X-IronPort-AV: E=Sophos;i="5.13,453,1427752800";
  d="pdf'?scan'208,217";a="26981779"
From: Sundin Jenny - HDO <jenny.sundin@dom.se>
To: "jya@pipeline.com" <jya@pipeline.com>
Subject: Request for Records on Julian Assange
Thread-Topic: Request for Records on Julian Assange
Thread-Index: AdCRbmSp+IsRgpOsRA+sQpUPoBmSVA==
Date: Mon, 18 May 2015 13:29:02 +0000
Accept-Language: sv-SE, en-US
X-MS-Has-Attach: yes
X-MS-TNEF-Correlator:
x-originating-ip: [192.168.71.24]
X-ELNK-Received-Info: spv=0;
X-ELNK-AV: 0
X-ELNK-Info: sbv=0; sbrc=.0; sbf=bb; sbw=000;

Thanks for the answer.

Attached is now the documents you wanted to take part.

Jenny Sundin
Court Secretary, The Supreme Court
+46 8 561 666 63 • jenny.sundin@dom.se • Postal address: • Visiting address: • Fax: +46 8 561 666 86 • www.hogstadomstolen.se

5880-14.pdf

To: Sundin Jenny - HDO <jenny.sundin@dom.se>
From: John Young <jya@pipeline.com>
Subject: Re: VB: Request for Records on Julian Assange
Cc:
Bcc:
Attached:

Dear Jenny Sundin,

Thank you very much for a prompt response.

I agree to pay the cost.

Billing address:

John Young
251 West 89th Street
New York, NY 10024
US Tel: 212-873-8700

Regards,

John Young

At 09:21 AM 5/18/2015, you wrote:

> Hi,
>
> You have to request documents from the Supreme Court´s goal Ö 5880-15, Julian Assange.
>
> A total of 291 pages that will be charged for you. The total cost will land at 612 SEK. You agree that cost?
>
> We need a billing address where we can send the invoice?
>
> Med vänlig hälsning
> Jenny Sundin
> Domstolssekreterare, Högsta domstolen
> 08-561 666 63 . jenny.sundin@dom.se . Postadress: Box 2066, 103 12 Stockholm .
> Besöksadress: Riddarhustorget 8 . Fax: 08-561 666 86 . www.hogstadomstolen.se
>
> -----Ursprungligt meddelande-----
> Från: John Young [mailto:jya@pipeline.com]

Skickat: den 14 maj 2015 16:09
Till: Registrator Högsta domstolen - HDO
Ämne: Request for Records on Julian Assange

For publication on the US news website, Cryptome.org, we request copies of all records, decisions, transcripts and related material from the Sweden Supreme Court concerning Julian Assange, including documents submitted to the Court by other courts and or parties.

We agree to pay for costs associated with this request.

Thank you very much.

Sincerely,

John Young
Administrator
Cryptome.org
251 West 89th Street
New York, NY 10024
212-873-8700

HÖGSTA DOMSTOLEN

Dagbok
Utskriftsdatum
2015-05-18

Målnummer: **Ö 5880-14**
Målgrupp: 60
Måltyp: 50

Organisatorisk enhet: Enhet 1, R 14
Inkommandedatum: 2014-12-09

Sambandsmål:
Hela akten gallras:

Avgörande

Datum	Avgörandetyp	Utgång	Innehåll	Överklaganden
2015-03-10	BESLUT	Övrigt	Övrigt	
2015-04-28	SLUTLIGT BESLUT	Avvisat		
2015-04-28	BESLUT	Övrigt	Övrigt	
2015-04-28	BESLUT	Övrigt	Övrigt	
2015-05-11	SLUTLIGT BESLUT	Övrigt		

Aktörer

1	Assange Julian, 710703	Klagande
	Ombud: Advokat Olsson Thomas	
	Ombud: Advokat Samuelson Per E	
2	Pettersson Christina	Klagande
3	Allmän åklagare, RÅ010	Motpart
4	Riksåklagaren, RÅ555	Motpart

Saken

häktning m.m.

Händelser

Nr	Datum	Aktbilaga	Händelsetext	Bevakningsdatum	Samband
1	2014-12-09	1	Överklagande		
2	2014-12-09		Del av hovrättens akt Ö 8290-14 (inkom via e-post)		
3	2014-12-10		Ab 1 med beviljat anstånd exp. till adv. Olsson och Samuelsson.		
4	2014-12-10		Hovrättens akt Ö 8290-14 (inneh heml handl) Stockholms tingsrätts akt B 12885-10 (inneh heml handl)		
5	2014-12-10		Överklagande i original		
6	2014-12-22	2	Begäran om förlängt anstånd tom 22/1-15 från adv Olsson och Samuelsson		
7	2014-12-23	3 - 4	Överklagande från Christina Pettersson jämte bilaga		
8	2014-12-23		Anstånd tom 22/1-15 beviljat och exp till adv Olsson och Samuelson		
9	2015-01-22	5	Anståndsbegäran		
10	2015-01-23		Anstånd tom 25/2-15 beviljat och exp till adv Olsson, ytterligare anstånd kan inte påräknas, ee		
11	2015-02-25	6	Kompletterande yttrande		
12	2015-02-26		Kompletterande yttrande i original		
13	2015-02-26	7 - 17	Bilagor till kompletterande yttrande		
14	2015-03-10	18	HD:s protokoll, kommunikation.		
15	2015-03-10	19	Föreläggande, Kopia av aktbilaga 1-17 Svea hovrätts akt Ö 8290-14 och Stockholms tingsrätts		

			akt B 12885-10 översänt till Riksåklagaren /bew
16	2015-03-12	20	Underrättelse till Advokat Thomas Olsson, Advokat Per E Samuelson. Kopia av aktbilaga 18, översättning av HD:s protokoll översänt. /bew
17	2015-03-24		Hovrätten och tingsrättens akt åter, jämte svarsskrivelse från riksåklagare/mari, reg
18	2015-03-24	21	Svarsskrivelse från RÅ
19	2015-03-24		Beställt översättning (skyndsamt) på aktbilaga 21 (till engelska) OBS felaktigt målnummer uppgivet vid beställningen, det är 5880-14, inget annat, ee
20	2015-03-24		Aktbil 21 översänd f.k. till adv Olsson och Samuelsson
21	2015-03-25		Bekräftelse på beställd översättning ink
22	2015-03-25	22	E-post från adv Samuelson, önskemål om översättning på ab 21
23	2015-03-31	23	Översättning till engelska av aktbilaga 21
24	2015-04-01	24	Föreläggande till Advokat Thomas Olsson och Advokat Per E Samuelson. Kopia av aktbilaga 23, översättning av aktbilaga 21 översänt. / bew
25	2015-04-10	25	Begäran om anstånd.
26	2015-04-13		Anståndsbeslut t om den 16 april tecknat på ab 25 exp till adv Thomas Olsson och adv Per E Samuelsson
27	2015-04-16	26	Yttrande ingivet av adv Per E Samuelsson och adv Thomas Olsson (e-post)
28	2015-04-16	27 - 31	~~Yttrande från advokat Olsson jämte bilagor.~~ Bilagor till ab. 26
29	2015-04-16		Aktbilaga 26-31 till RÅ för kännedom per fax /bew samt per post den 17 april 2015 /bew
30	2015-04-17		Ab. 26 jämte bilagor i original.
31	2015-04-28	32	~~HD's protokoll /js~~ HD's protokollsbeslut /js
32	2015-04-28		HD's protokoll expedierat till adv. Olsson, adv. Samuelson samt riksåklagaren per e-post samt post /js
33	2015-04-28	33	HD's protokollsbeslut (avvisat) - expedierat till Chistina Pettersson (per e-post) och Riksåklagaren /js
34	2015-04-28	34	HD's protokoll /js
35	2015-04-28	35	Betänkande /js
36	2015-05-11	36	SLUTLIGT BESLUT / js
37	2015-05-11		Aktbilaga 36 expedierat /js

		Hovrättens samt tingsrättens akter återsändes	
38	2015-05-11	Aktbilaga 36 skickad på översättning /js gm CE	
39	2015-05-11	Beställningsbekräftelse från Språkservice, bokningsnr: EDH82	2015-05-19

ADVOKAT F:A SSW

Till

Högsta domstolen

ÖVERKLAGANDE

Klagande

Julian Assange, 19710703

Häktad i sin frånvaro

Ecuadors ambassad i London
Flat 3B, 3 Hans Crescent
SW1X 0NT London
United Kingdom

Ombud och försvarare:

1. Advokat Thomas Olsson

Fria Advokater KB

Box 127 06

112 94 Stockholm

2. Advokat Per E Samuelson

Advokatfirman Samuelson, Schönmeyr & Wall HB

Box 127 04

112 94 Stockholm

Åklagare

Överåklagare Marianne Ny och vice chefsåklagare Ingrid Isgren

Utvecklingscentrum i Göteborg, resp.

Söderorts åklagarkammare i Stockholm

Överklagat beslut

Beslut meddelat av Svea hovrätt 2014-11-20 i mål nr Ö 8290-14

Saken

Yrkande om upphävande av utevarohäktning

Som ombud för Julian Assange får vi härmed överklaga rubricerade beslut enligt följande.

1. YRKANDEN

Julian Assange yrkar att Högsta domstolen upphäver beslutet om utevarohäktning.

