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 SUBMISSIONS: PART ONE

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

1. Introduction

1.1. These Defence Submissions are in two parts. In **Part 1,** we provide an overall summary of the case and briefly set out Mr Assange's position on each of the grounds of abuse, including the Treaty point, and each of the statutory bars. This updates and refines the defence opening; responds to issues raised at the February hearing about the Treaty point and develops the Article 3 and Section 91 argument in more detail. In **Part 2** (a separate document) we set out in full the interlinked arguments on *Zakrzewski* abuse, Article 7 and Article 10, and the related dual criminality point that no extradition crime is made out. That is because these points require amplification from the earlier submissions.

1.2. In these submissions we first summarise the **history of this case** to demonstrate that the prosecution is not motivated by genuine concerns for criminal justice but by politics.

1.3. We next address the three ways in which these proceedings constitute an **abuse of process,** in the following three separate but overlapping categories:

(i) **First**, the request seeks extradition for what is a classic "**political offence"**. Extradition for a political offence is expressly prohibited by Article 4(1) of the Anglo-US Extradition Treaty. Therefore, it constitutes an abuse of this Court's process to require this Court to extradite on the basis of the Anglo-US Treaty in breach of the Treaty's express provisions.

(ii) **Second**, the prosecution is being pursued for ulterior political motives and not in good faith. That engages the jurisdiction recognised in the successive cases of ***R (Bermingham and Others) v Director of the Serious Fraud Office*** *[*2007] QB 727 and ***R (Government of the USA) v Bow Street Magistrates' Court*** [2007] 1 WLR 1157 ("*Tollman").*

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

1.4. Finally we then turn to the special protections set out in the Extradition Act 2003 ("the 2003 Act") and the **successive bars to extradition** which are relied upon. It is respectfully submitted that extradition should be refused on the following grounds:-

i. **Firstly**, extradition is barred under s81a of the 2003 Act by reason of the political motivation of the request, which is directed at Mr Assange because of the political opinions he holds and that have guided his

actions. Moreover we submit that extradition is barred under s81b because it exposes Mr Assange to the real risk of discrimination on grounds of "political opinions" and his foreign nationality at every stage of the criminal justice process in the US.

ii. **Secondly**, it is submitted that it would be unjust and oppressive to extradite Mr Assange by reason of the lapse of time since the alleged offences, and the effect that extradition would now have on his family and young children.

iii. **Thirdly,** extradition is barred under s87 of the 2003 Act because it would expose Mr Assange to a complete denial of his right to a fair trial under Article 6.

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

v. **Fifthly,** extradition is barred because it would expose Mr Assange to inhuman and degrading treatment contrary to Article 3 ECHR. That is because of the risk of a wholly disproportionate sentence, amounting in effect to a life sentence; and because of the virtual certainty that he will be exposed to inhuman and degrading treatment in prison in the United States because of the inevitable impact of those conditions on someone with his mental vulnerabilities.

vi. **Sixthly**, extradition should be refused under s91 because it would be unjust and oppressive to extradite Mr Assange by reason of his mental condition and the high risk of suicide if he is extradited.

2. History of the proceedings

2.1. The background facts are more fully set out in the chronology, the Particulars of Abuse and Response on Abuse of Process, which are intended to be read alongside this document [Submissions Bundle, tabs 8, 5 and 7].

The original conduct

2.2. Extradition is being sought for the receipt and publication of materials provided to WikiLeaks by Chelsea Manning. All the relevant conduct occurred between 2010 and 2011, and was known about at that time. Mr Kromberg effectively recognises this in his second supplemental declaration at paragraph 12 where he refers to public reporting that the Department of Justice was "investigating Assange for his acts in connection with the Manning disclosures" and that "specific concerns of the United States that Assange's publications endangered the lives of innocent informants and sources were well publicised" in 2010 and 2011. Moreover the basic allegations in the 17 espionage counts of the present indictment (count 1 and counts 3-18) remain that Mr Assange obtained and published State Department cables, rules of engagement, Iraq war logs, and Guantanamo detainee reports; and that this occurred in the years from 2010 to 2011. Yet, **Mr Assange's prosecution** and **the first extradition request** were not begun until December 2017. The superseding indictment upon which the prosecution principally rely was not issued until 23 May 2019. And during the intervening period between 2010-2011 and the first indictment in December 2017 there was a well-publicised decision by the Obama administration in 2013 that Mr Assange should not be prosecuted. Moreover the second superseding indictment which is the basis of the second request is dated 24 June 2020 but, with the exception of charge 2, is still principally focussed on the receipt and publication of materials provided to Wikileaks by Chelsea Manning.

The Nature of the Wrongdoing Exposed by the Publications

2.3. It is necessary to emphasise here that the publications that are the subject of the indictment '*exposed outrageous, even murderous wrongdoing [including] war crimes, torture and atrocities on civilians'* [Feldstein 1, tab 18, para 4]. This is fully analysed in **Part 2** under Submission 4. At present it suffices to summarise as follows:

2.4. **The US Diplomatic cables** (counts 1, 3, 7, 10, 13, 17) exposed *inter alia* ;-

i. Evidence of CIA and US forces involvement in targeted, extra-judicial killings in Pakistan [Stafford-Smith, tab 64, para 84] [M2/56-69];
ii. Evidence of US rendition flights [Overton, tab 61, para 14];
iii. Deliberate killing of civilians [M2/48-54];
iv. Evidence of CIA '*black sites'* where detainees were subject to torture [Overton, tab 61, §14].

2.5. **The Rules of Engagement** (counts 1, 4, 8, 11, 14) were sought and published to demonstrate the significance and illegality of the conduct shown in the 'Collateral Murder' video – see Feldstein 1, tab 18, para 4; Cockburn, tab 51, paras 5 – 6.

2.6. **The Guantánamo Detainee Assessment Briefs** (counts 1, 6, 9, 12, 18) provided evidence that Guantánamo detainees had been the subject of prior rendition and detention in CIA '*black sites'* before their arrival at Guantánamo and that their detention was arbitrary [Worthington, tab 33, paras 8 and 14].

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

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

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

- Systematic torture of detainees (including women and children) by Iraqi and US forces and a secret order by which the US ignored the abuse and handed detainees over to the Iraqi torture squad;

- Helicopter killings, including of insurgents trying to surrender;

- Details of 15,000 previously unreported civilian deaths, including those of women and young children, through checkpoint killings, use of contractors, targeted assassinations, drive-by killings, executions; showing that the US Government was hiding the full civilian cost of the Iraq war.

- Details of 23,000 previously unreported violent incidents in which Iraqi civilians were killed or their bodies were found.

2.9. The **Iraq War Diaries** attracted worldwide opprobrium for torture and war crimes committed by or acquiesced in by the US, leading to calls for proper investigations into the conduct of allied troops, as is evidenced by condemnation and calls for investigation by Amnesty International, the UN Special Rapporteur on Torture and the UN Commissioner for Human Rights (see **Part 2**).

Chelsea Manning's Court Martial

2.10. Chelsea Manning was arrested in 2010. She was convicted in 2013 and sentenced to 35 years in prison [Boyle 1, tab 5, para 22]. At her trial, she explained her <u>motivation</u> for downloading documents and videos which exposed war crimes in Afghanistan and Iraq, and the torture of detainees in Guantanamo [as summarised in the Chronology, see Submissions Bundle, tab 8, p.3]. In her plea allocution statement to the Court Martial on the 30 July 2013, she stated *'the decisions I made to send documents and information to the WLO website were my own decisions and I take full responsibility for my own actions'* [Core Bundle, Boyle 1, tab 5, p.8, para 21]. At that time no attempt was made to indict Julian Assange. The prosecution say that Julian Assange caused Chelsea Manning to obtain the materials referred to in

Counts 2 – 4, 9 – 11, and 12 – 14. But her own account gives the lie to that false claim.

2.11. In evidence given at the Manning Court Martial General Carr gave evidence that "after long research, his team of 120 counter-intelligence officers hadn't been able to find a single person, among the thousands of American agents and secret sources in Afghanistan and Iraq, who could be shown to have died because of the disclosures". (see paragraph 12 of Patrick Cockburn's witness statement of 15 July 2020: tab 51).

2.12. Chelsea Manning's sentence was subsequently commuted by President Obama in 2017 so as to allow for her immediate release.

Decision not to prosecute Julian Assange in 2013

2.13. A decision was made under the Obama administration not to prosecute Julian Assange. That was because of what has been described as 'the New York Times problem', as referred to in the Washington Post article dated 26 November 2013 [Submissions Bundle, Chronology, tab 8, p6]. The US prosecutors operating at the time concluded that charging Assange would have been tantamount to prosecuting any journalist who published information that is alleged to endanger national security, and would thus violate the First Amendment [Feldstein, tab 18, para 9] [Jaffer, tab 22, para 21] [Shenkman, tab 4, para 27] [Lewis 2, tab 24, para 15][1].

2.14. Former Department of Justice ('DOJ") spokesman **Matthew Miller** set out the main reason for the decision in 2013: *"If you are not going to prosecute journalists for publishing classified information, which the department is not, then there is no way to prosecute Assange"* [Politico, BK, Tab 4; The Washington Post, BK, Tab 5]. The significance of this statement is highlighted in the 4th statement of Eric Lewis at paragraph 14 (Lewis 4, tab 70). He highlights the fact that Miller made the comment on the record in 2013 with

[1] Core Bundle.

the Washington Post and then issued confirmations in 2016, 2017, 2018 and 2019 that "the DOJ couldn't indict Assange in the Manning leaks because he was a publisher, not hacker." The same point is made by Mark Feldstein in his supplemental declaration of 5 July 2020 (Feldstein 2, tab 57).

2.15. This point is analysed in detail by Professor Feldstein who also refers to the '*longstanding precedent that publishing secret records is not a crime'* [Core Bundle, tab 18, para 9, pp.18, 19]. As all the First Amendment experts make clear, it is for that reason that no journalist had ever been prosecuted for like conduct in the US despite *'thousands upon thousands of national security leaks to the press'* [Feldstein 1, tab 18, paras 5, 8-11] [Shenkman, tab 4, paras 21, 25-27, 32-34, 41-42] [Jaffer, tab 22, para 21] [Tigar, tab 23, pp16-18].

Political war on journalists under Trump

2.16. The principled and consistent stand taken under the Obama administration was reversed under the present Trump administration from early 2017 onwards. The prosecution initiated later in December 2017 was plainly the result of President Trump's effective declaration of war on leakers and journalists.

2.17. As is clear from the expert reports, President Trump has '*repeatedly referred to the press as 'the opposition party' a*nd the *'enemy of the people'* [Jaffer, tab 22, paras 4 and 28]. He has '*denounced the news media as a whole as 'sick', 'dishonest', 'crazed', 'unpatriotic', 'unhinged' and 'totally corrupt' and attacked them as 'purveyors of 'fake news'*" [Feldstein 1, tab 18, para 2] [Prince 2, tab 13].

2.18. In this context, President Trump met with FBI Director James Comey in February 2017 and agreed that they should be *'putting a head on a pike'* as a message to journalists over leaks and *'putting journalists in jail'* [Feldstein 1, tab 18, para 9] [Shenkman, para 30]. **As Professor Feldstein shows, President Trump then instructed his attorney general to '*investigate***

"criminal leaks" of "fake news" reports that had embarrassed the White House' [Feldstein 1, tab 18, para 9] [Shenkman, tab 4, para 30]. The Trump administration has thus set about systemically punishing whistle-blowers in general, and '*dramatically escalated the number of criminal investigations into journalistic leaks'* [Feldstein 1, tab 18, para 2]. President Trump's *'use of government power to punish his media critics'* is further identified as a *'deliberate attempt to "stifle the exercise of the constitutional protections of free speech and the free press"'* such that '*all journalists work under the threat of government retaliation'* [Feldstein 1, tab 18, para 2].

Julian Assange targeted to make an example of him

2.19. It was against that background that President Trump and his administration then decided to make an example of Julian Assange. He was an obvious symbol of all that Trump condemned, having brought American war crimes to the attention of the world [Boyle 1, tab 5, para 11] [Tigar, tab 23, p8-9]. Professor Feldstein puts it in this way: **'*On a worldwide scale [he disclosed] significant governmental duplicity, corruption, and abuse of power that had previously been hidden from the public... [he] exposed outrageous, even murderous wrongdoing, including war crimes, torture and atrocities on civilians*'** [Feldstein 1, tab 18, p.7, para 4]. As indicated above, the sheer scale and significance of the revelations brought about by Julian Assange and WikiLeaks can scarcely be understated [Feldstein 1, tab 18, p.6, para 4]. They range from the video of American soldiers shooting unarmed civilians from a helicopter, to the brutal torture of detainees in Iraq and the exposure of the true figures of civilian deaths resulting from the invasion of Iraq. Such revelations obviously put him in the sights of the aggressive 'America First' ideologues of the Trump Administration. They targeted him because of his exposure of American war crimes and because of the threat that his revelations and continuing work posed to their geo-political agenda.

The denunciations of Julian Assange in April 2017

2.20. That is why the prosecution of Mr Assange, based on no new evidence, was now pursued and advocated by the Trump administration, led by spokesmen such as **Mike Pompeo** of the CIA and **Attorney General Sessions**. They began denouncing him in **April 2017,** as can be seen from the following:

i. Firstly, the statements of **Mr Pompeo**, as director of the CIA, on 13 April 2017, denouncing Julian Assange and WikiLeaks as "**a non-state hostile intelligence agency**". [Feldstein 1, tab 18, p.19 and K10]. On the same occasion, Pompeo also stated that Julian Assange as a foreigner had no First Amendment rights. [See Guardian article, bundle K]

ii. Then came the political statement of **Attorney General Sessions** on 20 April 2017 that the arrest of Julian Assange was now a priority and that *'if a case can be made, we will seek to put some people in jail'* [Feldstein quoting Washington Post article of Ellen Nakashima, tab 18, p.19].

2.21. The full scale of these denunciations is encapsulated in the report of Professor Feldstein [Core Bundle, tab 18, p.19].

2.22. These public denunciations reveal the political motivation that fuels the prosecution of Mr Assange. They violate the presumption of innocence and prejudice the prospects of a fair trial. And they form the context in which Attorney General **Sessions,** a political appointee with a political agenda, was directly responsible for the First Indictment in December 2017.

2.23. Thus, as Professor Feldstein shows, pressure was then put on prosecutors by the Attorney General and *'the new leaders of the justice department'* to bring an indictment, even in the face of *'vigorous debate'* from *'career professionals'* who were '*sceptical'* about its legality, and despite open objections from prosecutors directly involved in the case [Feldstein 1, tab 18, paragraph 9, page 19]. That was the position in April 2017 as confirmed by reports in the Washington Post and the New York Times on 20 April 2017 [Feldstein 1, tab 18, paragraph 9, page 19].

The Criminal Complaint in December 2017

2.24. That is why on 21 December 2017 a criminal complaint was made of computer misuse against Julian Assange, and his extradition on a provisional warrant was sought. The timing is also very significant because it coincided with the grant of diplomatic status by the Ecuadorian government. The US were of course well-informed of all developments in the Ecuadorian embassy, because US intelligence agencies had access to recordings of all conversations between Julian Assange and his lawyers in the embassy (a point which will be developed further below). By then, prosecution had become a political imperative.

