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

SUBMISSIONS ON BEHALF OF THE DEFENDANT
THAT HIS EXTRADITION IS UNLAWFUL BY REASON OF THE FACT THAT HIS ALLEGED OFFENCES ARE 'POLITICAL OFFENCES'

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1. Introduction and Overview

1.1 Unlike many other modern extradition treaties, but in accordance with long and well-established Anglo-US practice, Article 4(1) of the Anglo-US Extradition Treaty 2003 (ratified in 2007) expressly provides that '*extradition shall not be granted if the offence for which extradition is requested is a political offence'*.

1.2 The offences with which Mr Assange is charged, and for which his extradition is sought, are, on the face of the extradition request, '*political offences'*.

1.3 The offences alleged in the US indictment that forms the basis of the extradition request are a series of offences, cumulatively punishable with 170 years' imprisonment, under the Espionage Act 1917 (now codified in Title 18, USC chapter 37 '*espionage and censorship'*), namely:

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

b) Unauthorised obtaining and receiving of national defence information (Counts 2 to 8);

c) Unauthorised disclosure of national defence information (Counts 9 to 17).

1.4 There is also an offence[1] (punishable with 5 years' imprisonment) of '*conspiracy to commit computer intrusion'* in order to '*facilitate Manning's acquisition and transmission of classified information related to the national defence of the United States*' (Count 18; Indictment, p36).

1.5 The gravamen (and defining legal characteristic) of each of the 18 charges is an alleged intention to obtain or disclose US state secrets in a manner that was damaging to the security of the US state.

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

2. A 'pure political offence'

2.1 The concept of a '*political offence'*, or an offence '*of a political character',* has featured in successive Extradition Acts and in numerous bilateral treaties over

[1]. Originally the only offence charged.

the last century and a half. It is a concept familiar to the courts of both the US and the UK and carries a particular meaning under international law.

2.2 As a starting point, the authorities, both in England and abroad, first identify certain offences that are, by definition, paradigm or '*pure'* political offences because they are clearly offences against the state. Viscount Radcliffe states in ***Schtraks v Government of Israel*** [1964] AC 556 at p588 that there are '*two alternative ways of identifying a political offence – one, a charge that on the face of it smacks of the political, say caricaturing the head of state* [2] *or distributing subversive pamphlets'* (at p588). These are offences which are '*on their face political'*. Viscount Radcliffe contrasts this with the '*other'* type of political offence where '*a charge which, ostensibly criminal in the ordinary sense, is nevertheless shown to be 'political' in the context in which the actual offence occurred*'.

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

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2. Making remarks critical of the Queen ('*leasing-making'*) and seditious libel were, until 2011, offences in the UK (s73 of the Coroners and Justice Act 2009; s.51 of the Criminal Justice and Licencing (Scotland) Act 2010). It is still currently an offence in, *inter alia*, Spain, Denmark, Germany, Netherlands, Kuwait, Jordan, Saudi Arabia, Morocco, Cambodia, Malaysia and Thailand to insult the monarch or head of state.

Espionage is a 'pure political offence'

2.4 There is powerful authority that the offence of espionage is understood under American law, common law and international law, to be a paradigm example of a '*pure political offence*', because it is not an ordinary crime and it is, by definition, directed against the political order of the state itself. ***Bassiouni*** on International Extradition speaks in terms of '*purely political offences'* as offences against the state itself in his analysis at pp677-679 and identifies '*treason, sedition and espionage'* as paradigm examples belonging to this category.

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

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

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

> *'...It is well accepted, though the terminology is not used in the Act itself, that there are two analytically distinct kinds of political offence, the one being "the pure political offence", the other, "the relative political offence": see Aughterson, at 90ff; Stanbrook and Stanbrook, at 69; 31A Am Jur 2d "Extradition" §44...*

...Illustrative of pure political offences are offences such as treason, espionage, sabotage, subversion and sedition. Such are offences "directed solely against the political order": Shearer, Extradition in International Law, 151 (1971). Their purpose has been described, variously, as to protect the political institutions of the State: Aughterson, 91; the State itself; 34A Am Juris 2d §44; or the sovereign or public order: Bassiouni, International Extradition 512 (3rd ed)...'

2.8 See also, for example:

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

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

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

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

3. The conduct underlying all charges is that of 'pure political offences'

3.1 Even if one ignores (which one cannot) the juridical label of the Espionage Act, the conduct which underlies those charges (and charge 18) is unquestionably one of a '*pure political offence'*. Mr Assange is alleged to have sought, obtained and published official state secrets. That is an allegation of an offence *'designed to protect the political institutions' or 'protecting the political order' of the USA'*.

