosecution to rely on their claim that some kind of plausible case can be stitched together by way of unsubstantiated allegations of potential harm, references to so-called 'hacking', and hopeful deployment of the decision in ***Rosen*** (see US Closing at para 330 - 331). The decision in ***Cabal*** correctly recognises that a prosecution can fail the political motivation test even where there is in fact a *prima facie* case (see Defence Closing Submissions, paras 8.2 and para 14.3, footnote 76).

3.6. The prosecution say that it is necessary to show that the prosecution is being used as a '*tool of oppression, brought to punish for political reasons'* (US Closing, para 40). That is not in fact the statutory test. But, in any event, it is submitted that this

prosecution **is** being used as a '*tool of oppression'* by a regime with whose values and agenda Julian Assange is openly at odds as evidenced by Julian Assange's open debate with Pompeo about the '*Pompeo doctrine'* just months before the prosecution was initiated (Defence Closing Submissions, paras 4.10 – 4.15). The political purposes behind the prosecution are several and overlapping. They include the intention to '*put a head on a pike'* in the war on 'leakers' and journalists, Pompeo's motivation to '*work to take down*' WikiLeaks and Julian Assange, and the intention to punish and deter his exposures about the misconduct of the US and the CIA. The defence evidence in that this was the purpose is undeniable.

3.7. As to the prosecution's general comments at paragraph 44, the defence respond as follows:

(i) There is **no proper, objective basis for the prosecution case** as they assert at 44(1) and (2). Their case is at the very least highly controversial, for the reasons set out in the Defence Closing Submissions, parts 11 and 12.

(ii) The comments and denunciations of President Trump, Mike Pompeo and Attorney General Sessions, that Julian Assange relies upon go well beyond any normal expression of concern that justice should take its course, contrary to the prosecution's suggestion at 44(3) of their closing submissions.

(iii) The significance of the surveillance in the embassy, which the prosecution seek to excuse as legitimate at para 44(5), is that this intrusive surveillance reflects a willingness by the executive to take any step (whether legal or not) to bring down Mr Assange. And this executive willingness to condone illegality is part of the context in which the prosecution was brought at the urging of the same executive power.

(iv) It is misleading to suggest that the *'evolution of the case against Assange reflects the way the case has developed'* as the prosecution does at para 44(6). The point made by each of the defence experts Lewis, Durkin and Rogers, on a sound analysis of the facts of this case, was that there was no new evidence to justify the change in prosecutorial approach in 2017. All the relevant evidence was known in 2011. Mr Kromberg himself refers to no new evidence. And this was precisely why career prosecutors in the DOJ voiced their objections to the Superseding Indictment as quoted in the Washington

Post article of 24th May 2019 (Defence Closing Submissions, para 4.33 and Bundle K, tab 38, pg.3)

The correct approach to the application of section 81(a)

3.8. The prosecution state at paragraphs 46 – 47 that the correct approach is to start with **a presumption of good faith** on the part of the requesting state, given the history of bi-lateral treaties consistently honoured. The defence respond that any such presumption is rebutted when dealing with a demonstrably quixotic regime that glories in denouncing international treaties and has conspicuously failed to abide by the international rule of law. The details are set out in Defence Closing Submissions, part 16. Highly relevant also is the government's blatant disregard in this case of the Anglo-US Treaty's prohibition on seeking extradition for political offences.

Julian Assange's 'Political Opinions'

3.9. The prosecution do not dispute that Julian Assange has 'political opinions'. It would be difficult for them to do so given the overwhelming evidence summarised in Part 2 of the Defence Closing Submissions as to his political opinions and their relevance to the prosecution (paras 2.13 – 2.36). Nor do the prosecution dispute the fact that Julian Assange has been denounced for his opposition to US policy. They simply question whether these political opinions have placed him *'at odds in any directed sense with the government of the United States of America*' (US Closing, paras 48 – 49). They appear to suggest that his political opinions would have to extend to '*seeking regime change or the overthrow of the government of the United States' .* That is plainly not necessary, as is clear from the decision in ***Suarez*** [2002] 1 WLR 2663 (analysed in Defence Closing Submissions, para 8.6). It is sufficient that he holds '*an opinion which challenges governmental authority'* per ***Suarez,*** paras 29 – 30, and, in the current global context, an individual who exposes wholescale abuse and war crimes by a state, and thereby attracts prosecution for the very act of such exposure, is entitled to the protection of section 81(a) and also to the protection of Article 4 of the Treaty (Defence Closing Submissions, paras 8.2 – 8.7).

3.10. Mr Assange's political opinions were encapsulated by Professor Rogers who stated that while Mr Assange cannot be labelled *"a conservative or a liberal, or a Marxist, a socialist"* it is still *"very clear cut"* that he has *"a political view"* and is *"coming … from a much more libertarian standpoint"* with a *"libertarian view of the need for individuals and public groups to produce a much greater degree of transparency and accountability"* (Tr. 09.09.20, pg.8, ll 4-8 and pg.7, ll 14-20).

3.11. In his essay "Conspiracy as Governance" Julian Assange speaks of "*radically shift[ing] regime behaviour"* through disrupting authoritarian conspiracies so as to reform bad governance:

> *"To radically shift regime behavior we must think clearly and boldly for if we have learned anything, it is that regimes do not want to be changed. We 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. We must understand the key generative structure of bad governance[1]. We must develop a way of thinking about this structure that is strong enough to carry us through the mire of competing political moralities and into a position of clarity. Most importantly, we must use these insights to inspire within us and others a course of ennobling and effective action to replace the structures that lead to bad governance with something better."* (Bundle M, Tab 1a)

3.12. The US government suggestion that he does not seek to effect change at a governmental level is simply unsupportable.

3.13. It is also important to address Mr Assange's imputed political opinions and motivations, as exemplified by the many statements made publicly by Mike Pompeo when head of the CIA, for example stating that *"WikiLeaks will take down America any way they can."* (Bundle K, Tabs 10 and 12). There is abundant evidence that Julian Assange's politically charged publications have brought him into conflict with many elements of the US government – most notably with the intelligence agencies (the NSA, CIA, ICE), the US State Department (UN embassy cables), and the Pentagon – such that he is seen by them as an enemy of the united states (Bundles M, P)

The prosecution's alternative narrative of decisions taken under the Obama and Trump Administrations

3.14. The prosecution put forward an alternative narrative at paragraphs 51 – 81. We have already fully dealt with this at 2 above.

Abuses of the rule of law

3.15. The prosecution state that the allegations of abuse of the rule of law are unfounded or irrelevant (US Closing, paras 82 – 94). But they have simply failed to address or answer the point about the clear and obvious violations of legal professional privilege during the surveillance in the embassy. The claim that this will not be used in the US prosecution is neither here nor there. The willingness to resort to such plainly illegal means by the very State which makes this request is a relevant factor in determining whether the prosecution is being pursued as part of a normal and proper criminal justice agenda.

4. <u>Abuse of Process</u>

4.1. The abuse of process submission is closely allied to the Section 81(a) submissions and constitutes an alternative basis to refuse extradition. If an improper motive and improper abuse of power is established then the proceedings would constitute an abuse of process on a slightly wider basis which need not necessarily be tied to the targeting of political opinions. In that sense we accept the prosecution's argument that the abuse of process argument invokes a residual jurisdiction

4.2. The essential substantive points remain the same.

4.3. As to the treaty point, the prosecution have not replied on this. But they have treated it as solely an abuse of process point. We should respectfully point out that the treaty objection also goes to the compatibility of Julian Assange's present and continuing detention with Article 5 of the European Convention. In that sense, it is a challenge under section 87 also. This is a point that the learned judge herself identified during the February 2020 hearing.

5. **Section 81(b): the real risk of discrimination on grounds of nationality and political opinion**

5.1. The defence stand by their existing submissions on this issue (Defence Closing Submissions, pgs.66 – 68). We will briefly deal with two points.

5.2. Firstly, the prosecution have confirmed that there is a **risk of differential treatment on grounds of foreign nationality** in relation to First Amendment safeguard as set out in the Defence Closing Submissions at paras 9.2 and 11.56, and as confirmed in the Supreme Court decision, *USAID v Alliance for Open Society*. Yet this differential treatment is plainly discriminatory within the terms of section 81(b). If the prosecution, on the basis of that authority, intend to deploy the point that Julian Assange should be denied the protections of the First Amendment because of his alien status, then this clearly creates a real risk that he will be prejudiced at his trial precisely because he is a foreigner. In other words, there is a real risk that the substantive law applicable to his case will be different from that applied to a US citizen, and that the protections for his freedom of speech will be less than those for a citizen. The prosecution rely on ***Pomiechowski and ors v District Court of Legnica, Poland*** [2012] UKSC 1 WLR 1604 for the proposition that only British nationals are entitled to rely upon Article 6 in relation to their removal from this country because only they are losing a civil right (US Closing para. 99). That is a very different point. It is obvious that the right to be protected from removal from one's homeland is confined to those who are being removed from their own homeland. But the right to freedom of expression and the right to receive and impart information is a universal right. The US should not assert entitlement to remove the rights of foreigners to receive and impart information, and the right to prosecute them in defiance of that right, whilst according protection from prosecution in those circumstances only to their own citizens. Moreover, in the case of ***Pomiechowski,*** Lady Hale expressly stated that it was an unsatisfactory consequence of the Court's decision in that case that '*it discriminates between nationals and aliens'* (para 52) and that in fact led to the introduction of legislation which removed the

discrimination.[2] Yet a far more fundamental discrimination awaits Julian Assange in the United States.

5.3. Secondly, it is plain that Julian Assange's political position and political actions have caused him to be treated as a national security risk and that this will expose him to a high risk of being detained under SAMs. That is despite the fact that he is clearly not an alleged terrorist as were the defendants in the case of ***Ahmad and others***. Nonetheless, as Maureen Baird made clear, he will be treated in the same was as if he was a terrorist because of the political nature of his case, the charges of espionage that arise therefrom, and the national security elements of his revelations (see Defence Closing Submissions at paragraph 21.1. and Maureen Baird's evidence at Tr. 29.09.2020 pg.54, 1 – 5). This clearly amounts to being prejudiced in his treatment on grounds of his 'political opinions' which are in reality the reason for him being singled out for SAMs and the reason for him being charged with espionage.

6. <u>Passage of Time: Section 82</u>

6.1. **The prosecution submit that Mr Assange is debarred from reliance on section 82 because he is a <u>fugitive</u>**. We make the following points in response:

(i) When Julian Assange took refuge in the embassy it was to avoid extradition to Sweden for fear of onward extradition to the United States. As is now clear there was no US indictment against him at that time. So he could not reasonably be described as a fugitive from US justice since no criminal justice machinery had been activated against him.

(ii) It is true that he expressed the fear that he would be unlawfully rendered from Sweden to the US, without adequate protections, if a request was made. That was the basis on which he was granted political asylum by Ecuador. This was only withdrawn as a result of a change of administration and concerted pressure from the Trump administration. A person who has been properly granted political asylum cannot as a matter of international comity be

2. See for example ***Szegfu v Hungary*** [2016] 1 WLR 322, paras 9-11.

described as a fugitive and thereby debarred from the protections of section 82 under English law.

(iii) Moreover, the evidence now shows he was seeking to avoid persecution, not prosecution.

6.2. The prosecution at paragraph 115 describe Mr Assange as *'the Appellant'* in dealing with the '**injustice'** limb of s.82. This is somewhat presumptuous on their behalf since the Court has not yet ruled. Turning to the merits of their contention, there is certainly evidence that he will be prejudiced at his trial by reason of the long lapse of time. This is set out in the Defence Closing Submissions on which the prosecution have made no substantive reply but simply referred back to their earlier skeleton.

6.3. On the question of **oppression,** the prosecution have again made no substantive submissions on this beyond dismissing the fact that Mr Assange has formed a relationship and had two children in the intervening **decade**. What makes it oppressive is that there has been a long delay on any view and this delay remains unexplained and unjustified; and his mental health has deteriorated in the intervening period, as a result of the years in the Embassy during which he was subject to US surveillance, the invasion of his privacy and legal professional privilege; and after he has formed a new family whilst in the UK during the last 10 years. The combination of unjustified delay and the formation of new links in the country of the requested state are the very factors that rendered it oppressive to extradite in the three successive cases of ***Kakis***, ***Patel***, and ***Obert*** referred to in the defence written submissions at paragraphs 23.3 – 23.5. In this case, there is the additional factor of a deterioration of the requested person's mental state during the intervening period - to which the actions of the Requesting State have themselves significantly contributed.

PART B

7. **Article 7 ECHR**

The prospective trial will not look to human rights at all

7.1. The US response to Article 7 is to be found at paragraphs 303 - 342 of its Closing (which takes up submissions trailed previously at paragraphs 75 - 81). It relies heavily on the '*protection'* afforded to Mr Assange by the Fifth Amendment to the US Constitution (which, it is said, contains some parallels to Article 7 ECHR). It is therefore appropriate to begin elsewhere in the US Closing, namely at paragraphs 398 - 399.

7.2. The Court will recall that the defence has previously aired its alarm at the proposition, seemingly advanced by Mr Kromberg, that the US prosecution will 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 (see e.g. Defence Closing, paras 11.15(iv) and 11.56).

7.3. US Closing paragraph 398 now confirms that the US may seek to bring this situation about. It certainly offers no assurance, or any other comfort, to this court that it will not. Neither presumably could it, given that the US court will be obliged to apply US law of its own volition. And to that, para 399 confirms that the US Supreme Court has recently held that it is '*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*'. So, the position is that, there is at lowest a real risk that, the US Constitution will not apply to this prospective trial.

7.4. It ought to be obvious that extradition to any trial which will not even consider Article 7 ECHR (or any other human rights protection) is fundamentally contrary to both the scheme of the 2003 Act and offensive to the HRA 1998. As the US itself accepts, '*There is an obvious difference between a legal process that will judge the availability of certain rights to defendants and those rights being removed for prejudicial reasons*

like nationality'.