Julian Assange yrkar också att Högsta domstolen förelägger åklagaren att till Assange utge, alternativt till Högsta domstolen inge, kopior av målsägandenas SMS.

För det fall Högsta domstolen inte anser att yrkandet i närmast föregående stycke kan bifallas, och då det rör sig om tillämpning av EU-rättsliga frågor, yrkas, i andra hand, att Högsta domstolen inhämtar ett förhandsbesked från EU-domstolen rörande frågan om det av art 7 i direktivet följer en skyldighet för åklagaren att överlämna kopior av det material som den misstänkte fått del av och önskar åberopa till stöd för sitt bestridande av ett beslut om frihetsberövande.

2. ANSTÅND

På grund av hög arbetsbelastning begärs anstånd med att närmare utveckla grunderna för överklagandet till den 22 december 2014.

Stockholm den 7 december 2014

Thomas Olsson

Per E Samuelson

HÖGSTA DOMSTOLEN
BESLUT 2014-12-10
Anstånd medges t.o.m.
2014-12-22 kl. 1000
Justitiesekreterare

Johansson Jessica - HSV

Från: Christina Pettersson <christinapettersson15@gmail.com>
Skickat: den 20 december 2014 07:29
Till: HSV hovrätt Svea - HSV
Ämne: Häktning; nu begäran om omprövning
Bifogade filer: images39JHCJAI (2).jpg; [redacted]

Yrkande:

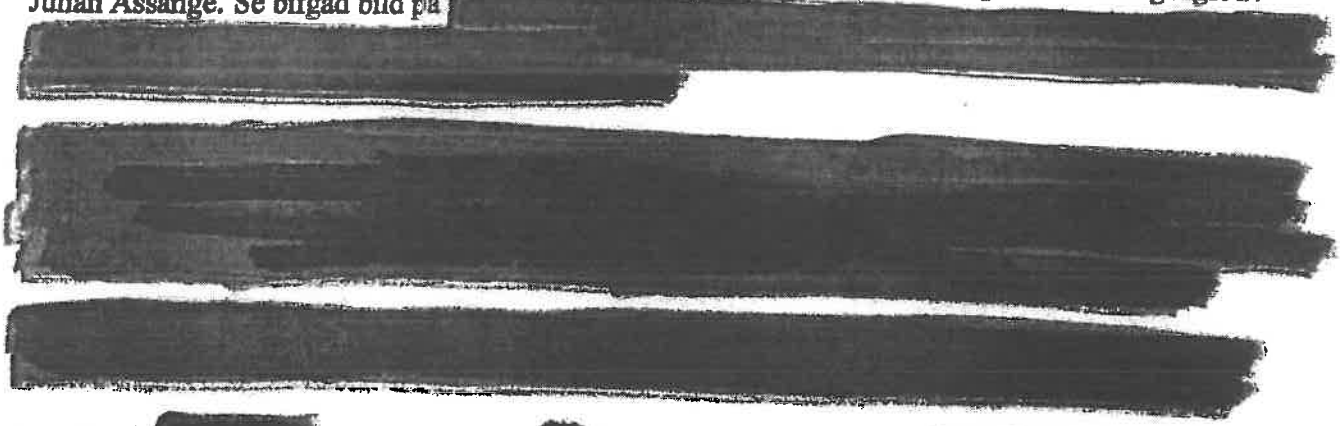
Begäran om omprövning av häktning.

Grund:

Häktning av Julian Assange strider numera mot proportionalitetsprincipen och Eurpakonventinen om mänskliga rättigheter.

Beträffande sakomständigheter som ligger till grund för beslut om häktning, kan följande omnämnas.

Påstådda övergrepp handlar om [redacted]. Det är således inte fråga om brott begånget av Julian Assange. Se bifgad bild på [redacted]



Beträffande [redacted] kan omnämnas att [redacted] är en synnerligen drivande [redacted] och bl.a. vän med Advokat Claes Borgström.

Med vänlig hälsning,

Christina Pettersson
Jur. kand.

Ab. 6

Till

Högsta domstolen

YTTRANDE

Mål nr Ö 5880-14: Julian Assange ./. Åklagaren

Härmed kompletteras rubricerade överklagande enligt följande.

1. YRKANDEN

Se överklagandet den 7 december 2014 till Högsta domstolen, aktbilaga 1.

2. GRUNDER

Assange åberopar samma grunder som i underinstanserna, se särskilt vad som anges i avsnitt 2 och 3 i vårt överklagande till hovrätten, hovrättens aktbilaga (hab) 1.

3. SKÄL FÖR PRÖVNINGSTILLSTÅND

Det är av vikt för ledning av rättstillämpningen att Högsta domstolen beviljar prövningstillstånd, RB 54:10 p.1.

Det finns också synnerliga skäl till sådan prövning enligt RB 54:10 p.2.

Prövningstillstånd bör också beviljas enligt artikel 7.1 av Europaparlamentets och rådets direktiv 2012/13/EU av den 22 maj 2012 om rätten till information vid straffrättsliga förfaranden, samt enligt artiklarna 3, 5, 6, 10 och 11 Europakonventionen och enligt artikel 2 av Protokoll nr 4 till Europakonventionen.

Vi hänvisar till samtliga tidigare angivna omständigheter, se uab 39 och 51 samt hab 1 och 19. Dock vill vi nu särskilt framhålla nedan i avsnitt 4-6 angivna förhållanden samt hänvisa till de olika utlåtanden m.m. som anges i avsnitt 7 (och som även delvis omnämns i avsnitt 4-6).

4. ÅKLAGARENS PASSIVITET

Åklagarna har, sedan september 2010, underlåtit att driva förundersökningen framåt. Det är fråga om en total passivitet, som för närvarande har pågått i över fyra år.

Det faktiska händelseförloppet och vår kritik av åklagarnas agerande är framförallt beskrivet i uab 39, under avsnitten SKYNDSAMHET och PROPORTIONALITETSPRINICPEN samt i avsnitt 5 i hab 1.

Åklagarnas passivitet strider mot tvingande lag och mot de allmänna rättsprinciperna om skyndsamhet och effektivitet, vilket orsakar Assange, målsägandena och det allmänna stor skada.

Dessutom strider åklagarens hantering av fallet mot artikel 6 av Europakonventionen eftersom hennes passivitet och brist på objektivitet - bl.a. bestående i att inte ha prövat alternativ till den europeiska arresteringsordern, att ha återupptagit förundersökningen i målet, samt hennes engagemang i den allmänna debatten om sexualbrottslagen i Sverige - har gett Julian Assange anledning att tro att hon inte är opartisk.

Trots detta har underinstanserna godtagit åklagarnas agerande.

Tingsrätten: *Tingsrätten finner inte att vad som kommit fram beträffande åklagarens handläggning av frågan om verkställande av ett förhör i Sverige eller i Storbritannien, eller hanteringen i övrigt, leder till bedömningen att utevarohäktningen ska hävas.*

Hovrätten har däremot i princip instämt med Assanges kritik: *Hovrätten konstaterar att utredningen om brottsmisstankarna har stannat upp och anser att åklagarnas underlatenhet att pröva alternativa vägar inte stämmer överens med deras skyldighet att – i alla berördas intresse – driva förundersökningen framåt.*

Vid proportionalitetsbedömningen har hovrätten emellertid kommit fram till *att skälen för häktning fortfarande uppväger det intrång eller men i övrigt som häktningsbeslutet innebär. Det finns således för närvarande inte skäl att häva häktningsbeslutet.*

Att utevarohäktningen och den europeiska arresteringsordern har varat i över fyra år utan att ha upphävts bryter även mot artikel 5 av Europakonventionen. Även om Assanges situation inte kan anses utgöra ett frihetsberövande enligt artikel 5, är artikel 2 av 4:e Protokollet tillämplig, vilken bestämmelse kräver att en åtgärd måste vara nödvändig i ett demokratiskt samhälle, vilket enligt Europadomstolens praxis innebär att den måste överensstämma med en självständig proportionalitetsprincip, se (Legal Note 2).

Hovrättens beslut att fastställa häktningsbeslutet stämmer således inte heller överens med proportionalitetsprincipen såsom den formulerats i europarätten .Hovrätten har inte beaktat följande omständigheter: den europeiska arresteringsordern utfärdades för över fyra år sedan för att *förhöra* Assange, hans fruktan att utlämnas (refoulement) till USA, åklagarens underlåtenhet att förhöra Assange genom att använda sig av internationellt rättsligt samarbete, att de ursprungliga misstankarna inte har bestyrkts, Assanges hälso- och familjesituation, den omänskliga och förnedrande behandling han är utsatt för, hans status som en utsatt person ("personer som är inriktade på att försvara mänskliga rättigheter, som är associerade och inblandade i avslöjandet av grova brott genom 'whistleblowing' och offentliggörande"), att den europeiska arresteringsordern utfärdades innan beslut hade fattats om åtal eller rättegång, det faktum att svenska myndigheter inte har gett en garanti att Julian Assange inte kommer att bli utvisad till USA och deras vägran att erkänna den asylstatus som Ecuador har beviljat Assange, osv.

Assange är starkt kritisk mot underinstansernas synsätt.

Att tillåta åklagare att uppsåtligen bryta mot tvingande lag- och rättsregler kan inte vara riktigt från någon utgångspunkt.