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

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

3.3 Thus:

a) Under Count 1: '...*the objective of the conspiracy charged in Count 1 of the Superseding Indictment was to obtain, receive, and disclose national defense information*...' (Dwyer, §§61-62) '...*which were classified up to SECRET level*...' (Indictment, p17);

b) Counts 2-8: require proof of the purposeful obtaining / receiving of information '...*connected with the U.S. national defense*...' (Dwyer, §§66-68) '...*classified up to the SECRET level*...' (Indictment, p19-25);

c) Counts 9-17: require proof of the wilful obtaining / receiving of information '...*relating to the national defense*...' (Dwyer, §§66-68) '...*classified up to the SECRET level*...' (Indictment, p26-34);

d) That is equally true of Count 18 (conspiracy to commit computer intrusion). Count 18 is not an allegation of common computer hacking; it is (and is predicated upon) a legally necessary allegation that Mr Assange planned *'...to obtain information that has been determined by the United States Government...to require protection against unauthorized disclosure for reasons of national defense and foreign relations, namely, documents relating to the national defense classified up to the "Secret" level...'* (Dwyer, §85) (Indictment, p35). In sum, s.1030 USC as alleged here requires that (and is only engaged where) the '*conspiracy'* is directed at state secrets as defined by Executive Order. '...*The primary purpose of the conspiracy was to facilitate Manning's acquisition and transmission of classified information related to the national defense of the United States so that WikiLeaks could publicly disseminate the information on its website*...' (Indictment, p36).

3.4. According to the Government's Opening Note:

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

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

3.6 It is conduct *'on [its] face political' (**Schtraks**), 'necessarily committed against the state' (**Cheng**),* or *'directed at the sovereign and his apparatus of state' (**T**).* It is conduct equivalent to say, sedition, and is certainly every bit '*obviously of a political character*' as political caricature or handing out political pamphlets *(**Schtraks**).*

3.7 It is ultimately no different to the extradition request concerning MI5 agent David Shayler, prosecuted under the Official Secrets Act 1989 for passing top secret documents to The Mail on Sunday in 1997 (including disclosing the names of agents who had been put in fear of their lives by his actions).[3] That extradition request was rejected by the French Cour d'Appel on 18 November 1998 as being a '*political offence'* (under Article 3(1) of the European Convention on Extradition 1957).[4]

3.8 In addition to alleging the commission of political conduct, the motivation and purpose attributed to Mr Assange (which constitutes a core aspect of the criminal allegation against him) is to damage '*the work of the security and intelligence of the US'* and to '*damage the capability of the armed forces of*

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

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

the USA to carry out their tasks; and endanger the interests of the United States of America abroad' (Dwyer affidavit, §4). For example:

> *'...ASSANGE knew the disclosure of these classified documents would be damaging to the work of the security and intelligence services of the United States of America...'* (Dwyer, §8);
>
> *'...ASSANGE is the public face of "WikiLeaks," a website he founded with others as an "intelligence agency of the people." To obtain information to release on the WikiLeaks website...for distribution to the public...'* (Dwyer, §11) (Indictment, §1);
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> *'...As the website then-stated, "WikiLeaks accepts classified, censored, or otherwise restricted material of political, diplomatic, or ethical significance...'* (Dwyer, §12) (Indictment, §2);
>
> *'...the WikiLeaks website...stated that documents or materials...must "[b]e likely to have political, diplomatic, ethical or historical impact...*' (Dwyer, §14) (Indictment, §4);
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> '*...ASSANGE and WikiLeaks have repeatedly sought, obtained, and disseminated information that the United States classified due to the serious risk that unauthorized disclosure could harm the national security of the United States*...' (Indictment, §2);
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> '*...ASSANGE personally and publicly promoted WikiLeaks to encourage those with access to protected information, including classified information, to provide it to WikiLeaks for public disclosure*...' (Indictment, §3);
>
> '*...ASSANGE designed WikiLeaks to focus on information, restricted from public disclosure by law, precisely because of the value of that information. Therefore, he predicated his and WikiLeaks's success in part upon encouraging sources with access to such information*...' (Indictment, §7);

'...*ASSANGE knew, understood, and fully anticipated that Manning was taking and illegally providing WikiLeaks with classified records containing national defense information of the United States that she was obtaining from classified databases. ASSANGE was knowingly receiving such classified records from Manning for the purpose of publicly disclosing them on the WikiLeaks website*...' (Indictment, §20);

'...*ASSANGE, Manning, and others shared the objective to further the mission of WikiLeaks, as an "intelligence agency of the people," to subvert lawful measures imposed by the United States government to safeguard and secure classified information, in order to disclose that information to the public and inspire others with access to do the same*...' (Indictment, §29);

'...*this shared philosophy*...' (Indictment, §30);

'...*this mission...'* (Indictment, §31);

'...to publish the classified documents...damaging to the United States...' (Indictment, §31).