7.5. The US appears to advance two misconceived arguments to seek to justify the alarming situation that has emerged.

7.6. First, it argues that the non-availability of human rights protections, at trial, may be '*objectively'* justified by reference to nationality (para 398). That, with respect, is patent nonsense. ***Pomiechowski*** concerns extradition proceedings. Extradition proceedings are, as the US is so keen to point out, not a trial. Their conduct is not governed by Article 6 because they are not proceedings which determine guilt or innocence (per Lord Mance at paras 27 - 31). What, however, is also and separately being determined for British citizens in such proceedings is a distinct and different common law right, that has nothing to do with determination of guilt or innocence (paras 31 - 33). No authority exists for the proposition, apparently advanced at US in this case Closing para 398, 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.[3]

7.7. Secondly, the US suggests (at para 399) that the HRA 1998 would operate in the '*same'* way because '*the protection of the Human Rights 1998 is restricted to those within the physical territory of the UK, subject to very limited exceptions*'. That is, again with respect, a deliberate attempt to lead this Court into 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).

7.8. 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 paragraph 90, concerning the article 10 rights of an

3. ***Al-Rawi*** 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).

Iranian in Paris to visit the UK to speak[4]) 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 paragraph 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.

7.9. In sum, any UK trial of a non-UK citizen (even for conduct allegedly committed abroad) would be governed by the ECHR / HRA. This Court is being asked to send Mr Assange to face a trial in which no human rights protections will exist, at all. Such a decision would, it is respectfully submitted, be extraordinary. It would certainly be unprecedented.

7.10. Not only is this a point which strikes at the heart of this Court's s.87 examination, for obvious reasons, it also strikes at s.81(b) (see above para 5.2).

Article 7 practice and history

7.11. Returning (unnecessarily therefore) to the US substantive submissions on Article 7 ECHR, the Court will immediately note that no issue is taken with the evidence (and fact) that a prosecution of the press for solicitation, receipt and/or publication of classified materials 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*

4. *'...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...'*

circumstances not foreseen when a provision was enacted' (US Closing para 306). That submission is then taken up again at paragraphs 317 - 318 with a suggestion that the '*factual circumstances [being prosecuted here] are novel'*.

7.12. What that strange submission omits is that **(a)** these '*circumstances'* are not novel in the slightest; as the unchallenged evidence demonstrated, the active and knowing solicitation, receipt and publication by the press of national security materials has occurred every day in the US for decades and has never been prosecuted, and **(b)** they were moreover '*circumstances'* that were '*foreseen'* when the Espionage Act was drafted (see the unchallenged evidence summarised Defence Closing at paras 10.37-39), again when the Act was amended in 1950 (Defence Closing para 10.40), and through prosecutorial practice over the past 100 years (Defence Closing paras 10.41-46). Yet, they have nevertheless never been the subject of prosecution.

Extradition case law

7.13. Having next sought to persuade this Court (at paras 310 - 315) that, despite it being an unqualified and underogable right, a '*flagrancy'* threshold should apply to this Court's assessment of Article 7 ECHR (itself a contentious proposition which the High Court in ***Arranz*** said ought to be considered by the Supreme Court), the US then proceeds to offer no guidance on what it suggests a non-flagrant (as opposed to flagrant) Article 7 violation might look like. It is indeed difficult to conceive of one. Neither, it seems, can the US conceive of one. Which is presumably why, in the next following paragraph (316), they tell this Court that '*the only question that it is permissible for the Court to determine is whether Assange's extradition is incompatible with Article 7*'.

Vagueness

7.14. The US Closing then proceeds (at paras 316 - 325) **(a)** to set about erecting and then defeating a submission never made, and **(b)** to seek to impugn Mr Shenkman's evidence.

7.15. It has never been submitted that the Espionage Act is constrained to '*classic espionage'* (US Closing paras 320 - 323). Nor could it, in view of ***Morison***. Yet the US Closing devotes paragraphs to defeating '*any suggestion*' to this effect (without, of course, identifying where such a suggestion appears).

7.16. What is submitted (and what the evidence this Court heard was directed at) was that the Act is impermissibly '*vague'*, for reasons articulated at Defence Closing paras 10.9-21, in its potential application to the activities of the press. Whatever aspects of US law might have been employed by US Courts to render the Act non-vague in its application to the acts of whistle-blowers (per ***Morison*** etc. and per US Closing paras 318 - 319), no authority exists to explain how those same (and other) vagaries could or would be cured in a case trammelling press freedoms.

7.17. No doubt appreciating the absence of any authority to support its case (on the argument actually advanced), the US then proceeds to attempt to impugn Mr Shenkman (US Closing para 324). That attack was as outrageous then as it is now. It should never have been made.

7.18. The Court will recall that, in evidence, Mr Shenkman was invited by counsel for the USA to '*agree'* various propositions – thrown at him randomly - of US law as '*incontrovertible'*. For instance, Mr Shenkman was provided with an un-numbered copy of ***Morison***, from which it was demanded that he agree that '*one of the holdings'* of the US Court of Appeals had been, and it was thus '*not a controversial proposition of law in the United States*' that, a whistle-blower '*is not entitled to invoke the First Amendment as a shield to immunise his act of thievery. To permit the thief thus to misuse the Amendment would be to prostitute the salutary purposes of the First Amendment'* (Tr. 17.09.20, xx pgs.54 - 55). Mr Shenkman disagreed, and said this is not what ***Morison*** held. He was pressed ('*it is a finding by the Fourth Court of Appeals. Are you saying that you disagree with it?*'). He was right. What had been put to him was completely misleading. The passage flung at him was from the middle of (what transpired to be) paragraph 31 of Russell J's opinion. What was not revealed to him or to the Court was that, on this issue, Russell J was in the dissent.

Both Wilkinson J (para 82) and Phillips J (para 106) expressly disagreed with what Russell J had suggested. The Court of Appeals in ***Morison*** had in fact held the very opposite to what the US were putting to Mr Shenkman (Tr. 18.09.20, re-x, pgs. 60 - 62). It was not Mr Shenkman's evidence that was '*incomplete and omitted a number of important points [and] misleading'* (US Closing para 324), it was the questioning of him. To extract from this wholly unfortunate line of questioning that his evidence should not be accorded weight because it '*appeared to dispute and argue the finding of the Court of Appeals in Morison...In general, Mr Shenkman appeared unable to accept statements of principle by the US Courts – rather the thrust of his evidence was that he and others disagree with them*' was and is completely outrageous. Indeed, without Mr Shenkman's careful, knowledgeable and considered evidence in response to what was being suggested, this Court would have been seriously misled.

Foreseeability

7.19. Nothing in the US Closing comes remotely close to impacting the force of the submissions outlined at Defence Closing paras 10.29-58.

7.20. The US first appears to suggest (paras 326 - 327) that the (acknowledged and accepted) absence of <u>any</u> precedent for this type of prosecution, in the face of the regular publication by the press of national security materials and decades of contrary practice, '*does not fall to be determined in this case because the case against Assange is in large part based upon his unlawful involvement in Manning's theft of the materials*'. That, it seems, appears to be a submission that the press have only ever '*published'* classified materials, and that they have never before actively and knowingly solicited or encouraged or assisted whistle-blowers. It need hardly be said that such a contention runs clean contrary to the unchallenged evidence in this case (see the evidence summarised at Defence Closing paras 10.29-31 & 11.21-23).

7.21. Next, the US suggests (para 328) that the first-instance, *obiter* (in the sense both of being decided on different facts and also being in the context of a discontinued case) observations of the US District Court in ***Rosen***, about which even the US legal team

were apparently unaware until midway through the September hearing, shows that '*United States law has, for a very long period of time contemplated that [publishers] may be susceptible for prosecution for publishing*'. Of course, ***Rosen*** was not concerned with '*publishers'*. It was concerned with intermediaries of whistle-blowers, assisting in the process of getting the classified materials '*to the media'*. It considers none of the issues surrounding press freedoms or practices. See generally Defence Closing paragraph 10.56.

7.22. Compare ***Morison*** (omitted by the US on this issue) which, whilst also *obiter*, did at least consider the position of the press (and indicated in clear terms that prosecution of the press would be unlawful (Defence Closing paras 10.50-51)).

7.23. In a series of confused and contradictory submissions, the US then submits that **(a)** the Supreme Court judgment in ***NY Times*** (the Pentagon Papers case) does contemplate prosecution of the press (US Closing paragraphs 330 - 333), but then inconsistently that **(b)** '*Assange's position is wholly different. His position cannot be compared to the New York Times'* (paras 334 - 335), because (so far as the Manning allegations are concerned) '*Wikileaks' very purpose and design'* was recruit and solicit whistle-blowers. Both propositions are manifestly wrong:

(i) The Supreme Court in ***NY Times*** does not contemplate prosecution of the press; it recorded no more than the undisputed reality that the Act is broad (i.e. vague) enough to potentially apply to the press (see Defence Closing para 10.35). The clear evidence before this Court (and as is evident from the face of the Supreme Court judgment itself) is that the Supreme Court did not examine (nor did it even receive argument on) the Constitutionality of prosecuting the press (see Defence Closing para 10.49). The underlying premise of ***NY Times*** is that restrictions on press freedom to publish classified materials are unconstitutional. That is why, for example, ***NY Times*** is specifically held out by Lord Hope in ***Shayler*** at paragraph 50 as authority for the proposition that the press 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 paragraphs 37 and 111) (see Defence Closing

para 11.38).

(ii) 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, Tr. 8.9.20, re-x, pg.63). Which is why it is so revealing (and so inconsistent with the US submissions here) that the NY Times was never prosecuted.

7.24. Next, the US attempts to suggest (paras 336 - 338) that the ***Bartnicki*** prohibition on press law-breaking (stealing, wire-tapping etc) for the purposes of news gathering somehow encompasses (and criminalises) the act of soliciting, encouraging or assisting a whistle-blowers in their act of whistle-blowing; and that this is a '*complete answer'* to Article 7 in this case (presumably because they assert that, from this line of authority, Mr Assange could have foreseen this novel prosecution). That, however, as the evidence before this Court made abundantly clear, is not and has never been true. ***Bartnicki*** etc are not, and have never been suggested by any US court, or even by any academic, to be directed at the act of assisting the process of whistle-blowing. The US Closing simply does not engage with (because it manifestly cannot) the evidence on this issue (summarised at Defence Closing at paras 11.18-29).

7.25. Finally, '*overarchingly and a complete answer to whether there is any risk that Assange's extradition might be incompatible with Article 7*' is suggested to be the Fifth Amendment to the US Constitution (paras 341 - 342) – without, of course, mentioning that it will not be available to Mr Assange: see above.

8. **Article 10 ECHR (and dual criminality)**

8.1. In order to seek to save its obviously untenable position on Article 10 ECHR in relation to the Manning allegations, paras 343 - 399 of the US Closing is peppered with references to the new 'hacking' allegations contained within the Second Superseding Indictment. That is to say that the US Closing obfuscates the issue that the defence *have* raised and called evidence on (whether the Manning allegations

are compatible with the principles of press freedom entrenched in Article 10) by reference to different issues which have not been the subject of evidence (whether the wide-ranging new 'hacking' allegations comport with Article 10). That the US feels that it has to obfuscate the Manning / Article 10 issues in this way ought to tell this Court volumes about the confidence it has in its Article 10 position on the Manning allegations.

8.2. Put simply, these are separate issues: **(a)** do the Manning allegations offend Article 10? **(b)** do the new allegations in the new indictment offend Article 10?. If the Court finds (as the defence submit it clearly must) that prosecution of the Manning conduct offends Article 10, then extradition cannot be saved (other than by ***Osunta*** excision of the Manning conduct from the Court's order) by the fact that other, different, conduct in the request might not.

Solicitation of whistleblowing

8.3. US Closing para 347 misstates both the evidence and arguments (Defence Closing paras 11.18-38). It is not the case that, *because* investigative journalists routinely recruit / solicit / assist the act of whistle-blowing (which they plainly do, without prosecution), *thus* ***Bartnicki*** is not directed at that conduct. Rather, the reverse is true. The clear evidence and law is that, *because* neither ***Bartnicki*** nor any other authority is directed at that conduct, *thus* investigative journalists do it routinely and lawfully (Defence Closing paras 11.20-29). There is no '*gloss'* on US law here: that recruitment / solicitation / assisting <u>the act of whistle-blowing</u> is <u>lawful</u> conduct (as ***Levine, Siegel and Bead*** explains), is the <u>only</u> explanation this Court has 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 <u>no single US authority</u> which purports to criminalise the recruitment / solicitation / assisting <u>of the act of whistle-blowing</u>. 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.

8.4. All that follows in paras 348 - 350, so far as it concerns the alleged '*solicitation'*, '*encouragement'* of or '*complicity'* in Manning's whistle-blowing, is founded on the '*gloss'* that this prosecution seeks to put on two centuries of US history; namely that '*criminal'* activity has been committed daily in the US by investigative journalists for decades and has, inexplicably, gone unprosecuted.

8.5. Little wonder that the US retreats to the position that it '*is not the function of this Court to determine whether the prosecution of Mr Assange would affect news gathering in the United States*' (para 344). It is central to this Court's determination of Article 10. It is because this prosecution seeks to criminalise '*news gathering in the United States'* – routine lawful conduct under the First Amendment - that it can be so clearly seen to violate Article 10, and flagrantly so.

8.6. After all, the US does not (and cannot) suggest that Article 10 operates in some different way to the First Amendment.

Strasbourg case law

8.7. ***Girleanu*** states, in terms at para 84, that '*the fact that a journalist has breached the law is a relevant, albeit not decisive, consideration*'. The ECHR therefore anticipates that journalists might, consistently with Article 10, engage in a range of 'law breaking'; some (such as theft or wiretapping by a journalist to obtain materials as in ***Bartnicki***) will or may violate Article 10, whereas some (such as assisting the act of whistle-blowing) will not.

8.8. ***Brambilla*** (journalists involved in wire-tapping to obtain newsworthy materials) and ***Doryforiki*** (journalists using hidden cameras) are clear examples of the former. They are ***Bartnicki***-type cases. They do not concern or consider the legality of assisting the act of whistle-blowing. They do not assist the Court. This was what Prof. Feldstein was talking about, for example, in the passage quoted at US Closing para 357 (criminal activity '*to get newsworthy material'*).