Därvid ska särskilt beaktas att syftet med åklagarnas passivitet uppenbarligen är att tillfoga Assange sådant personligt lidande att han tvingas ut från ambassaden, se närmare härom våra tidigare yttranden.

Situationen som Assange är utsatt för utgör vidare omänsklig och förnedrande behandling, vilket är förbjudit enligt artikel 3 av Europakonventionen. Julian Assange är för närvarande frihetsberövad eller i vart fall utsatt för frihetsinskränkningar som under alla förhållanden strider mot artikel 3 av Europakonventionen: varaktigheten av inskränkningarna (över 2,5 år) ingen möjlighet att motionera utomhus, ingen möjlighet att vistas utomhus alls (frisk luft och

dagsljus), han tvingas vistas i en liten och upptagen kontorslokal. han har ingen tillgång till sjukhusvård, se Europadomstolens fall: Kudla mot Polen, 26/10/2000. Dougoz mot Grekland, 06/03/2001, Alver mot Estland, 08/11/2005, , A. Och adra mot Storbritannien, 19/02/2009, Popandopulo mot Ryssland, 10/05/2011, och Timochenko mot Ukraina. 15/03/2012, Glowacki mot Polen, 30/10/2012, Chervenkov mot Bulgarien, 27/11/2012. Canali mot Frankrike, 25/04/2013. Chkhartishvili mot Grekland, 03/05/2013, Fakailo (Safoka) och andra mot Frankrike, 02/10/2014, se närmare härom (Legal Note 4).

Genom att underinstanserna godtagit åklagarnas agerande har man i praktiken accepterat att en förundersökning bedrivs på ett sätt som står i strid med tvingande svensk lag. Detta måste vara felaktigt. Vid proportionalitetsbedömningen kan inte lagstridiga ageranden räknas myndigheterna till godo. Det åligger istället svenska domstolar att omedelbart sätta stopp för ett sådant rättsvidrigt agerande.

Det föreligger därför synnerliga skäl för prövningstillstånd enligt RB 54:10 p.2.

I vart fall föreligger prejudikatdispens enligt RB 54:10 p.1. Tidigare prejudikat i frågan saknas och hovrättens proportionalitetsbedömning är felaktig enligt såväl inhemsk som europeisk rätt: en underlåtenhet som för närvarande har pågått i över fyra år är mer än tillräcklig för att utevarohäktningen ska upphävas.

5. FRIHETSBERÖVANDE ALTERNATIVT LEGALT VERKSTÄLLIGHETSHINDER

Sedan den 19 juni 2012 råder ett dödläge i målet.

Detta dödläge är beskrivet av oss framförallt i uab 39 under rubriken VERKSTÄLLIGHET, i avsnitt 6 i hab 1 samt i avsnitten 2 och 3 i vårt andra yttrande till hovrätten, hab 19.

I första hand görs gällande att Assanges levnadsförhållanden sedan den 19 juni 2012 utgör ett frihetsberövande (se avsnitt 2 i hab 19).

I andra hand görs gällande att dödläget i vart fall utgör ett legalt verkställighetshinder(se avsnitt 6 i hab 1 och avsnitt 3 i hab 19). Att ett legalt verkställighetshinder råder är ostridigt mellan parterna.

Frågan om frihetsberövande föreligger

Hovrätten har i denna del gjort följande bedömning: *Till saken hör dock att Julian Assange kan lämna ambassaden om han vill. Det sistnämnda innebär att begränsningen av hans rörelsefrihet inte går att jämställa med ett frihetsberövande (jfr Danelius, Mänskliga rättigheter i europeisk praxis, 4:e uppl., s.100-103 och däri anmärkta rättsfall).*

Hovrättens hänvisning till Danelius är märklig. Där redogör nämligen denne för just de rättsfall som Assange själv hänvisat till i avsnitt 2 i hab 19 och Danelius kommer fram till samma slutsats som Assange, nämligen att det faktum att en person har möjlighet att själv lämna sin tvångssituation saknar betydelse om detta skulle ske till priset av att han tvingas ge upp sin rätt till politisk asyl (se särskilt vad Danelius anför om *Amuur mot Frankrike*).

Med hänvisning till vad Assange anfört i avsnitt 2 i hab 19 och med stöd av vad Danelius anför i anfört arbete hävdar Assange – tvärtemot vad hovrätten anfört – att han är att anse som frihetsberövad. Detta utvecklas närmare från europeisk utgångspunkt i Legal note 5.

Hans levnadsförhållanden är ytterst prekära. De kan förväntas fortsätta att vara så under överskådlig tid. Att lämna ambassaden skulle ske till priset av att ge upp den politiska asyl som Ecuador beviljat Assange till skydd för utlämning till och risk för politisk förföljelse i USA.

Assange är därmed att anse som frihetsberövad. Därmed kommer frågan om utevarohäktning i ett helt nytt läge, vilket vi utvecklat i avsnitt 2 i hab 19.

Det är av stor vikt att den frågan får sin rättsliga belysning. Frågan har avgörande betydelse för om utevarohäktningen ska bestå. Är Assange frihetsberövad har han med råge avtjänat hela sitt straff. Frågan är inte prövad i svensk praxis tidigare.

Hovrättens bedömning står också i strid med europadomstolens praxis.

Europadomstolen har nämligen fastslagit att utgångspunkten för frågan huruvida ett frihetsberövande föreligger i enlighet med artikel 5 måste vara den konkreta situation som individen befinner sig i, och hänsyn måste tas till en mängd olika faktorer såsom typ, varaktighet, effekt och det sätt som åtgärden verkställs på. Skillnaden mellan inskränkningar av rörelsefriheten och frihetsberövanden är endast en skillnad i grad och intensitet, och inte i art eller substans. Inskränkningar är bara acceptabla i den mån de är knutna till individens

rättssäkerhetsgarantier, som måste se till att inskränkningarna inte förlängs onödigt. Annars förvandlas en enkel restriktion av individens frihet till ett frihetsberövande.

Enligt Europadomstolen utgör en situation ett frihetsberövande om två rekvisit är uppfyllda: för det första, det objektiva rekvisitet (typ, varaktighet och sätt) och för det andra det subjektiva rekvisitet (frivilligt samtycke från personen i fråga till den frihetsinskränkande åtgärden): Europadomstolen i Guzzardi mot Italien, 6/11/1980, Raimondo mot Italien, 22/2/1994, Amuur mot Frankrike, 25/10/1996, Labita mot Italien, 6/11/2000, Baumann mot Frankrike, 22/8/2001, Napijalo mot Kroatien, Luordo mot Italien, 17/7/2003,13/11/2003, Shamsa mot Polen, 27/11/2003, Mogos mot Polen, 6/5/2004, Mahdid och Haddar mot Österrike, 8/12/2005, Riad och Idiab mot Belgien, 24/1/2008, Gochev mot Bulgarien, 26/11/2009, Stanose mot Bulgarien, 27/11/2012.

Julian Assange har utsatts för åtgärder som faller inom definitionen av ett frihetsberövande enligt artikel 5 i Europakonventionen: hans pass har beslagtagits, han utsätts för en extraordinär polisbevakning 24 timmar om dagen (till en kostnad som för närvarande uppgår till omkring 10 miljoner pund), villkoren för åtgärden kränker artikel 3 av Europakonventionen, varaktigheten av åtgärden har pågått i över 2,5 år, karaktären av atgärden är obegränsad i tiden och han har inte valt fritt att stanna inne på ambassaden eftersom att lämna den skulle innebära att han förlorade sin politiska asyl och utsattes för risken att bli utlämnad till och hamna i fängelse i USA.

Julian Assange har rimliga skäl att tro, alternativt är det inte orimligt för honom att tro på objektiva grunder, att han som en utsatt person, i första hand riskerar refoulement av europeiska stater (Storbritannien eller Sverige) till USA där, i andra hand, han har rimliga skäl att tro, alternativt är det inte orimligt för honom att tro på objektiva grunder, att han som en utsatt person, riskerar att utsättas för omänsklig och förnedrande behandling, orättvis rättegång eller en uppenbar rättsvägran, se närmare härom i Legal Note 5.

Julian Assange tillhör en utsatt grupp [group of vulnerable persons]: "personer som är inriktade på att försvara mänskliga rättigheter, som är associerade och inblandade i avslöjandet av grova brott genom 'whistleblowing' och offentliggörande". Europadomstolen skyddar denna kategori av personer inom ramen för artikel 10 och 11 i Europakonventionen: Stater som har undertecknat Europakonventionen har en positiv skyldighet att bevara yttrandefriheten och en skyldighet att inte bestraffa personer tillhörande denna kategori av

utsatta personer: Guja mot Moldavien, 12/2/2008, Heinisch mot Tyskland, 21/7/2011, Bucur och Toma mot Rumänien, 8/1/2013.