2.25. In the intervening period Julian Assange continued to have his conversations with his lawyers and family constantly monitored and recorded by a private agency acting on the instructions of US intelligence and for their benefit.

Superseding indictment

2.26. Then, in May 2019, a superseding indictment was proffered. That indictment charged Julian Assange under the Espionage Act. It charged him with publication of state secrets in a multi-count indictment that dramatically ratcheted up the scale of the charges, the pressure on him, and the potential penalties. As Eric Lewis shows, Mr Assange faces up to 175 years in prison if he is convicted of all offences charged in the Superseding Indictment [Core Bundle, tab 3, p.10, para 36].

Unprecedented

2.27. This decision to prosecute for the **publication** of state secrets was **unprecedented.** The unprecedented nature of the decision is stressed by witness after witness whose reports are before the Court. The Court is referred to:-

i. Professor Feldstein [Core Bundle, tab 18, paras 5 and 8 – 11].
ii. Carey Shenkman [Core Bundle, tab 4, paras 32 and 41 – 42].
iii. Jameel Jaffer [Core Bundle, tab 22, para 21].
iv. Professor Michael Tigar [Core Bundle, tab 23, pp.16 – 18 and 20].

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

2.29. Jameel Jaffer characterises the novel nature of the Superseding Indictment in equally troubling terms: '*the government's indictment of a publisher under the Act, however,* ***crosses a new legal frontier'*** [Core Bundle, tab 22, p.12, para 21].

2.30. Finally Carey Shenkman puts it thus: the '*indictment of a publisher for the publication of secrets under the Espionage Act has no precedent in U.S. history'* and in particular, there has been '*no known prior attempt to bring an Espionage Act prosecution against a non-U.S. publisher'* [Shenkman, tab 4, para 32].

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

2.32. The US reply offers no legal precedent for this indictment.

The Swedish investigation and the timing of the superseding indictment

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

2.34. The full facts are set out in the Defence Reply on Abuse of Process [Submissions Bundle, tab 7, paras 53 to 54]. As made clear there, the coincidence is too great. It leads to the inescapable inference that the US ratcheted up the charges so as to ensure that their extradition request would take precedence over any Swedish request. The actions taken by the US government were not about criminal justice; they represented a manipulation of the system to ensure that the US was able to make an example of Julian Assange.

2.35. The **second superseding indictment** dated 24 June 2020 maintains the basic allegations as to the publication of the Manning materials summarised above. Insofar as it adds significant materials, these are designed to depict Julian Assange as a continuing threat to the US and to link him to Edward Snowden. The Court is referred to paragraphs 83-92 of the second superseding indictment. The injustice of adding these further allegations at this stage will be the subject of separate submissions to the Court.

3. Accompanying abuses of the rule of law

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

Invasion of legal professional privilege

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

3.3. The clear evidence of illegal monitoring and intrusion is referenced in detail in the Particulars of Abuse [Submissions Bundle, tab 5, paras 36 – 39] and in the statement of Witness 2 [tab 12, p7].

3.4. All this points to an agenda that is not confined to a *bona fide* prosecution. It also points to a clear disregard for the rule of law. It violated the sanctity of diplomatic premises. And it took place in this country, which is relevant to the question of abuse. The Court is referred to the Reply Submissions on abuse at paras 42 – 43 [Submissions Bundle, tab 7].

Pressuring Ecuador to expel Julian Assange

3.5. Then too steps were taken to ensure that he was expelled from the Ecuadorian embassy by a process of bullying and bribing Ecuador into expelling him, so as to make him available for extradition [see Particulars of Abuse, Submissions Bundle, tab 5, paras 43 – 45].

Further breach of legal privilege

3.6. After the removal and arrest of Julian Assange, his legally privileged papers were seized and sent to the United States; they have not been returned [Gareth Peirce's second statement, Core Bundle, tab 21, paras 12(v) and (vi)].

This again constitutes the most serious breach of one of the most fundamental safeguards known to the common law. The US has declined to respond to or challenge the evidence on this point.

The pardon offer

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

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

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

3.9. Rohrabacher has publicly stated in February 2020 that he and Charles Johnson did meet with Julian Assange, and that he did make the proposal about a pardon deal. [see Guardian article dated 19 February 2020 citing Rohrabacher's personal blog that day]. He denies it was at the direction or with the approval of President Trump and President Trump himself denies

everything. But in the immortal words of Mandy Rice Davies: 'Well he would, wouldn't he?'.

3.10. The proposed pardon deal shows that, just as the prosecution was initiated in December 2017 for political purposes, so too the Trump administration had been prepared to use the threat of prosecution as a means of extortion to obtain personal political advantage from Mr Assange. This accords with the way in which the Trump administration has manipulated the criminal justice process in a manner that undermines the rule of law (see Eric Lewis' 4th declaration at Core bundle tab 79, paras 44-71).

4. Abuse by reason of fact that offences are political in nature

4.1. The basic case is set out in the Defendant's Note on Political Offence and in the Defendant's Response on Political Offence [Submissions Bundle, tabs 2 and 10].

A. Court's jurisdiction to stay the proceedings

4.2. It is submitted that the Court has jurisdiction to stay an extradition request on the grounds of abuse of process where the request is in breach of the terms of the treaty which enables extradition to take place. (Mr Assange's submissions on jurisdiction are set out in detail in the Defendant's Reply on Political Offence [Submissions, tab 10, pp.6 – 7, paras 5.1 – 5.3]).

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

4.4. Moreover it is contrary to the rule of law and Article 5 ECHR to detain an individual in breach of the requirements of public international law: see ***R v Mullen*** [2000] QB 520 [Abuse Authorities, tab 7, p535E]. This accords with

the general principle that any deprivation of liberty is arbitrary when it occurs in a manner that is incompatible with a state's international legal obligations. (See Jared Genser The Working Group on Arbitrary Detention ("WGAD") at page 5 and Deliberation Number 9 of the WGAD Concerning the Definition and Scope of Arbitrary Deprivation of Liberty Under International Law.)

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

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

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

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

B. The Substantive Protection

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

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

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

ii. Secondly, as a matter of substance and logic, the allegations against Mr Assange relate to pure political offences. That is because his alleged conduct satisfies the established test of conduct directed against '*the apparatus of the state'* [See ***Schtraks v Government of Israel*** [1964] AC 556 at p588, and ***T v Immigration Officer*** [1996] AC 742 at p716D]. This is dealt with in more detail in the Defendant's Note on Political Offence [Submissions Bundle, tab 2, pp.6 – 13, paras 3.1 – 3.12].

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

4.7. The prosecution submit that <u>the treaty is not directed at pure political offences,</u> but only at relative political offences. However, their reasoning

simply focuses on the fact that most of the caselaw decided in the Anglo-American context prior to the 2003 treaty deals with relative political offences. That is because the conduct alleged that was analysed in those cases could not qualify as pure political offences such as treason, espionage and sedition. But, in all the decided caselaw referred to by the prosecution, it was a basic premise that "pure political offences" such as treason or espionage were to be regarded as political in character for the purposes of the statutory exemption that operated in the UK in respect of political offences. See for example ***Schtraks*** and ***Cheng***. There was no suggestion that such offences were not covered by the Act and Treaty.

In any event, a "relative" political offence

4.8. In any event the conduct alleged against Mr Assange plainly qualifies as a "relative" political offence because the conduct alleged is clearly intended to '*effect a change in government policy'* and thus comes within the test laid down in ***Cheng v Governor of Pentonville Prison*** [1973] AC 931 at 943C and 945E-F, per Lord Diplock. For a fuller analysis of this the Court is referred to part 4 of the Defendant's Note on Political Offence [Submissions Bundle, tab 2, pp.13 – 20, paras 4.1 – 4.15].

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

4.9. The prosecution claim that Mr Assange's conduct does not even qualify as constituting a "relative" political offence. This overlooks the obvious fact that the exposure of detainee abuse in Guantanamo and of war crimes in Afghanistan and the Iraq war was self-evidently politically motivated and designed to induce a change in government policy. It is impossible to divorce the alleged disclosure of the names of sources from the context in which it occurred. The Court is referred to Daniel Ellsberg's statement in Tab 55 at paragraph 24 where he states that the purpose of the publications that gave rise to this prosecution were precisely *"to have effect on US government*

policy and its alteration". This is dealt with in detail below under 'Political Opinion' and further developed in **Part 2** under Submission 5.

Conclusion on Political Offence

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

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

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

iii. In any event, the conduct alleged against Mr Assange and indeed the motives expressly imputed to him, self-evidently confirm that his alleged offences qualify as "relative" political offences because the alleged conduct was clearly intended to *'effect a change in government policy',* per ***Cheng*** p945E- F, and to have a political effect on a global level.

5. Abuse of process by reason of bad faith and abuse of power

5.1. The particulars of abuse relied on are set out in the Defendant's Particulars of Abuse and in the Defendant's Response on Abuse of Process [Submissions bundle, tabs 5 and 7].

5.2. The Court is respectfully referred to the summary at paragraph 87 of the Defendant's Particulars of Abuse, which is repeated below for ease of reference [Submissions Bundle, tab 5]:

i. The prosecution and extradition request were initiated and influenced by ulterior, extraneous considerations rather than purely criminal justice

reasons [Lewis 3, tab 38, paras 18, 23-30, 3738] [Feldstein 1, tab 18, pp23-24] [Jaffer, tab 22, paras 27-28] [Tigar, tab 23].

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

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

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

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

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

vii. The whole history involving the resurrection of allegations which date as far back as 2010 and which were deliberately not pursued at the time of Chelsea Manning's trial in 2013, engage the s82 bar on passage of time, but also speak loudly to bad faith and abuse.

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

i. There has been no response to the allegations of wholly improper political denunciation.
ii. The prosecution have not dealt with the allegation that the Superseding Indictment was introduced for ulterior and improper purposes.
iii. The prosecution have failed totally to explain the reason for the long delay between 2010 and 2017 in bringing the prosecution.
iv. As to the allegations of the deliberate violation of the Mr Assange's right to legal professional privilege by agents of the US, the US has failed totally to respond to or deny these allegations.

6. *Zakrzewski* abuse

6.1. The ***Zakrzewski*** abuse argument is dealt with in detail in **Part 2**. In essence we submit that the request for extradition is marred by serious and significant misstatements of fact regarding the three central allegations.

6.2. First, the '*passcode hash'* allegation is a necessary part of the US prosecution in order to escape the long held position that <u>publishing</u> state secrets of itself is lawful, per the US Supreme Court. Illegality only arises under US law (per ***Bartnicki v Vopper*** (2001) 532 US 514) when the publisher is also involved in the underlying data theft [Jaffer, tab 22, paras 23-24] [Kromberg 1, para 7, p71]. This allegation has therefore been made of necessity to the US case, despite it being flatly contradictory to the evidence given by US government witnesses before the Manning Court Martial. The evidence of Patrick Eller demonstrates that the allegation is misleading by drawing on the US Government's own evidence, such that there can be no real dispute, and the misleading facts presented are material because they are central to the Court's dual criminality assessment.

6.3. Second, the allegation that Manning's disclosures were connected to the WikiLeaks *'most wanted list',* is again a necessary part of bringing this prosecution in the US but is directly contradicted by the evidence given in Manning's court martial and publically available information. Manning is clear that her disclosures arose out of a sense of duty, not because Wikileaks had sought any particular material – this is further demonstrated by the fact she first tried to provide the disclosures to the *Washington Post* and the *New York Times.*

6.4. Further, material provided by Manning does not correlate to what Mr Assange is alleged to have sought through Wikileaks. In short summary, neither the Iraq and Afghan War diaries (counts 1, 15, 16), the Guantánamo Detainee Assessment Briefs (counts 1, 6, 9, 12, 18), nor the Diplomatic Cables (counts 1, 3, 7, 10, 13, 17) were ever on the list but rather were all items of manifest public interest, for which reason they were disclosed by Manning. The Rules of Engagement (counts 1, 4, 8, 11, 14) were within a *category* of materials potentially on the list but were plainly inextricably linked to her provision of the 'collateral murder' video.

6.5. Third, the allegations that WikiLeaks '*deliberately put lives at risk'* by deliberately disclosing unredacted materials [Kromberg 1, §§8-9, 20-22, 71] [Kromberg 2, §10], the '*intentional outing of intelligence sources'*, is also factually inaccurate. WikiLeaks was in possession of the material referred to above for a considerable period before publication and went to extraordinary lengths to publish then in a responsible and redacted manner. WikiLeaks in fact held back information while it formed media partnerships with organisations around the world to manage the release of materials. Unredacted publication of the cables in September 2011 was undertaken by third parties unconnected to WikiLeaks (and despite WikiLeaks substantial efforts to prevent it). Those who did reveal unredacted cables have not been prosecuted nor even requested to remove them from the internet.

6.6. For all these reasons, the extradition request in this case is a paradigm example of ***Zakrzewski*** abuse and meets the framework set out by Lord Sumption at paragraph 13 of that case.

Statutory Bars

7. Political motivation and section 81(a)

7.1. Mr Assange's extradition is being sought on the basis of a prosecution for Espionage because of his alleged act of publishing state secrets in 2010.

7.2. As set out above, the prosecution has all the hallmarks of a politically motivated prosecution:-

i. The prosecution initiated at the end of 2017 constitutes a complete reversal of the decision taken under the Obama administration in 2013 not to prosecute him. The reason for that earlier decision under President Obama not to prosecute him was that to do so would constitute a violation of the First Amendment of the American Constitution.

ii. It is unprecedented to indict a publisher of official secrets under the Espionage Act.

iii. The prosecution was the culmination of an escalating public war on free speech by the Trump administration which first targeted whistle blowers and then proceeded to attack investigative journalists and publishers.

iv. It was preceded and accompanied by public denunciations of Julian Assange by senior figures in the Trump administration including Mike Pompeo and Attorney General Sessions.

v. Finally, the means adopted to monitor and target Julian Assange and to strip of his protections in the Ecuadorian Embassy were the actions of a lawless state bent on adopting any means necessary to 'bring him down'. Even if it meant violating public international law. Even if it meant violating legal professional privilege and the sanctity of the

Embassy's protection. Even if it meant stealing his newborn child's DNA

Political Opinions

7.3. For the purposes of section 81(a), it is necessary to deal with the question of how this politically motivated prosecution satisfies the test of being directed against Julian Assange because of his political opinions. The essence of his **political opinions** which have provoked this prosecution are summarised in the reports of Professor Feldstein, Professor Rogers, Professor Noam Chomsky and Professor Kopelman [Core Bundle tabs 18, 40, 39 and 6, respectively] and in Daniel Ellsberg's statement [tab 55]:-

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

7.4. In his speeches, articles and book, Julian Assange has clearly articulated and consistently advocated political positions in line with those beliefs. The Court will be referred to the relevant passages contained in Bundle M. Moreover has acted to advance those beliefs and influence governmental behaviour.

7.5. Those beliefs and those actions have inevitably brought him into conflict with the current US administration, which explains why he has been denounced as a terrorist and repeatedly identified as an anti-American ideologue. This is part of the political motivation for the prosecution. Moreover, the current administration has identified "public disclosure organisations" as "ideologically motivated" and as a "growing threat". Finally, targeting him for exposing war

crimes is part of a wider ideological agenda of the current US administration to punish and deter non-US nationals who seek to expose US war crimes or advocate accountability for them. That point is developed in detail in **Part 2**, (under Submission 7 at paras 214 onwards), which deals with the US agenda of suppressing and deterring investigation by of the US by the ICC, and those who assist it.