8.9. ***Stoll v Switzerland*** (2008) 47 EHHR 59 on the other hand does very much assist the Court. Unlike the other cases cited by the US, ***Stoll*** did concern the obtaining of confidential governmental materials from a state whistle-blower. Importantly, yet inexplicably omitted from the US Closing, Stoll's conduct viz. his whistle-blower (what the ECtHR terms '*The manner in which the applicant obtained the report'*) was not the basis on which the ECtHR found an Article 10 violation: see judgment paras 140 - 144. As the ECtHR held at paragraph 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.

8.10. It ought to come as no surprise to this Court that, consistently with the position that prevails in the Europe, no UK prosecution for assisting 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***.

8.11. The US Closing on Article 10 consists, in essence, of the repeated, and repetitive, exhortation that Mr Assange '*encouraged'*, '*solicited'* or '*assisted'* Manning's whistle-blowing. At root, as ***Stoll*** and ***Shayler*** amply show, that is no answer to Article 10 (just as it has never been an answer to the First Amendment).

8.12. The evidence, and law, on this issue is clear. It is consistent across Europe and the US. It is simply not grappled with by the US.

8.13. Instead, the US devotes its submissions to the task of seeking to impugn Mr Timm's '*credibility'* (para 356) on the ground that the globally-renowned Freedom of the Press Foundation has an interest in protecting other journalists from this novel, unprincipled, and chilling theory of criminal liability. As to that: **(a)** Of course all

journalists have, indeed all society has, '*a vested interest in the outcome of these proceedings'*. **(b)** The US cannot and does not level '*credibility'* criticisms at the other multiple respected experts who corroborated what Mr Timm told this Court about '*all journalists engaging in'* the lawful activity of encouraging, soliciting or assisting whistle-blowing. **(c)** Of course Mr Timm '*does not decide the law; nor what, nor who will be prosecuted'* (para 356) – he informs this Court about what the law is under the First Amendment, and what has (or more accurately has not) been prosecuted pursuant to those law.

Hash decoding

8.14. The US case on the suggested purpose of the hash decoding allegation proves more slippery every time it is articulated:

(i) At first, it was alleged that the purpose of the '*passcode conspiracy'* was to obtain anonymous access to classified databases. That was then shown to be wrong in fact by Mr Eller. Use of the 'ftpuser' account could afford no anonymous access (and in some cases no access at all) to any database.

(ii) So, to meet Mr Eller's evidence, Kromberg 4 re-cast the alleged purpose of the allegation. It was now '*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*'.

(iii) When the witnesses pointed out that making it '*more difficult for investigators to identify Manning as the source of disclosures of classified information*' is the very essence of Article 10-protected journalistic source protection, the allegation moves back again: '*Assange agreed with Manning to crack the encrypted password hash, not to protect Manning from having her identity*

*revealed, but to facilitate the acquisition of the national defence information. That course might well have had the incidental effect of protecting Manning from discovery but that is not the allegation Assange face*s' (para 360).

8.15. In truth, the allegation is whatever it suits the US to say depending on the argument they happen to be meeting. But whichever it happens to be, its common feature is always that it aimed to facilitate Manning's anonymity (whether in accessing material on databases or in obfuscating her subsequent activities on her own computer). Providing whistle-blowers with anonymity is what journalist do. It is what their professional standards require. It is an integral part of the process of national security news gathering (Defence Closing para 11.42-43) 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, para 39). The US may regard ***Goodwin*** as '*absurd'* or '*unsustainable'* (US Closing paras 360-361), but the US offers this Court no answer to this issue.

Unredacted names

8.16. Finally, the assertion that publication of 'names' is a complete answer to the First Amendment / Article 10 issues in this case (US Closing paras 362 - 364) is plainly wrong. Assuming for these purposes that names were revealed, it is:

(i) At best relevant only to counts 15 - 17 which are (we are told) constrained by reference to '*names'*. All other counts are not limited in this way all and allege as criminal the obtaining / receipt by the press of classified information not containing names.

(ii) As multiple expert witnesses told this Court, and as academic writings plainly show, '*harm'* is irrelevant even to counts 15 - 17 as a matter of First Amendment law (see Defence Closing paras 11.48-53).[5]

(iii) Moreover, even the '*tenets of responsible journalism'* under Article 10 (***Stoll, Girleanu*** etc) would weigh the (unintentional, small and unsubstantiated) risk to a small number of sources against the risks (to millions potentially subject to global-scale ongoing war crimes and torture) that the journalist was seeking to (accurately) reveal. To this issue the US offers this Court no assistance whatsoever.

Constitutional protections

8.17. But none of that will matter anyway in the US because, per US Closing paras 398 - 399, the First Amendment will not likely run to or govern this prosecution at all.

The Human Rights Act

8.18. Finally, the US sets about constructing an argument that '*In the domestic context, Article 10 cannot be deployed as a defence*' (US Closing paras 366 - 369). Presumably this is articulated as some sort of basis to persuade the Court to ignore the fact that First Amendment will be absent from Mr Assange's trial.

8.19. What the US submits represents a fairly fundamental misunderstanding both of law and fact.

8.20. Wrong in law: It is said that defendants can *only* challenge Acts, not prosecutions, as being incompatible with the ECHR. That is obviously nonsense. What about common law offences? And, even in relation to statutory offences, UK case law is replete with prosecutions held to have violated the ECHR, under Acts that do not. What, of course, *sometimes* happens (and happened in all of the cases cited at US Closing

5. See likewise ***Shayler*** per Lord Hope at para.44: '*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'*.

paras 370 - 373) is that defendants argue that an Act (where an Act is in play) cannot have *intended* to criminalise the conduct with which they are charged because to do so would be incompatible with the ECHR. They therefore seek from the court a limiting construction of an Act, often as a preliminary issue in their trial. ***Choudary*** for example, argued unsuccessfully pre-trial that '*support'* within s.12 of the Terrorism ought always, consistently with Article 10, to be limited to material or tangible support as a matter of law.

8.21. From these decisions, the US seeks to extrapolate that defendants can never argue that *their prosecution* violates the ECHR. Of course, once a court has ruled that an Act can criminalise conduct X (e.g. in Choudary's case, the provision of non-material, intangible support for a terrorist organisation) compatibly with the ECHR, that realistically forecloses further argument when he is then prosecuted for that same conduct (per ***Choudary No. 2***). But, *non sequitur* that where no such ruling exists, such limitation nonetheless exists. No authority is cited for such a bizarre proposition.

8.22. Wrong in fact: It is next suggested that ***Shayler*** is such a ruling because it holds that s.1 OSA 1989 is compatible with Article 10 (US Closing paras 376 - 379) and therefore, it is said, that ruling precludes any possible reliance on Article 10 in Mr Assange's case. Public interest justification aside (as to which see section 12 below), ***Shayler*** of course holds that s.1(1) – which applies to Intelligence Service employees – can be applied to a whistle-blower compatibly with Article 10 (US Closing para 380). ***Shayler*** was not concerned with, and the House of Lords expressly declined to address, the Convention compatibility of the OSA, much less different sections of the OSA, as applied to the press (per Lord Bingham at para 37, Lord Hope at para 50; Lord Hutton at para 117). To suggest that ***Shayler*** precludes a member of the press arguing that the principles of Article 10 which touch upon the press freedoms render this type of prosecution Article 10-offensive – is patently wrong.

8.23. In short, beyond the bare assertion that the OSA is drafted widely enough to encompass it (US Closing paras 381 - 382), no authority whatsoever exists to support the position that '*journalists may be prosecuted for publishing damaging classified material even if they acquired it passively*' – compatibly with Article 10 (US Closing para 365). No such prosecution has ever been attempted in the UK, despite decades of such conduct occurring. Numerous examples of such conduct are included in the evidence bundles. For example, the Guardian and The Mail on Sunday both recently published the names of CIA agents (Vol L, Tabs D28, D29, D34). And for decades Cryptome has published names of intelligence agents, including the names of hundreds of MI6 and MI5 agents and informants (Vol L, Tabs D1, D2, D15, D16, D18, D19, D20). The fact that none of this has been the subject of OSA (or any) prosecution is not '*nothing to the point*' (US Closing para 387) – it is the surest indicator that such conduct is protected by Article 10.

8.24. And, insofar as reliance is being placed by the US on the 1988 White Paper that preceded the OSA, to suggest that a prosecution of the press could survive an Article 10 challenge (US Closing paras 384 - 385), the White Paper says no such thing. This Court is respectfully reminded that 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 para 41).

9. Zakrzewski abuse

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

9.1. As detailed above, all of the conduct (including, as it happens, the fresh allegations emerging from the new indictment now smuggled into this aspect of the case) outlined at US Closing paragraph 465 concerning the 'draft most wanted list' is protected by Article 10 ECHR / the First Amendment. '*Expressly solicit[ing] classified information for public release'* is protected journalistic activity. '*Encourag[ing] and caus[ing] individuals to illegally obtain and disclose protected information, including*

classified information to WikiLeaks contrary to law' is protected journalistic activity. Even if '*Manning responded to the [draft most wanted] list'* and '*provided [material to Assange] consistent with the list*', that was - so far as Assange was concerned - protected journalistic activity. See, for example, ***Stoll***. To labour the point, if this activity was unlawful, the Mail on Sunday would (have had to have) been prosecuted in ***Shayler***.

9.2. But, of course, the US assert in this prosecution, for the first time in two centuries, and without any authority to support the proposition, that such activity is unlawful.

9.3. At root, and regardless of the legal position surrounding this novel theory of criminality, this Court needs to be confident that the factual allegations that underlie it are fair, proper and accurate (per ***Murua***). They are not.

9.4. The US knows, from its own evidence in the Manning Court Martial and from publicly available information, but fails to acknowledge in the request, that:

(i) Assange did not author the 'list' (Defence Closing para 12.8);

(ii) The 'list' could not be navigated to from within the WikiLeaks site (Defence Closing para 12.13(i));

(iii) Manning and Assange never discussed the 'list' (Defence Closing para 12.13(iii));

(iv) The 'list' was completely offline from (at least) January to May 2010 (Defence Closing para 12.12) - not merely through March (US Closing para 468(1)) - i.e. it was unavailable to Manning at any point during any of the Manning uploads;

(v) 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' (Defence Closing para 12.13(ii));

(vi) With the exception of the Rules of Engagement, the 'list' never requested any of what Manning actually sent to WikiLeaks; and Manning did not in fact send any of what the 'list' did request (despite having access to it) (Defence Closing para 12.13(v) & 12.14).

(vii) It is not even established that the Rules of Engagement were on the 'list' at the material time (Defence Closing para 12.14(iv) & 12.20).

9.5. These are not '*simple evidential disputes'*. None of the above was challenged in evidence (despite ***Eason***), nor is any of it challenged in the US Closing. These are matters which stand as '*clear beyond legitimate dispute'* (per ***Zakrzewski***).

9.6. These extraordinary facts, including as it now transpires (but which had been concealed by the US request), that the war diaries, the Guantanamo materials and the Cables '*were never on the list'* at all - are however baldly stated by the US Closing to be '*an irrelevance'* (US Closing para 468((6)). The basis of that (extraordinary) submission appears to be (per US Closing para 465(3)) no more than than the following two propositions.

'Manning performed [other] searches related to material requested on the list'

9.7. What this means is that in the course of her online searches (<u>not</u> her interaction with WikiLeaks or Assange), Manning accessed <u>other</u> materials which featured on the list. This is a reference to Manning's searches for '*detainee abuse'*, '*retention of interrogation videos'*, and queries related to '*Guantanamo Bay detainee operations, interrogations, and standard operating procedures*' (Indictment, paras 11 - 12).

9.8. Aside from having no relevance to this indictment at all, the fact which emerges from these searches is that, despite having access to them, Manning <u>did not supply</u> the materials in question to WikiLeaks (see Defence Closing para 12.16). That is flatly undermining of the US case (that Manning's disclosures to WikiLeaks were '*solicited'* by the 'list'). If Manning were truly '*responding to'* the list, why would she search for documents that were supposedly requested and then not send them? Like the US request, the US Closing fails to even <u>mention</u>, much less grapple with, this.

'Material provided by Manning was consistent with the list'.

9.9. This is an (unstated) reference to '*bulk databases'* on the 'list' (see Kromberg 4). Of course, what it omitted from this (new) theory, is that the '*bulk databases'* that the 'list' sought were in fact specified by name in the list (L2, pg.12-13), and did <u>not</u>

include any of what Manning provided (see Defence Closing para 12.17). The US Closing fails to grapple with, or even address, this.

The Zakrzewski misleading goes deeper

9.10. But Court cannot even have confidence that the description of conduct underlying the US case on these two fall-back theories is fair, proper or accurate. In addition to being irrelevant, this aspect of the US request is also fundamentally misleading and partial. What the US omits is that:

(i) The subject matter of Manning's searches were prominently reported in the news just days before Manning's search queries.

(ii) Furthermore, the issues that Manning was searching the internet about had been major subjects of political debate throughout 2009. A decade later, this context has been forgotten, but even a cursory examination of the evidence before the Court of the news at the time reveals that Manning's search queries were '*directly related*' to contemporaneous stories in The New York Times, FOIA lawsuits by The American Civil Liberties Union (ACLU), and statements by Human Rights Watch.

(iii) Instead of recognizing that Manning and those contributing to the 'list' were both expressing interest in the prominent political debates of the time, the US government has chosen to disregard this crucial context entirely and present the case as if Manning must have been prompted to research these matters by a random (inaccessible, offline) web page that she never accessed.

9.11. Regarding Manning's 28 November 2009 search query: '*retention of interrogation videos'* (Indictment, para 11), the evidence before this Court is that:

(i) **(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. **(e)** 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).

(ii) 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.