3.9 Thus:

a) Count 1: specifically alleges that Mr Assange's knowing objective and purpose '...*was to obtain, receive, and disclose national defense information*...' (Dwyer, §62), with '*reason to believe that the information was to be used to the injury of the United States or the advantage of any foreign nation*' (Indictment, p17) (USC Title 18, s.793(b)-(e));

b) Counts 2-8 (unauthorised obtaining and receiving of national defence information) specifically allege that Mr Assange wilfully aided or abetted Manning acting '*with intent or reason to believe that the information was to be used to the injury of the United States or the advantage of any*

foreign nation' (Dwyer, §§66-68) (Indictment, p19-25) (USC Title 18, s.793(b)-(c));

c) Counts 9-17 (unauthorised disclosure of national defence information) specifically allege that Mr Assange wilfully aided or abetted Manning disclosing '*to all the world'* with '...*reason to believe [the disclosure] could be used to the injury of the United States or to the advantage of any foreign nation*...' (Indictment, p26-34) (USC Title 18, s.793(d)-(e));

d) Count 18: alleges that the purpose of Mr Assange's alleged conspiracy to commit '*computer intrusion'* was likewise to enable Manning to '*steal classified documents from the United States'* (Dwyer, §87) and was carried out '...*with reason to believe that such information so obtained could be used to the injury of the United States and the advantage of any foreign nation*...' (Dwyer, §85) (Indictment, p35).

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

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

- '...*WikiLeaks walks like a hostile intelligence service and talks like a hostile intelligence service. It has encouraged its followers to find jobs at CIA in order to obtain intelligence. It directed Chelsea Manning in her theft of specific secret information. And it overwhelmingly focuses on the United States, while seeking support from anti-democratic*

countries and organizations. It is time to call out WikiLeaks for what it really is – a non-state hostile intelligence service often abetted by state actors...' (Mike Pompeo, US Secretary of State and former CIA Director, 13 April 2017);[5]

- '...*WikiLeaks will take down America any way they can and find any willing partner to achieve that end...I mean you can go – you only need to go to WikiLeaks' Twitter account to see that every month they remind people that you can be an intern at the CIA and become a really dynamite whistleblower...free range chickens [who] run around the world with resources to spare, and who don't intend well for the United States of America*...' (Mike Pompeo, Aspen Security Forum in July 2017);[6]

- '...*guilty of treason*...' (Mick Huckabee, Republican candidate for the 2010 Presidential election);[7]

- '...*He's waging cyberwar on the United States...'* (KT McFarland, deputy national security advisor, 2017);[8]

- '...*a conduit for...some other adversary of the United States just to push out information to damage the United States*...' (FBI Director, James Comey, testifying before the Senate Judiciary Committee on FBI oversight, May 2017);[9]

- '...*Section 623 provides a Sense of Congress that WikiLeaks and its senior leadership resemble a non-state hostile intelligence service, often abetted by state actors, and should be treated as such*...' it is

5. https://www.cia.gov/news-information/speeches-testimony/2017-speeches-testimony/pompeo-delivers-remarks-at-csis.html
6. https://www.denverpost.com/2017/07/20/mike-pompeo-cia-aspen-security-forum-2017/
7. https://www.theguardian.com/world/2010/dec/01/us-embassy-cables-executed-mike-huckabee
8. https://www.telegraph.co.uk/news/worldnews/wikileaks/8172916/WikiLeaks-guilty-parties-should-face-death-penalty.html
9. https://www.washingtonpost.com/news/post-politics/wp/2017/05/03/read-the-full-testimony-of-fbi-director-james-comey-in-which-he-discusses-clinton-email-investigation/

'...*part of a direct attack on our democracy*...' (s.623 in the Intelligence Authorization Act for Fiscal Year 2018, approved by the U.S Senate Intelligence Committee on 18th August 2017);[10]

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

3.12 In short, Mr Assange faces precisely the same sort of accusation (of wilful disclosure of state secrets harmful to the state) that the UK brought against Katherine Gunn under the Official Secrets Acts (and which was ultimately discontinued in the face of a defence plea of justification / preventing illegality). Of course, in the domestic context, the political nature of the charge is no defence (***Castioni*** at p162 per Hawkins J) but, as ***Shayler*** shows, such conduct is not properly the subject of extradition. Had Alfred Dreyfus fled to Germany (or anywhere), for example, he could never have been extradited to France (and the scandal that has come to symbolise modern injustice throughout the French speaking world would never have played out).