7.6. Professor Noam Chomsky puts it like this: - ***'in courageously upholding political beliefs that most of profess to share he has performed an enormous service to all those in the world who treasure the values of freedom and democracy and who therefore demand the right to know what their elected representatives are doing'*** [Core Bundle, tab 39, para 14]. Julian Assange's **positive impact** on the world is **undeniable**. The hostility it has provoked from the Tump administration is **equally undeniable.**

The legal test for 'political opinions'

7.7. The Court will be aware of the legal authorities on this issue, the key question being whether a request is made because of the defendant's political opinions. A broad approach has to be adopted when applying the test to the concept of political opinions, per ***Re Asliturk*** [2002] EWHC 2326 [Abuse Authorities, tab 11, paras 25 – 26]. Julian Assange's ideological positions are clearly encompassed in the correct, broad approach.

7.8. Moreover, cases such as ***Emilia Gomez v SSHD*** [2000] INLR 549 show that the concept of "political opinions" extends to the political opinions imputed to the individual citizen by the state which prosecutes him [Political Offence Authorities, tab 43]. For that reason the characterisation of Julian Assange and WikiLeaks as a *'non-state hostile intelligence agency'* by Mr Pompeo makes clear that he has been targeted for his imputed political opinions. All the expert reports on this issue show that Julian Assange has been targeted because of the political position imputed to him by the Trump administration – as an enemy of America who must be brought down.

7.9. There can be no doubt that opposition to and exposure of abuses of governmental authority can qualify as protected political opinions. Thus in ***Suarez*** *[*2002] 1 WLR 2663, the Court of Appeal held at paras 29-30 that:

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

7.10. In the current global context, it is obviously outdated to confine the concept of 'political opinion', and indeed the concept of a 'political offence', to conduct manifesting adherence to a particular political party within a nation state, or to the context of an internal political struggle within such a state. An individual who exposes wholescale abuse and war crimes by a state, and thereby attracts prosecution for the very act of such exposure, is entitled to the protection of section 81(a) and also to the protection of Article 4 of the Treaty (referred to in Part 4 above).

7.11. The key witnesses whose evidence is adduced in relation to the **history** and **political motivation** of the prosecution, and the **free speech** issues raised by it, are as follows:-

i. Professor Mark Feldstein, a distinguished academic specialising in broadcast journalism [Core Bundle, tab 18].
ii. Carey Shenkman, an academic who has made a special study of history of the Espionage Act and the Computer Fraud Abuse Act [tab 4].
iii. Jameel Jaffer, Executive Director of the Knight First Amendment Institute at Columbia University [tab 22].
iv. Professor Michael Tigar, former journalist and academic specialising in constitutional and criminal law [Core Bundle, tab 23].
v. Professor Noam Chomsky, Professor of Politics and world renowned author [Core Bundle, tab 39].
vi. Professor Paul Rogers, Emeritus Professor of Peace Studies at Bradford University [Core Bundle, tab 40].
vii. Patrick Cockburn, a distinguished journalist in his statement of 15 July 2020 [tab 51].
viii. Daniel Ellsberg, the chief protagonist in the Pentagon Papers revelations, in his statement [tab 55 para 24].

Prosecution Reply

7.12. The Prosecution submit that there was no earlier decision not to prosecute and that the experts are wrong to base any opinions on that assertion. Their position is undermined by the following:

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

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

iii. They provide no explanation of the decision making process, despite the fact that memoranda would clearly exist recording the various decisions taken;

iv. They do not deny the fact that there were express protests and resignations by career prosecutors involved in the case when the Superseding indictment was brought in 2019.

7.13. **Mr Kromberg makes some generalised assertions about the independence of prosecutorial decisions in the US Federal system** and asserts that they are not influenced by political considerations. However the overwhelming evidence is that, under the Trump administration, there has been repeated interference by the President and his political appointees, with the normal criminal justice process. In particular Mr Assange refers the Court to:

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

ii. The interference by the President, and the Attorney General in the normal prosecutorial and sentencing process in the cases of Roger Stone and Michael Flynn. (Eric Lewis' 4th declaration at tab 70, paras 44 ff which deals also with the increasing politicisation of the DOJ under Attorney General Barr and President Trump).

Conclusion

7.14. The prosecution do not dispute the unprecedented nature of the prosecution. They have not explained or excused the timing of the prosecution, the accompanying political denunciations or the means adopted to monitor and target Julian Assange. Nor have they answered the expert evidence of political motivation by any independent expert evidence of their own or in any other way.

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

8.1. Turning to section 81(b), it is submitted that Julian Assange will be exposed to prejudice and discrimination both at trial and on sentence and in any subsequent detention by reason of his political opinions and indeed his foreign status. That is for the following reasons:-

i. He has been publicly denounced by the most high-ranking public officials, including the President, the Secretary of State and the Attorney General because of his political opinions. Those overtly intemperate denunciations have irretrievably prejudiced the presumption of innocence and his prospects of a fair trial. That is highly relevant to section 81(b).

ii. Furthermore, the US are taking the position **that he has no First Amendment rights as a foreigner.** That is clear from the statement of Mr **Pompeo** reported in the Guardian on 21 April 2017 that '*Julian Assange has no First Amendment Freedoms'* because *'he is not a US citizen'* [see Bundle K, tab 11]. Indeed the prosecution attorney Mr Kromberg indicates an intention to argue that *'foreign nationals are not entitled to protections under the First Amendment'* [Prosecution Bundle, tab 2, para 71].

iii. Mr Assange's political status will also result in him being held in especially harsh prison conditions. He is likely to be placed in isolation both pre-trial and post-trial, and may well be held under the excessively restrictive regime of SAMs. That is established by the evidence of the US lawyer **Yancey Ellis and Joel Sickler,** the renowned expert on the

US prison system [Core Bundle, tabs 15 and 20]. **US Attorney Kromberg** himself accepts the real possibility that Mr Assange will be put in administrative segregation because of his notoriety [Prosecution Bundle, tab 2, para 84]. This point is further developed in part 8 below.

iv. Finally, Julian Assange's trial, sentence and any subsequent detention will all take place in the context of a criminal justice system that lends itself to political manipulation in cases such as this. And all this at a time when the Trump Administration is blatantly demonstrating its readiness to interfere in the criminal justice system to harm its enemies and favour its supporters (such as Roger Stone and Michael Flynn).

Human Rights

9. Flagrant Denial of Justice and Article 6 ECHR

9.1. The evidence of a number of experts supports the view that there is a real risk that Julian Assange will be exposed to a flagrant denial of justice both at trial and at the sentencing stage. The Court is referred to the evidence of:-

i. **Eric Lewis,** a practicising lawyer in the US who deals with issues both of trial and sentence [tabs 3 and 24]

ii. **Barry Pollack,** Julian Assange's lawyer in the US [tab 19].

iii. **Robert Boyle,** an expert on grand juries, who deals with Chelsea Manning contempt proceedings [tab 5].

iv. **Thomas Durkin,** a former Federal Prosecutor who will deal with the history of this prosecution and fair trial issues [tabs 16 and tab 43].

9.2. The US Federal System operates to secure pleas through coercive plea-bargaining powers, swinging sentences and overloaded indictments designed to increase sentence exposure [Lewis 1, tab 3, paras 36-48] [Durkin, tab 16, paras 17-23]. These pressures are coupled, in case such as this, with the effects of pre-trial detention in solitary confinement in a '*cage the size of a parking space, deprived of any meaningful human contact'* [Lewis 1, tab 3, paras 12-23] [Ellis 1, tab 15, paras 7-8]. The result is a system in which the

plea rate is over 97%, higher than any other country, including Russia. That is confirmed by the evidence of Eric Lewis in his statement [tab 3, para 40] and by the first statement of Thomas Durkin [tab 16, para 18].

9.3. The system will be skewed even further against Julian Assange, because this prosecution will be located in Alexandria, Virginia; from which a jury pool comprised almost entirely of government employees and/or government contractors is guaranteed [Pollack, tab 19, paras 10-11] [Prince 1, tab 13].

9.4. He will then be deprived of the supporting evidence of Chelsea Manning because of coercion by the contempt proceedings, as described by grand jury expert Robert Boyle [tab 5]. It is also foreseeable that prosecutor will force Mr Assange to cooperate and identify other sources of WikiLeaks publications.

His trial will be prejudiced by public denunciations violating the presumption of innocence

9.5. In addition, his trial will be prejudiced irretrievably by the very fact of the public denunciations of him made by a series of administration officials from the President, to the present secretary of state Mike Pompeo and successive Attorney Generals. These intemperate public denunciations violate the presumption of innocence, as is clearly established by the European Court decision in ***Allenet de Ribemont*** **(1996) 22 E.H.R.R. 582**.

The unjust sentencing procedure

9.6. Moreover, his sentence can be enhanced on the basis of unproven allegations even where he is acquitted of those same allegations at trial, as per the evidence of former federal prosecutor Thomas Durkin [Core Bundle, tab 16, paras 19 – 24]. The prosecution say that this procedure has been found to accord with the principles of specialty. That may be so. But the fact of compliance with the technical rules of specialty is one thing. It is quite different to assert that a procedure which enables the Court to increase the

sentence on the basis of allegations that were rejected even by the jury accords with the fundamental principles of a fair trial.

9.7. For these reasons Mr Assange's extradition would violate Article 6 ECHR.

10. Article 7 ECHR

10.1. The inherent unforeseeability of Mr Assange's prosecution as a publisher of classified materials, and consequent bar to his extradition, pursuant to Article 7 ECHR, is dealt with in detail in Part 2 of the Defendant's Submissions.

10.2. In summary, Article 7 both prohibits the retrospective application of criminal law and requires legal certainty, such that the law must be applied in a foreseeable manner. It is an "*essential element of the rule of law"* which must be construed in such a way "*as to provide effective safeguards against arbitrary prosecution, conviction and punishment*": ***S.W. v United Kingdom*** (1995) No. 20166/92 at paragraph 35.

10.3. There are substantial grounds for believing an Article 7 violation would arise in this case if Mr Assange were extradited to face charges under either the Espionage Act or the CFAA because both are so broad, vague and ambiguous that they are vulnerable to political manipulation, and are unforeseeable in their application. Further, they are being used in this case in a legally unprecedented manner, applying an entirely novel legal theory.

10.4. The Espionage Act as originally drafted and in its most recent iteration has been widely criticised by legal scholars for its '*hopeless imprecision'* [Shenkman, tab 4, para 18] as a result *inter alia* of the following:

i. The concept of '*national defense',* which is a key element of the charges in this case, is excessively vague such that the ordinary person could not reasonably understand its scope or anticipate how it will be defined by Courts.

ii. The statute does not define the central concepts of '*injury'* to the United States or '*advantage'* to a foreign nation. Journalism by its nature involves the publication of materials which could be *'useful' to all sorts of people'* and which '*may in some instances be harmful, in the sense that government officials are embarrassed or people are stirred to anger'* [Tigar, tab 23, p19].

iii. The concepts of '*injury'* or '*harm'* hinge upon the classification of documents by the executive where the over-classification of documents is '*widely acknowledged as rampant to the point of absurdity*' [Feldstein 1, tab 18, §6] [Chomsky, tab 39, §12] [Tigar, tab 23, p10] but in respect of which courts *almost never question the government's proffered reasons'* for classification in a given case [Jaffer, tab 22, §14(c)].

10.5. The CFAA incorporates the concepts of '*national defense', 'injury to the United States'* and *'advantage of any foreign nation'* and thus suffers from the same imprecision and '*enormous malleability'* as the Espionage Act, allowing for '*extreme prosecutorial discretion'* [Shenkman, tab 4, para 35].

10.6. Such discretion has led to '*extraordinary selectivity in the initiation of prosecutions'* and leads to *'severe double standards'* [Shenkman, p17, para 31]. This is in part because thousands of classified documents have been leaked to the press, so prosecution of all leaks would not be possible, and in part because many of the leakers are senior government employees who are rarely made the subject of prosecutions [Jaffer, tab 22, paras 11-12, 17-20].

10.7. Despite the extraordinary breadth of the Espionage Act, which some commentators have warned means it could theoretically apply to journalists or publishers [Jaffer, tab 22, paras 8-9] [Tigar, tab 23, pp16-17] [Shenkman, tab 4, para 29], that was never the statute's purpose and rare, attempted political prosecutions of journalists have always foundered either due to concerns over press freedoms or due to political expediency [see detailed summary in Shenkman, tab 4, paras 33-34 and Feldstein 1, tab 18, paras 8-9].

10.8. Even the Justice Department under the Obama administration, which pursued *leakers* aggressively, decided after a three year probe and '*months of internal debate'* not to prosecute Mr Assange because of the so-called '*New York Times problem',* which (as described by former Justice department spokesman Mathew Miller) is that if the Justice Department was not *'going to prosecute journalists for publishing classified information, which the department is not, then there is no way to prosecute Assange'* [Feldstein 1, tab 18, para 9] [Shenkman, tab 4, para 27] [Timm, tab 65, para 36] [Lewis 4, tab 70, §§2-8, 14] [K4-5].

10.9. Thus the prosecution of Mr Assange, a journalist, '*crosses a new legal frontier'* [Jaffer, tab 22, para 21] and '*has no precedent in U.S. history';* certainly there has been '*no known prior attempt to bring an Espionage Act prosecution against a non-U.S. publisher'* [Shenkman, tab 4, para 32]. By this novel and unforeseeable extension of the law, he is exposed to the real risk of a flagrant denial of his Article 7 rights.

11. Article 10 ECHR

11.1. This point is dealt with more fully in **Part 2**. For the purposes of this part we will simply summarise the key propositions as to why this prosecution exposes Julian Assange to the real risk of a flagrant denial of his Article 10 rights.

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

11.3. Secondly, the conduct it seeks to criminalise is investigative journalism. There is no logical distinction between his conduct and that of the New York Times.

11.4. The prosecution's attempt to distinguish his conduct from that of other investigative journalists on the basis that he solicited classified material is convincingly refuted by the reasoning of Feldstein: '*The government's attempt to draw a distinction between passive and active newsgathering – sanctioning*

the former and punishing the latter - suggests a profound misunderstanding of how journalism works. Good reporters don't sit around waiting for someone to leak information, they actively solicit it...When I was a reporter, I personally solicited and received confidential or classified information, hundreds of times' [Feldstein 2, tab 57, §2].

11.5. The means adopted to facilitate the provision of information from Manning are standard journalistic practices: see paras 60 – 70 of **Part 2.**

11.6. As further demonstrated in **Part 2,** Article 10 protects journalists for their activity in obtaining or publishing leaked information as distinct from to conduct of state officials under a duty of confidentiality who leak such information. That is the fundamental distinction from ***R v Shayler*** [2001] 1 WLR 2206.

11.7. Finally, it is clear that US law is not Article 10 compliant. It fails to provide any adequate protection for the exposure of state secrets in the public interest. See paras 204 – 213 of **Part 2.** For that reason too Mr Assange faces a real risk of a flagrant denial of his Article 10 rights.