9.12. Regarding Manning's 29 November 2009 search query: '*detainee abuse*' (Indictment, para 11) - and even assuming (in the US government's favour) this is related to '*detainee abuse photos*' (per the draft most wanted 'list') - the evidence before this Court is that:

(i) **(a)** In 2004, photos from the Abu Ghraib prison in Iraq were published (Vol L1, Tab 42). These photos '*showed prisoners naked or in degrading positions, sometimes with Americans posing smugly nearby*' and '*caused an uproar in the Arab world and elsewhere when they came to light*' (Vol L1, Tab 42). **(b)** The publication of these photos of detainee abuse by CBS News was the result of a governmental whistle-blowing leak (Maurizi, Tab 69, para 26). **(c)** In order to obtain additional photos of detainee abuse, the ACLU filed a FOIA lawsuit (Vol L1, Tab 43). The new set of pictures supposedly contained '*more*

than 2,000 images' and had been described by officials as '*worse than Abu Ghraib*' (Vol L1, Tab 42). The executive director of the ACLU noted that this indicated that '*it is no longer tenable to blame abuse on a few bad apples. These were policies set at the highest level*' (Vol L1, Tab 42). **(d)** In September 2008, the appeals court ruled in ACLU's favour and ordered the US government to release the additional photos (Vol L1, Tab 43). **(e)** On 14 May 2009, The New York Times reported that President Obama announced '*that he would fight to prevent the release of photographs documenting abuse of prisoners in Iraq and Afghanistan by United States military personnel*' (Vol L1, Tab 42). **(f)** On 28 May 2009, the US government '*filed a motion asking the appeals court to recall its order for the release of the photos on the grounds that it would appeal the case to the Supreme Court. The court consented and recalled its mandate on June 10*' (Vol L1, Tab 43). **(g)** On 7 August 2009, after two extensions, the US government finally filed a request for the Supreme Court to hear the appeal (Vol L1, Tab 43). **(h)** In response, on 8 September 2009, the ACLU released a statement urging the Supreme Court to deny the US government's request for appeal (Vol L1, Tab 45). ACLU's opposition was supported by friend-of-the-court briefs filed by Human Rights Watch, the International Center for Transitional Justice, Amnesty International, Reporters Committee for Freedom of the Press, and sixteen media organizations (including The New York Times) (Vol L1, Tabs 40, 45). **(i)** On 28 October 2009, the US government changed the Freedom of Information Act so that any photograph that '*relates to the treatment of individuals engaged, captured, or detained after September 11, 2001, by the Armed Forces of the United States in operations outside of the United States*' could be withheld from FOIA requests on national security grounds (Vol L1, Tab 41). **(j)** The Supreme Court ruled on ACLU's FOIA case on 30 November 2009, deciding that the case should be sent back to the appeals court to be re-heard under the revised law (Vol L1, Tabs 40, 44).

(ii) Thus, Manning searched for '*detainee abuse*' on 29 November 2009, just the day before the Supreme Court ruled on the ACLU's high-profile FOIA lawsuit requesting the release of detainee abuse photos. This lawsuit and the political debate about the detainee abuse photos were prominent topics in the news at

the time of Manning's search query and throughout 2009. The New York Times and other major media organizations regularly reported on the case as it progressed and the ACLU released regular updates about their FOIA lawsuit (Vol L1, Tab 40).

9.13. Regarding Manning's 8-9 December 2009 search queries related to: '*Guantanamo Bay detainee operations, interrogations, and standard operating procedures'* (Indictment, para 12), the evidence before this Court is that:

(i) Guantanamo was a frequent topic of political discussion in 2009 for numerous reasons. **(a)** The Obama administration was in the process of trying to close the prison and transfer the detainees elsewhere, but had encountered opposition from the Senate (Vol L1, Tabs 60, 62, 65, 66). **(b)** And in the midst of growing political pressure about the treatment of detainees, Congress had also published an investigative report about the treatment of detainees in US custody (Vol L1, Tab 67). **(c)** Human rights researchers continued to investigate issues related to Guantanamo as well. On 7 December 2009, a Seton Hall University study was published that called into question the US military's finding that three Guantanamo detainees had killed themselves (Vol L1, Tab 63). That same day, Human Rights Watch called for the release of the unredacted or minimally redacted investigative reports into the deaths (Vol L1, Tab 64).

(ii) Thus, Manning's search queries on 8-9 December 2009 were therefore entirely normal in the political context of the time.

(iii) That said, there exists an even clearer explanation for Manning's search queries on 8-9 December 2009. The evidence before this Court also shows that: **(a)** WikiLeaks had a long history of publishing documents and stories about Guantanamo Bay and had already published the Guantanamo Standard Operating Procedures (SOPs) in 2007 (Vol L1, Tabs 24, 25). **(b)** Assange collaborated on this publication with lawyers from the Center for Constitutional Rights, an academic research group at UC Davis, and a psychologist (Vol L1, Tabs 26, 27, 30, 31, 32, 35). In addition to writing joint

analyses of the documents with these partners, Assange also wrote his own stories about the documents (Vol L1, Tabs 33, 34, 36). **(c)** The release of these documents revealed inhumane conditions, including: the use of isolation and psychological stress as interrogation techniques (in violation of the Geneva Convention) (Vol L1, Tabs 25, 27, 30, 31, 35), the use of dogs to intimidate prisoners (Vol L1, Tabs 26, 36), increasing restrictions at Guantanamo Bay, including on eye contact with visitors and bans on reading material on seemingly-benign subjects such as technology or languages (Vol L1, Tabs 26, 33), severe mental illness and suicide attempts within the prison, which the military tried to cover up (Vol L1, Tab 26, 35). **(d)** In response to these revelations, the Center for Constitutional Rights '*called for the current SOP manual to be made public immediately, saying that vague assurances are not enough*' (Vol L1, Tab 35). **(e)** The WikiLeaks publication of the Guantanamo SOPs was widely reported on and publicly debated (Vol L1, Tab 28, 29, 37). **(f)** Journalists continued to cite the Guantanamo SOP documents published by WikiLeaks into 2009, with Jeremy Scahill relying on them in a story about Immediate Reaction Force (IRF) teams that '*operate at Guantánamo as an extrajudicial terror squad that has regularly brutalized prisoners outside of the interrogation room, gang beating them, forcing their heads into toilets, breaking bones, gouging their eyes, squeezing their testicles, urinating on a prisoner's head, banging their heads on concrete floors and hog-tying them -- sometimes leaving prisoners tied in excruciating positions for hours on end*.' (Vol L1, Tab 48).

(iv) Manning even admitted, to the knowledge of the US Government, to '*reviewing the WLO website, I found information regarding US military SOPs for Camp Delta at Guantanamo Bay, Cuba'* (Vol H, Tab 17).

9.14. The US case, that these (factually irrelevant) searches (for matters that 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.

The second Zakrzewski abuse: the 'passcode hash' allegation

9.15. The Court is firstly reminded that this 'conspiracy' (indeed any conspiracy) was never alleged against Manning. Little wonder, the Court might think, when it considers what the allegation, as aired against Assange, deliberately omits.

The conspiracy suggested was impossible

9.16. The evidence this Court heard on this issue was abundantly clear (see Defence Closing para 12.23). It is, as Mr Eller told this Court, what the US government's own experts concluded in the Court Martial (Eller, Tr 25.9.20, re-x, pg.52) (see Shaver, H3 pg.8538).

9.17. Yet, the US now attempts to suggest otherwise before this Court by means which are respectively absurd (US Closing para 476) and misleading (US Closing para 477):

(i) Absurd (US Closing para 476): It is suggested that a 1999 SysKey security flaw (in Windows NT), which had been 'patched' by Microsoft immediately, is nonetheless relevant because '*there is no evidence the patch was applied to Manning's computer*'. The notion that a security issue from 1999, in a predecessor version of Windows, cured by Microsoft in 1999 to '*eliminate the vulnerability and makes it computationally infeasible*' to decode (Eller, Tr. 265.9.20, xx pg.42), nonetheless persisted in Windows XP (Tr. 25.9.20, xic, pg.26 / xx pg.40) in 2010, is arrant desperation. So fantastical is the notion that it was not even suggested to Mr Eller (TR 25.9.20, xx p42).

(ii) Misleading (US Closing para 477): The evidence Mr Eller actually gave was:
'...Q: And would you agree that a skilled hacker can sometimes break even the strongest encryption?
A: Yes.
Q: Thank you. Right, let us just move to something else then. Next topic.
A: But that is also when all the data is provided...'

No useful purpose

9.18. The US Closing takes no issue with any of Mr Eller's evidence that accessing the 'FTP user' local account **(a)** would not have provided Manning with more access to databases than she already possessed, **(b)** would not have enabled Manning to have downloaded any data '*anonymously'* onto her computer from any government database (Defence Closing paras 12.25-34), and **(c)** that Manning knew this (Vol M2, Tab 499, pg.37) (Eller Tr 25.9.20, xic, p30 – unchallenged).

9.19. Instead, the US relies (US Closing paras 480 - 482) on Mr Eller's acknowledgement that '*using the FTP user account would have provided some anonymity for the task of exfiltrating materials from the government machine onto a non-government machine, stage [c] of Mr Kromberg's analysis'* (Eller, Tr. 25.9.20, xx. pgs.46-47 / re-x, pg.54). See Defence Closing para 12.35.

9.20. What he also told this Court (but the US Closing completely omits) was that using the 'FTP user' account in this way would have left the original downloads from the databases onto Manning's computer (stages (a) and (b) of Mr Kromberg's analysis) still traceable to Manning's own computer. '*The original download onto the SCIF computer [would] still be traceable to her*' (Eller, Tr. 25.9.20, xic, pg.33). '*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, Tr. 25.9.20, re-x, pg.54). That evidence was unchallenged.

9.21. 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'* ascribed by the US to the passcode hash conversation.

9.22. Neither does the US Closing *even address* the evidence, clear from the Court Martial record from military witnesses, that **(a)** local user accounts with administrative access (such as Mr Eller told this Court the 'FTP user' account was) would, by contrast, have enabled the (known practice of) installation of programs to play

movies / music, nor **(b)** the recent re-imaging of Manning's computer which made re-installation of those programs necessary (Defence Closing para 12.41).

The third Zakrzewski abuse: The alleged recklessness as to sources

9.23. 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*, on the premise that, Assange disclosed (or obtained/received for publication)[6] war diaries and cables containing unredacted names of intelligence sources; '*wilfully*' and '*knowingly*' and '*with reason to believe*' that the information was to be used to the injury of the US.

9.24. What the US knew, but concealed from its request, was that any release of such 'names' only occurred following, and despite, all-embracing redaction efforts, including the creation of unique collaborative media alliances. In short, the US knew (not least because the White House and the State Department had been party to them) that a comprehensive and deliberate system had been put in place by Assange <u>to prevent</u> the release of any names (Defence Closing paras 12.44-46).

9.25. The contrary suggestion ventilated before this Court in September with certain witnesses (by reference to a hearsay account of a restaurant conversation by a disaffected media partner, or a Frontline Club speech misleadingly taken out of context and truncated) -unsurprisingly - no longer features at all in the US Closing.

9.26. The true picture, known to the US, and now '*clear beyond legitimate dispute*' (per ***Zakrzewski***), is that Assange had been striving <u>to prevent</u> the release of any such

6. This is most definitely <u>not</u> a submission that only attaches the counts 15-17 (per US Closing para.485). These are merely the three counts that rely <u>exclusively</u> on this allegation. The US indictment is replete with the allegations that the obtaining / receipt of information was also for the purpose of publication. See, e.g. the very first paragraph of the Indictment ('"*1. <u>To obtain information to release on the WikiLeaks website</u>, ASSANGE recruited sources and predicated the success of WikiLeaks in part upon the recruitment of sources to (i) illegally circumvent legal safeguards on information, including classification restrictions and computer and network access restrictions; (ii) <u>provide that illegally obtained information to WikiLeaks for public dissemination</u>; and (iii) continue the pattern of illegally <u>procuring and providing classified and hacked information to WikiLeaks for distribution to the public</u>*').

names. If they emerged,[7] it was, and was known to the US to be, unwanted and unintended.[8]

9.27. That would have been the proper factual context for the allegation that a small number of names entered the public domain (none of whom can be said to have come to actual harm).[9] Aside from being centrally relevant to this Court's dual criminality assessment, it is the US case that the issue of '*harm'* is relevant to the Article 10 / First Amendment assessment this Court has 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, paras 8-9). What the US concealed at all stages was its knowledge that names were released (if indeed they were) in the face of strenuous efforts to prevent it. Instead, the US request materials are 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, paras 8-9, 22) (Kromberg 2, para 10), or '*knowingly putting their lives at risk*' (Dwyer para 44; Kromberg 5 paras 78; US Opening Note para 280 - 281). It is simply inexplicable that the US indictment was framed for the Grand Jury, and the extradition request was framed for this Court, completely omitting the US's knowledge that he had, in fact, been acting to prevent that happening. This was, and is, an unambiguous ***Zakrzewski*** abuse. And is ongoing (US Closing paras 34 - 35, 73, 359).

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7. It was not Assange who confirmed that the 300 sensitive names, said by the DoD to have been published, had been redacted in the version of the documents published by WikiLeaks (US Closing para.493(1)) – it was the DoD Pentagon spokesman (Vol Q, Tab 2). Furthermore, while the War Logs may have included names of people that soldiers interacted with in passing on the street or similar, they would not have contained the names of human intelligence sources (or other high level sources). This was confirmed many times during Manning's Court Martial. See e.g. Vol H15, p7834 (Prosecution Witness Kyle Balonek);
Q. Now, in the human reports, you wouldn't identify the sources by name, right?
A. No, sir.
Q. They were by number?
A. That's correct.
Q. And with regards to the SIGACTs, SIGACTs, they didn't have sources in them, right?
A. They had a reporting -- they had the name of whoever reported the SIGACT.
Q. But I'm talking about sources, sources for information.
A. Not that I can remember, sir.
Q. You wouldn't list a true HUMINT source in a SIGACT, correct?
A. No, sir.
Q. You wouldn't do that because, why?
A. To protect the source...'

8. And, on the evidence, done by the media partners (Goetz, Tab 31, para.25 / Mauritzi, Tab 69, para.45 / Hager, Tab 71, para.16).