4. <u>The Test for relative political offence</u>

4.1 Even in cases where a common crime is alleged (such as computer misuse; count 18), if it is plain from the context of the allegation itself, and the motivation ascribed to (or claimed by) the offender, that the conduct is directed against the interests of the state, it will nonetheless be regarded as constituting a '*political offence*':

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10. https://www.intelligence.senate.gov/publications/report-accompany-s1761-intelligence-authorization-act-fiscal-year-2018-september-7-2017

11. https://thehill.com/homenews/senate/438456-top-senate-republican-assange-put-millions-of-lives-at-risk

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

4.2 The greater part of the English law relating to '*political offences*' has concentrated on this broader concept of '*relative political offence'* in the context of '*ordinary crimes'.*

The early formulation – political disturbance

4.3 Such as murder[12] in ***In re Castioni*** [1891] 1 QB 149 where it was held that the core test of whether a common crime is a political crime is that it is committed as part of a political activity and with a political object in mind:[13]

'...it must at least be shewn that the act is done in furtherance of, done with the intention of assistance, as a sort of <u>overt act in the course of acting in</u>....' either *'...<u>a political matter</u>, a political rising, <u>or</u> a dispute between two parties in the State as to which is to have the government in its hands'* (per Denman J at p156).

'...*The question really is, whether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts...of a political character with a political object, and as part of the political movement...in which he was taking part*...' (p159)

4.4 Hawkins J however formulated the test as '*incidental to and formed a part of political disturbances*' (per Hawkins J at p166).

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12. Until 1978, crimes of violence, such as murder were capable of being *'political crimes*': see below at section 6.
13. See ***Prevato v the Governor, Metropolitan Remand Centre*** [1986] 8 FCR 358 per Wilcox J at §62.

4.5 Even under this early (later rejected) formulation it was never part of the the enquiry to assess the quality or merits of the politics in question:

> '...*whether the act done at the moment at which it was done was a wise act in the sense of being an act which the man who did it would have been wise in doing with the view of promoting the cause in which he was engaged. I do not think it would be at all consistent with the real meaning of the words of the statute if we were to attempt so to limit it. I mean, I do not think it would be right to limit it...by considering whether it was necessary at that time that the act should be done*...' (per Denman J at pp158-159)

> '...*even though it is an act which may be deplored and lamented, as even cruel and against all reason, by those who can calmly reflect upon it after the battle is over*...' per Hawkins J at p167).

The modern law – attempts to alter governmental policy – in a disturbed political atmosphere

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

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

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

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

4.9 Secondly, so far as the notion of '*political disturbance'* as a necessary element of the test (per ***Castioni***), Lord Reid also reminded (p583) that '*political disturbance'* means no more than that '*the political atmosphere must be disturbed*', not that '*there must have been some disturbance of public order*'.

4.10 Thirdly, Lord Reid reiterated (at p583):

> *'...We cannot inquire whether a "fugitive criminal" was engaged in a good or a bad cause. A fugitive member of a gang who committed an offence in the course of an unsuccessful putsch is as much within the Act as the follower of a Garibaldi. But not every person who commits an offence in the course of a political struggle is entitled to protection. If a person takes advantage of his position as an insurgent to murder a man against whom he has a grudge I would not think that that could be called a political offence. So it appears to me that the motive and purpose of the accused in committing the offence must be relevant and may be decisive. It is one thing to commit an offence for the purpose of promoting a political cause and quite a different thing to commit the same offence for an ordinary criminal purpose...'*

4.11 Viscount Radcliffe thus summarised '*the idea that lies behind the phrase "offence of a political character"*' as that:

> '...*the fugitive is at odds with the State that applies for his extradition on some issue connected with the political control or government of the country. The analogy of "political" in this context is with "political" in such phrases as "political refugee," "political asylum" or "political prisoner." It does indicate, I think, that the requesting State is after him for reasons other than the enforcement of the criminal law in its ordinary, what I may call its common or international, aspect... It is not departed from by taking a liberal view as to what is meant by disturbance or these other words, provided that the idea of political opposition as between fugitive and requesting State is not lost sight of...'* (p591).

What is required is evidence to '...*suggest that the appellant's offences, if committed, were committed as a demonstration against any policy of the Government...itself or that he has been abetting those who oppose the Government...'* (p592)

4.12 ***Schtraks*** was confirmed in ***Cheng v Governor of Pentonville Prison*** [1973] AC 931:

'...*Political character in its context, in my opinion, connotes the notion of opposition to the requesting state...taking political action vis-à-vis the American Government*...' (per Lord Hodson at p943A-B);

'...*it was no part of his purpose to influence the policy of the Government of the United States*...' (per Lord Diplock at p943C);

'..."Political" as descriptive of an object to be achieved must, in my view, be confined to the object of overthrowing or changing the government of a state or inducing it to change its policy or escaping from its territory the better so to do. No doubt any act done with any of these objects would be a "political act"...' (per Lord Diplock at p945C), and if the government in question was the one seeking extradition, it would be a '*political offence'* (per Lord Diplock at p945E);

'...even apart from authority, I would hold that prima facie an act committed in a foreign state was not 'an offence of a political character' unless the only purpose sought to be achieved by the offender in committing it were to change the government of the state in which it was committed, or to induce [the government] to change its policy, or to enable him to escape from the jurisdiction of a government whose political policies the offender disapproved but despaired of altering so long as he was there...' (per Lord Diplock at p945E-F);

'...I would not hold that an act constituted 'an offence of a political character'...if the only 'political' purpose which the offender sought to achieve by it was not directed against the government or governmental policies of that state within whose territory the offence was committed...' (per Lord Diplock at p945F-G);

'...*the most exacting relevant test, namely...[is] his crime was committed both from a political motive and for a political purpose*...' (Per Lord Simon at p952C);

It is not part of the '*political offence'* exception that *'...the courts of this country [should] inquire into the merits of those who have committed crimes against the requesting state or to pass judgment upon the political acts or policy of the government of that state...'* if *'...a man who has committed a crime directed against the régime of the requesting state and which, in that sense, was a crime of a political character...'* (per Lord Salmon at p961C-G).