Dessutom har Europarådet och EU-institutionerna vid upprepade tillfällen bekräftat att medlemsstater måste skydda denna kategori av personer, bla. genom att bevilja asyl: (Prague, 7 and 8 December 1994), Recommendation No. R (2000) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information (Adopted by the Committee of Ministers on 8 March 2000 at the 701st meeting of the Ministers' Deputies), Resolution 1729 (2010)1, Parliamentary Assembly, Council of Europe, 29/4/2010 on the Protection of "whistle-blowers", Declaration of the Committee of Ministers on the protection of freedom of expression and freedom of assembly and association with regard to privately operated Internet platforms and online service providers (adopted by the Committee of Ministers on 7 December 2011 at the 1129th meeting of the Ministers' Deputies), European Parliament resolution of 4 July 2013 on the US National Security Agency surveillance programme, surveillance bodies in various Member States and their impact on EU citizens' privacy (2013/2682(RSP)), Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers (Adopted by the Committee of Ministers on 30 April 2014, at the 1198th meeting of the Ministers' Deputies)Report of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe of 26 January 2015 on 'Mass surveillance'.

Under dessa omständigheter har Julian Assange rimliga skäl att tro, alternativt har han inte orimliga skäl att tro, på objektiva grunder, att Sverige kan komma att utlämna honom till USA utan att respektera den asyl som har beviljats honom av Ecuador.

Detta framgår av Sveriges bakgrund när det gäller olaglig refoulement i allmänhet enligt Europadomstolens bedömningar: (Bader och Kanbor mot Sverige, 8/11/2005, N. mot Sverige, 20/7/2010 och I. mot Sverige, 5/9/2013) samt av FN:s Tortyrkommitté (CAT) (A.S. Mot Sverige, 15/2/2001). Samma situation har inträffat när det gäller refoulement av politiska motståndare enligt färska avgöranden från Europadomstolen (R.C. mot Sverige, 9/3/2010, S.F. och andra mot Sverige, 15/5/2012 och F.N. mot Sverige, 18/12/2012) samt av FN:s Tortyrkomite (CAT) (Karoui mot Sverige, 25/5/2002, T.A. och S.T. mot Sverige, 27/5/2005, C.T. och K.M. mot Sverige, 22/1/2007, Njamba och Balikosa mot Sverige, 3/6/2010 och Aytulun och Güclü mot Sverige, 3/12/2010.) (Legal Note 7).

Av Legal note 7 framgår även att vissa frågor om effektiviteten i den svenska asylprocessen och svenska myndigheters nära samarbete med SÄPO och amerikansk polis och underrättelsetjänst har aktualiserats på senare år, vilket bidrar till Julian Assanges rädsla att hans status som politisk flykting inte kommer att respekteras.

Under dessa omständigheter har Julian Assange rimliga skäl att tro, alternativt har han inte orimliga skäl att tro, på objektiva grunder, att han riskerar att utsättas för omänsklig och förnedrande behandling, orättvis rättegång eller en uppenbar rättsvägran i USA. (Legal Note 6). Denna risk är grundad på sju skäl. (1) För det första att det finns konkreta bevis på en pågående brottsutredning i USA beträffande WikiLeaks och Julian Assange, vilken brottsutredning nu är inne i sitt femte år. (2) Uttalanden av högt uppsatta politiska rådgivare och opinionsbildare som har hotat skada och avrätta (ibland utomprocessuellt) Julian Assange. (Att så är fallet framgår av den film som finns inspelad på det USB-minne som ingivits i målet.) (3) Uttalanden av seniora tjänstemän i USA att åtala Assange för spionage, att få WikiLeaks klassad som 'enemy combatants' och att svartlista WikiLeaks personal. (4) Situationen för Bradley (numera Chelsea) Manning (påstådd Wikileakskälla) som enligt Juan Mendez (Special Rapportuer on Torture) hat blivit utsatt för omänsklig och förnedrande behandling och en orättvis rättegång i USA. (5) De illegala åtgärder som, enligt en utredning som genomförts av isländska myndigheter, USA:s och Storbritanniens polis och underrättelsetjänster vidtagit mot Julian Assange och Wikileaks. (6) Angrepp mot Julian Assanges and Wikileaks ekonomiska medel, vilka förklarats olagliga av Islands högsta domstol (7) Andra rättsliga åtgärder som vidtagits mot Wikileaks, Julian Assange och hans medarbetare.

Till följd av denna situation är att Julian Assange kvar i Ecuadors ambassad i London och detta kan på ovan angivna skäl inte ses som ett fritt val. Och av samma skäl kan det inte anses att artikel 5 i Europakonventionen ej är tillämplig. Hovrättens beslut (av innebörd att Assange kan lämna ambassaden om han vill) står därmed i strid med europarätten.

Artikel 5.1.c (skyldigheten att undersöka en skälig misstanke), 5.3 (varaktigheten av frihetsberövandet) och 5.4 (prövning av lagligheten av frihetsberövandet) i Europakonventionen, i kombination med artikel 3, 10 och 11 har kränkts.

Skäl för prövningstillstånd föreligger enligt RB 54:10 p.1, i frågan huruvida ett frihetsberövande föreligger.

Frågan hur det legala verkställighetshindret ska beaktas

I denna del har underinstanserna gjort samma bedömning: *Hovrätten anser vidare, och delar i det avseendet tingsrättens uppfattning, att vistelsen på ambassaden inte kan betraktas som en beaktansvärd följd av häktningsbeslutet och att den därför inte heller bör beaktas vid proportionalitetsbedömningen. Detsamma gäller Julian Assanges invändning i hovrätten om att han måste ge upp sin rätt till politisk asyl, om han lämnar ambassaden och blir föremål för utlämning till USA.*

Assange är starkt kritisk till underinstansernas bedömning. Felet ligger i att man uppställer ett krav på adekvans (*beaktansvärd följd*) för att Assanges svåra levnadsförhållanden på ambassaden ska beaktas vid proportionalitetsbedömningen på verkställighetsstadiet.

Detta resonemang står i strid med samtliga existerande uttalanden i doktrinen om hur ett legalt verkställighetshinder ska beaktas, se de hänvisningar till doktrinen som vi gjort i uab 39, bab 1 och 19 i ovan angivna avsnitt.

I doktrinen framgår tvärtom att ett häktningsbeslut ska upphävas om det inte kan verkställas. Detta följer av såväl proportionalitets-, behovs- som ändamålsprinciperna.

Därvid ska särskilt beaktas att det legala verkställighetshindret – såvitt nu kan bedömas – kommer att bestå under överskådlig tid och att det har sin grund i att Ecuador beviljat Assange politisk asyl för att förhindra att han utlämnas till och utsätts för politisk förföljelse i USA.

Det är helt orimligt att kräva att Assange ska avstå från detta skydd. Förundersökningen i Sverige får istället bedrivas vidare med detta skydd kvar, vilket blir effekten om utevarohäktningen upphävs.

Det är av vikt för ledning av rättstillämpningen (RB 54:10 p.1) att Högsta domstolen beviljar prövningstillstånd. Tidigare prejudikat i frågan saknas och de uttalanden i doktrinen som gjorts i frågan (och som stöder Assanges inställning) får här sin rättsliga prövning. Underinstansernas rättstillämpning strider mot uttalandena i doktrinen.

6. SMS-FRÅGAN: TOLKNING AV 24 kap, 9a § RÄTTEGÅNGSBALKEN OCH INHÄMTANDE AV FÖRHANDSBESKED FRÅN EU-DOMSTOLEN

Inledning

I förundersökningsmaterialet ingår ett stort antal SMS-meddelanden mellan målsägandena A och B och mellan målsägandena och tredje person. SMS har i tiden skickats under och efter det de påstådda gärningarna som avses med brottsmisstankarna.

Innehållet i SMS:en utvisar bland annat målsägandenas [redacted]. Enligt försvarets uppfattning föreligger det diskrepanser mellan det som framgår av SMS:en och åklagarens redogörelser för de omständigheter som ligger till grund för brottsmisstankarna.

Enligt försvarets uppfattning är innehållet i SMS:en av stor betydelse för prövningen av om det kan anses föreligga sannolika skäl för brottsmisstankarna. Därför ligger det i Julian Assanges intresse att åberopa SMS:en i syfte att angripa beslutet om häktning i hans utevaro.

Den misstänktes rätt att ta del av förundersökningen

I 23 kap. 18 § rättegångsbalken föreskrivs att den misstänkte har rätt att ta del av förundersökningen innan beslut om åtal. Delgivningen av materialet ska ske fortlöpande, i den mån det kan ske utan men för utredningen. Så snart åtal beslutats har den misstänkte och hans offentliga försvarare rätt att få en avskrift av protokollet (23 kap. 21 § fjärde stycket rättegångsbalken).

Den misstänkte har även med stöd av 24 kap. 9a § rättegångsbalken rätt att få ta del av omständigheter som ligger till grund för beslut om anhållande eller häktning. Av förarbetena till bestämmelsen framgår att innebörden av bestämmelsen är att den misstänkte ska ha rätt att ta del av handlingar som är nödvändiga för att en effektiv prövning av beslutet om frihetsberövande ska kunna komma till stånd (prop. 2013/14:157 s. 28).

Frågan om hur materialet ska göras tillgängligt för den misstänkte är inte uttryckligen reglerat i lag, men i förarbetena sägs att det inte föreligger någon rätt att få en kopia av materialet, utan det ska tillhandahållas på det sätt som bedöms lämpligt i det enskilda fallet (prop.

2013/14:157 s. 28). Uttalandet måste förstås så att det är upp till åklagarens prövning att besluta om hur och i vilken form materialet ska tillhandahållas.