9. US Closing para. 486(4).

9.28. To assert, as the US does at Closing para 486(5) that '*it does not matter if Assange took measures to protect sensitive information...[because] he still published the names'* is to try to reduce criminality to an issue of bare factual causation. That is simply not how any law operates (see e.g. ***R v Kennedy (No. 2)*** [2008] 1 AC 269).

9.29. Worse still, in order to obfuscate that clear abuse, the US has set in train a series of further misrepresentations, especially so far as the cables are concerned:

(i) It has sought to suggest that Assange purposefully released 133,887 cables *en masse* in August 2011 which, it is said, contained '*names marked strictly protect'*; and

(ii) It has sought to suggest that Assange also released the entire 250,000 unredacted cable database in September 2011.

The 133,887 cables in August

9.30. This allegation is utterly outrageous. It is addressed at Defence Closing paras 12.69-72. The US government knows (not least because the State Department was forewarned) that this release contained unclassified cables (and the US knew the reason that release was made). Prof. Grothoff told this Court that he had verified (what the US knew all along) and confirmed that the cables were unclassified. That evidence was not challenged.

9.31. It is patently ridiculous to suggest that unclassified materials could 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.

9.32. Yet, this Court was still invited to conclude, *by reference to press reports*, that these unclassified cables '*contained names'*. When the US finally disclosed evidence (rather than press reports) which underpinned this bizarre submission, it transpired (per Kromberg 6) that the assertion had been based upon '*investigators [having] downloaded from the WikiLeaks website on August 30, 2011... approximately 140,000 State Department cables'*. That is to say, the sample group from which the assertion came contained both the 133,887 unclassified cables, and additional

classified ones (i.e. cables released by the media partnership following careful redaction efforts designed to prevent names being published). 'Names' were (only) present in the '*classified'* portion of them according to Mr Kromberg. The Court is invited to read this evidence carefully. It does not say that names had been disclosed by the 133,887 unclassified cables released *en masse* in August. It is a matter for the Court whether the Court regards this as sleight of hand or as muddled drafting. But it formed (and still appears to form – see US Closing paras 510(5) & 513(4)) the foundation for misconceived submissions to this Court that the 133,887 unclassified cables disclosed sensitive names. They did not.

9.33. The end position of the evidence is that the 133,887 cables were unclassified (as was unchallenged), and revealed no names, and are not the subject of this indictment. Continued reference by the US to press reports that wrongly suggest otherwise (US Closing para 489) is unfortunate, to say the least.

The 250,000 cables in September

9.34. These cables, by contrast, did contain names. On this issue, however, the US knowingly concealed everything about the circumstances of the publication of these cables. Ultimately, it concealed from the Court (and presumably the Grand Jury) that the cables had been published multiple times by multiple other media outlets beforehand.

9.35. On this, Prof. Grothoff's evidence was completely clear. The Court will recall that counsel for Assange was prevented from even re-examining Prof Grothoff based on the assertion from the US that the chronology was *'not disputed'* (Tr. 21.9.20, re-x, pg.55). It ought therefore to come as a something of a surprise to the Court (to put it as neutrally as possible) that the US Closing now cavils with the chronology described by Prof. Grothoff (US Closing para 508). The following are not '*the defendant's own narrative'*:

(i) Para 508(1): The evidence (notably Leigh's own book) does show that the password to the cables was provided to Leigh (as media partner) reluctantly. Moreover, this was a topic first introduced by the US in cross examination (Tr.

21.9.20, xx, pgs.22 - 23 / re-x pgs.47 - 48) – who were then (speculatively) exploring the possibility that other media partners might have also been given access to the entire unredacted cache of cables.

(ii) Para 508(2): WikiLeaks did state - contemporaneously (in a tweet at 5.05am on 1 September) – that even by then '*the full database [was already] downloadable from hundreds of sites*' (Grothoff, Tr. 21.9.20, xx, pgs.42 - 43). Once again, this was evidence introduced by the US (in the US's cross-examination bundle for Prof. Grothoff at p.16). It is, with respect, surreal for the US to then criticise the defence for citing that evidence (US Closing para 509).

9.36. The chronology relevant to the unredacted cable release is summarised at Defence Closing paras 12.48-54. It is, with respect, the US' revision of the chronology (at US Closing para 510) that inserts '*colour'*. Almost every stage of it is incomplete or wrong. For example:

(i) Para 510(1): 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 (Defence Closing para 12.48(i)-(ii)), with the written password being partial only with an additional word given orally (Defence Closing para 12.48(ii)) (Vol P, Tab C201). This Court also has 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) Para 510(2): 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.[10]

10. During which the redaction process was strengthened through the incorporation of local media partners with the necessary local knowledge to effect redactions (Mauritzi, Tab 69, para.16) (Goetz , Tab 31, para.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 that pertained to their country or

(iii) Para 510(3): **(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 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)** Para 510(3) does not mention that the mirrors '*encouraged'* by WikiLeaks would not and did <u>not</u> include the cables file (Defence Closing para 12.48(iv)), **(c)** Nor does para 510(3) mention that the cables file only emerged in mirrors created by others using different software (Defence Closing para 12.48(iv)) (Vol P, Tabs C203, 205, 214). **(d)** Nor does para 510(3) mention that, in any event, all mirrors were outside of the control of WikiLeaks / Assange (Defence Closing para 12.48(vii)).

(iv) Para 510(4): **(a)** Mr Assange does not '*assert'* that the password published by Leigh to the (now mirrored) cables file could not be changed; that is the <u>unchallenged</u> expert evidence of Prof. Grothoff (Defence Closing para 12.48(vii) & 12.68). **(b)** Neither (having not challenged that evidence) is it open to the US 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'* (Defence Closing para 12.68).

(v) Para 510 (5): **(a)** Mr Assange does not '*claim'* that the 133,887 cables released in August were unclassified; that is what the statistics show (Defence Closing para 12.69, 71) (Vol P, Tabs C157, C234 - 244); it is what the State

region (Goetz, Tab 31, para.21). Stefania Maurizi, for example, was given access to only 4,189 cables (Maurizi, Tab 69, para.16) and described how she was given the subset of the cables on an encrypted USB stick (instead of via a temporary website) and noted that the decryption passphrase she was given was not the same passphrase published by David Leigh (Mauritzi, Tab 69, para.17).

Department transcripts show (Vol P, Tab C227); it is what WikiLeaks announced at the time (Vol P, Tab C233, 217); and ultimately it is the unchallenged expert evidence of Prof. Grothoff who has independently verified the same (Defence Closing paras 12.69-71). **(b)** Neither does Kromberg 6, on careful reading, show otherwise. As discussed above, Mr Kromberg is talking about a wider sample of cables, which contained additional '*classified'* cables.

(vi) Para 510(6): **(a)** Omits Mr Assange's communications with Der Freitag (Augstein) to prevent their publication (Defence Closing para 12.48(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 (Defence Closing para 12.48(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.

(vii) Para 510(7): **(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 (Defence Closing para 12.48(xi)) (Vol P, Tabs C221 - 227). **(b)** The US even also omits its own evidence contained within its cross-examination bundle of WikiLeaks efforts to deflect attention from the Der Freitag article (Defence Closing para 12.49).

(viii) Para 510(8): **(a)** Omits all reference to Cryptome's actions on 31 August publishing the text of the '*specific passphrase and [the exact name of] which file it decrypts'* online (Defence Closing para 12.50). 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 (Defence Closing para 12.51).[11]

(ix) Para 510(9): 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) Para 510(11): 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 has shown, from <u>contemporaneous</u> materials (Parry's blog) that Parry confirmed, contemporaneously, that that is what occurred (Defence Closing para 12.52(i)). Whether or not Prof. Grothoff can now recreate the event from the wayback machine is completely irrelevant.[12]

(xi) Para 510(12):[13] The evidence is in fact that the cables were already online long before yoshimo / Pirate Bay: at '*hundreds of [other] sites*' by 5.05am (Defence Closing para 12.57[14]); including at Cryptome by 12.27am (Defence Closing para 12.52(ii); and at Nim_99 before that (Defence Closing para 12.52(i)).

(xii) Para 510(13): The evidence is that Cryptome posted the cable database online at or before 12.27am on 1 September (Defence Closing para 12.52(ii) (Vol P, Tab C206)).

(xiii) Para 510(14):[15] Omits the fact that the US army themselves obtained a copy of the database from Pirate Bay on 1 September (Defence Closing para 12.52(v)).

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11. 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).
12. In fact, as it happens, Nim_99's twitter post from 10.08pm on 31 August is still available online.
13. It is yoshimo, not yoshima.
14. Defence Closing §12.57 contains a timing error. The quotation is not from the 31 August 11.44pm editorial, but rather from the following 1 September 5.05am tweet (found at prosecution cross-examination bundle for Prof. Grothoff, p16). The point remains
15. It is droehein, not draheem.

(xiv) Para 510(15): mrkva.eu published '*the first searchable copy of the cables'* at cables.mrkva.eu and tweeted the location of the publication on 1 September (Defence Closing para 12.53) (Vol P, Tab C209).

9.37. In sum, and contrary to US Closing para 511(2),[16] 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'*.

9.38. This is not '*Assange [saying] in response simply that he disputes this'* (US Closing para 486(6)), it is '*clear beyond legitimate dispute'* that all this occurred. Yet none of this, of course, was discernible from the face of the extradition request.

9.39. Faced with this '*clear beyond legitimate doubt'* evidence, the US next sets about a '*so what?*' submission (at US Closing para 512(4)-(6)). Here, it is disputed by the US that ***Attorney-General v Guardian Newspapers (No 2)*** [1990] 1 AC 109 ('Spycatcher') is authority for the proposition that re-publication of material already in the public domain is not a criminal offence in this jurisdiction, and for the purposes of this Court's dual criminality assessment, because it does not occasion damage. The headnote to Spycatcher records that the House of Lords there held that:

> '...*a third party in possession of information known to be confidential was bound by a duty of confidence unless the duty was extinguished by the information becoming available to the general public or the duty was outweighed by a countervailing public interest requiring disclosure of the information; that in seeking to restrain the disclosure of government secrets the Crown must demonstrate that disclosure was likely to damage or had damaged the public interest before relief could be granted; that since the world-wide publication of Spycatcher had destroyed any secrecy as to its*

16. '*Because there is evidence of a website with far less presence/visibility on the internet publishing the material 14 hours earlier, [the defence allege] the proceedings amount to a Zakrzewski abuse'*.

contents, and copies of it were readily available to any individual who wished to obtain them, continuation of the injunctions was not necessary; and that, accordingly, the injunctions should be discharged'. Accordingly, '*since the information in Spycatcher was now in the public domain and no longer confidential no further damage could be done to the public interest that had not already been done; that no injunction should be granted against the "Observer" and "The Guardian" restraining them from reporting on the contents of the book'*. See pp. 260A-E (Lord Keith), 267B-E (Lord Brightman), 276A-B (Lord Griffiths), 290E-G (Lord Goff), 293E-F (Lord Jauncey).

9.40. As Lord Brightman put it

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

9.41. The US then asserts that (even if Spycatcher says what it does) it is a civil case (US Closing para 512(6)). But as Lord Hope held in ***Shayler*** at paras 81 - 83 by reference to Spycatcher '*There is parity on this point between the two systems'* (the OSA criminal system including judicial review and the civil pre-publication injunction system).

9.42. Neither is it any answer to suggest that WikiLeaks' re-publication might have had greater reach (US Closing para 512(3)). **(a)** Prior to 2 September, the '*reach'* of the database published by others was such that the US itself had downloaded it (Grothoff 2, Tab 59, para 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, Tab 59, para 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. The Telegraph reported that this publication by Cryptome was sufficient 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).

9.43. Finally, and bizarrely, the US sets about submitting (US Closing para 513) that all the other points that Mr Kromberg submitted in response to this abuse issue (and which the defence dissect at Defence Closing paras 12.61-77) were '*on the periphery*' or '*irrelevant*' or *'of marginal relevance'*. The defence agree. They should never have been raised.

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

10.1. The US urges that this Court should not adjudicate in these proceedings on a submission that the '*United States of America is guilty of torture, war crimes, murder*' (US Closing para 2). Whilst such issues can be highly relevant to s.81 issues, and to

the human rights issues (see above, paras 1.4-5), for the purposes of these submissions, the defence agrees. As the Court is aware from multiple discussions that took place during the September hearing, the contrary is not and has not been suggested.

10.2. What is suggested, and what the uncontested evidence detailed at Defence Closing paragraphs 13.1-27 showed, was that the Manning disclosures contained evidence suggesting the existence of those things. That is the unchallenged evidential position before this Court. Just as the US did not challenge any of the evidence on that issue, neither does it do so in submissions. The Court is therefore faced with disclosures which, it can safely be satisfied, revealed evidence suggesting the commission of ongoing state criminality at the very apex of the international legal order.

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

10.3. The notion, now apparently advanced, that the principles of necessity outlined in ***Shayler*** CA at paras 63 - 64 would not justify steps to prevent those crimes apparent continuing (US Closing paras 19 - 25, 33 - 35), is completely fanciful:

(i) '*Avoid[ing] imminent peril of danger to life or serious injury'* to those the subject of the apparently ongoing war crimes, torture, etc that the materials suggested were occurring on an ongoing basis, is precisely what the Manning disclosures did.

(ii) Anyone in possession of such information, as Manning and then Assange were, was manifestly in a position of responsibility towards those in Afghanistan, Iraq, Guantanamo etc. That is because it is '*possible to describe the individuals by reference to the action which is threatened would be taken which would make them victims absent avoiding action being taken by the defendant [and therefore] the defendant has responsibility for them because he is placed in a position where he is required to make a choice whether to take or not to take the action which it is said will avoid them being injured*' (per ***Shayler*** CA para 63).

10.4. By obvious contrast, Mr Shayler was exposing historic misconduct within MI5, and could therefore not '*identify any incident which is going to create danger to the member of the public which his actions were designed to avoid*' (***Shayler*** CA para 65). The position appears to have been likewise in ***R v Finch*** (US Closing para 28).