4.13 See also ***Prevato v the Governor, Metropolitan Remand Centre*** [1986] 8 FCR 358. Italy. Prevato was a member of the Ronde Armate Proletarie (Proletarian Armed Patrols) which opposed a system called the selection in schools program. He was charged with various offences involving damage to schools and threats to teachers and other officials, committed in furtherance of the Ronde Armate Proletarie's '*long and bitter campaign to induce a change in education policy in government schools in Padua*'. Extradition was refused on the ground that the offences were political offences. Per Wilcox J at §§71-72:

'...71...the object of changing government policy...may...be sufficient to institute an offence of a political character. [The contrary view] would be inconsistent with the speeches in both Schtraks and Cheng.

72....The early debate upon the necessity for there to be a campaign to change the government itself was decisively resolved in the negative in Schtraks; it is enough that there be a concerted campaign to change government policy. Not every offence committed in the course of opposition to government policy is a political offence. There must be, at least, an organized, prolonged campaign involving a number of people. The offence must be directed solely[14] to that purpose; it must not involve the satisfaction of private ends. And the offence must be committed in the direct prosecution of that campaign; so an assault upon a political opponent in the course of the campaign may be a political offence but an assault upon a bank teller in the course of a robbery carried out to obtain funds for use in the campaign would not be...'

4.14 In ***T v Immigration Officer*** [1996] AC 742, Lord Mustill reiterated at p761D-E the:

'...broad division, established by a series of bi-lateral treaties and a handful of decisions into (a) 'common' crimes, (b) purely political crimes such as treason, and (c) 'relative' political crimes which are common crimes with a political overlay...'. That is to say that *'there was a need for certain of such crimes to be exempt, when impressed with a political character.*

4.15 According to Lord Mustill, a '*relative political offence'* will '*look to the connection between the motive and political content of the crime and the criminal act itself*' (p764D). '*The general proposition, which I believe is binding on this House as a matter of English law, is known in the literature as the "incidence" theory. The essence of this is that there must be a political*

[14]. In fact, it is an '*error of law'* to regard political motivation and revenge as mutually exclusive (***Minister for Immigration and Multicultural Affairs v Singh*** [2002] HCA 7 per Gleeson CJ at §§18-20).

struggle either in existence or in contemplation between the government and one or more opposing factions within the state where the offence is committed, and that the commission of the offence is an incident of this struggle' (p764F-G). That is to say (p764G-765A): '*the fugitive is at odds with the state that applies for his extradition on some issue connected with the political control or government of the country'* (per Viscount Radcliffe in ***Schtraks***) and that '*the only purpose sought to be achieved by the offender in committing it'* is *'to change the government of the state in which it was committed, or to induce it to change its policy'* (per Lord Diplock in ***Cheng***). '*This principle underlies the major English decisions on extradition law'* (p765B).

5. The exceptions to the exemption: violent offences

5.1 All this would, of course, also offer protection to acts of violent insurrection, or terrorism. In the nineteenth century that was acceptable. But in view of the societal shift described by Lord Mustill in ***T v Immigration Officer*** (supra), such means are no longer regarded as tolerable: '*certain acts of violence, even if political in a narrow sense, are beyond the pale'* (p755H). For this reason (and at the same time recognising and reinforcing the breadth of the definition of '*political offence*'),[15] international law has moved to exclude certain violent offences from qualifying as '*political offences'*.

[15]. See e.g. ***Santhirarajah*** (supra) per North J at §250: *'...the fact that Parliament has expressed limitations on what amounts to a political offence recognises that the ordinary meaning of that term covers a range of conduct which today is viewed as inappropriate for exclusion from the process of extradition...'*. Put otherwise (per North J at §242) '*...Such violent activity was undertaken in aid of political campaigns. It is difficult to argue that offences arising out of such conduct are not political. The means used are designed to advance political ends. In the words of Lord Mustill [in T v Immigration Officer at p762C-D] which bear repeating: Those who struggle against odious regimes have now come to seem, by their aims and methods, scarcely less odious than their oppressors. Yet it was (and still is) hard to see why their crimes, however distasteful and heartless, are any the less "political" than those of the heroes of the Risorgimento. International terrorism must be fought, but the vague outlines of the political exception are of no help...'*.