11.8. **Professor Feldstein** summarises the threat to Article 10 rights posed by this prosecution and extradition request thus:

> "***Julian Assange faces lifetime imprisonment for publishing truthful information about governmental criminality and abuse of power, precisely what the First Amendment was written to protect. In the end, however, this case about more than Assange or journalism.*** *It is about the right of citizens to have the information they need to participate in a democracy. A free society depends on democratic decision-making by an informed public. And an informed public depends on a free and independent press that can serve as a check on governmental abuse of power—the kinds of abuses that WikiLeaks made public. "In a free society, we are supposed to know the truth," a US congressman said when WikiLeaks first began*

publishing this batch of documents. "In a society where truth becomes treason, we are in trouble." [Feldstein 1, tab 18, para 11]

12. Dual Criminality

12.1. It is further submitted there is no extradition crime for the reasons more fully set out in **Part 2.** Put shortly, Mr Assange's conduct would not constitute an offence under English law because the prosecution would not be able to satisfy the reverse burden of demonstrating there was no defence of necessity.

12.2. Were Mr Assange to be tried in England and Wales, for any offences arising under the Official Secrets Acts ('OSA'), the prosecution would need to prove, to the criminal standard of proof, that Mr Assange's disclosures were not the result of duress of circumstance or necessity: see ***R v Shayler*** [2001] 1 WLR 2206, §70. The DPP discontinued the prosecution of GCHQ leaker Katherine Gun, who revealed important information about misconduct surrounding the invasion of Iraq, on the precise basis that the prosecution could not disprove the defence of necessity.

12.3. In this case the governmental actions revealed by Mr Assange goes far beyond misconduct and amounts to evidence of the gravest of crimes, including illegal rendition, torture and murder.

12.4. The prosecution of any journalist in England and Wales for similar revelations could never be pursued, due to the availability of the necessity defence, quite apart from the obvious public interest and human rights considerations. In such circumstances, the dual criminality bar must operate to prevent extradition.

13. Article 3 and section 91

13.1. There is a real risk that Julian Assange will be exposed to inhuman treatment in the United States. In support of the submission that extradition would violate

Article 3 and be oppressive on mental health grounds under section 91, we rely upon the evidence of:

i. **Eric Lewis,** on the issue of sentencing and on prison conditions in his first declaration at tab 3 of the core bundle and in his fourth declaration at tab 70.
ii. **Yancey Ellis,** an experienced lawyer who practices in the very area of Virginia in which Mr Assange's trial and pre-trial detention will take place. In his first report at tab 15 of the core bundle and in his further report dated 14 July 2020 at tab 54.
iii. **Joel Sickler,** a renowned expert on prison conditions in the Federal System at tab 20 of the core bundle and in his second statement of 20 June 2020 at tab 62.
iv. **Lindsay Lewis,** in her affidavit of 17 July 2020 – which deals with the treatment of Abu Hamza post extradition, who has been detained long term in ADX Florence despite express claims by the US government in his extradition proceedings here that this would not take place.

13.2. **Firstly**, it should be stressed that Mr Assange is likely to be singled out for special conditions of administrative segregation, both at the pre-trial stage and the post-trial stage, because of his political profile. **As to the pre-trial stage,** the risk of detention in administrative segregation and even the most repressive regime of special administrative measures ("SAMS") is confirmed by the evidence of Yancey Ellis [Core Bundle, tab 15, paras 6 and 10] and Joel Sickler [Core Bundle, tab 20, paras 13 – 16]. In fact, Mr Kromberg expressly recognises the possibility that Julian Assange would be subject to SAMs in his First Declaration [Prosecution Bundle, tab 2, para 95].

13.3. **As to the post trial stage** there is then the real risk of detention under highly restrictive conditions of segregation in a Communications Management Unit or, worse still, the notorious ADX Florence [Prosecution Bundle, tab 2, paras 102 – 106]. Mr Kromberg does not rule out detention in ADX Florence in either his First Declaration [paras 102 – 106] or his Second Supplemental Declaration [para 14 onwards]. The reality is, that this would involve

conditions tantamount to solitary confinement. For prolonged periods. Without proper review. And without proper consideration of his mental condition.

13.4. The evidence is clear that such a regime precipitates mental breakdowns and heightens the risk of suicide even for mentally stable prisoners and that such a regime is inappropriate and dangerous for mentally ill inmates. Mental health treatment and care in these regimes fails to comply with minimum Article 3 protections [see for example the report of Joel Sickler in Core Bundle, tab 20, paras 18 – 19].

13.5. This is significant because there is clear evidence from Professor Kopelman, Professor Mullen, Dr Deeley and the prosecution expert Professor Fazel that Mr Assange suffers from serious clinical depression and requires medical treatment – including prescribed medication for his depression and psychological support. Moreover, he has now been diagnosed as suffering from Asperger's Syndrome (ASD) by Dr Deeley, a psychiatrist with special expertise in ASD.

Principles of Law applicable under Article 3 and Section 91

13.6. Mr Assange does not seek to challenge the inhumanity of the US prison system in the abstract. It is its likely operation in his case and its effect on him, given his mental and physical problems, that creates the risk of inhumanity contrary to Article 3 and of oppression under section 91. This accords with the approach of the UK courts in such cases as ***Lauri Love*** (2018) EWHC 172 at paras 116-120 and ***Aswat*** 2014 EWHC 1216 (Admin) and of the European Court itself in the same case of ***Aswat v UK*** (2014) 58 EHRR 1 at paras 52 – 57. Mr Assange is likely to be detained in the most restrictive conditions, amounting to solitary confinement, because of his political profile and perceived threat to the US; and yet these very conditions will make it virtually certain that he will suffer mental deterioration and commit suicide given the history of his mental condition.

The recognised risk of pre-trial detention in the US federal system

13.7. The English High Court has already identified the special problems that may arise in pre-trial detention in the US for those suffering from mental disorder. That was what led to decisions to discharge the Requested Persons in the case of ***Lauri Love*** [2018] EWHC 172 at paras 116-120 and to require special assurances in the case of ***Aswat*** (2014) EWHC 1216 at paras 38 - 40***.*** Here there is a real likelihood that Mr Assange will be detained in administrative segregation and even under special administrative measures at the pre-trial phase. He will effectively be subject to solitary confinement, denied association and have limited contact with the outside world. And he will receive no specialist mental health care. The full circumstances are set out in part 12 below and in the appendix.

Risks of detention post-trial

13.8. Turning to the position post-trial, the US acknowledges that there is a real risk that Mr Assange will be subjected to the SAMS regime and that he could be detained in a communications management unit, including even ADX Florence. But they submit that these regimes would not contravene Article 3; and they rely on decisions such as ***Ahmad v UK*** in 2010 and ***Pham v US*** in 2014. However the legal background needs some analysis before accepting any trite proposition that neither the conditions in ADX nor the SAMS regime violate Article 3 or render extradition "oppressive" for the purposes of Section 91.

Observations of the High Court in Hamza

13.9. In the case of ***Abu Hamza v United States*** [2008] EWHC 1357 (Admin) the President of the Queen's Bench Division stated:

> "…*like Judge Workman, we too are troubled about what we have read about conditions in some of the Supermax prisons in the United States… confinement for years and years in what effectively amounts to isolation, may well be held to be, if not torture, then ill-treatment*

which contravenes Article 3. This problem may fall to be addressed in a different case" [para 70].

13.10. In the case of *Hamza*, the question of whether it would be inhuman to subject a man with his disabilities to the conditions in ADX Florence was not determined. But in fact the only reason why it was not determined was because the High Court, and subsequently the European Court, were wrongly informed by the US authorities that there was no real prospect of Mr Hamza being detained in Supermax conditions in ADX Florence for more than a few months, for administrative reasons, pending allocation to a more suitable prison. The fact that the European Court acted on the basis of this wrong information in Mr Hamza's case was expressly recognised by the European Court itself in the later case of ***Aswat v UK*** (2014) 58 E.H.R.R.1 at para 56. But, in fact, Mr Hamza has now been detained in ADX Florence since 8 October 2015 (core bundle, Tab 60). The whole history of Mr Hamza's treatment is dealt with in the affidavit of Lindsay Lewis dated 17 July 2020 at tab 60 of the core bundle. As she shows, the representations made by the US government that Mr Hamza would be extremely unlikely to go to ADX Florence proved false, and despite protests he has been held there for the past 5 years. She further makes the point that inmates held under SAMS at ADX *"are housed in a special secure unit of ADX known as H unit which may result in further limitations on an inmate's ability to benefit from any remaining available mental illness treatment options."* She predicts a similar fate for Mr Assange at paragraph 74 of her affidavit.

The European Court in *Ahmad* in 2012

13.11. The prosecution have referred to the decision in ***Babar Ahmad v United Kingdom*** (2013) 56 E.H.R.R. 1 [Submissions Bundle, tab 6, para 72] and Mr Kromberg refers to the evidence before the European Court in that case in his First Supplemental Declaration [Prosecution Bundle, tab 3, §14]. It is accepted that the European Court in 2012, on the basis of the evidence then before it, rejected a challenge to the compatibility with Article 3 of the conditions in ADX Florence and the regime of segregation there. However:

i. The European Court recognised in ***Ahmad*** that indefinite detention in conditions of segregation could violate Article 3, depending on the particular conditions – the stringency of the measure, its duration, the objective pursued, and its affect on the person concerned [para 209]. They recognised that '*solitary confinement, even in cases entailing relative isolation, cannot be imposed on a prisoner indefinitely'* [para 210].

ii. The Court further recognised that solitary confinement must be accompanied by procedural safeguards guaranteeing the prisoner's welfare and the proportionality of the measure [para 212]. They emphasised the need for review procedure, reasons for any review, and regular monitoring of the prisoners physical and mental condition [para 212].

iii. The Court recognised also that it was important to ensure monitoring and appropriate medical treatment for those suffering from mental illness, detained in conditions such as ADX Florence [para 212].

iv. However, the Court found that there was scope for procedural review [para 220], that conditions were not unduly restrictive given the security risk posed by the Applicant in that case, and that there were well established procedures for reviewing the continuation of detention so that detention need not be indefinite [paras 221 – 223].

13.12. Thus the findings of the European Court were premised on the mistaken assumption that **detention would not be long-lasting or indefinite; that there was a proper system of review in place and that appropriate treatment would be assured for those with mental illness**. None of these assumptions hold good today.

13.13. Furthermore, the Wylie affidavits referred to by Mr Kromberg in his First Supplemental Declaration at paragraph 14 - which were relied upon by the European Court in ***Ahmad*** - were filed in 2007 and 2009, so that they are over a decade out of date. Subsequent events and further revelations have

demonstrated that the contents of those affidavits is no longer an accurate reflection of the conditions there.

High Court Decision in Pham (December 2014)

13.14. It is true that the English High Court in its decision in the case of ***Pham v US*** [2014] EWHC 4167 (Admin), in December 2014, rejected the submission that detention in ADX Florence under SAMS would violate Article 3, despite the evidence adduced by Laura Rovner at an earlier hearing. The High Court relied on the findings of the US Federal Court of appeal in ***Rezaq v Nalley*** 677 F.3d 1001 (2012) [see paras 48 – 49]. On the basis of the ***Rezaq*** decision, the High Court found as follows in ***Pham****:-*

i. Placement in ADX Florence is not indeterminate [para 49];
ii. It is subject to periodic reviews, so that there is no real risk of indefinite detention in ADX Florence.

The current situation

13.15. Since the decisions in ***Ahmad*** and ***Pham*** the situation in ADX Florence has either changed or been clarified by further developments and further revelations. These include:-

i. The Amnesty report of 2014 'Entombed…Isolation in the US Federal System' which observed that conditions for prisoners at ADX had become increasingly restrictive and isolated in recent years (see page 12)
ii. The report of Allard Lowenstein, dated September 2017, for the Centre of Constitutional Rights 'The Darkest Corner: Special Administrative Measures and Extreme Isolation in the Federal Bureau of Prisons'.
iii. Clear evidence that the BOP does not set an upper limit on the amount of time a person can spend in isolation including evidence that one man with mental illness spent 19 years in ADX Florence before he was finally transferred out. (See the July 2017 Review of the Federal

Bureau of Prisons use of restrictive housing for inmates with mental illness).

iv. The history of the case of Abu Hamza himself as set out in Lindsay Lewis's affidavit.

v. The up to date report of Joel Sickler which deals with the situation as it is now and makes clear that "were Mr Assange to be given a SAM or sentenced to a CMU, his time in federal prison in the United States would be a de facto sentence of solitary confinement". (see paragraph 48).

vi. The lawsuit filed by a group of inmates at ADX Florence in the case of *Cunningham v BOP* is analysed by Sickler in his second declaration dated 20 June 2020 [tab 62]. This shows in shocking detail that inmates with mental illness housed at ADX Florence suffered "a near complete lack of mental health care", that "suicide attempts were common", and that "many have been successful" [tab 62, paragraphs 63 – 67]. Despite a settlement approved by the federal district court in 2017[2] which included promises of various improvements in conditions, Sickler shows that the problem of severe lack of medical treatment persists at the prison and that there remains a high rate of suicide [tab 62, paras 65 – 66].

13.16. Thus the true position is now clearer, in that:-

i. The reports referred to above have shown the real risk of indefinite detention in ADX Florence.

ii. There is evidence that detention in ADX Florence in segregation can be indefinite, as shown by the facts of Abu Hamza's case (see Lindsay Lewis' affidavit and see Sickler at paragraph 56, where he refers to *"one man with mental illness spending 19 years in ADX before he was finally transferred out").*

[2] https://www.prisonlegalnews.org/news/2017/aug/30/federal-court-approves-landmark-bop-adx-mental-health-settlement/

iii. There is no proper system of review of detention (see Sickler at paras 55 – 57 of his second statement of 20 June 2020 at tab 62).

iv. This case itself shows the real risk that such detention will be imposed not on a convicted terrorist, but on a troublesome whistleblower – which is wholly disproportionate and arbitrary.

Lack of Medical Care Pre-Trial and Post Trial

13.17. Both the English High Court in the case of ***Love*** and the European Court of Human Rights in ***Ahmad*** have expressed profound concerns about the potential inhumanity of conditions in so-called administrative segregation in the US prison system, amounting effectively to solitary confinement, particularly in relation to those with special mental vulnerability.

13.18. In the case of ***Aswat v UK*** (2014) 58 E.H.R.R. 1 at paras 52 - 56 the European Court found that extradition to the US would violate Article 3 because there was no sufficient evidence that Mr Aswat would receive an appropriate location and appropriate treatment for his mental disorder in the US system. At para 56 the Court took account of the fact that:-

> "*there is no guarantee that, if tried and convicted he would not be detained in ADX Florence, where he would be exposed to a highly restrictive regime with long periods of social isolation. In this regard, the Court notes that the Applicant's case can be distinguished from that of Mustafa (Abu Hamza). While no 'diplomatic assurances' were given that Abu Hamza would not be detained in ADX Florence the High Court found on the evidence before it that his medical condition was such that, at most, he would only spend a short period of time there. The Court notes, however, that there is no evidence to indicate the length of time that the present Applicant would spend in ADX Florence.*
>
> *While the Court in Ahmad did not accept that the conditions in ADX Florence would reach the Article 3 threshold for persons in good health or with less serious mental health problems, the Applicant's case can*

be distinguished on account of the severity of his mental condition. The Applicant's case can also be distinguished from that of Ben Said v United Kingdom as he is facing not expulsion but extradition to a country where he has no ties, where he will be detained and where he will not have the support of family and friends. Therefore in light of the current medical evidence, the Court finds that there is a real risk that the Applicant's extradition to a different country and to a different, and potentially more hostile prison environment, would result in a significant deterioration in his mental physical health and that such a deterioration would be capable of breaching the Article 3 threshold."