10.5. Much more relevant to this case are the observations of the DPP in ***R v Gun.*** When consideration was given in 2004 to the prosecution of GCHQ translator Katherine Gun, who leaked materials to the press regarding ongoing UK involvement in spying on members of the UN to help secure a UN resolution supporting the invasion of Iraq, the Crown accepted that '*necessity'* was not only available to Ms Gun, it operated to prevent her prosecution. In a statement issued by the DPP on 26 February 2004, offering no evidence, it was said that: *'...The evidential deficiency related to the prosecution's inability within the current statutory framework to disprove the defence of necessity to be raised on the particular facts of this case...'* (Bundle Q, Tab 9).

10.6. The House of Lords in ***Shayler*** did not endorse, but did not (as they could have) overrule the Court of Appeal's ruling (that necessity is available under the OSA). ***R v Gun*** confirms its continuing availability, on facts far less dramatic than here.

10.7. Neither, for the avoidance of doubt, is this a ***Shayler***-prohibited '*public interest'* claim (US Closing paras 26 - 27). There was obviously a high public interest in disclosing evidence of US war crimes. But what takes them past '*public interest'* and into the realms of '*necessity'* however is that the materials suggested that those war crimes were ongoing. The defence agree there should be no '*elision'* of necessity with public interest. Exposing evidence of ongoing war crimes not only serves the public interest it separately serves to '*avoid imminent peril of danger to life or serious injury'.*

None of this is relevant under US law

10.8. The evidence before this Court shows conclusively (because it was unchallenged) that no sort of examination of the necessity of these disclosures '*avoid[ing] imminent peril of danger to life or serious injury'* will or can occur in the US.

The result for these proceedings

10.9. The result is therefore this. This Court is being asked to extradite for conduct which would not result in conviction in the UK. That is an alarming state of affairs.

10.10. The first '*answer'* to this advanced by the US is s.137(7A) – to the effect that defence evidence is inadmissible to dual criminality (US Closing paras 9 - 11, 23, 30). Not so, however, if the US request is misleading by omission (see ***USA v Shlesinger*** [2013] EWHC 2671 (Admin) at para 13 - 22). Here, on the issue of necessity, all relevant facts were omitted from the request. As the High Court did in ***Murua*** (paras 61 – 64), concluding that new material meant the original request could not be considered to '*give particulars of conduct capable of constituting a viable extradition offence'* (para 64), this Court is obliged to consider the true facts.

10.11. And this Court can safely proceed on the basis that those facts are accurate (***Zakrzewski*** at para 13) because they have gone unchallenged, despite this Court having expressly drawn the US's attention to ***Eason v USA*** [2020] EWHC 604 (Admin) at paragraph 12: '...*Whatever may or may not be or have become the practice in extradition proceedings, 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*...'.

10.12. Secondly, it is suggested by the US that necessity is a defence and that this Court is not concerned with '*defences'* per ***In re: Evans*** (US Closing paras 16 - 18, 31 - 32). ***Evans***, however, does not consider the position of '*defences'* <u>which the prosecution are required, under UK law, to disprove, and nor does any other UK case</u>. Ordinary defences are usually excluded because this Court cannot know the evidential matrix for them (what evidence will the defence adduce? Will that evidence satisfy a jury?).

Not so here. A court faced with a defence on which the defendant bears only a persuasive burden (can he raise evidence before a judge to render the issue arguable?) does know the relevant factual matrix. It knows here that, in a UK trial, the prosecution would be required to disprove necessity, and it can demand to know how the US says it can/will do so (in exactly the same way that the US must explain to this court how it can/will establish all other elements of that which it needs to prove).

10.13. In the knowledge that no UK authority at all supports its submissions, the US then seeks to rely upon the Canadian case of ***M.M v United States of America*** [2015] 3 RCS 973. What the US omits to inform the Court this time is that the extradition scheme in Canada splits consideration of dual criminality into two different phases, the first phase being addressed by a judge, who it is true is not entitled to consider the existence of defences, and the second phase being addressed by the Minister of Justice, who does take into account the availability of defences under Canadian law. In short, Canada would not (contrary to the partial submission advanced by the US here) sanction extradition in circumstances such as these.

10.14. Ultimately, the *reason* the US can point to no authority, anywhere, which holds (in the way that the US submits) that any country's extradition scheme is deliberately blind to '*defences'* which the prosecution are required under the law of the requested state to disprove - is *because* the consequences of an extradition court not addressing such an issue (here, necessity), in a case where it knows that the courts of the requesting state will not do so, are so exceptionally serious. As the High Court explained in ***Cleveland***, it carries the (legally unacceptable) risk that Mr Assange will be convicted for conduct which was, or may have been, necessary and therefore lawful as a matter of UK law. Such an outcome is inherently inconsistent with any extradition scheme, anywhere, and to the core principles of international comity. No country, anywhere, operates a scheme which surrenders people for conduct it does not regard as criminal. On the US approach advocated in this case, had Katherine Gun's conduct touched on America, she would have had no answer to an extradition request, and would have been prosecuted rather than discharged, despite her

conduct being entirely lawful under UK law. She would likely still be in prison in the US.

10.15. Relatedly, therefore, this Court might finally wish to reflect upon the protections deliberately written into section 9 of the OSA, namely the predicate requirement for any OSA prosecution to obtain permission from the Attorney General. Such a decision would be taken by the Attorney General in his or her capacity as '*guardian of the public interest'* (***Shayler*** para 35 per Lord Bingham) and would thus inevitably involve a consideration of whether a defence of necessity arises.

11. Section 81(a): Disclosing criminality

11.1. The US Closing contains no answer to (or even submissions on) Part 14 of the Defence Closing

12. Serving the public interest and Article 10 again

The content of the Manning disclosures

12.1. The US does not suggest (much less seriously suggest) that the Manning disclosures were not disclosures that served and furthered the public interest. Just as the US did not challenge any of the evidence on the high public interest served by these disclosures at the hearing in September (see Defence Closing paras 15.1-16), neither does it do so in submissions.

Shayler

12.2. The US says instead that ***Shayler*** shows that the OSA is blind to public interest justification, and ***Shayler*** ruled that that was consistent with Article 10 (US Closing

paras 376 - 379). If, presumably says the US, no public interest justification would be examined in the UK, it cannot be ECHR-offensive to extradite to a country where such issues will similarly not be considered by the trial court.

The pregnant issue

12.3. At the outset it needs to be made clear that the defence do not accept that ***Shayler*** is good law. Its holding (that there can be no public interest justification to an OSA charge despite the application of Article 10) is directly contrary to ***Stoll*** at paras 101-139. According to the Grand Chamber, there '*must be'* a weighing by the domestic court of the public 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'* (para 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*' (para 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*' (para 139). ***Shayler***, and its prohibition on any public interest justification, by contrast does precisely that which the Grand Chamber prohibits

12.4. ***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'*.

12.5. It is also notable also that the Law Commission has recently recommended an overhaul of ***Shayler*** as being contrary to modern Strasbourg case law.[17] In Part III (chapters 8 - 11), the Law Commission concludes, by reference to ECtHR case law, that '*we cannot be certain that the current legislative scheme, in the OSA 1989, affords adequate protection to Article 10 rights under the ECHR'* (para 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'* (para 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*' (para 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*' (para 9.90).

12.6. The defendant accepts that, as a matter of precedent, this Court is bound to apply ***Shayler*** and not the contrary decisions of the ECtHR: per ***Kay v Lambeth Borough Council*** [2006] 2 AC 465. The defence therefore reserve its submissions on the correctness of ***Shayler*** for another forum should it be necessary. For this reason, the defence have not sought to develop this issue, or the kind of review of the Strasbourg case law outlined in Chapter 9 of the Law Commission's report. This Court is obliged to follow ***Shayler*** and proceed on the (artificial and erroneous) basis that the OSA renders criminal the acts of those serving and disclosing matters in the public interest.

Shayler

12.7. As this Court well knows, the *reason* however the House of Lords held in ***Shayler*** the OSA could criminalise compatibly with 10 without consideration of the public

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

interest in disclosure was because there exist other, complimentary, Article 10-compliant schemes that apply to the situation of a whistle-blower. Namely, routes of disclosure to other agencies, with a robust system of judicial review to back them up. That way, the English system achieves Article 10 compliance, per the House of Lords (Defence Closing paras 15.19-22).

12.8. As the defence witnesses have repeatedly stated, no such comparable system exists under US law (Defence Closing paras 15.18, 23-27). No witnesses were challenged on the subject. It was even the agreed evidence of Mr Jaffar (Jaffer, Tab 22, para 7). Yet the US Closing, completely impermissibly, now seeks to introduce evidence on this issue (in the guise of submissions) that this Court has neither admitted, received, nor has its content been put to any witness as it should have been (see US Closing para 396).

13. **The ICC and this prosecution**

13.1. None of the following evidence (given by Mr 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 (above, Part 11);
(ii) That the US had engaged in unlawful efforts to prevent and frustrate judicial inquiry into the same (Defence Closing paras 13.8-10, 16.2-3);
(iii) That the US has engaged in a campaign of interference with, and frustration of, the ICC (Defence Closing paras 16.11-17);
(iv) That the ICC prosecutor applied to open its investigation into the criminality the subject matter of the Manning disclosures in November 2017 (Defence Closing paras 16.4-5);
(v) That this prosecution (of a source of the ICC's evidence) emerged *days* afterwards (Defence Closing paras 16.6); and
(vi) That the US has, since then, continued its campaign of interference with, and frustration of, the ICC ((Defence Closing paras 16.18-30).

13.2. Neither was the evidence before this Court - that it is reasonable to infer that (v) was motivated by (iv) in this case (because of (i)-(iii) & (vi)) - the subject of any challenge in the evidential hearing in September (Defence Closing paras 16.7). Mr Lewis' unchallenged evidence was 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, Tab 81, paras 9, 16 / Tr. 14.9.20, pg.6).

13.3. The US Closing likewise contains no answer to (or even submissions on) Part 16 of the Defence Closing.

PART C

14. **Article 3**

14.1. The prosecution effectively seek to argue that the argument based on liability to SAMs is foreclosed by the two decisions of the European Court on admissibility and on the merits in ***Babar Ahmad v United Kingdom*** (2013) 56 E.H.R.R. 1., some 8 years ago.

14.2. These decisions have been exhaustively analysed in the Defence Closing Submissions as set out at paragraph 19.5 *et seq.* They are no authority for the proposition that detention in isolation in the US federal system under SAMs will always comply with Article 3. On the contrary they contemplate that indefinite segregation in conditions of isolation could violated Article 3 (Defence Closing Submissions, para 19.8). That is particularly so if the detention is long-lasting or indefinite, there is no system of review in place and there would not be appropriate treatment for those with mental illness (Defence Closing Submissions, para 19.9 *et seq*).

14.3. At paragraph 19.12 of the Defence Closing Submissions, the defence have identified the developments and further revelations since the decision in ***Ahmad*** that justify a reconsideration. In any event the doctrine of *res judicata* does not apply in criminal proceedings, see ***Connelly v DPP*** [1964] A.C. 1254. Moreover, this Court has heard specific, up to date, expert evidence from Maureen Baird and Lindsay Lewis. The Court is invited to rely on the evidence of those two witnesses and Eric Lewis. It is accepted that the Court may well decide to give limited weight to Mr Sickler's evidence on SAMs because of his admission in cross-examination that he himself had no direct experience of the SAMs regime. Indeed, given the prosecution's attack on him during live evidence, it is somewhat surprising that they nonetheless seek to rely so heavily what Mr Sickler was induced to concede, in cross-examination, as to the risk of SAMs being a matter of conjecture (set out in the Prosecution Submissions, para 135). Moreover, in re-examination at Tr. 28.09.2020, pg. 83, ll 9 – 33, he explained in some detail the very good reasons why he did in fact think that there was '*a real risk of SAMs'*, including the 'national security' nature of the

allegations, the risk of a very long sentence, and the fact that he was facing 17 charges of espionage.

14.4. It is obviously necessary to distinguish the position **pre-trial** and **post-trial** as the prosecution themselves submit.

14.5. As to **pre-trial**, the real risk of detention in conditions of isolation at the Alexandria Detention Center (ADC) was established by the evidence of Yancey Ellis, Eric Lewis, Maureen Baird, and Lindsay Lewis. The likelihood of SAMs was clearly established, as was the alternative risk of administrative segregation recognised by Yancey Ellis and Joel Sickler himself. In relation to pre-trial SAMs, the prosecution rely on the admissibility decision in ***Ahmad*** that pre-trial detention under SAMs does not give rise to an issue under Article 3 (see para 129 of the decision cited in the US Closing para 182). But that decision does not preclude reconsideration ten years later in the light of the specific evidence heard by this Court. Nor does the fact that Julian Assange will be permitted to confer with his lawyers remove the extremely damaging effects of pre-trial detention at ADC, in conditions of isolation. It has to be remembered that that Chelsea Manning herself was driven to attempt suicide at ADC in circumstances described by Robert Boyle (Boyle 2, Tab 49, para 12). Furthermore, there is a stark and inhumane contrast between the access to family that Julian Assange now has at HMP Belmarsh, and would have in the US if subject to SAMs, either pre-trial or post-trial. In the US, if subject to SAMs, he would only be permitted half an hour of phone calls per month, as was clearly established by the unchallenged evidence of Maureen Baird (Tr. 29.09.20, pg.4, ll 1 – 3). By contrast, he and other prisoners at HMP Belmarsh are usually permitted 90 minutes per day. That contrast is telling testimony to the inhumanity of conditions under SAMs in the US even at the pre-trial stage.