5.2 In the asylum context, under article 1F(b) of the Refugee Convention, no international rules exist which govern how to identify such cases and thus the Courts have sought to articulate and erect rules which exclude acts of terrorism and the like (***T v Immigration Officer*** (supra)); ***Minister for Immigration and Multicultural Affairs v Singh*** (supra)).

5.3 In extradition law, by contrast, as Lord Mustill observed in ***T v Immigration Officer*** at p753G, 761B-763A, 765G-H, the limits are set instead by Treaties which '*depoliticise'* certain violent offences.[16]

5.4 For example, following Lord Simon's plea in 1973 in ***Cheng*** '*for governments in international conclave*' to set the applicable limits, the Council of Europe's Convention on the Suppression of Terrorism 1977,[17] excludes certain listed violent offences from being regarded as '*political'* for the purposes of extradition between Convention states. Those exclusions were, in turn, given effect to by s.1 of and Schedule 1 to the Suppression of Terrorism Act 1978.[18]

5.5 As with other Treaties elsewhere, the UK/USA Supplementary extradition Treaty 1985 also erected a similar (but narrower) list of excluded offences. Accordingly, the 1978 Act was applied to extradition with the USA (with relevant omissions designed to reflect the more limited exclusionary list).[19]

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16. See also ***Santhirarajah*** (supra) per North J at §250 '*...Any further limitation to be imposed on the ordinary scope of the term political offence is a matter for Parliament...*'
17. And now its 2003 Protocol.
18. For offences excluded from the ambit of '*political'* by the Convention, the UK is also obliged to establish extra-territorial or universal jurisdiction (see article 6 of the 1977 Convention, s.4 of the 1978 Act) so that if, for some other reason, extradition is not granted, the UK will be in a position to prosecute itself (*aut dedere aut judicare*). See ***T v Immigration Officer*** (supra) per Lord Mustill at p763.
19. See Schedule 2 to the Suppression of Terrorism Act 1978 (Application of Provisions) (United States of America) Order 1986 (1986/2146).

5.6 Neither the USA list, nor even the wider Council of Europe list, have ever included espionage[20] or computer misuse.[21]

5.7 The USA exclusionary list is now contained in Article 4(2) of the 2003 UK / USA Treaty. It still does not include espionage or computer misuse.

5.8 ***Santhirarajah*** is an example of a '*relative political offence'* disclosed by the face of a USA extradition request. It concerned an allegation of purchasing night vision goggles (in the USA) to provide to the Tamil Tigers to support their cause for independence in Sri Lanka. Common crimes were alleged (conspiracy to violate export control laws, conspiracy to provide material support to a terrorist organisation, money laundering). All, however, were exempt from extradition as '*relative political offences'* because:

> *'...252...the applicant was a member of the LTTE. That organisation had been engaged in a civil war in Sri Lanka since 1983. The charged conduct involved a conspiracy to supply weapons for use against government forces in that civil war. It was a critical factor that the charged conduct was in relation to the LTTE which was expressly designated by the US Secretary of State as the object of the offences. In designating the LTTE the Secretary of State formed the view that the LTTE was a foreign organisation engaged in terrorist activity which threatened the security of the US or nationals of the US.*
>
> *253. No doubt the struggle in Sri Lanka was a political confrontation. The contending parties were seeking the power to govern Tamils in Sri Lanka.*

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[20]. No doubt because it is a pure political offence.

[21]. Which is why, for example, neither espionage or computer misuse committed in the USA are offences which the UK has extra-territorial jurisdiction to prosecute (see above, fn. 15).

254. The designation of the LTTE by the US Secretary of State was directed to that struggle. It made some dealings in support of one side of the political struggle illegal. When the US criminalised dealing with the LTTE it took a political stand.

255. When the applicant took the actions alleged against him it should be inferred from the circumstances that he did so in support of the political struggle of the LTTE. That is to say, he was at odds with the US over the political issue of support for the LTTE against the government of Sri Lanka in the civil war. These circumstances fall within the ordinary understanding of the expression "political offence".

256...The alleged conspiracy to provide weapons to the LTTE is an incident in the political struggle no less than was the arming of Mr Castioni in preparing for his assault on the municipal buildings. If the applicant had acquired the weapons to advance the cause of the LTTE and they had been used to kill and maim innocent civilians indiscriminately the conduct would have been atrocious. However, because the actions were in furtherance of a political cause the offences are properly described as political. No satisfactory definition has been formulated in the cases that would exclude the conduct from that characterisation. That is recognised by Parliament in expressly excluding certain terrorist activities from the purview of the political exception. It is common ground that Parliament has not expressly excluded the offences with which the applicant has been charged...'

5.9 In sum, extradition for all of the offences alleged against Mr Assange are, on the face of the extradition request itself, squarely prohibited by Article 4 of the Treaty.