13.19. The English High Court in its decision in 2014 ***Aswat v UK*** EWHC 1216 (Admin) followed the European Court's decision. And it was only after specific guarantees were given that Mr Asfaw would be sent to an appropriate mental health institution that his extradition went ahead. Nonetheless, after he was extradited, he was only briefly detained in a psychiatric institution and then almost immediately sent to MCC New York.

13.20. More recently in 2018 the English High Court in the case of ***Lauri Love*** has found that the pre-trial conditions in Metropolitan Correctional Centre ("MCC") and Metropolitan Detention Centre ("MDC") in New York are so defective and inappropriate for someone suffering from depression and autism as to render extradition oppressive.

13.21. Those cases are significant because here we are dealing with an extremely vulnerable person with a long history of clinical depression, a diagnosis of Asperger's Syndrome, and an established risk of suicide. Detention in such conditions for Julian Assange would be the height of inhumanity.

13.22. There is clear evidence that Mr Assange suffers from serious clinical depression and requires medical treatment – both in the form of prescribed medication for his depression and in the form of the support of a psychologist and group therapy, which he has been receiving in HMP Belmarsh. There is clear evidence that he will not receive the necessary medical care either pre-

trial or post-trial. Yancey Ellis refers to the very limited medical support that will be available to Mr Assange in Alexandria, as does Joel Sickler [Core Bundle, tab 15, para 11 and tab 20, paras 54 – 57].

13.23. As to the general lack of medical care in the US federal prison system for those suffering from mental illness, the Court is respectfully referred to the following official US reports:-

i. The 2014 Bureau of Prisons ("BOP") report as to the acute lack of appropriate psychiatric care and the dramatic under-diagnosing of mental illness (see Sickler 2, tab 62, at para 15);

ii. The 2017 Department of Justice ("DOJ") Report from the Office of the Inspector General, 'Review of the Federal Bureau of Prisons use of restrictive housing for inmates with mental illness'. This makes clear that the mental disorders of the inmate population are grossly under recorded and, as a consequence, *'the BOP is unable to ensure that it is providing appropriate care'* to those with mental disorder (see Sickler 2, tab 62, at para 18);

iii. The November 2018 report of the Marshall Project, a prominent criminal justice NGO, which revealed that '*increasingly, prison staff are determining that prisoners – some with long histories of psychiatric problems – don't require any routine care at all'*. Moreover the report found that though the BOP itself states that 23% of incarcerated people have a diagnosed mental illness, it classified just 3% as having a mental illness serious enough to require regular treatment. Mr Sickler drew attention to the consequences of the "*steep drop in mental health treatment*" including the increased number of suicides and suicide attempts. (see Sickler 2 tab 62, at paras 19 – 21).

Course to be taken

13.24. In what follows we will first summarise why the regime Mr Assange faces both pre-trial and post-trial would constitute inhuman and degrading treatment contrary to Article 3. And then go on to deal with the oppressiveness of the

extradition to face such conditions in the light of Julian Assange's mental condition.

14. Article 3: the risk of inhuman and degrading conditions

14.1. In respect of Article 3 we will deal in turn with the conditions pre-trial, the risk of inhuman conditions post-conviction, and the general lack of appropriate medical care.

Conditions Mr Assange faces pre-trial

14.2. The likelihood is that Mr Assange will be detained pre-trial in wholly inappropriate and dangerous conditions for someone in his mental state thus:

i. He will be detained in the Alexandria jail's equivalent of a housing unit. (see Sickler's second declaration at paras 8 – 9).

ii. He will be confined to a windowless small cell for 22-23 hours a day in ADSEG. **This effectively amounts to solitary confinement.**

iii. He will not be able to associate with other prisoners even when he is out of his cell (see Ellis's second declaration at para 4 bundle O tab 7; and see Lewis fourth statement of 18 July 2020 at tab70 at para 14).

iv. Kromberg's account at paras 86-87 of his first declaration as to the ability of inmates to speak through the doors and windows of their cells is emphatically contradicted by Yancey Ellis in his second declaration of 14 July 2020 (tab 54).

14.3. **There is the additional risk that Mr Assange will be placed under SAMS.** Mr Kromberg accepts this as a real possibility at paragraphs 95 of his first declaration. This will place yet further restrictions on his contact with other prisoners and with the outside world – as confirmed by Sickler in his second declaration at para 37. The combination of ADSEG and SAM is equivalent to solitary confinement. Mr Kromberg's denial of solitary confinement at paras 86-87 of his first declaration is contradicted by all of the defence experts on pre-trial prison conditions (Lewis, Sickler, and Yancey Ellis).

14.4. Therefore the likely conditions of detention pre-trial would be both inappropriate and dangerous for someone with Mr Assange's medical history. As the UN Special Rapporteur on Torture commented, the practice of solitary confinement during pre-trial detention is "meant to bludgeon people into co-operating with the Government, accepting a plea or breaking their spirit". Mr Sickler declared that due to the stress of this type of confinement, the Government has found inmates will often change their plea and co-operate with the Government. (see Sickler's first declaration tab 20 core bundle paragraph 60). A regime of detention which is designed to break one's spirit is clearly contrary to Article 3 (Lewis first declaration para 23).

Post-trial detention

14.5. Post-trial there is a likelihood that Julian Assange will be detained in a CMU in conditions of severe restriction and constant monitoring such as those described by Sickler in his second statement at paras 43 ff; a real risk that he will be subjected to virtual solitary confinement under SAMS (and Kromberg himself accepts the real possibility that SAMS will be applied at para 95 of his first declaration.) Moreover there is a very real risk, even a likelihood, that Julian Assange will be detained in the very restrictive conditions of H-Block at ADX Florence. We will deal with each of these in turn.

Placement in a CMU

14.6. Firstly, there is clear expert evidence that Julian Assange could well be detained in a CMU. (see part 4 of Sickler's second statement of 20 June 2020 at tab 62). Mr Sickler deals with the very restrictive conditions in a CMU at paras 39-43 of his second statement at pages 28-30. As he states there:-

> *"CMUs are highly restrictive federal prison units that segregate certain prisoners from the general prison population and the outside world, closely monitoring and controlling those prisoner's communications. Prisoners in CMUs are banded from any physical contact with friends*

and family and their access to phonecalls and work and educational opportunities are extremely limited."

At para 41 he sets out the extent of monitoring. At para 42 he deals with the fact that such prisoners in the isolation units are barred even from contact with other prisoners in the general population in what is widely known as the 'terrorist unit'. Finally, he explains that inmates in CMUs suffer significant levels of depression as a result of the constant monitoring.

SAMS

14.7. Sickler goes on to explain, at part 6 of his report, that there is actually a likelihood that Mr Assange would be subjected to SAMS and the dehumanising regime under SAMS.

14.8. At part 7 Sickler addresses the real risk, if not likelihood, that Mr Assange will be detained at ADX Florence in circumstances of extreme isolation that effectively amount to solitary confinement. At para 52 he sets out the fact that prisoners detained at ADX "spend from 22-24 hours per day locked alone in their cells" and that a psychologist at ADX has stated that "it's a form of torture on some level" and "I would say they are in fact in solitary confinement".

14.9. The prison regimes described above, the accompanying isolation and the life-threatening effects are likely to be imposed on Mr Assange arbitrarily and despite the fact that he is alleged to be neither a violent offender or a terrorist. He is not even a Category A prisoner in the UK, in contrast to the prisoners whose cases were considered in ***Ahmad and Ors***. Moreover, he will be exposed to these regimes irrespective of his mental condition and suicidal tendencies as is clear from the long history of inappropriate use of isolation in general and the ADX regime in particular on those suffering from mental illness.

14.10. For the reasons summarised above it is submitted that earlier cases such as ***Ahmad v UK*** and ***Pham*** relied on by the prosecution do not address the

particular type of situation here or the evidence that is now available on the prison conditions that Julian Assange will face in the year 2020 and the effects that these prison regimes will have in his particular case. In summary, the prison regimes he faces and in particular the risk of detention under SAMS and in ADX Florence are inhuman for the following reasons:-

i. They are wholly inappropriate in his case given the actual nature of his alleged offending.
ii. the imposition of such regimes would be inhuman given his mental vulnerabilities.
iii. The SAMS regime and detention in ADX Florence could be potentially indefinite as shown by the examples Joel Sickler cites and the case of ***Abu Hamza*** himself.
iv. Despite Kromberg's assertions to the contrary, placement under SAMS and subjection to the ADX regime is not subject to any realistic or effective review. This is clearly shown by Sickler's evidence.
v. Inevitably the subjection of Julian Assange to these draconian and dehumanising regimes will inevitably increase the high risk of suicide that already exists.

14.11. The Court is respectfully referred to the Appendix for a more detailed analysis of the prison condition issues, including the lack of proper procedural review for those detained in ADX Florence.

15. Section 91: unjust and oppressive to extradite by reason of Julian Assange's medical condition

15.1. Section 91 affords a protection from extradition where extradition would be rendered unjust or oppressive by reason of physical or mental disorder. In this context Mr Assange relies upon the evidence of expert psychiatrists and psychologists who deal with Mr Assange's history of clinical depression and trauma, and the risk of suicide if he is extradited to the US. They are, in turn:-

i. **Professor Kopelman**, a distinguished forensic psychiatrist [Core Bundle, tab 6].

ii. **Dr Sondra Crosby,** who examined Mr Assange in the Ecuadorian Embassy [Core Bundle, tab 7].

iii. **Professor Mullen,** a psychiatrist who assessed Mr Assange in Australia [Core Bundle, tab 8].

iv. **Dr Quinton Deeley,** an expert in the diagnosis and treatment of ASD in his report of August 14th 2020 [Core Bundle, tab 80].

15.2. This is a classic case for invoking the jurisdiction exercised by the High Court in the case of ***Love*** pursuant to **s.91** of the 2003 Act. That case provides this Court with a precedent for protecting a person suffering from mental illness from the high risk of suicide posed by extradition to, and detention in, the oppressive conditions of the US prison system.

History of Clinical Depression and Trauma

15.3. It is plain that Julian Assange suffers from a long history of clinical depression that dates back many years. There is a family history of mental illness [Core bundle, tab 6, para 2].

15.4. He was diagnosed with depression by **Professor Mullen** in 1995, following an earlier history of self-harm in 1990 [Core Bundle, tab 8, para 4]. Professor Mullen saw him again in HMP Belmarsh in 2019 and recorded that he has "a history of episodes of significant periods of depression dating back to his teens" which "were for the most part of mild to moderate severity" and that his "current depression was precipitated by the distress and fear occasioned by his imprisonment and threatened extradition" [Core Bundle, tab 8, para 38]. He concluded that he "will remain at risk of suicide while the depression continues in its current form" [Core Bundle, tab 8, para 38]. Finally, he gave this view as to the effects of extradition to the US: "in my opinion his mental health will likely deteriorate further and his risk of suicide will increase if he continues to be subject to the current level of isolation, or to potentially even

more isolation and restriction in the US prison system" [Core Bundle, tab 8, para 40].

15.5. **Professor Kopelman** carried out a series of interviews with Mr Assange over a long period in 2019 and concluded in his report dated 17 December 2019 that "Mr Assange suffers from recurrent depressive episodes sometimes with psychotic features present, and often with ruminative suicidal ideas" [Core bundle, tab 6, p33, para 9]. This report drew on an extensive consideration of Mr Assange's family history, medical history and consultation with Professor Paul Mullen's case history of Mr Assange's treatment in Australia. Professor Kopelman recorded symptoms relevant to Mr Assange's mood disorder that included loss of sleep, loss of weight, a sense of pre-occupation and helplessness as a result of threats to his life, the concealment of a razor blade as a means to self-harm and obsessive ruminations on ways of killing himself [Core bundle, tab 6, pp11-12 and 33, para 9]. At that time, Julian Assange expressed frequent suicidal ideas and a constant desire "to self-harm or suicide" [Core bundle, tab 6, p33, para 9]. Professor Kopelman's conclusion was that:

> *"(a) Mr Assange is indeed suffering from mental disorders, namely a severe depressive episode with psychotic (hallucinatory) and somatic symptoms, in the context of a history of recurrent depression, as well as PTSD and anxiety disorder. (b) In my opinion, there is a very high risk of suicide, should extradition become imminent. Mr Assange shows virtually all the risk factors which researchers from Oxford have described in prisoners who either suicide or make very lethal attempts. I would add that he is telephoning the Samaritans regularly. He has received Catholic absolution, and he wants to prepare a Will. He has had potential suicidal implements confiscated. He is very aware of the example of relatives and friends who have suicided. He has been preparing the ground, like his grandfather, by (in effect) saying Goodbye to those closest to him. (c)* ***This suicide risk arises directly from Mr Assange's psychiatric disorder*** *(his severe depression). He finds it difficult to cope in HMP Belmarsh, particularly with his relative*

isolation in Healthcare, and he thinks of suicide "hundreds" of times a day. …I reiterate again that I am as certain as a psychiatrist ever can be that, in the event of imminent extradition, Mr Assange would indeed find a way to commit suicide." [Core Bundle, tab 6, p35, para 14 (iv); emphasis added]

15.6. **Dr Sondra Crosby** confirms the diagnosis of a major depression [Core Bundle, tab 7, para 48]. On the issue of suicide risk, she assesses a high likelihood of suicide if he is extradited to the United States :-

"It is my strong medical opinion that extradition of Mr Assange to the United States will further damage his current fragile state of health ***and very likely cause his death****. This opinion is not given lightly."* [Core Bundle, tab 7, para 49; emphasis added]

15.7. We rely further on the recent report of **Dr Quinton Deeley** dated 14th August 2020 [Core Bundle, tab 80]. At paragraph 29.13 (at page 25) Dr Deeley confirms Professor Kopelman's diagnosis of a depressive condition. He highlights that this is of a fluctuating nature; that Mr Assange was suffering from 'a severe depressive episode with psychotic symptoms' when Professor Kopelman assessed him; and that he was suffering from a 'moderate depressive episode' in July 2020. He identifies a succession of symptoms of depression at paragraph 10 of his report.

15.8. Dr Deeley, who is a leading expert on Autism Spectrum Disorder, further finds that Mr Assange satisfies the criteria for Asperger's Syndrome Disorder (at paras 27.1 to 27.2) and explains that diagnosis fully thereafter. He further explains that the capacity for forming relationships that led Dr Blackwood to discount ASD does not in fact discount such a diagnosis on the basis of Dr Deeley's comprehensive experience in this field. (paras 27.6 to 27.9)

15.9. Dr Deeley finally addresses the risk of suicide 'should a determination be made to extradite him to the United States'. He indicates that his history of depression (31.2 to 31.8), and his Asperger's Syndrome condition (para 31.9)

greatly increase the risk of suicide if a decision to extradite is taken. He concludes that, if a decision to extradite is taken, 'he is likely to try to kill himself' (para 31.14). Still worse, Dr Deeley goes on to assess that there is a high risk of attempted suicide if he is actually extradited, detained and tried in the US; and that this risk would be due to a significant degree to the fact that his Asperger's condition 'would render him less able to manage' conditions in US prisons.(para 31.18)

15.10. Taken as a whole therefore the defence expert evidence satisfies the test laid down in *Turner v United States* for discharge under s.91 in cases of suicide risk, in that:-

i. There is a high risk of suicide, as established by the evidence of Professor Kopelman, Dr Sondra Crosby and Dr Quinton Deeley.

ii. That risk of suicide arises out of the diagnosed mental conditions of depression and Asperger's Syndrome as expressly found by both Professor Kopelman and Dr Quinton Deeley.

iii. The evidence is that this risk would not be addressed and obviated by appropriate precautions in the US system.

iv. Moreover for the reasons set out in part 12 above, the US system does not have "appropriate arrangements in place… so that [the US] authorities can cope properly with the person's mental condition and the risk of suicide" [*Turner v US*, para 28 (6)].

v. Indeed, for all the reasons set out in part 12 above, the real risk of indefinite detention in solitary confinement and also the denial of human contact under a SAMs regime are likely to exacerbate the deterioration of his mental state and increase the risk of suicide.