14.6. As to the position **post-trial**, here the evidence of inhumanity is even stronger and clearer. Firstly, the evidence is overwhelming that there is a **real risk, indeed a virtual certainty**, that Julian Assange being subjected to SAMs post-trial. That evidence came from the categorical expert opinions of Eric Lewis, Lindsay Lewis and Maureen Baird (see Defence Closing Submissions, para 21.1). Their assessment is based on the fact that this is a ‘national security’ case and the fact that Julian

Assange faces 17 charges of espionage. Moreover, the test laid down in the rules includes whether there is '*a danger that the inmate will disclose'* '*classified information'* and it is almost certain that the CIA will assert such a risk and the Attorney General will authorise SAMs accordingly. That follows from the very nature of the prosecution allegations at paragraph 31 – 34 of the First Superseding Indictment, where there is repeated reference to the 'threat' by WikiLeaks to '*disclose additional [classified] information'*. As against that clear expert evidence, and those clear objective reasons why SAMs *will* be imposed, the prosecution merely have the unexamined and untested assertion of Mr Kromberg that Julian Assange *may* be subject to SAMs but that it is a matter of conjecture. But, as Maureen Baird pointed out, the very fact that Mr Kromberg expressly allowed for the possibility of SAMs is eloquent testimony that there is recognised to be a likelihood that SAMs will in fact be imposed (see evidence of Maureen Baird, Tr. 29.09.20, pg. 3, ll 1 – 3 and pg.16, ll 21 – 29).

14.7. If Julian Assange is subjected to SAMs it is likely that he will be detained in ADX Florence in H Unit and certainly there is a **very real risk** that he will be so detained (Defence Closing Submissions, paras 21.2 – 21.6).

14.8. The prosecution have done little to contradict or undermine the evidence of the defence experts, Eric Lewis, Lindsay Lewis, and Maureen Baird, that **there is a real risk, indeed a likelihood, that Julian Assange will be detained in ADX Florence and most probably in H Unit** (see Defence Closing Submissions at 21.1). The prosecution have simply sought to rely on the earlier decision in 2012 of the European Court that detention there will not be indefinite and will be subject to proper review (US Closing, paras 214 and 222 – 231). They have also put forward evidence to suggest that conditions have improved since 2012 and since the ***Cunningham*** litigation was concluded. But they have failed to confront the oral evidence of Maureen Baird and Lindsay Lewis to the contrary. In particular, their evidence shows that the SAMs regime is of a virtually uniform nature in its subjection of inmates to isolation; mental illness is no bar to detention in ADX Colorado; that lengthy or indefinite detention under SAMs at ADX Colorado is a very real possibility; and that there is no meaningful interaction during detention under SAMs there.

14.9. Firstly then, **the prosecution claim that the SAMs regime is flexible.** This claim is simply based on a recitation of the legal provisions governing SAMs, and on two cases which include the atypical case of ***El Hage*** decided in 2000 (see US Closing, paras 164 – 170). The evidence of how the system *actually* works in practice from Maureen Baird, who has direct experience of it, and Lindsay Lewis, who has a client subject to it, was far more convincing than the prosecution's recitation of the statutory formula and reference to the ***El Hage*** case. The truth is that **SAMs '*is what it is*'**, and **the regime of isolation and complete separation from other prisoners is now applied across the board with very little variation** (see Baird at Tr. 29.09.20, pg.5, ll 5 – 19 and also Lewis at 29.09.2020, pg. 57, l 21 – pg. 58 – l 23). Moreover, the case of ***El Hage*** relied on by the prosecution was explained by Lindsay Lewis on the basis that he was only permitted a cell mate for a short period after 15 months of pre-trial detention in solitary, and that was then returned to solitary after an interval. She further explained that practices had hardened since the year 2000, when ***El Hage*** was decided, as a result of the 9-11 terror attacks in 2001 (see Tr. 29.09.20, pg. 59, l 15 – pg. 60, l 8). Therefore, the Court is invited to find that there is in fact little or no scope for variation in the SAMs regime post-trial.

14.10. The prosecution say that neither Maureen Baird nor Lindsay Lewis were sufficiently qualified to give evidence on the conditions in ADX (US Closing at paragraph 127). Both explained the basis on which they had gained knowledge of the conditions in ADX (for Baird, see Tr. 29.09.20, pg. 5, ll 5 - 19, pg. 7 ll 18 – 31, and pg. 49, ll 1 – 14, and for Lindsay Lewis, Tr. 29.09.20, pg. 60, l 22 – pg. 61, l 3). The prosecution have relied on the evidence of Kromberg and Dr Leukefeld, who did not even assert that they themselves had any direct knowledge of the conditions and did not offer themselves for cross-examination. But then, the prosecution **objected to the Court considering the independent evidence of Professor Haney** who **did** have up to date and direct knowledge of the '*extreme levels of social isolation'* of conditions in ADX Florence, despite the fact that his report responded to very recent and misleading assertions from Kromberg and Dr Leukefeld in their August and September 2020 reports. Moreover, it is an undeniable fact that the US has not permitted inspection of ADX Florence by independent external bodies such as the

UN Special Rapporteur on Torture[18], and that the Inter-American Commission has very recently determined admissible a challenge based on up to date evidence of inhumanity at ADX Florence (see Defence Closing Submissions at paragraph 21.19 – 21.23).

14.11. Secondly, the **prosecution suggest that the *Cunningham* decision has led to an improvement such that mentally ill people will not be detained in ADX Florence, Colorado**. But it is clear that in fact **mental illness is no bar to detention in ADX Florence**. In theory those suffering from serious mental illness are now excluded as a result of the ***Cunningham*** decision. But, in practice, as Baird and Lindsay Lewis made clear the test for exclusion on grounds of mental illness is incredibly high and can be overridden on national security grounds. There is furthermore an impressive body of evidence, some of which emanates from the official reports of the Office of the Inspector General of Prisons, and from the Marshall Project, that the US authorities underdiagnose mental illness on a routine basis and to a significant degree (Defence Closing Submissions, para 19.20) and that those suffering from mental illness are still detained in ADX Florence (Defence Closing Submissions, paras 21.24 – 21.32 and 21.2). The potential detention of the mentally-ill at ADX Florence was an issue which clearly troubled and was part of the ratio of the European Court in ***Aswat*** in 2014 (see Defence Closing Submissions at para. 19.15). Further revelations on the depth of this problem is a significant post-***Ahmad*** development set out fully in the Defence Closing Submissions at paragraph 19.20, and paragraphs 21.24 – 21.33. This demonstrates the superficiality of the prosecution's attempt to say that all the relevant issues have been determined once and for all by the ***Ahmad*** decision nearly a decade ago.

14.12. Thirdly, **it is clear that there is a real risk of indefinite detention in ADX Florence despite the prosecution's submissions to the contrary**. In this respect, the Court is invited to prefer the detailed and evidence-based conclusions of Lindsay Lewis and Maureen Baird summarised in full in the Defence Closing Submissions. They are backed by the statistics as to the length of time some prisoners have actually spent in isolation in ADX Colorado. Thus, 82% of prisoners under SAMs were under

[18] Furthermore, the 2012 report of Juan Mendez, the UN Special Rapporteur notes his inability to interview Chelsea Manning under conditions of confidentiality (see Boyle 1, Tab 5, Exhibit 1).

those restrictions for more than a year, and 13 individuals were held for more than a decade (Tr. 29.09.20, pg.58, ll 31 – 34).

14.13. **Fourthly, the actual experience of those with knowledge of the SAMs system is that it is extremely difficult to challenge SAMs or obtain a review of it**. Lindsay Lewis made this clear in her evidence, at Tr. 29.09.20, pg. 59, ll 4 – 14, and Baird gave similar evidence at Tr. 29.09.20, pg. 7, ll 8 – 17. The published literature on the subject is to like effect, as are the deposition in the IACHR petition (see Defence Closing Submissions at para 21.17 – 21.23).

15. **Article 6**

15.1. Julian Assange stands by his submissions on Article 6, and the real risk that he will be exposed to a flagrant denial of the right to a fair trial at both the trial and sentencing stage (see Defence Closing Submissions at Part C, section 17, pg. 196 - 198). In these submissions we will confine ourselves to dealing with the issue of sentencing which is in any event relevant to the likely length of detention in ADX Florence.

15.2. The prosecution goes so far as to suggest that the actual sentence will not be in excess of 63 months (para 296 of the US Closing). In making this assertion, they do not respond to Thomas Durkin's careful calculation as to why his estimate is between 30 – 40 years (Tr. 15.09.20. pg. 58), and Eric Lewis' careful analysis in his oral evidence that the likely actual sentence using the Federal Sentencing Guidelines is between 20 years and life (Tr. 14.09.2020, pg.12 and 15.09.2020, pgs.50 - 53). It is plain that there is a real risk of a sentence in the region of 30 – 40 years for the detailed reasons given by Eric Lewis and Thomas Durkin, who give full account of the 18 separate charges and the sentencing range for the espionage offences. Insofar as there is clearly a real risk of an actual sentence of life – which would be life without parole under the federal system - exposure to the risk of such a sentence would violate Article 3 for the reasons set out in the European Court's decision in ***Trabelsi v Belgium*** (2015) 60 E.H.R.R. 21.

15.3. The prosecution condescendingly dismiss the argument that the increase of a sentence on the basis of unproven allegations, and even allegations on which a person has been acquitted, constitutes a flagrant denial of justice. But this was not the argument submitted and rejected in ***Welsh and Thrasher,*** which concerned the technical rules of specialty alone. The remarks of Dobbs J in the ***MacKellar*** case were expressly *obiter*. And the issue of whether the terrorism enhancement that Mr Siddiq (Motiwala) potentially faces in the US breaches Article 6 is a point on which the High Court has expressly granted permission in recent months. For all these reasons, and those of basic justice, the Court is invited to consider for itself whether the fact Julian Assange could be given a greatly increased sentence on the basis of allegations that were not the subject of formal charges, and even on the basis of allegations which have resulted in an acquittal, constitutes a real risk of a flagrant denial of justice.

16. **Reply on mental health and Section 91**

The challenge to Professor Kopelman's impartiality

16.1. It is neither fair nor right to discount Professor Kopelman's evidence on the basis of lack of impartiality. It is said that this 'lack of impartiality' is established by Professor Kopelman's failure to disclose that Julian Assange had two children by Stella Moris, in his first report, dated 18 December 2019 (see US Closing, para 406, where it is alleged that 'it is clear he agreed with defence lawyers to conceal relevant information from the Court').

16.2. Professor Kopelman was cross-examined on the basis that he did not disclose in his report of 18 December 2019 that Stella Moris was the partner of Julian Assange and that she and Julian Assange had two young children conceived in the Embassy. Professor Kopelman explained that was then trying to *'respect her privacy'* because these facts were not *'in the public domain'*. In his report, he clearly disclosed at paragraph 2, pg. 8, that "*Mr Assange commenced a close relationship with another woman which is of continuing huge support to him. This woman has remained very supportive, which greatly helped his morale in the embassy. She has two children".* He further stated at pg. 34, para 11, '*he speaks to his partner by telephone nearly*

every day. She also visits him. He has been visited by some of his children". Finally, he mentioned that Julian Assange told him that he had feelings for his children which would no longer prevent his suiciding. Thus, the Court and the Prosecution were clearly informed in that report dated 18th December that he had a long-standing partner who was a great support to him, that he had children, and that he was visited by them in prison, but that they would not prevent him committing suicide. All these matters were there in his report to be further explored if anyone determined them to be relevant and chose to ask. It is true that Professor Kopelman did not disclose in that report that Stella Moris was the partner in question, and that she and Julian Assange had had two children. As he explained, this was because of concerns to protect Stella Moris' privacy, and that he had discussed this with the legal team, and that *'we decided not to mention it'*. The Court will be aware of the very real concerns to protect Stella Moris and the children from harassment, which led the defence in March 2020 to make an unsuccessful application to the Court for an order that their names not to be published when they were disclosed as part of a bail application.

16.3. In determining whether this limited omission in his first provisional report of 18th December 2019 does in fact undermine Professor Kopelman's impartiality and the reliability of his conclusions, the Court is invited to have regard to the following facts:

(i) The report of 18 December 2019, despite its length, was a **preliminary report.** It expressly anticipated further investigations would be made before Professor Kopelman produced a final report and actually gave evidence. Thus Professor Kopelman referred to the need to get a '*further opinion'* from Doctor Deeley on whether Julian Assange had Asperger's/ASD (Kopelman 1, Tab 6, pg.32, para 7). He further referred to the need for him to consider a further report on prison conditions (Kopelman 1, Tab 6, pg.33, para 10).

(ii) At the time the report was written, no substantive hearing was imminent.

(iii) At that stage, counsel were not aware of the relationship between Julian Assange and Stella Moris, or the fact they had children together.

(iv) Stella Moris had expressed concerns to Professor Kopelman about the potential risk to her and her children if the fact of their relationship and their having children together became publicly known.

(v) Professor Kopelman spoke to Gareth Peirce who was aware of the incoming evidence from the Spanish proceedings about the intrusion into the privacy of Stella Moris and her child (at that time). Therefore it was agreed that Professor Kopelman should make no express connection in his report between Julian Assange's having a long-term relationship, and that that relationship was with Stella Moris, and they had children together, until further considered advice could be given.

(vi) Consequently, Professor Kopelman made the references to Stella Moris he deemed appropriate in his report and went no further at that stage (Kopelman 1, Tab 6, pg.34, para 11).

(vii) Full disclosure was, of course, made when Professor Kopelman completed his final report in August 2020 prior to him actually giving evidence. Moreover, he was never cross examined on the basis that he would *never* have made such full disclosure to the Court.

(viii) So the highest that the matter can be put against Professor Kopelman is that out of concern to respect the privacy of Stella Moris and the children, and the need to protect them, he did not disclose the full details of Julian Assange's family position in this preliminary report, at that stage. There was no question of any tactical advantage being gained by his deliberately cautious approach to the disclosure of the full family position, which was highly confidential at that time.

(ix) The Court is invited to accept the statements of Professor Kopelman and Gareth Peirce which have been provided in answer to the prosecution's allegations at paragraph 406. Counsel has indicated to James Lewis QC that, in view of the suggestion of impropriety, we would wish to adduce this further evidence in response; and he has indicated that he does not object to further evidence on this one issue being put before the Court. (See the defence application which accompanies this document.)

16.4. Once the position is properly looked at, it is respectfully submitted that the initial limiting of disclosure of intimate family matters in Professor Kopelman's preliminary report against a background of respect for privacy cannot possibly justify the conclusion that Professor Kopelman lacked impartiality and was unreliable as a witness.