Direktivet 2012/13/EU

Bestämmelsen i 24 kap. 9a § rättegångsbalken är en implementering av art. 7 i Europaparlamentets och rådets direktiv 2012/13/EU av den 22 maj 2012 (nedan Direktivet). Direktivet grundar sig på art. 6, 47 och 28 i Europeiska unionens stadga om de grundläggande rättigheterna (nedan Stadgan) och art. 5 och 6 i den Europeiska konventionen om skydd för de mänskliga rättigheterna och grundläggande friheterna (nedan Europakonventionen) och har beslutats med stöd av art. 82.2 i fördraget om Europeiska unionens funktionssätt (FEUF). Direktivet ska vara genomfört senast den 2 juni 2014 (art. 11 i Direktivet).

I art. 7 i Direktivet föreskrivs att medlemsstaterna ska se till att handlingar som rör det specifika målet, som är i de behöriga myndigheternas besittning och som är väsentliga för att i enlighet med nationell rätt effektivt angripa anhållandets eller häktningsbeslutets laglighet, göras tillgängliga för frihetsberövade personer eller deras försvarare.

Syftet med Direktivet är att möjliggöra ett effektivt utövande av den misstänktes rätt att få anhållande eller häktningsbeslutets laglighet prövat och särskilt att främja rätten till frihet, rätten till en rättvis rättegång och rätten till försvar (se preambeln p. 30 och 40 i Direktivet). Medlemsstaterna bör genomföra alla åtgärder som är nödvändiga för att följa Direktivet och det bör genomföras i enlighet med sitt syfte (preambeln p. 38 och 40 i direktivet).

Försvarets tillgång till SMS:en

Försvaret har beretts möjlighet att ta del av SMS:en vid besök i polisens lokaler och även under förhandlingen rörande omprövning av häktningsbeslutet vid tingsrätten den 16 juli 2014.

Inför förhandlingen vid tingsrätten framställdes till åklagarna en begäran om att få ta del av SMS:en i syfte att förbereda försvaret. Försvaret erbjöds att få göra det i polisens lokaler kl. 13.00 den 15 juli 2014. För försvarets räkning infann sig advokat Anwar Osman vid den överenskomna tiden och möttes upp av polismannen Cecilia Redell. Som framgår av

efterföljande korrespondens mellan advokat Osman och åklagaren meddelade Cecilia Redell att hon fått direktiv om att det inte fick göras några avskrifter av SMS:en, se bilaga 1.

Vid förhandlingen tillhandahöll åklagarna en kopia av SMS:en, vilken överlämnades till försvaret, men försvaret fick återlämna dem till åklagaren efter förhandlingen och de gavs inte in till tingsrätten. Försvaret redogjorde muntligen för innehållet i de SMS, vilka under rådande förhållanden vad avser de praktiska begränsningarna att analysera och värdera meddelandena ansågs betydelsefulla för prövningen av frågan om frihetsberövandet. I vilken utsträckning tingsrätten ordagrant tecknade ned SMS:ens lydelse eller inte undrar sig försvarets kännedom.

Åberopandet av SMS:en

Som omnämnts ovan anser försvaret att innehållet i SMS:en, var för sig och sammantagna, talar med styrka för Julian Assanges sak och därför har ett betydande bevisvärde vid prövningen av om det föreligger sannolika skäl för brottsmisstankarna. Av det skälet är det angeläget för försvaret att SMS:en införs som processmaterial vid prövningen av häktningsfrågan.

Till följd av de begränsningar som åklagarna uppställt i samband med att materialet gjorts tillgängligt för försvaret har det inte varit möjligt att fullt ut analysera, bearbeta och kontextualisera samtliga SMS inför tingsrättens prövning. Det har inte heller varit möjligt för Julian Assange att få tillgång till SMS:en direkt, utan det har fått ske genom att försvararna redogjort för sina minnesbilder av innehållet.

Försvaret har inte heller kunnat åberopa SMS:en vid tingsrätten, utan endast givits möjlighet att lämna en muntlig redogörelse för innehållet i de delar som vid sittande rätt bedömdes vara relevanta. I hovrätten hölls ingen muntlig förhandling, vilket innebär att försvaret i hovrätten inte ens muntligen kunde redogöra för sina minnesbilder av SMS:n.

Sannolika skäl

Som beviskrav för beslut om häktning anges att det ska föreligga sannolika skäl för brottsmisstanken (24 kap, 1 § rättegångsbalken). Härmed avses att de föreliggande

omständigheterna ska vara sådana att misstanken vid en objektiv bedömning framstår som berättigad.

Vid häktningsförhandlingen ska sakfrågan prövas utifrån vad handlingarna från förundersökningen innehåller och vad parterna i övrigt anför. Därutöver får ytterligare utredning inte läggas fram såvida det inte föreligger särskilda skäl (24 kap. 14 § andra stycket rättegångsbalken).

Något krav på i vilken form bevisning ska förebringas vid en häktningsförhandling föreligger inte, utan det är, i princip, tillåtet att åklagaren och försvarer muntligen redogör för innehållet i olika handlingar, protokoll och utsagor. Domstolens prövning av materialet torde endast vara underkastad den i svensk rätt gällande principen om fri bevisprövning (35 kap. 1 § rättegångsbalken).

Det faktum att domstolens prövning kan komma att grunda sig på muntliga redogörelser för innehållet i förundersökningen är inte helt oproblematiskt i så måtto att det kommer att röra sig om två skilda bedömningar, nämligen först i vilken utsträckning beskrivningen av förundersökningsmaterialet är korrekt och fullständigt och sedan i vilken mån det beskrivna utredningsmaterialet konstituerar sannolika skäl.

Den förra frågan torde, i normalfallet, bedömas utifrån åklagarens objektivitetsplikt och tjänsteansvar på så sätt att åklagarens redogörelse godtas såvida inget talar mot den. Motsvarande garantier föreligger knappast vad avser den misstänkte och hans försvars redogörelse för omständigheterna i målet. Den misstänkte har inte någon sanningsplikt och försvaret har endast till uppgift att ta tillvara den misstänktes intressen. Således föreligger det en påtaglig obalans mellan parterna i så måtto att det finns tyngre vägande skäl för domstolen att godta åklagarens uppgifter framför försvarets.

Mot den bakgrunden är det än mer angeläget för försvaret att kunna underbygga sina påståenden med handlingar från förundersökningen och att utredningsmaterialet i de delar där åklagarens redogörelse ifrågasätts inges till rätten.

Implementeringen av Direktivet

Utöver vad som ovan redovisats i form av uttalanden i preambeln om genomförandet av Direktivet kan framhållas att det ska införlivas enligt bestämmelserna i art. 288 FEUF och 4.3 förordningen om Europeiska unionen (nedan FFU). Det innebär att Direktivet ska införlivas på ett rättssäkert och förutsägbart sätt för att säkerställa och förverkliga det resultat som Direktivet syftar till. Det innebär bland annat att Direktivet inte i sina väsentliga delar kan genomföras genom administrativ praxis eller domstolspraxis (se Jörgen Hettne och Ida Otken Eriksson (red.), EU-rättslig metod, s. 179 f.).

Vid genomförandet i svensk rätt infördes inte några uttryckliga bestämmelser om rättsmedel avseende prövningen av ett beslut om att göra förundersökningsmaterial tillgängligt för den misstänkte enligt 24 kap. 9a § rättegångsbalken. Utgångspunkten synes vara att det är förundersökningsledaren som fattar beslut i frågan. Någon föreskrift om att den som är missnöjd med beslutet kan begära domstolens prövning föreligger inte, och det är därför oklart om det kan ske eller om beslutet ska överprövas av högre åklagare och förvaltningsdomstol.

Vidare har lagstiftaren vid genomförandet av Direktivet valt att använda rekvisitet "omständighet" istället för "handling", vilket skapat en osäkerhet om det som åsyftas med den svenska regleringen är uppgiften i handlingen eller handlingen som sådan. Av uttalandena rörande "handling" som återfinns i p. 30 i Direktivets preambel torde följa att det är handlingen som sådan som ska göras tillgänglig.

Slutligen saknas även en uttrycklig reglering av frågan om hur den misstänkte ska få förfara med materialet om han efter att ha fått ta del av det önskar åberopa det till sitt försvar inför rätten.

Brister i implementeringen m.m.

Enligt försvarets bedömning måste det med utgångspunkt i att det är handlingen som ska göras tillgänglig även föreligga en möjlighet för den misstänkte att förebringa handlingen inför rätten om han anser att innehållet är av betydelse för bedömningen. Även om rätten har möjlighet att beakta vad den misstänkte muntligen anför vid förhandlingen kan värdet av den misstänktes utsaga om innehållet inte tillmätas samma tyngd som om den kan underbyggas

med handlingen. Särskilt gäller det i de fall där åklagare och den misstänkte har olika uppfattningar om betydelsen av handlingen.

Vidare ska framhållas att även om Direktivet inte uttryckligen reglerar formerna för tillhandahållandet av förundersökningsmaterialet, måste det ske på ett sätt som säkerställer att syftet med Direktivet genomförs. Det innebär att den misstänkte måste få ta del av materialet på ett sådant sätt att det möjliggör för honom att på ett effektivt sätt utöva sin rätt att få beslutets laglighet prövad. Om materialet är omfattande och måste bearbetas för att kunna redovisas på ett rättvist och fullständigt sätt måste det finnas ett utrymme för att överlämna det till försvaret för närmare analys och hantering utanför polisens lokaler och under former som försvaret själv förfogar över.