6. Reliance on Treaty

6.1 True the 2003 Extradition Act itself provides no '*political offence'* bar, but authority establishes that it is the duty of the Court, not the executive, to ensure the legality of extradition under the terms of the Treaty.

6.2 The Extradition Act 2003 removed '*political offence'* as a bar to extradition. With reference to the international trend under which the '*political offence'* bar has disappeared from most modern extradition Treaties,[22] ***Nicholls Montgomery Knowles***, 3rd ed. observes at §5.41:

> *'...In the EA 2003 Parliament took this process to its conclusion by removing entirely the political offence exception to extradition for both Category 1 and Category 2 countries...'.*

6.3 Despite that, the UK / USA Treaty containing the '*political offence'* exception was ratified, and came into force, in 2007; after the 2003 Act had been passed. Both governments must therefore have regarded Article 4 as a protection for the liberty of the individual, whose necessity continues (at least in relations as between the USA and the UK).

6.4 Applying clear authority discussed below, and notwithstanding the terms of the 2003 Act, Mr Assange is entitled to the substantive protection of the Treaty.

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[22]. Including the EAW Framework decision. Which is why, for example, Spain feels able to issue EAWs for '*rebellion'*, and now '*sedition'*, against members of the Catalan regional government; and yet European States still balk at such cases.

Sinclair [1991]

6.5 Since ***R v Governor of Pentonville prison, ex parte Sinclair*** [1991] 2 AC 64,[23] it has been the law that '*monitoring the provisions of the Treaty is an executive, and not a magisterial, function*' (per Lord Ackner at pp89E and 91H).[24] On that analysis, the defendant who asserts that his extradition is prohibited by the Treaty must issue habeas corpus proceedings directed to the Secretary of State's decision to initiate proceedings under the Act (p81E, 82G).

6.6 The point was reiterated in ***R (Guisto) v Governor of Brixton Prison*** [2004] 1 AC 101 where Lord Hope spoke at §§36-37 about the '*basic point'* that '...*It is the function of the Secretary of State to see that the provisions of the treaty have been satisfied*...'

Article 5 ECHR and *Kashamu [2002*]

6.7 However, ***Sinclair*** precedes the incorporation of the ECHR by the Human Rights Act.

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[23]. Prior to ***Sinclair***, it was well recognised that where the governing Treaty provides protections additional to those found in the statute, its provisions had to be given effect to by the magistrate. See, e.g. ***R v Governor of Pentonville prison, ex parte Sotiriadis*** [1975] AC 1, per Lord Diplock at p33H-34C '*...The treaty between the United Kingdom and Germany is a contract, whereby the parties 'engage to deliver up to each other...under the circumstances and conditions stated in the present treaty'...the question on this contract, as it seems to me, is whether under the circumstances and the conditions stated in the treaty the United Kingdom is obliged to carry out the terms of the contract...which limit, for the protection of a fugitive, the obligations imposed upon the party called upon to surrender him...'*; ***In re: Nielsen*** [1984] AC 606 per Lord Diplock at p616B-C '*...the magistrate's jurisdiction and powers under the Acts are subject to such limitations, restrictions, conditions, exceptions and qualifications as may be provided for in the extradition treaty with the particular foreign state. The jurisdiction conferred upon the Bow Street magistrate by the Acts of 1870 to 1932 is the widest that he may lawfully exercise upon applications for extradition of fugitive criminals from foreign states. His jurisdiction cannot be extended beyond that maximum but it may be limited, in the case of fugitive criminals from a particular foreign state, by the terms of the extradition treaty with that state...'.*

[24]. See also, e.g. ***Rey v Government of Switzerland*** [1999] 1 AC 54 at p63.

6.8 Detention for the purposes of extradition is now governed by (and must therefore comply with) Article 5 ECHR: see Article 5(1)(f).

6.9 Article 5(4) ECHR requires an independent impartial '*court'* (in adversarial proceedings) to determine the '*lawfulness'*[25] of detention for the purposes of extradition. In this context, that means that (contrary to ***Sinclair***) the legality of detention pending extradition cannot be determined by the executive. See ***R (Kashamu) v Governor of Brixton Prison*** [2002] QB 887 at §§27-36:

> '*... It is, in my judgment, plain that article 5 expressly requires the lawfulness of the detention of a person detained with a view to extradition under paragraph (1)(f) to be decided speedily by a court. It is equally plain to my mind that, in the extradition context, the Secretary of State lacks the qualities of independence and impartiality required of the court-like body by the Strasbourg jurisprudence...*' (per Rose LJ at §27)
>
> '*Having regard, as this court must, to the Strasbourg jurisprudence, it seems to me to be clear that a court and not the Secretary of State is the appropriate forum for a decision as to the lawfulness of a fugitive's detention*' (§29)
>
> '*Furthermore, as it seems to me, the district judge's obligation under section 6(1) of the Human Rights Act 1998 to act compatibly with Convention rights requires him to make a determination under article 5(4)...he must consider whether the detention is lawful by English domestic law, complies with the general requirements of the Convention and is not open to criticism for arbitrariness'* (§32).