Other Criticisms of Professor Kopelman's Reliability

16.5. We next turn to the further criticisms of Professor Kopelman's reliability. The Court will be aware that Professor Kopelman is a distinguished expert whose evidence has been repeatedly accepted and acted upon by District Judges and the High Court, and who was called as a prosecution expert in the ***Dewani*** case. The exacting, thorough and conscientious nature of his methodology is fully set out in our closing submissions at paragraphs 22.5 and in more detail at 22.22 – 22.26, pgs.236 – 239. We maintain that Professor Kopelman was right to diagnose him as suffering from depression, which varied in intensity at different times, and was liable to deteriorate seriously if he was extradited. He was also right to predict that there was a high risk of suicide if Julian Assange was extradited. In both respects, he was supported by Dr Deeley and given very considerable support in many of his conclusions by the prosecution psychiatrist Professor Fazel himself.

16.6. Turning to the specific criticisms, the Professor has firstly been criticised as unreliable witness **because of his response to questions about the ICD classification of depression** (US Closing, paras 406 – 409). It is respectfully submitted that the attempt to test him on the common symptoms of depression *'without looking at them in the book'* (as cited in US Closing, at para 408) was trivial, demeaning and unfair. In any event there was general agreement between all the experts that Julian Assange did display the '*common symptoms'* of depression. So this exchange cast no doubt on his reliability. And in fact, Professor Kopelman had cited and deployed the ICD test for severe, recurrent depressive episodes in the opinion section of his report (Kopelman 1, Core Bundle Tab 6) at paragraph 3, pages 30 - 31 and referred elsewhere to the ICD tests for generalised anxiety disorder, paragraph 6 and ASD paragraph 7 on page 32 of that report. So there was no question of him disregarding or failing to apply the ICD criteria in reaching his conclusions.

16.7. Secondly, **the prosecution say he is unreliable because he could not recite when challenged what the acronym ACCT stood for** off the top of his head

because he could not '*remember off-hand'* (cited in US Closing, para 410). This is again a trivial, demeaning and unjust approach to take to a distinguished expert.

16.8. Thirdly, it was said that he was '*selective in the details he extracted from the medical notes'* (US Closing, para 411 – 418). This criticism has been fully answered already in Defence Closing Submissions at paragraph 22.24, pgs.237 – 8. It is absolutely clear that Professor Kopelman had extensively and fairly quoted from the medical records in which Dr Daly and the nursing staff had recorded Julian Assange as being *'not suicidal'* on numerous occasions, as was established in re-examination in answer to the specific criticism of his *'being selective'* (see Tr. 22.09.20, pgs.82 – 84).

16.9. The point about the razor blade is dealt with in Defence Closing Submissions at 22.24. Contrary to the prosecution's suggestion, Dr Corson did record the razor blade incident when Julian Assange told her about it, and indeed as a result he was put back on ACCT. Professor Kopelman was perfectly entitled to refer to the fact that not everything of significance was contained in the general medical records or referred to by Dr Daly in her entries. One such example was put to Dr Blackwood and shows that Dr Daly omitted to mention to Dr Blackwood in explaining the reasons for Julian Assange's move to healthcare that on 18 May 2019, the day that Julian Assange was moved, it was recorded by a prison officer at an ACCT review that '*Assange stated he is finding it hard to control thoughts of self-harm and suicide'* (Tr. 24.09.2020, pg. 11, ll 19 - 27). And yet that was the reason why there was discussion of his move to healthcare on that day.

16.10. For all these reasons it is submitted that the conclusions of Professor Kopelman stand, and were supported both by Dr Deeley, and to a significant extent, also by Professor Fazel.

Professor Mullen

16.11. It is accepted that the Court should not rely on Professor Mullen's report dated 14th December 2019 in the absence of an opportunity to cross-examine him. However, the historical fact that Professor Mullen wrote a psychiatric report on 5th February 1996 recording a mild degree of depression with a history of mild to moderate depression is relevant and admissible historical evidence and was set out and relied

on by Professor Kopelman in his first report (see Kopelman 1, Core Bundle Tab 6, pg. 27). To that extent it confirms the history of depression accepted by all the psychiatrists.

Dr Crosby

16.12. The prosecution have criticised Dr Crosby as unduly sympathetic to Julian Assange's cause. The fact that her conclusions were based on in depth knowledge of him, gained both in the Embassy and from visits to him in HMP Belmarsh does not invalidate her conclusions. The Prosecution dismiss her evidence on the basis that she is not a psychiatrist. She is a psychologist doctor who clearly had profound knowledge of psychological conditions induced by mistreatment, detention, and stress, based on years of experience in examining victims of torture at the Boston Center for Refugee Health and Human Rights. The Court is asked to give weight to her evidence of suicidal rumination and a high risk of suicide at Tr. 24.09.20, pgs.43 – 47, which is based on her extensive clinical experience.

Dr Deeley

16.13. The Prosecution attacked Dr Deeley's diagnosis of ASD. However, he is the only true expert on autism to give evidence to the Court. The Prosecution's criticisms are rejected for the reasons set out in our Closing submissions at paragraphs 22.7 – 22.9.

16.14. Moreover, Dr Deeley's evidence as to the history of depression stands uncorrected (see Defence Closing at 22.7) and the views expressed by him, Professor Kopelman and Dr Crosby as to the high risk of suicide if extradition was ordered, and certainly if he was actually extradited remain sound and reliable.

Professor Fazel

16.15. Professor Fazel's evidence is relied on to some extent by the prosecution. And yet he <u>supported</u> both the existence of a long-standing depressive condition and a high risk of suicide. He accepted that he could not predict the effect of long-term detention in the United States. And he accepted that both isolation and long-term detention would exacerbate the risk of suicide. His evidence is analysed in detail in our Closing submissions at 22.14 – 22.19.

Dr Blackwood

16.16. The Prosecution rely on his conclusion that Julian Assange would have the capacity to resist the impulse to commit suicide. But he clearly was unable to predict the position in the event of lengthy incarceration in the United States, and admitted that he had no expertise on the prison system in the United Stated. He further admitted that in his report, he had simply taken the assertions of Mr Kromberg at face value. The court is further referred to our detailed analysis in the Closing submissions at 22.20.

Dr Daly

16.17. The prosecution refer to Dr Daly's past entries in her medical notes, to the effect that Julian Assange was not a suicide risk in Belmarsh. But Dr Daly has produced no report for the court, has given no oral evidence, and has not been cross-examined. The prosecution cannot object to Professor Mullen's evidence on the basis he has not been cross-examined, and then try to smuggle in Dr Daly without proffering her for cross-examination. Clearly there are many questions the defence would have wished to put to her given that she seems to have recorded a misleading account of the reason why Julian Assange ended up in healthcare in HMP Belmarsh (on which see above).

Conclusion

16.18. For all these reasons it is submitted that the diagnosis of clinical depression is clearly made out on all the evidence; that the high risk of suicide is clearly made out on the evidence of Professor Kopleman, Dr Deeley, Dr Crosby and Professor Fazel, and that there is clear evidence that any suicidal reactions would be influenced by his underlying mental disorder. Moreover the prosecution have concentrated solely on the risk of suicide. They have failed to address the fact that it would be cruel after this length of time to expose someone with Julian Assange's mental condition to extradition in America, and with the conditions he is likely to face there. For that separate reason too, his extradition would be oppressive on grounds of mental health (the court is respectively referred to the clear precedent in the case of ***Lauri Love***).

PART D

17. **The new allegations and the scope of counts 1 and 2**

Dual criminality

17.1. The defence do not understand the US's position on dual criminality in relation to the new conduct now pleaded (concerning 'teenager' or 'NATO Country-1' or 'Anonymous' or 'Laurelai' or 'Gnosis' or 'Kayla' or 'AntiSec' or 'LulzSec' or 'Sabu' or 'Topiary' or Jeremy Hammond or Edward Snowden). The draft notional charges simply do not comply with ***Biri***. No attempt at all has been made to explain *how* the new conduct establishes the elements of the notional offences baldly identified. This Court expects (and ***Biri*** requires) the US to explain, for example, how alleged computer intrusion into the Icelandic Parliament's telephone system from abroad could possibly amount to any criminal offence in the UK, much less any of those identified by the draft charges? And if it amounts (as it plainly does) to no comparable offence, what does it suggest that this Court do about that conduct?

17.2. The US submissions on Part D (paras 519 - 530) are completely silent on the issue of dual criminality. The closest this Court gets to knowing what the US says is at US Closing paras 12 - 13 where is is variously said that:

(i) '*It is beyond argument that the conduct set out in the request constitutes the conduct required to make good those draft charges'* (para 12). If so clear, why has it not been set out, despite this Court's request for ***Biri***-compliant charges?

(ii) It is then suggested that '*no contrary argument is put forward on the material in the request constituting those charges'* (para 12). First, that misunderstands the burden of proof here. Secondly, it misrepresents the position (see Defence Closing para 24.17).

(iii) Finally, complaint about the charges only identifying the corresponding offences, not the conduct which is said to constitute those offences, is baldly

labelled '*misconceived*' – whilst avoiding any analysis (or even mention) of ***Biri***.

17.3. It is not for the defence, much less this Court, to have to guess at how the US puts its case on dual criminality.

The other statutory and non-statutory questions

17.4. On all remaining issues (where, unlike dual criminality, defence evidence is admissible without reference to ***Zakrzewski***), the US Closing (para 529) falls into precisely the error that Part D of the Defence Closing warns this Court about. It seeks to <u>determine</u> the statutory and non-statutory questions raised by the new conduct, based on the information (not evidence) currently available to the court. All this Court can do however is <u>determine whether there exist arguable issues</u> under the statutory and non-statutory questions. That is because the inexplicably late arrival of these new allegations has placed the Court in a position where it has received no defence evidence.

17.5. The matters detailed at Defence Closing paragraphs 8.21-27 are manifestly <u>arguable</u>:

(i) The suggestion for example (US Closing para 529(4)) - that no arguable ***Tollman*** abuse arises where a friendly foreign government has claimed (and acted upon the claim) that the US (in fact Mr Dwyer) was seeking to '*frame'* (i.e. create false evidence against) Mr Assange through '*Teenager'* – is risible.

(ii) Equally risible is the suggestion (US Closing para 529(2)) that the fact that there has been a trial in the UK, of conduct introduced by the new indictment, against alleged co-conspirators, raises no <u>arguable</u> forum issue.

17.6. If there is, to the knowledge of the Court, an arguable issue (or issues) to be determined under one or more statutory and non-statutory questions, it is simply not possible or permissible for the Court to proceed to determine those questions without sight of the relevant evidence.

Osunta excision

17.7. The defence have not '*repeatedly said that he will not ask for such time'* to adduce that evidence (US Closing para 528). He did so initially (for two weeks and for what it is submitted were understandable reasons – see Defence Closing para 24.9) but then made that very application on 7 September.

17.8. If the Court is not prepared to receive evidence, and cannot determine arguable issues that arise, it cannot extradite for the aspects of counts 1 and 2 that reflect the new conduct.

17.9. If the Court is minded, for any or all of the reasons set out in Parts A-C of the Defence Closing, not to extradite for the Manning conduct, that poses no difficulty.

17.10. But if the Court is minded to send the Manning allegations to the Secretary of State, it cannot, without the proper evidential enquiry required by the 2003 Act, send the new conduct. To proceed forward, the conduct must be excised.

17.11. The US submits (US Closing paras 521, 527) that this Court '*cannot'* excise the new conduct from any order. The primary source of that submission in said to be s.137(7A). It is said that s.137(7A) 'res*tricts the court's power to excise or ignore conduct within the request*' (para 521). With respect, the US construction of s.137(7A) plainly cannot be correct. It would have flatly prevented the House of Lords in ***Dabas*** or the High Court ***Osunta*** doing what they did (excising part of a foreign charge from the scope of an extradition order) in those cases. What happened in ***Dabas*** and in ***Osunta*** would (if the US were correct here) have been prohibited by s.137(7A) (or s.66(1A)) and unlawful. Plainly it was neither. Having '*considered'* the new conduct, the Court has power to excise it from the scope of any extradition order.

17.12. What the US next says (US Closing paras 522 - 526) is that the *reason* the courts excised conduct in ***Dabas*** and ***Osunta*** was to help the requesting state achieve extradition which would otherwise be prohibited. Manifestly, which side benefits from

the excision cannot constrain the scope of the power. But, even if it did: so here. This Court cannot lawfully extradite for Counts 1 or 2 at all if it cannot either (a) determine all of the statutory and non-statutory questions that pertain to them or (b) excise that which cannot be determined.

PART E

18. **Conclusions**

18.1. For all the reasons set out above, this Court is asked to make the following findings:

(i) That no extradition crime is made out and that the request misrepresents the facts in such a way as to constitute an abuse of process within the test laid down in the case of ***Zakrewski***.

(ii) That this prosecution is politically motivated and designed to punish Julian Assange for his political opinions and for his political actions.

(iii) That in any event the request constitutes an abuse of process because it is requires the Court to extradite in breach of the express terms of the Anglo-US Treaty and because it is improperly motivated by extraneous considerations.

(iv) That there is a real risk that on extradition, Julian Assange would be prejudiced in his trial, in his sentence, and in the nature of his subsequent detention in ADX Florence by reason of his foreign nationality and his political opinions.

(v) That the passage of time between his alleged conduct and this hearing is such as to render an order for his extradition unjust and oppressive.

(vi) That his extradition would expose him to a real risk of inhuman and degrading treatment, both by reason of his sentence and more especially by reason of the conditions of extreme isolation to which he would be exposed in detention in the US.

(vii) That his extradition would expose him to a flagrant denial of justice both at the trial and at the sentencing stage in violation of Article 6.

(viii) That his extradition would further expose him to a violation of his rights under both Article 10 and Article 7 of the European Convention.

18.2. This is not a case in which the remedies provided by the common law and by the Extradition Act itself can be denied on the basis that the issues raised can be addressed in the United States. The request itself, and Julian Assange's detention pursuant to that request, has already led to a breach of the requirements of Article 5 of the European Convention; and the fact of a

politically motivated request based on a politically motivated prosecution has already been established by convincing evidence which entitles him to immediate discharge.

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Matrix Chambers

1st December 2020