Här ska även framhållas att föreskrifterna om successiv delgivning i 23 kap. 18 § rättegångsbalken inte kan anses lägga något hinder i vägen för att materialet lämnas över till försvaret. Materialet har redan gjorts tillgängligt för försvaret och innehållet rör andra förhållanden än sådana som Julian Assange kan anses ha erfarit eller kan uttala sig om.

För Julian Assange del innebär bristerna i implementeringen att han personligen inte fått ta del av innehållet i SMS:en, att försvarets möjligheter att analysera och bearbeta materialet begränsats av åklagarens instruktioner, att det föreligger oklarheter kring vilket rättsmedel som kan användas för att få åklagarens beslut prövat, att han inte kunnat åberopa handlingarna vid tingsrätten och att han inte ens muntligen kunnat redogöra för innehållet i handlingarna i hovrätten.

Förhandsbesked

Enligt försvarets uppfattning innebär tillämpningen av 24 kap. 9a § rättegångsbalken en tillämpning av EU-rätten och Direktivet är i nu aktuella delar så tydligt vad avser den enskildes rättigheter att det får anses ha en så kallad horisontell direkt effekt efter den 2 juni 2014 (se Mats Melin och Joakim Nergelius, EU:s konstitution, s. 36 ff).

Vidare anser försvaret att ett genomförande av Direktivet förutsätter att handlingarna tillhandahålls på ett sätt som möjliggör för den misstänkte att använda dem på ett effektivt och ändamålsenligt sätt och att den misstänkte ges en möjlighet att åberopa handlingarna inför rätten.

Julian Assange hemställer därför om att Högsta domstolen inhämtar ett förhandsbesked från EU-domstolen rörande följande frågor.

1. Ska Direktivet tolkas enligt sin ordalydelse så att det är den fysiska handlingen som ska göras tillgänglig för den misstänkte eller kan det vara tillräckligt att den misstänkte får del av en uppgift om handlingens innehåll?

2. Ska Direktivet tolkas så att det är upp till åklagarens fria skön att bestämma formerna för hur den misstänkte ska få del av handlingarna?

3. Förutsätter Direktivet att den misstänkte har en möjlighet att få en domstolsprövning av åklagarens beslut om tillhandahållet av handlingen?

4. Förutsätter Direktivet för sitt genomförande att den misstänkte, om han efter att ha tagit del av handlingen bedömer att den har betydelse för prövningen av beslutet om frihetsberövande, tillerkänns en rätt att förebringa och åberopa handlingen som bevis inför rätten?

När förhandsbeskedet rör en fråga i ett mål med frihetsberövanden hemställes om att Högsta domstolen ska begära att EU-domstolen handlägger ärendet enligt art. 267 FEUF och bestämmelserna om skyndsam handläggning i art. 105 i Rättegångsreglerna för domstolen (2012/C 337/01).

Se i denna fraga även innehållet i Legal note 1.

7. ÖVRIGT

Följande handlingar bifogas detta yttrande.

Meddelande från polismannen Cecilia Redell i fråga om SMS:n, bilaga 1.

Bifogat inges nedan angivna yttranden som upprättats av olika internationella experter och som tillhandahållits oss av vår klient med instruktioner att ge in dem till Högsta Domstolen:

Yttrande från Fair Trials international, bilaga 2.

Legal Note 1 on the right to acces to the file, bilaga 3.
Legal Note 2 on Prot 4, art 2 ECHR, bilaga 4.
Legal Note 3 on PPU, bilaga 5.
Legal Note 4 on the conditions of detention, bilaga 6.
Legal Note 5 on the deprivation of liberty, bilaga 7.

Legal Note 6 Submission to UNWGDA, bilaga 8.
Legal Note 7 on the fear of refoulement to the USA, bilaga 9.
Legal Note 8 on the fear fore indirect refoulement to the USA by Sweden, bilaga 10.

Affidavit from Julian Assange re. i.a. the circumstances of the case during August 2010, bilaga 11.

För det fall att prövningstillstånd beviljas förbehåller vi oss rätten att inkomma med ytterligare skrivelser.

Vi hemställer också om att samtliga skrivelser från åklagarna och Högsta domstolen (frånsett rutinartade föreläggganden) översätts till engelska.

Stockholm den 25 februari 2015

Thomas Ohlsson

Per E Samuelson

Per E Samuelsson

Bilaga 1

Från: Thomas Olsson <olsson@friaadvokater.se>
Skickat: den 15 juli 2014 18:53
Till: Z
Kopia: Per E Samuelsson
Ämne: Fwd: Ang Assange

Se nedan

Mvh/Thomas Olsson

Vidarebefordrat brev:

Från: Anwar Osman <osman@friaadvokater.se>
Datum: 15 juli 2014 17:01:56 CEST
Till: "Marianne.ny@aklagare.se" <Marianne.ny@aklagare.se>
Kopia: Thomas Olsson <olsson@friaadvokater.se>
Ämne: Ang Assange

Marianne,

Jag tillskriver dig med anledning av att min kollega Thomas Olsson begärt att försvaret dels skulle få ta del av SMS med anknytning till målsägandena som finns i utredningen och dels förhör samt övrigt utredningsmaterial som inte tagits med i häktningspromemorian.

Jag vill informerad dig om att jag idag träffat utredaren Cecilia Redell för genomgång av utredningen i målet.

Med anledning av dina direktiv till utredaren har jag inte fått ta del av några förhör och övrigt utredningsmaterial som inte tagits med i häktningspromemorian. Vad gäller SMS:en med anknytning till målsägandena så fick jag inte ta med mig en kopia, på relevanta sidor. Jag fick inte heller skriva av de aktuella sidorna. Därtill fick jag inte heller möjlighet att föra anteckningar vid genomgången av materialet.

Med vänlig hälsning
Anwar Osman
Jur. kand.

Advokatfirman Fria Advokater
Tel: 08-242323
Mobil: 0739-733946
www.friaadvokater.se

BILAGA 2

FAIR TRIALS

INTRODUCTION

1. This opinion is produced by Fair Trials in the context of pending criminal proceedings in the case of [---], which we understand to raise an issue as to the interpretation of Article 7(1) of Directive 2012/13/EU on the right to information in criminal proceedings (the '**Directive**'). As an expert on EU criminal justice issues, we provide this opinion as an independent entity with no interest in the outcome of the specific case.

About Fair Trials

2. Fair Trials is an independent human rights organisation based in London and Brussels which works for respect for the right to a fair trial according to internationally-recognised standards of justice. It is the coordinator of the Legal Experts Advisory Panel ('**LEAP**'), a network of 130 criminal justice experts from all 28 Member States of the European Union.

3. Fair Trials works with LEAP to obtain current information on the protection of defence rights within the European Union. For instance, in 2013-14 LEAP 56 members from 25 countries met in six different meetings to discuss the situation of defence rights covered by the directives adopted under the EU Roadmap for strengthening procedural rights of suspects and accused persons in criminal proceedings[1] (the '**Roadmap**'), discussed further below, including the Directive and the specific question of access to the case-file.

4. Fair Trials also convenes regular roundtables of LEAP to discuss strategic priorities and issues of common concern, with access to the case-file identified as one of four key areas of focus. LEAP also provides knowledge on the implementation of the directives adopted under the Roadmap through roundtable meetings, questionnaire-based surveys and regular telephone calls.

The issue

5. We understand this case to raise the question of the meaning of the requirement in Article 7(1) to 'make available' documents and, in particular, whether this should be interpreted as precluding the application of a rule whereby a person subject to an arrest warrant is refused both the right to take copies of evidence on which they intend to rely to challenge their detention and the ability for their lawyer to take notes when consulting such documents.

---

[1] Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (OJ 2009 C 295, p. 1).

Assumptions

6. We assume, for the purposes of this opinion, that the existence of an arrest warrant is sufficient to trigger the obligations of the Member State whose authorities issued that arrest warrant under Article 7(1), irrespective of whether the person is actually detained further to it.

7. We also assume that the person subject to that arrest warrant has full standing to avail themselves of any procedural rights available to persons detained in the ordinary course of criminal proceedings in that Member State, irrespective of where they are physically located.

Content of this opinion

8. This opinion makes the following points:

   a. Article 7(1) of the Directive was adopted to facilitate compliance with the requirement arising under Article 5(4) of the European Convention on Human Rights ('**ECHR**') for access to the file to the extent necessary to ensure equality of arms in proceedings for challenging the lawfulness of detention.

   b. A review of the case-law of the European Court of Human Rights ('**ECtHR**') on Articles 5(4) and, by analogy, 6 of the ECHR shows that there is a certain flexibility within the ECHR as to how such access is provided, but that the modalities chosen must in any case enable an effective opportunity to prepare a challenge to the lawfulness of detention, a rule which may in certain cases be infringed by practical arrangements which limit the opportunity for lawyer and client to consult on the basis of the evidence in the file.

   c. Article 7(1) of the Directive, at least, reproduces this requirements. It also entails additional effects including (i) the requirements for legal certainty and clarity in implementation of directives, which means that practical restrictions upon this right should have a clear legal basis; (ii) national courts must do all that lies within their jurisdiction to give effect to the Directive; and (iii) the provision needs to be read together with the Charter of Fundamental Rights of the EU (the '**Charter**'), the requirements of which in this context are not clear.

   d. A review of some of the ways in which access to the case file is made available to suspects or their lawyers at the pre-trial stage in criminal cases in different Member States of the EU shows that there seem to be different views among the Member States as to the requirements of Article 7(1), and that there exist various practical ways of providing such access, some of which produce difficulties when it comes to challenging detention.

e. In the event of doubt as to the proper meaning of Article 7(1) and the extent to which it may prescribe certain minimal procedural modalities, a reference to the Court of Justice of the EU ('**CJEU**') is available (or, as the case may be, mandatory). A refusal to refer by a court of final must be adequately reasoned, in accordance with Article 6 ECHR.