15.11. Moreover, is a very real risk that Julian Assange will be driven to take his own life by the very prospect of extradition or the very fact of being extradition to the US, given the lengthy detention in inappropriate and inhuman conditions that he knows await him there. In this context the Court's attention is drawn to the likely disastrous effects on him of being separated from his family and support system. It is significant that the European Court in ***Aswat*** attached significance to the separation of a mentally ill person from all family support in

the alien and hostile prison system of the US [para 56, *supra*]. So too did the English High Court in ***Love*** [para 104D]

The evidence of Dr Nigel Blackwood

15.12. The prosecution rely on the evidence of Dr Blackwood who (somewhat surprisingly, given the limited ambit of appropriate expert comment) ventures his own opinion as to section 91 that Mr Assange's "mental health condition is not such that it would not [sic] be unjust and oppressive on mental health grounds to extradite him" [Blackwood, p15, para 56]. This somewhat incoherent assertion is founded on a number of highly questionable assertions and assumptions:-

i. Firstly, his view that Mr Assange's only mental health problem is a moderate depressive disorder and that he suffers from no other mental health conditions [para 56]. This is contrary to the expert evidence of Professor Kopelman, Dr Crosby, Professor Mullen and Dr Deeley, who have far more in-depth and longitudinal knowledge of Mr Assange.

ii. Secondly, his view that there is a risk of suicide, but it is not a substantial risk [para 56]. Again this is contrary to the view of all the defence experts, and of the prosecution's own expert Professor Fazel, that Mr Assange presents a high risk of suicide. And it is based on only two interviews with Mr Assange during a particular week in March.

iii. Thirdly, his view that any suicide risk can be managed in the US since "there appears to be an equivalent multi-disciplinary approach in the Virginia prison system" [para 56]. In this respect Dr Blackwood simply takes at face value Mr Kromberg's claims as to the nature of the regime in the Virginia state system and uncritically repeats those claims at para 55, including the assertion that "there is no solitary confinement in the ADC". Notably, he does not address the question of the federal prison regime outside Virginia that Mr Assange will face post-trial at all.

iv. Finally, that his "**current** mental condition … does not remove his capacity to resist the impulse to commit suicide" [para 56]. This crude assertion does not even begin to address the risk of deterioration if extradition is ordered and if Mr Assange faces the harsh and isolating

conditions he is likely to face in the US prison system and the hostile foreign environment. This is simply brushed aside by a slighting and blithe reference to the fact that "access to his support network may be restricted in Virginia correctional system, such that he interacts with his support net work to an increased degree through his attorneys" [para 57].

15.13. In all the circumstances the Court will be invited to prefer the evidence of the defence experts; to reject Dr Blackwood's optimistic acceptance of all Mr Kromberg's assertions as to prison conditions in the States and the management of suicide risk there; and to apply the same critical approach that the High Court of England adopted in the case of ***Love*** to the US system's capacity to manage the suicide risk of a mentally ill foreign extraditee in their judgment at paragraphs 116 – 119.

Evidence of Professor Fazel

15.14. The prosecution further relies on the recent report of Professor Seena Fazel dated 30th July 2020 who was requested to address both the diagnosis of depression, and the comparative suicide rates as between US prisons and UK prisons generally.

15.15. Professor Fazel records Mr Assange's history of depression; the antidepressant medication he has received in prison (3.10-3.15); the deterioration in Mr Assange's condition by the 20th June 2020 at part 4, and he confirms a 'clinical diagnosis of depression, which is of moderate severity' (5.2).

15.16. Professor Fazel concludes that Mr Assange's suicide risk is currently high but modifiable whilst he is in a UK prison (5.6). Turning to the position if Mr Assange is extradited he recognises that his extradition, conviction and sentence in the US 'would further increase his suicide risk'. He goes on to say:- 'if Mr Assange is moved to a US prison, his suicide risk may be

modifiable but his risk will depend on other circumstances, some of which cannot be anticipated with any certainty'. (5.6)

15.17. Professor Fazel states at paragraph 5.9 that currently 'Mr Assange's mental condition is not sufficiently severe that it removes his capacity to resist suicide'. But clearly that position could alter if he is extradited. And Professor Fazel does not address the extent to which the fact of extradition is likely to exacerbate his present condition and the resultant risk that sooner or later he would then commit suicide or at the very least his condition would 'gravely worsen' and he would 'be at permanent risk of suicide'. Yet this is precisely the scenario that was addressed in the context of oppression in ***Love v USA, 2008 1WLR 2889***. And it was this risk that led the High Court to conclude in that case that extradition would be oppressive in the comparable context of a person suffering from both depression and Asperger's Syndrome and likely to suffer a mental deterioration in the US prison system.

15.18. Professor Fazel refers to the comparative statistics on suicide in US and UK prisons. But he does not address the specific risk of suicide in the case of a mentally disordered foreign national extradited to the United States and detained in conditions of solitary confinement there. The evidence is that there is a high risk of suicide amongst the mentally disordered in US prisons; a vastly enhanced risk in conditions of solitary confinement as noted by Professor Kopelman at page 20 of his second report [cited below]; and a particularly high risk of suicide in conditions of isolation such as those in ADX Florence [see appendix at paragraph 2.33].

15.19. For these reasons we submit that the evidence of Professor Fazel actually supports the case that extradition is oppressive by its recognition that Mr Assange suffers from depression, that he has a currently high risk of suicide; and that that risk of suicide is likely to be increased in the US prison system though Professor Fazel understandably recognised that it is not possible to predict the exact circumstances in which he would be detained in the US [see para 5.6]

Professor Kopelman's response

15.20. In his most recent report of August 13th Professor Kopelman has reaffirmed his diagnosis of severe depression and his conclusion that there is a high risk of suicide in the US. This is after a careful analysis of the reports of the Prosecution experts Dr Blackwood and Professor Fazel.

15.21. In confirming his diagnosis it is important to stress that Professor Kopelman draws on a deeper knowledge of the case that the Prosecution psychiatrists. In particular:-

i. He draws on the extensive family history of depression set out as point 2 of his opinion on page 16 of his second report.

ii. He draws on detailed and contemporaneous accounts of Mr Assange's history of earlier depressive episodes including Professor Mullen's 1996 report as to his depressive episode in Australia then and the records of depression and suicidal ideation during the years 2003 to 2005 when he was further treated in Australia.

iii. He extensively analyses the prison medical records and the significant evidence of an improvement after he was removed from seclusion in Healthcare in single cell occupancy (Paragraph 4, page 17).

iv. He further relies on Dr Humphreys' conclusions on the basis of psychometric tests that Mr Assange has suffered an impairment of his cognitive functions whilst in custody (see findings under the heading Neuropsychological Assessment at pages 4 – 5).

v. Moreover, Professor Kopelman has given this case comprehensive consideration. He had a series of interviews with Mr Assange over a long period of time in 2019, two further interviews in January and February 2020 and has further conducted a telephone interview in May 2020.

15.22. Professor Kopelman's conclusions are based on profound knowledge and careful clinical research in relation to Mr Assange.

15.23. As to Professor Kopelman's findings on the question of suicide risk, his finding that there is a high risk of Mr Assange's suicide in the US is soundly based on a comprehensive review and the following factors:-

i. The family history of depression and suicide (pages 5-6, page 16 and at page 21 (iii) of the second report).

ii. Mr Assange's own past history of self-harm and suicidal ideation (set out at pages 16-17 of the second report).

iii. His current expression of suicidal intentions over a long period of time (first report at pages 11-12 and page 33 at para 9).

iv. The fact that he now has a confirmed diagnosis of Asperger's/ASD and that the study of Cassidy, Baron-Cohen et al (2014) found that an Asperger's/ASD diagnosis in adults increases the risk of suicidal ideation by 9 times compared with the general population (pages 21-22 (iii) of second report). The Court is further referred to the additional statistical studies supporting Professor Kopelman's risk prediction set out in the same paragraph.

v. The further statistical evidence that there is a high risk of suicide in the case of those subject to solitary confinement in the US. As Professor Kopelman points out at page 20 of his second report, the research of Terry Kupers shows that 'approximately 50% of all successful suicides within US prisons occur in the 3.8% of prisoners who are held in segregation or isolated confinement'. Similarly, the rate of 'threatened bodily harm' in ADX facilities was almost 10 times the overall Bureau of Prisons (BoP) prison rate during 2016-17 (8.7 per 100 inmates versus 0.9 per 100) *(Id)*. These statistics completely place in context the more general suggestion of Professor Fazel that the US prison suicide rate is lower generally than the rate of suicide in UK prisons. If one is placed in solitary confinement in the US then the risk of suicide in is very high.

vi. Finally, there is the clear evidence from the prison experts (Joel Sickler, Yancey Ellis, Eric Lewis and Lindsay Lewis) that he is likely to face conditions amounting to solitary confinement in custody in the US. This is most important evidence that cannot be discounted.

15.24. For all these reasons the Court will be invited to conclude that Professor Kopelman's assessment of the high risk of suicide in Mr Assange's particular case if he is extradited to the US is well founded on a comprehensive consideration of the case, the overall clinical picture, the statistical evidence and a careful consideration of the prison conditions he is likely to face in the US.

The overall oppressiveness of extradition

15.25. In dealing with the question of oppression under s91, the Court is entitled to look at all factors, including the nature of the charges (see ***Obert v Greece*** [2017] EWHC 303 (Admin), para 40 and ***Kakis v Cyprus*** [1978] 1 W.L.R. 779 per Lord Diplock at p784G). Here the charges are, to say the least, highly controversial. Moreover, the actual lack of gravity of the offences, and the lack of any actual (as opposed to potential) harm, is apparent from the very fact that the US did not even consider it right to prosecute until December 2017**.** Thus, though the relevant facts were known in 2010, it was not even considered proper to pursue them until 2017, after current President Trump took office and appointed Mike Pompeo as head of the CIA. In determining this issue of oppression, the Court can have regard to all these matters. It can take account of the delay and the highly unusual and unprecedented nature of the case against him. In the light of all these factors taken together it is our case that it would be "oppressive and "unfair" to expose Julian Assange to the very high risk, if not certainty, of suicide if he is extradited to the US.

Additional Risk of Covid in US Prisons

15.26. The Court is already familiar with the evidence as to Mr Assange's physical ill-health and the factors that make him particularly vulnerable to deterioration or death if he contracts Covid. These were fully set out in the reports of Dr Fluxman and Dr Crosby served for the purposes of the bail application. In the light of a body of publicly available materials demonstrating that the US prison system in general affords inadequate safeguards against Covid the European Court has recently granted rule 39 protection against extradition in the case of

Hafeez v UK. In the circumstances the special risks of Covid infection in the US prison system affords an additional reason to decline extradition on section 91 grounds. Mr Assange reserves his right to pursue this point in the light of the fast changing position in the US and the pending application to the ECtHR.

16. Section 82

16.1. Finally, the Court must consider the passage of time and whether to apply the protection against extradition where it has become unjust and oppressive by reason of the same. The position of Mr Assange is as follows:-

16.2. **Firstly,** there clearly has been a long passage of time. No explanation has been given by the US for bringing the charges as late as December 2017 in respect of conduct known as long ago as 2010. Mr Kromberg has made no less than four declarations. But none of them even attempt to explain the delay in bringing charges, despite the fact that he expressly claims in his Second Supplemental Declaration that it was well publicised as early as 2010 '*that the department of Justice had confirmed it was investigating Assange for his acts in connection with the Manning disclosures'* and that *'the specific concerns of the United States that Assange's publications endangered the lives of innocent informants and sources were well publicised'* [para 12]. [The Court is referred to paragraph 12 of Kromberg's Second Supplemental Declaration and to footnote 2 which quotes articles published in 2010 and 2011].

16.3. If it really is self-evident that Mr Assange should be the subject of prosecution (and the section 81(a) argument is rejected) the Court is still left with the question as to why there has been such a long delay in prosecution Mr Assange for publications that took place in 2010 and 2011. That is relevant because "*culpable delay on the part of the state seeking extradition"* is a factor to be taken into account in deciding whether it would be unjust or oppressive to extradite now [***La Torre v Italy*** [2007] EWHC 1370, at para 37]. The relevant authorities are all summarised in the case of ***Obert.*** The Court is

referred to Lord Edmund Davies' judgment in ***Kakis*** at p785C, Lord Woolf's judgment in ***Osman No.4*** (1992) 1 AER 579 at p587D- 587H and Lord Justice Henry's judgment in ***Ex Parte Patel*** [1995] Admin 7 LR 56 **p66 – 67:**

> *'All the circumstances must be considered in order to judge whether the unjust/oppressive test is met. Culpable delay on the part of the state may certainly colour that judgment (as to whether it would be unjust or oppressive to extradite him by reason of the passage of time) and may be decisive not least in what is otherwise a marginal case (as Lord Woolf indicated in Osman (No.4). And such delay will often be associated with other factors such as the possibility of a false sense of security on the extraditee's part'.*

16.4. If the decision to prosecute now, that was taken from December 2017 onwards, has to be presumed as a matter of law to be justified, then the long delay does require explanation. Absent explanation, the Court is entitled to conclude that there was culpable delay in bringing the prosecution for these offences – which the US now say are very serious – when all the relevant factors were known at the latest by 2012.

16.5. **Secondly,** there has been an earlier considered decision not to prosecute, in 2013. The fact of an earlier inconsistent decision not to pursue a prosecution was recognised to be a highly significant factor in determining injustice and oppression in the leading case of ***Kakis v Cyprus*** [1978] 1 W.L.R. 779, where the requested person's belief that he was covered by an amnesty and the long delay in initiating proceedings against him, taken together, were held to render it oppressive as well as unjust to extradite [see Lord Diplock (at p.784) and Lord Scarman (at p.790)]. The Court is further referred to the decision in ***Obert,*** where again delay in seeking extradition was held to be a relevant factor in rendering extradition oppressive [per para 39].

16.6. **Thirdly**, there is a real risk of prejudice given the great difficulties in reconstructing the events of 2010 and 2011, which will be necessary in order

to rebut the US's misleading allegations as to recklessness to the causation of harm. There are grave problems in now attempting to reconstruct and prove the sequence of events in 2011 which led to the eventual publication of unredacted materials after publication by others [Peirce Core Bundle, tab 36, paras 10 – 18]. Equally Mr Assange faces real difficulty in rebutting the allegations that individuals in various countries were exposed to danger as a result of the revelations [Ibid, paras 15 – 17]. This plainly gives rise to a real risk of prejudice at any forthcoming trial.