[25]. Which includes arbitrariness: ***R v Governor of Brockhill Prison, ex parte Evans*** [2001] 2 AC 19 at p38B-E.

6.10 Specifically, the High court held that ***Sinclair***:

> '...*does not now, in the light of the provisions of article 5(4), provide a rationale for excluding the courts from exercising abuse jurisdiction in relation to the lawfulness of detention...*' (§§29-30).

6.11 ***Kashamu***, the Human Rights Act, and their combined implications for the Secretary of States' duty to monitor Treaty compliance (per ***Sinclair***), was not considered in ***Guisto.***

6.12 ***Kashamu*** was however approved and applied by the Privy Council in ***Fuller v Attorney-General of Belize*** (2011) 32 BHRC 394 per Lord Phillips at §37; again having expressly considered ***Sinclair***. The ***Kashamu*** principle was in fact extended to encompass:

> '...*Both the lawfulness of the detention and the lawfulness of the extradition [which] are a matter for the courts and not the executive...'* (§50).
>
> '...*For the reasons given by the Administrative Court in* ***Kashamu****...[it is not lawful] to confer on the executive rather than the courts the determination of any issue that goes to the legitimacy of extradition or of detention pending possible extradition...'* (§51).

6.13 The Human Rights Act requires (per ***Kashamu*** and ***Fuller***) the transference from the executive to the judiciary of determination of compliance with Article 4 of the Treaty.

7. Abuse of Process

7.1 It is, in any event, an abuse of process for the USA to request extradition for conduct prohibited by the terms of the relevant Treaty. Article 1 provides that '*the Parties agree to extradite to each other, pursuant to the provisions of this Treaty*'.

7.2 It is an abuse of process to prosecute in breach of the terms of the provisions of a Treaty or Convention that confers rights on the citizen. In ***R v Uxbridge Magistrates Court, ex parte Adimi*** [2001] QB 667, Simon Brown LJ held that '*the abuse of process jurisdiction*' would '*provide a sufficient safety net*' for those wrongly prosecuted in a manner that breached Article 31 of the Refugee Convention, even though the Convention was not incorporated into English law (at p684E-F). That was, in turn, upheld and applied by the House of Lords in ***R v Asfaw*** [2008] 1 AC 1061, in the case of a prosecution that bypassed the protections of the Refugee Convention (at §§31-34 per Lord Bingham, §§70-71 per Lord Hope, §118 per Lord Carswell).

7.3. Extradition detention pursuant to an abuse of process is arbitrary within the meaning of Article 5 ECHR: ***Kashamu***. In ***Pomiechowski v District Court of Legnica, Poland*** [2012] 1 WLR 1604, Lord Mance stated at §§24-26:

> '...*As the Board [in **Fuller**] made clear the abuse alleged went, in that case also, to the extradition as much as to any prior detention...Where detention and the extradition proceedings as a whole stand and fall together, according to whether or not they involve an abuse of process, then **Fuller** suggests that article 5.4 may be an effective means by which a root and branch challenge to extradition may be pursued*...'

7.4 Thus it is that this Court has power to restrain the requesting state from abusing the process: ***R (Government of the USA) v Bow Street Magistrates' Court*** [2007] 1 WLR 1157.

8. Conclusions and Course to be Taken

8.1 For the reasons set out above, Mr Assange's extradition '*shall not be granted'* under the applicable Treaty because it concerns a '*political offence*':

a) Espionage (counts 1-17) is self-evidently a paradigm political offence. It is a '*pure political offence*'.

b) Even if stripped of nomenclature, the conduct underlying charges 1-17 (and indeed charge 18) is a *prima facie* political offence directed against the state. It is an allegation of a '*pure political offence*'.

c) Even if regarded as '*common crimes'*, all charges nonetheless allege a '*relative political offence*'. The alleged conduct is, on the face of the extradition request, incidental to a '*political'* struggle to influence governmental policy, and alleged to be motivated as such.

8.2 Separately from the evidential hearing scheduled for February 2020, the Court is therefore respectfully invited to list this matter for urgent resolution of the following:

a) **First,** the Court is invited to rule that it has jurisdiction to determine whether the offences for which Mr Assange's extradition is sought are '*political offences*';

b) **Secondly,** then the Court is invited to rule that the offences for which Mr Assange's extradition is sought are '*political offences'* for the purposes of Article 4 of the Treaty;

c) **Thirdly,** the Court is invited to rule that for that reason alone, extradition must be refused in this case.

Friday, 18 October 2019

Edward Fitzgerald QC

Doughty Street Chambers

Mark Summers QC

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