A. ARTICLE 7(1): OBJECT AND PURPOSE

9. Article 7(1) of the Right to Information Directive (the 'Directive') has not yet been interpreted by the CJEU. For the time being, we think it helpful to state what we understand to be its purpose.

10. Article 7(1) appears to be closely related to the requirement in the case-law of the ECHR based on Article 5(4) ECHR according to which the review of detention 'must provide guarantees of a judicial procedure. The proceedings must be adversarial and must always ensure "equality of arms" (...) Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his client's detention' (*Schöps v. Germany* App. No 25116/94 (13 February 2001), paragraph 44).

11. The ECtHR also states: 'information which is essential for the assessment of the lawfulness of a detention should be *made available* in an appropriate manner to the suspect's lawyer' (our emphasis) (*Garcia Alva v. Germany* App. No 23541/94 (13 February 2001), paragraph 42).

12. Article 7(1) appears to replicate this, requiring Member States to 'ensure that documents (...) which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers'. The relationship between the rules is confirmed by recital 30, which specifies that such documents must be made available at the latest before the hearing envisaged by Article 5(4) ECHR.

13. That is consistent with the general objective of the Roadmap, which called for 'further action on the part of the European Union to ensure full implementation and respect of Convention standards, and, where appropriate, to ensure consistent application of the applicable standards and to raise existing standards' (recital 2).

14. Article 7(1) thus seems to be intended to protect the right to liberty by ensuring that sufficient access to evidence is provided to enable compliance with the equality of arms requirement inherent in Article 5(4) ECHR and, thereby, ensure effective judicial review of detention.

15. However, the specific meaning of the requirement to 'make available' documents is not clear. The expression does not appear elsewhere in Article 7 of the Directive, and appears to be a reference to the expression of the ECtHR reproduced above at paragraph 12. The Directive further states that 'the provisions of this Directive that correspond to rights guaranteed by the ECHR should be

twenty minutes. The Court is of the view that the *time and facilities* thus available to them for the preparation of the applicant's case were considerably limited' (paragraph 80).

c. The questions communicated to the respondent Government in *Apostu v. Romania* App. No 22765/12 (communicated 18 December 2012) ask whether the requirement for a detainee and his lawyer to consult through a glass partition, limiting their ability to discuss confidential documents, infringed the applicant's right under Article 5(4) ECHR, showing that practical restrictions can raise an issue under that provision.

25. Accordingly, the requirement for equality of arms under Article 5(4) ECHR should be approached on the same basis as Article 6 ECHR: it matters not how access to the file is organised, provided that there is at least be an effective opportunity for counsel and client to discuss the content in order to be able to make submissions regarding detention. Practical limitations relating to the making of copies and ability to make notes may infringe this requirement.

C. EU LAW OBLIGATIONS FLOWING FROM ARTICLE 7(1) OF THE DIRECTIVE

26. Article 7(1) of the Directive, as discussed above in paragraphs 11-14, seeks to ensure compliance with the requirements that exist in the Article 5(4) case-law. As a minimum, it must therefore be taken to require that the arrested person has an effective opportunity to consult the contents of the case file and confer with his/her lawyers on that basis. However, it is worth considering the additional characteristics of Article 7(1) as a provision of EU law.

27. Under Article 288 TFEU, a directive is binding as to the result to be achieved but leaves the Member State the choice of methods to achieve it. And indeed, beyond the requirement to 'make available' documents, Article 7(1) does not prescribe a particular method for making documents available. In addition, directives adopted under Article 82(2) TFEU (such as the Directive) do not 'harmonise' criminal justice systems: they impose only 'minimum rules' and respect the legal traditions of the Member States.

28. In principle, therefore, the modalities for access to the file fall to the Member State to decide. However, this is subject to (1) the requirement for legal certainty in implementation; (2) the requirement to ensure the effectiveness of the provision in question; (3) overriding requirements of the Charter which have not yet been explored in this context.

1. Legal certainty and precision in implementation of Directives

29. The CJEU has stated that 'each Member State should implement the directives in question in a way which fully meets the requirements of clarity and certainty (...) *Mere administrative practices, which by their nature can be changed as and when the authorities please and which are*

not publicized widely enough cannot in these circumstances be regarded as a proper fulfilment of the obligation imposed by article 189 [now 288 TFEU] on Member States to which the directives are addressed' (our emphasis) (Case 102/79 *Commission v. Belgium*).

30. Within the framework of Article 7 of the Directive, Article 7(1) is subject to no derogation, reflecting the irreducible nature of the requirement for disclosure under Article 5(4) ECHR (see, in this regard, *Dochnal v. Poland*, where the ECtHR found that even documents relating to national security could not be withheld at the expense of this requirement). This makes it clear that a practical restriction on the consultation of such documents impinges upon the enjoyment of an irreducible aspect of a fundamental right, and such restrictions should therefore be clearly provided in law and not left to prosecutorial discretion.

2. Requirement to ensure the full effect of Article 7(1)

31. Secondly, even if Article 7(1) simply restates the equality of arms rule in Article 5(4) ECHR, this comes with the added injunctive force of a provision of EU law. The CJEU states that 'EU law requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that the directive in question is fully effective and achieving an outcome consistent with the objective pursued by it' (Case C-69/10 *Diouf*). Accordingly, provisions of national law relating to access to materials, and any other general powers of the court, should be interpreted in such a way as to ensure that the person subject to the arrest warrant has an effective opportunity to prepare a challenge to the lawfulness of detention.

32. In addition, even if the national law appears to achieve the aims of the Directive, it falls to the court having jurisdiction to ensure the benefit of the Directive is enjoyed by the person concerned. 'The adoption of national measures correctly implementing a directive does not exhaust the effects of the directive. Member States remain bound actually to ensure full application of the directive even after the adoption of those measures. Individuals are therefore entitled to rely before national courts, against the State, on the provisions of a directive which appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise whenever the full application of the directive is not in fact secured [including] where the national measures correctly implementing the directive are not being applied in such a way as to achieve the result sought by it' (Case C-62/00 *Marks & Spencer*, paragraph 27). Article 7(1) is clear, precise and unconditional and appears specifically intended to confer an enforceable right upon the person concerned. Accordingly, it falls to the national court to ensure, in the specific case, that the practical arrangements adopted further to the relevant national law ensure a sufficient opportunity to prepare a case to challenge the arrest warrant.

3. The right to an adversarial proceeding under Article 47 of the Charter

33. Thirdly, it should be observed that the Article 7(1) should be read together with the Charter of Fundamental Rights of the EU, in particular Article 6 (right to liberty) and Article 47 (right to an effective remedy). The latter provision incorporates the right to an adversarial proceeding, requiring that 'the parties to a case must have the right to examine all the documents or observations submitted to the court for the purpose of influencing its decision, and to comment on them' (Case C-300/11 *ZZ*, paragraph 55). The *ZZ* case effectively established that principles developed by the ECtHR under Article 5(4) ECHR applied to decisions excluding an EU citizen from a Member State, but the CJEU has not had occasion to comment upon the application of those principles in the criminal justice context when a person presumed innocent is deprived of liberty. As explained below, the disparity in practices in the EU suggest that the requirements of the right to an adversarial proceeding in this context require further clarification..

D. SYSTEMS OF ACCESS TO THE FILE IN THE EU

34. A study which Fair Trials has been undertaking through consultation with LEAP shows how systems of pre-trial disclosure operate in other EU Member States. Some Member States appear not to have sufficiently complied with the substantive right of access conferred by Article 7(1), allowing access to the file itself to be restricted in order to protect the effectiveness of the investigation:

    a. In **Estonia**, the law specifically implementing the Directive permits the prosecutor to withhold access to documents which are essential for challenging detention. Thus, irrespective of modalities, in some cases there will simply be no access to the file. Estonian lawyers consider this contrary to the Directive.

    b. In **Bulgaria**, too, access is provided only at the conclusion of the pre-trial investigation, and prior to then the possibility to challenge detention is undermined. Earlier access may be provided but only on a sporadic basis by informal agreement with the prosecutor but this is not subject to specific requirements and may take the form of ad-hoc arrangements close to the hearing which do not provide an effective opportunity to prepare a challenge to detention.

    c. In **Portugal**, if no order has been issued to protect the secrecy of the investigation, copies of the file can be obtained at the pre-trial stage. However, if such an order has been issued, copies can be requested but may not always be granted. Only after the completion of the pre-trial investigation is full consultation of the case file provided, with the lawyer

able to make copies and take scans. This, ultimately, can mean that in some cases it becomes difficult effectively to challenge detention at the pre-trial stage.

d. In **Lithuania**, the law enables the prosecutor to withhold access to the file, but also to grant access but restrict the ability to make photocopies. Consultation takes place at the prosecutor's office and copies are made there if allowed. Certain documents, including as to the private lives of participants in the proceedings, cannot be copied. However, in any case, the law entitles the lawyer to take notes, with the exception only of documents considered a state secret.