16.7. **Fourthly,** during the intervening period, Julian Assange's mental state has deteriorated such that there is a real risk he could not effectively participate in his trial. That is in no small part due to the prolonged period of uncertainty caused by the original decision not to prosecute followed by repeated calls for prosecution in 2017 and the eventual bringing of a criminal complaint in December 2017.

16.8. **Finally,** it is oppressive to seek his extradition now after the well-publicised decisions in 2013 not to prosecute him for espionage or any other offences. In dealing with this issue of oppression, the Court can also take into account the very grave effect of all this on Julian Assange's own fragile mental condition.

17. Conclusion

17.1. For all of these reasons and each of them individually, the Court is invited to refuse extradition and discharge Mr Assange.

Edward Fitzgerald QC
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24 August 2020

Appendix on prison conditions relevant to Article 3 and oppression

1. Likely conditions pre-trial

1.1. It is likely that Mr Assange will be held in solitary confinement at the ADC, either in **administrative segregation**, protective custody or subject to **"Special Administrative Measures" (SAMs)**. Importantly, Mr Kromberg has confirmed this as a possibility *(Declaration Kromberg, Assistant US Attorney, 20 January 2020, para 84-85 and 95)*.

1.2. **Administrative segregation** (ADSEG) is a detention regime in which inmates spend 22-23 hours per day in their windowless, single-occupancy cells. Even during their out-of-cell time, they cannot talk to other inmates or take part in educational/recreative programmes. They must spend their out-of-cell time alone, using it to shower or make a phone call. *(Ellis 1 para 8; Lewis para 14)*

1.3. **Special Administrative Measures** (SAMs) is a detention regime with the same characteristics as administrative segregation and additional restrictions on inmates' communication with the outside world. Non-legal visits and phone calls are sharply curtailed; information redacted and censored. Communications with visitors and attorneys are monitored; with attorneys and family subject to prosecution if they make any of the detainee's messages public. *(Lewis 1 para 20-21; Sickler 2 para 40-42)*

1.4. Both these regimes are recognised as forms of solitary confinement, as detainees are confined to their cell for 22-23 hours per day *(Lewis 1 para 18)*.

1.5. Mr Kromberg's statement that there is no solitary confinement at ADC refers solely to the fact that none of the ADC's different detention regimes is formally named "solitary confinement", as he concedes in the following sentence that the aforementioned regimes are employed at the ADC *(Declaration Kromberg, Assistant US Attorney, 20 January 2020, para 83)*.

Administrative segregation

1.6. The ADC regularly houses high-profile defendants and is well-known for assigning them to the jail's administrative segregation unit (ADSEG) *(Sickler, para 52; Ellis, para 7; Lewis 1 para 8)*. Despite warnings from the US Department of Justice that administrative segregation should be used rarely and fairly, ADC uses it as a "default solution" for federal defendants awaiting trial *(Lewis 1, para 16)*.

1.7. According to the 2017 ADC Inmate Handbook, an inmate may be placed in ADSEG for the following reasons *(Lewis 1, para 12)*:

a. being a safety risk to other inmates, guards, or himself;
b. concerns about how well an individual handles being in jail;
c. an extensive criminal history or a "serious charge".

1.8. Mr Assange will almost certainly be held in segregation, in view of the charges against him and the possibility of being sentenced up to 175 years in prison, in combination with the usual practice to keep defendants charged with national security offences in segregation *(Lewis 1, para 12; Sickler 2, para 8)*. Mr Ellis and Mr Sickler add that in their experience, the Alexandria Sheriff would not place Mr Assange amongst the general population due to safety concerns and that it is thus much more likely that he would be placed in "protective custody" in one of the ADSEG units *(Ellis 1, para 7; Sickler 2, para 8)*. In addition, Mr Kromberg recognises that "it also is possible that Assange could be placed in administrative segregation status if, for example, he presents as a safety risk to himself" *(Declaration Kromberg, Assistant US Attorney, 20 January 2020, para 85*. See also *(Sickler 2, para 8)*.

1.9. Inmates are even placed in administrative segregation for 24-48 hours at ADC immediately upon arrival *(Sickler 1, para 54)*.

1.10. In administrative segregation, Mr Assange would be confined to a single occupancy cell of less than approximately 4.5 sq metres, containing a sleeping area, a small sink and a toilet *(Ellis 1, para 8)*. Inmates eat inside their cell, the doors are of thick steel and the "windows" are thick, non-transparent plexiglass material with no slots or wholes in ADSEG units *(Ellis 1, para 8; Ellis 2, para 5)*. This setting makes it impossible to communicate with other inmates through their doors or "windows", contrary to Mr Kromberg at para 87 in his first statement *(Ellis 2, para 5)*. Mr Ellis found it impossible to communicate with his clients through these doors, unless they are screaming throughout the entire conversation or the guard opens the food tray *(Id.).*

1.11. He would be allowed to exit his cell for 1-2 hours per day to the common area, which is about 9 sq m *(Ellis 1, para 8).* However, even during this time he would still remain largely deprived of all social contact and recreational or educational activities *(Id., para 8)*. These 1-2 hours are intended for phone calls or tending to hygiene needs *(Lewis 1, para 14)*. Mr Ellis' clients have also reported receiving their break late at night when other inmates are sleeping *(Ellis 2, para 12)*.

1.12. Only one inmate can leave his cell at one time and the doors and food trays of other ADSEG inmates remain closed *(Ellis 1, para 8)*. Mr Kromberg has stated that inmates may be in the day room together "when it is safe to do so", but Mr Ellis has in the more than two dozen occasions that he has visited the unit never seen inmates being permitted to be in the common room at the same time *(Ellis 2, para 4; Declaration Kromberg, Assistant US Attorney, 20 January 2020, para 87)*. In fact, Mr Ellis has on occasions been told to wait when he was meeting clients, because another inmate had a break and had to be placed in his cell again first *(Ellis 2, para 4)*.

1.13. At some points in the past there has been a television or an exercise bike, at other moments the common room was empty *(Ellis 1, para 8)*. There is no outdoor recreational area at ADC and ADSEG inmates have no access to the limited educational programmes run in the jail *(Id., para 8)*. Whilst Mr Kromberg has stated

that inmates can participate in programmes, Mr Ellis has never had a client in ADSEG who was allowed to participate in them *(Ellis 2, para 4)*. As he leaves open the possibility that his clients may well have been deemed security risks, he "cannot envisage any situation in which the jail would allow Mr Assange in the common room with another ADSEG inmate. For inmates that are in protective custody, the jail does not allow these inmates to congregate." *(Ellis 2, para 4).*

1.14. Mr Ellis adds that Mr Kromberg may be alluding to two administrative segregation units for inmates who committed disciplinary violations, which is supervised by deputies and for which his statement may be true (Ellis 2, para 3). However, Mr Assange is not likely to be placed in those, but will instead be placed in the protective custody ADSEG units, where contact with others through cell doors, in the common room or during programmes is ruled out, and no supervision by deputies is necessary for this reason (Ellis 2, para 4).

Special Administrative Measures

1.15. As the authorities have a considerable degree of discretion to impose SAMs, ranging from protecting against bodily injury to protecting national security information, Mr Assange is very likely to be subject to SAMs *(Sickler 1, para 59; Lewis 1 para 19)*

1.16. In fact, the government expressly recognises the possibility of these measures being imposed, both pre-trial and post-conviction *(Declaration Kromberg, Assistant US Attorney, 20 January 2020, para 95)*.

Regime

1.17. Detainees under the SAMs regime also have a right to 1-2 hours out-of-cell time per day, however, due to the manner in which this is organised, it does nothing to temporarily alleviate their isolation *(Lewis 1, para 20)*. Many inmates reject their out-of-cell time, because it is scheduled in the middle of the night and disturbs their sleep *(Id., para 20)*. Moreover, walking around in a small, dark and empty exercise area without any natural light, fresh air or contact with other prisoners is a very similar sensory experience to being alone in an isolation cell *(Id., para 20)*.

1.18. Aside from being socially isolated from the other detainees, the non-legal visits of SAMs inmates are sharply curtailed and they can only call for 15 minutes per month *(Id., para 20)*. These calls are monitored, as are their visits with lawyers *(Id., para 20)*. SAMs inmates' access to information is also heavily restricted, with material being censored and redacted *(Id., para 21)*. Ms Lewis' statement illustrates how these extreme measures make it nearly impossible to have adequate client-attorney interaction. Abu Hamza was not allowed to email her, no regular legal visits were assured and between the period of October 2012 and January 2013, she was able to have two legal phone calls with him, despite her attempts to set up regular calls *(Lindsay Lewis, para 54-55)*.

1.19. Moreover, family members and counsel can be prosecuted and incarcerated for repeating anything an inmate told them, even further impeding Mr Assange from making his defence or reporting ill-treatment *(Sickler 2, para 40)*.

1.20. Attorneys self-censor out of fear of being incarcerated themselves for violating SAMs *(Sickler 2, para 41, CCR 2017 Report)*. As one attorney stated: "The lines are not clearly drawn, so it ends up sort of amplifying the fear because it's hard to know whether you're going to say something that is going to sort of trip someone's wire. The consequences of [violating SAMs] are so significant and frightening that most lawyers err on the side of caution even with things that would be beneficial to their clients." *(Id.)*. Defence attorney Lynne Stewart's sentence to a decade in prison for revealing her client's statements to the press, in violation of his SAMs, illustrates the real risk for defence lawyers bringing a SAMs defendant's case *(Sickler 2, para 42, CCR 2017 Report)*.

1.21. SAMs also hamper candid conversations about trial strategy, as under certain circumstances, SAMs regulations permit monitoring of attorney-client communications *(CCR 2017 Report, p17)*. Accordingly, defendants and their attorneys must operate in an environment where everything they say, write, or signal may be monitored by the government *(Id.)*. While SAMs regulations purportedly create a firewall whereby no official involved in prosecuting a case can listen to these privileged conversations, attorneys' conversations are hampered nonetheless *(Id.)*. Some lawyers avoid speaking with clients on the phone because they worry that listeners will hear confidential information and even in-person visits are not necessarily secure *(Id.)*. (The latter are currently banned due to the Covid-19 crisis.) *(Sickler 2, para 33).* In similar facilities to where Mr. Assange would be held pretrial, cameras mounted to the walls in attorney-client visiting rooms stare down throughout the visit, creating the appearance – if not the reality – that interactions are constantly watched *(CCR 2017 Report, p 17)*. This monitoring, whether perceived or actual, leads to self-censorship *(Id.)*. Lawyers avoid certain questions, fearing they will tip off the government about their trial strategy, and defendants withhold information that could help with their defence *(Id.)*.

1.22. Lastly, the isolation will "dehumanize [Mr Assange as a] defendant" as it ultimately "eliminate[s the inmates] as participants in their defence" *(CCR 2017 Report, p 16).* This is particularly problematic with respect to his right to testify, as one attorney reported: "The first time [a defendant] talk[s] to anyone besides me after two and a half years in solitary confinement is the jury. There is no way to prepare [him] for it. It really discourages the client from testifying." *(Id).*

1.23. Experts believe these additional measures are designed to create psychological pressure on the defendant (Lewis 1, para 23). As the UN Special Rapporteur on Torture commented, the practice of solitary confinement during pre-trial detention is "meant to bludgeon people into cooperating with the government, accepting a plea or breaking their spirit". A regime of detention which is designed to break one's spirit is clearly contrary to Article 3 (Lewis 1, para 23).

2. Likely conditions post-trial

2.1. Upon conviction, the Federal Bureau of Prisons (BOP) would designate a post-sentencing facility; a prisoner's request or a court's recommendation would not be binding *(Sickler para 61; Lewis, para 49; Declaration Kromberg, Assistant US Attorney, 20 January 2020, para 100)*. Mr Assange's charges and potential sentence will most likely prompt the BOP to detain him at one of the **Communication Management Units (CMU's)** in **Marion**, **Illinois**, or **Terre Haute, Indiana**, or, alternatively, at **ADMAX Florence, Florence**, an "ultra-maximum-security" prison *(Sickler 1, para 62 and 66)*. Mr Kromberg appears to accept that he may be detained in these facilities, adding that "it is possible that Assange will be placed under **Special Administrative Measures** for at least a portion of his sentence" *(Declaration Kromberg, Assistant US Attorney, 20 January 2020, para 101-103)*.

Communication Management Units

Regime

2.2. Communication Management Units (CMUs) are designed to strictly limit the detainee's contact with the outside world and typically hold prisoners with politically sensitive profiles like Mr Assange, which is why it is widely known as the "terrorist unit" *(Sickler 2, para 46)*.

2.3. If detained in a CMU, Mr Assange would be subject to constant monitoring, with almost no opportunities to contact family. In a CMU, every communication made by a prisoner, except with an attorney, is actively monitored *(Sickler 2, para 45; Centre for Constitutional Rights [CCR] 2014 Report)*. Prisoners in CMUs are banned from any physical contact with friends and family, receive only 4 hours of noncontact visiting time, written correspondence is limited to one letter per week to and from a single recipient and the BOP may reduce calls to three 15-minute calls per month *(Sickler 2, para 44, CCR 2014 Report)*.

2.4. Mr Assange's conversations with other prisoners would also all be recorded by the BOP with cameras and listening devices *(Sickler 2, para 45)*. He would also be barred from contact with other prisoners in the general population and have limited access to educational and other opportunities, isolating him even further *(Sickler 2 para 46)*.

Ability to challenge designation/review

2.5. If designated to a CMU, Mr Assange risks remaining there for a prolonged period of time, as the opportunities to challenge the BOP's designation or to have it reviewed mostly exist on paper only *(Sickler 2, para 49)*.

2.6. **First**, it is highly unlikely that Mr Assange will be provided a full account of the reasons why he has been designated to a CMU, which is crucial to enable him to challenge his designation.

2.7. There is no requirement that the BOP's Assistant Director of Correctional Programs (prior to 2015 this was the Regional Director), who determines which prisoners shall be sent to CMUs, document his reason(s) for doing so *(Sickler 2, para 55; CCR 2014 Report)*. Officials who recommend (though do not determine) that certain prisoners be sent to a CMU do document their reasons *(CCR 2014 Report)*. However, they often do not include all of the reasons for their recommendation *(Id.)*. One official testified that he omits some of his reasons because there is not enough space on the form *(Id.)*.

2.8. Only after arriving at a CMU, Mr Assange would receive his "Notice of Transfer". Even then, the reasons provided in the notice are frequently vague, incomplete, inaccurate, and/or completely false *(Sickler, para 55, CCR 2014 Report)*. When prisoners have requested further details about the explanation provided for their designation (such as specific facts they could admit or deny), their questions were completely ignored and/or they have received a duplicate of the initial explanation *(CCR 2014 Report)*. When prisoners have pointed out that the facts purportedly underlying their CMU designation are false, including by referring the BOP to documentation, the BOP has ignored this entirely and continued to assert those facts as true *(Id.)*.

2.9. **Second**, Mr Assange would have no real opportunity to challenge his designation and no judicial review would be available, as was recently confirmed by Congress *(Sickler 2 para 54)*. He can challenge CMU placement only through the BOP's Administrative Remedy Program, a purely written process *(Sickler 2, para 55)*. An inmate has no right to a live hearing, no right to call witnesses or present evidence, and no right to representation of any kind *(Id.)*.

2.10. The administrative process is lengthy and cumbersome, consisting of many steps during which the original recommendation of the staff members who directly interact with the inmate can get lost *(Sickler 2, para 56)*. Lower-level staff members working in a CMU first make a recommendation to the warden of the institution where the prisoner is incarcerated *(Id.)*. The warden then decides whether to forward the recommendation to BOP's Counterterrorism Unit, a division with functions that include "identifying inmates involved in terrorist activities" and monitoring "terrorist inmate communications" *(Id.)*. The Counterterrorism Unit then forwards its own recommendation to the BOP's Assistant Director of Correctional Programs "for further review and consideration", who makes the final decision *(Id.)*.

2.11. **Third**, it is unlikely that he would be able to leave the highly restrictive regime within the next few years through the regular review process. Prisoners are given false, and even impossible, instructions for earning their way out of a CMU *(CCR 2014 Report)*. Some prisoners have been baldly lied to and told that they could earn their way out of the CMU by completing 18 months of clear conduct, but after meeting that goal their

requests for transfer were repeatedly denied without explanation *(Id.)*. Even on those occasions when a prisoner is transferred from a CMU back to the general prisoner population, he is not told why he was in the CMU or why he was transferred out, so he does not know what behaviour to avoid so as not to be sent back *(Id.)*. Moreover, as two out of five of the designation criteria make reference to the inmate's conviction, and there are no separate review criteria, there seems no incentive for the BOP to release the inmate from the CMU, as the original reason will never lapse *(28 CFR 540.201)*.

2.12. Special Administrative Measures

2.13. There is a real risk that Mr Assange will also be subjected to SAMs post-conviction, as now recognised by Mr Kromberg *(Declaration Kromberg, Assistant US Attorney, 20 January 2020, para 95)*. He would be subject to the same solitary confinement, far-going restrictions on communication and visits, and difficulties to have them reviewed.

ADX Florence

2.14. The US Government states that if Mr Assange does not have SAMs imposed the US might seek to limit his communications in other ways in which case he may be designated to a CMU. It also recognises that many inmates under SAMs are held at ADX Florence *(Declaration Kromberg, Assistant US Attorney, 20 January 2020, para 95 and 102)*. Administrative Maximum-Security United States Penitentiary ("ADX") is the US' strictest prison and is perceived critically even within BOP ranks *(Sickler 2, para 59)*. Robert Hood, who has worked for the BOP over 20 years and was ADX' warden from 2002-2005, has described it as "not built for humanity. I think that being there, day by day, its worse than death" *(Sickler 2, para 59).*

Regime

2.15. Mr Assange is most likely to be held in H-Unit, the special unit for detainees under SAMs, which is even more restrictive than the General Population (GP) at ADX *(Sickler 2 para 61)*. Both regimes are created to reduce human contact to a minimum and amount to solitary confinement. As a psychologist at ADX stated to the Department of Justice: "[Y]ou have no contact, you don't speak to anybody, and it's a form of torture on some level…. [Inmates] still talk to officers and stuff like that, but they don't really get a chance to see anybody…. They rec[reate] alone; we don't even have to be back there to rec them. So, yes, I would say that they are in fact in solitary confinement." *(Sickler 2, para 52; DOJ 2017 Report*

2.16. Prisoners at ADX are locked for 22-23 hours per day in their cells, which are designed to prevent any contact with detainees in adjacent cells *((Sickler 2, para 60; DOJ 2017 Report; AI 2014 Report p 8; Lewis 2 para 31)*. Meals are eaten inside cells and limited recreation time consists of being alone in individual cages *(Sickler 2 para 60; AI 2014 Report, p 9-10)*.

2.17. Similarly, the US government's claim that inmates have daily contact with correctional counsellors, medical and mental health and religious staff, in reality comes down to only a few words per day by staff *(AI 2014 Report, p 16)*. Amnesty International observed that conditions for prisoners at ADX have become increasingly restrictive and isolated in recent years, with, for example, group recreation being banned (*Id., p 12).*

2.18. Prisoners in the GP units may write letters and make two 15-minute non-legal phone calls a month (or, six hours per year in total to speak with their family) *(Id., p 16)*. All social and legal visits at the facility take place in a non-contact setting, behind a thick plexiglass screen *(Id., p 16)*. Even though visits are non-contact; detainees are shackled and in pain nonetheless *(Id., p 16)*. Other than when being placed in restraints and escorted by guards, prisoners may spend years without touching another human being *(Id., p 16)*. Nevertheless, due to ADX' remote location, visitors will only rarely be able to meet Mr Assange, a problem that has been reported by other prisoners as well *(Id., p 16)*.

2.19. There is a real risk that Mr Assange will be held under SAMs at ADX, subjecting him to even further restrictions.

2.20. Visits and correspondence for SAMs prisoners at ADX are typically limited to approved attorneys and approved immediate family members only *(Sickler 2, para 53; AI 2014 Report).* There is a real risk that even his close family members will not be approved: in Abu Hamza's case, the majority of his children and grandchildren are not approved- the oldest grandchild being 6 years old (Lindsay Lewis, para 91). Correspondence to or from approved contacts, which is monitored along with the twice-monthly non-legal phone calls allowed, may be limited to only one letter a week *(Id.)*. Abu Hamza described in his own case how he is only allowed to send one letter a week, subject to various controls, due to which its writing and receiving a reply takes 6 months *(Lindsay Lewis, para 92)*.

2.21. These conditions of solitary confinement are likely to have a detrimental effect on Mr Assange's already very fragile mental health. A study of prisoners in solitary confinement at ADX found that all prisoners interviewed exhibited memory problems and extreme lethargy, and most prisoners suffered from chronic insomnia and headaches *(CCR 2017 Report, p11).* All of these are well-known physical symptoms cause by solitary confinement *(Id.)*.

2.22. Despite Mr Assange's well-documented record of mental health issues, this would not prevent him from being held in isolation at ADX with no or highly limited access to mental health services. Also post *Cunningham v BOP*, a class-action suit concerning the detention of mentally ill detainees at ADX, ADX still houses mentally ill detainees in isolation, if their security status requires so *(Lindsay Lewis para 70-71)*.

Lack of physical and mental health care post-conviction

2.23. If Mr Assange were to be convicted and sent to one of the Federal Bureau of Prison's (BOP) facilities, it is highly likely that he will not receive any mental healthcare at all. Various reports (CNA 2014 Report commissioned by the BOP; Department of Justice 2017 Report; The Marshall Project 2018 Report) all document the BOP's systematic underdiagnosing of inmates requiring mental health care to avoid the expenses that this care requires. Numerous testimonies of (ex-)detainees corroborate the impossibility of receiving mental health care. It is also highly unlikely that the BOP can protect Mr Assange's weak physical health, as the BOP's physical health care suffers from the same root problems, understaffing and a lack of resources.

Systematic underdiagnosing

2.24. A report commissioned by the BOP in 2014 on the failings in mental health care for inmates in restrictive housing (e.g. administrative segregations, special administrative measures, as Mr Assange will most likely face), first highlighted the issue of dramatic underdiagnosing and an absolute lack of treatment *(Sickler 2, para 17; Report Commissioned by BOP, CNA, Federal Bureau of Prisons: Special Housing Unit Review and Assessment, 2014)*. The report relied on independent psychiatrists reviewing records and interviewing incarcerated people *(Id.)*. The reviewers "disagreed with the BOP diagnosis in nearly two thirds of the cases reviewed" and found numerous incarcerated people exhibiting symptoms of serious mental illness were not diagnosed by medical staff, and thus were not receiving treatment *(Sickler 2 para 15; CNA 2014 Report, p 117 and 121-122)*.

2.25. A 2017 report from the Department of Justice affirmed the issue in plain wording: "The BOP cannot accurately determine the number of inmates who have mental illness because institution staff do not always document mental disorders *(Sickler 2, para 18; Lewis 2 para 21)*. The BOP's FY 2014 data estimates that approximately 12 percent of inmates have a history of mental illness; however, in 2015, the BOP's Chief Psychiatrist estimated, based on discussions with institutions' Psychology Services staffs, that approximately 40 percent of inmates have mental illness, excluding inmates with only personality disorder diagnoses." *(Sickler 2, para 18; DoJ 2017 Report, Review of the Federal Bureau of Prisons' Use of Restrictive Housing for Inmates with Mental Illness, p ii).*

2.26. Lastly, the Marshall Project not only further documented the underdiagnosing, but also the policy reasons for doing so. After being subject to strong criticism about its mental health care system, in 2014, the BOP introduced a new policy aimed at providing better care. However, in order to implement the system without increasing the budget, the BOP also lowered the number of detainees in need of care by 35%, effectively depriving a third of those with mental health issues of care *(Sickler 2, para 19-21; Lewis para 22)*. The BOP classified only 3% of the inmate population in need of regular care, despite officials having admitted that more than 20% suffers from mental health issues *(Sickler 2, para 20)*. A former BOP psychologist stated: "You doubled the workload and kept the resources the same. You don't have to be Einstein to see how that's going to work." *(Sickler 2 para 21; Marshall Project 2018*

Report) For the sake of comparison, California provides mental health care for a "serious mental disorder" to more than 30% of people incarcerated in its state prisons, while New York and Texas provide mental health treatment to roughly 20% of incarcerated people *(Sickler 2, para 20)*.

2.27. It was also alleged in *Cunningham v Federal Bureau of Prisons*, in the class action addressing the mental health care at ADX Florence which ended in a settlement in 2016, that the BOP routinely disregards mental health evaluations of prisoners it wishes to send to ADX. Moreover, it was stated that the mental health screenings of prisoners who are transferred to ADX are woefully inadequate and that the BOP also fails to recognise mental health issues which arise after they arrive at the facility. The plaintiffs also alleged that detainees with a mental illness are often held in the Control Unit, where they are isolated 24 hours per day, for extended terms, such as periods of 6 years or more, without any mental health care or psychotropic medication. This is plainly unacceptable as recognised by the Lord Chief Justice in *Love*. It has also been reported regularly, as documented in *Cunningham*, that ADX staff provides medication irregularly and distributes the wrong medication.

Inadequate care/lack of care

2.28. Even if the BOP recognises Mr Assange's mental and physical health issues, he is likely to face woefully inadequate treatment, or simply no treatment at all.

2.29. The 2014 CNA Report indicated that the treatment being offered by the BOP was insufficient or inappropriate in over half of the cases reviewed *(Sickler 2 para 15, CNA 2014 Report, 117)*. Medications were prescribed in doses inadequate to treat the targeted conditions, and there was often little or no follow up to ensure the medications were working *(Sickler 2 para 15, CNA 2014 Report, 125)*. One inmate reported he had not seen a health care provider about his medications in two years *(Id.)*. Psychologists had caseloads so great that they had to "prioritize psychiatric review to only a handful of the least stable mentally ill inmates on their caseloads." *(Sickler 2 para 15, CNA 2014 Report, 123)* Psychiatrists were often available on a limited basis by teleconference only, and even then "the hours provided are so limited that the referral system is delayed and insufficient to meet the health needs of the inmates." *(Sickler 2 para 15, CNA 2014 Report, 125)*.

2.30. Several of Mr Sickler's clients have also provided him first-hand accounts about how the BOP's health care system, which looks excellent on paper, is failing in practice *(Sickler 2 para 17-21)*. A recently released client informed him that at no time could an inmate at his facility get treatment for on-going mental health issues *(Sickler 2 para 18)*. The mental health professional would occasionally walk the grounds of the prison and ask inmates how they were doing *(Id.)*. Another client reported that no anti-depression mediations were available, that there was a lack of inhalers for asthma patients, or that inmates with broken bones go untreated *(Sickler 2 para 17)*.

2.31. Mr Assange will also not have access to appropriate care for his Autism Spectrum Disorder. The BOP's "Skills Program" is only available for inmates in low to medium

security prisons, and is also highly inadequate for Mr Assange, as it targets inmates with very low cognitive abilities- which the High Court considered to be an important issue in *Love (Sickler, para 25-27; Lauri Love, para 81)*.

2.32. Whilst the *Cunningham v BOP* settlement has mainly improved the lives of mentally ill prisoners by allowing them to leave ADX if they can be housed in another secure facility, it has not meaningfully improved mental health care at ADX *(Lindsay Lewis, para 70)*. The 2017 District of Colombia's Corrections Information Council's ADX Inspection report documents that apart from transferring inmates to another secure facility, they could participate in the STAGES programme *(Lindsay Lewis, para 71)*. This is a form of group therapy, which nevertheless requires the inmates to be shackled in cages when participating *(Lindsay Lewis, para 72; Sickler 2, para 65)*. However, such therapy would most likely not be available to Mr Assange, since inmates under SAMs are prohibited from communicating with most other prisoners *(Lindsay Lewis, para 73)*. Those not permitted to take part in group therapy, may be provided with individual therapy- which is also unlikely to be accessible or effective for Mr Assange. Individual therapy is offered on a very limited basis (5 patients per week), inmates under SAMs are likely to be ineligible, and conversations with SAMs inmates are likely to be monitored, which prevents the patient from effectively engaging *(Lindsay Lewis, para 75)*.

2.33. The Report also documents that inmates often have difficulty accessing medication for their psychological disorders and are being taken off medication *(Sickler 2 para 65)*. ADX's alarmingly high rates of documented "Threatening Bodily Harm" incidents (8.7/100 inmates at ADX compared to the overall BOP rate of 0.9/100 inmates) indicates that mental health care at ADX is still highly inadequate, even compared to the BOP's own poor standards *(Sickler 2, para 65)*. According to the report, those committing self-harm or suicide are treated not seriously, but as "attention seeking" *(Id)*.

2.34. Also in a recent case from February 2020, the Court also held the care at ADX to be "dramatically short of medically acceptable standards of care, even for prisoners" *(Sickler 2, para 66).* Whilst the case concerned physical care, the underlying complaint demonstrated a lack of health care generally *(Sickler 2, para 66).*

Understaffing

2.35. The precipitous decline in mental health treatment by the BOP appears directly linked to understaffing; and is for this reason unlikely to be resolved soon.

2.36. The BOP has failed to increase staffing levels since it mandated more intense mental health treatment *(Sickler 2, para 19-21)*. In March 2016, the US Department of Justice reported that 17% of the medical care positions in the BOP were vacant, and that only 24 of 97 BOP institutions had a medical staffing vacancy rate of 10% or less, the minimum acceptable threshold established by BOP policy *(Sickler 2, para 16)*. 20 BOP institutions had a medical staff vacancy rate of 25% or more, and 3 institutions had a vacancy rate of 40% or more *(Id.)*. As of October 2015, the BOP

had filled only 28 of 49 (57%) of its authorized fulltime psychiatrist positions nationwide *(Id.)*. The BOP's former Assistant Director for Health Services and Medical Director, who oversaw the BOP's provision of medical care until his retirement in October 2015, described the staffing as "crisis level" *(Id.)* By 2017, nothing had improved: 18% of BOP's authorized medical positions were vacant *(Id.)*.

2.37. The BOP's systematic failure to provide health care can have detrimental consequences for Mr Assange, as the BOP's suicide statistics illustrate. The combined number of suicides, suicide attempts and self-inflicted injuries increased 18 percent from 2015 through 2017 *(Sickler 2 para 21; Lewis 2 para 23)*.