35. However, the enquiry reveals more examples of practices enabling relatively free access to documents, with the possibility to access physical evidence in the form of copies or scans:

a. In **Romania**, consultation of the criminal case file is governed by Article 94 of the new Code of Criminal Proceedings, which entered into force in February 2014. This entitles the lawyer of the person subject to criminal proceedings (inculpat) to consult the file and to take photocopies. If the person is deprived of liberty, there is a right to consult the whole file. A formal document issued by the prosecutor's office in March 2014 explained how prosecutors would be approaching this provision, stating that photocopies would be provided but that specific information, such as the personal data of third parties, might be redacted on a case by case basis in order to protect those data from circulation in the public domain. The result is that a person detained pre-trial is – if not immediately, due to delays in obtaining copies, then reasonably soon thereafter – able to consult the full file and retain possession of a copy of it.

b. In **Germany**, pursuant to Article 147 of the Criminal Procedure Code (which is federal law applicable in all the Länders), defence counsel has the right to inspect the case file. While restrictions apply to the right in order to protect the purpose of the investigation, where a person is deprived of liberty, 'information of relevance for the assessment of the lawfulness of such deprivation of liberty shall be made available to defence counsel in suitable form; to this extent, as a rule, inspection of the files shall be granted'. The LEAP Advisory Board member for Germany explains that, in cases involving lower volumes of information, a copy of the original file is made available, or the original file is made available to the lawyer who may make a copy for his client. In cases involving a larger volume of information, a CD/DVD with an electronic version of the file is made available. As a result, there is not a major issue challenging detention effectively. Another LEAP Member has, in fact, given the example of the courts ordering the authorities to provide a personal computer, at the state's expense, to enable a detained client to consult

vast amounts of electronic evidence in order to prepare for trial, showing the extent to which courts are prepared to use their jurisdiction to ensure practical, effective access.

c. In the **United Kingdom (UK)** (which is bound by the Directive), pre-trial disclosure is regulated by Part 10 of the Criminal Procedure Rules 2013, which provides that at the first court hearing the prosecution must provide 'initial details of the prosecution case', which include a summary of the evidence and any statement or document on which the prosecution case will be based. Such disclosure is provided in the form of a copy of the evidence, though there is a move towards digitalisation. If a copy cannot be supplied, the defence must be allowed to inspect the original. This disclosure is provided to the lawyer at court, or if no lawyer is present the prosecution would be under a duty to give the papers to the accused directly. As proceedings progress, the Criminal Justice and Procedure Act 1996 provides that, on an ongoing basis, any evidence which could assist the case of the accused or undermine the prosecution case must be disclosed, in which case, the same modalities apply.

d. In **Austria**, at the police station, the lawyer may consult the file and take pictures or copies, if the facilities are available. Thereafter, the file is accessed at the public prosecutor's office on the same basis. The request to consult the file is made in writing to the prosecutor, ordering copies there and then as the case may be. There is no legal basis for consultation only, without the right to take pictures or copies. The copies, when provided, can either be provided in paper or as data on a disc, depending on the facilities available to the particular prosecutor's office. There is a cost associated with copies (per file for electronic ones, or per page for hard copies, making the former cheaper). The right of access to the file applies to both defendants and their lawyers.

e. In **the Netherlands**, access is provided to the file within three days of arrest. At this stage, this is usually a paper copy of the file. Electronic files are then supplied later. This is currently organised through a CD, with an online system being piloted. The lawyer retains the file and is free to provide a copy to his client any time. Consequently, this aspect does not produce a difficulty in challenging detention.

36. On the basis of the above, we would suggest that it is clear that there is a lack of agreement, at least between the Member States' legislative authorities, as to the precise requirements of Article 7(1) of the Directive. This is presumably why the Roadmap sought to 'ensure full implementation and respect of Convention standards, and, *where appropriate, to ensure consistent application of the applicable standards*' (recital 2).

E. REFERENCE TO THE COURT OF JUSTICE OF THE EU

37. To the extent that the Court has doubt as to the proper interpretation of Article 7(1) of the Directive and, in particular, the concept of documents being 'made available' to arrested persons or their lawyers, we would underline that there is the possibility (and potentially the obligation) to make a reference for a preliminary ruling to the CJEU. For convenience, we summarise key relevant principles:

    a. Further to Article 267 TFEU, the CJEU has jurisdiction to give preliminary rulings concerning issues of EU law. Any court or tribunal *may*, if it considers that a decision on the question is necessary to enable it to give judgment, request the CJEU to give a ruling. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal *shall* bring the matter before the [CJEU] (our emphasis).

    b. The facility to refer a question belongs to any court or tribunal which considers that the interpretation of a question of EU law is necessary to enable it to give judgment. Thus, the *Amstgericht Laufen*, a first-instance court in Germany, has referred questions concerning the Directive and Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, seeking a ruling as to whether those measures are to be interpreted as precluding certain national procedural rules relating to the calculation of time limits and the submission of appeal documentation (Case C-216/14 *Covaci*, reference for a preliminary ruling lodged on 30 April 2014, OJ 2014 C 253, p. 17).

    c. The obligation to make a reference which applies to courts of final instance is subject to the rule that a question need not be referred if it is *acte clair*, the conditions for which were specified in the CILFIT case. In particular –

        i. 'the correct application of community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other member states and to the [CJEU]. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the court of justice and take upon itself the responsibility for resolving it' (Case 283/81 *CILFIT*, paragraph 16). Whilst this obligation does not require the national court to consider the position of administrative authorities in other states, we would suggest that the variety of approaches discussed in Part D above,

unlikely to be inconsistent with national jurisprudences, show there is no consensus on the requirements of Article 7(1).

ii. It is necessary to bear in mind the characteristics of EU law, including, inter alia, the fact that provisions of EU law must be interpreted in light of EU law as a whole, regard being had to the objectives thereof and to its state of evolution at the material time (CILFIT, paragraph 20). We would point out that the relationship between Article 7(1), Article 5(4) ECHR, and broader fundamental rights and principles of EU law is an incidence of the 'complex and evolving' relationship between the EU and the ECHR (*European Human Rights Law Review*, 2012 4 363) and for that reason alone cannot be considered acte clair.

38. We would further highlight the fact that Article 6 ECHR imposes obligations upon courts which are requested to make a reference for a preliminary ruling to the CJEU. The principles were summarised in *Vergauwen and Others v. Belgium* App. No 4823/04 (admissibility decision of 10 April 2012), paragraphs 89 and 90). In particular:

    a. Article 6(1) requires domestic courts to give reasons, in light of the applicable law, for any decision refusing to refer a question for a preliminary ruling;

    b. In the specific context of the third paragraph of Article 267 TFEU, national courts against whose decisions there is no judicial remedy under national law, and which refuse to request a preliminary ruling from the CJEU on a question raised before them concerning the interpretation of EU law, are required to give reasons for such refusal in light of the exceptions provided in the case-law of the CJEU.

39. In *Dhahbi v. Italy* App. No 17120/09 (Judgment of 8 April 2014), the ECtHR found a violation of Article 6(1) on this basis, noting that the Italian Court of Cassation, which had refused to make a preliminary reference to the CJEU in a particular case, was the court of last instance but provided no reasons for its refusal to refer.

CONCLUSION

40. Fair Trials hopes that the observations in this opinion are of assistance to the court and will be happy to clarify any of the information if requried.

Fair Trials

February 2015

BILAGA 3

ANNEMIE SCHAUS
as@juscogens.be

CHRISTOPHE MARCHAND
+32 (0)486 32 22 88
cm@juscogens.be

VINCENT LETELLIER
+32 (0)477 20 61 91
vl@juscogens.be

DOUNIA ALAMAT
+32 (0)470 57 59 25
da@juscogens.be

NICOLAS COHEN
+32 (0)470 02 65 41
nc@juscogens.be

CHARLOTTE MORJANE
+32 (0)498 60 72 45
cmo@juscogens.be

CRÉPINE UWASHEMA
+32 (0)488 31 39 13
cu@juscogens.be

LOUISE LAPERCHE
+32 (0)472 45 00 65
ll@juscogens.be

JA Swed. Litigation - LEGAL NOTE 1 – February 2015 – Schaus, Marchand and Chihaoui- Brussels

Right to Information Directive / art. 5 ECHR / art. 6 ECHR: Access to case file in detention, criminal defence rights under the EU and ECHR law

To be inserted in the submission at the Swedish Supreme Court

In European human rights law, the fundamental right to a fair trial is defined in article 6 of the European Convention on Human Rights ("ECHR") and articles 47 and 48 of the Charter on Fundamental Rights. These articles as well as their interpretation by the European Court of Human Rights and the European Court of Justice constitute an important source of protection of defence rights. By virtue of article 5 (4) of the ECHR, the fair trial protection is applicable to proceedings related to pre-trial detention.

The EU has recently developed new tools which are designed to strengthen procedural safeguards in the criminal proceedings before the national courts of Member States. One of them is the Directive 2012/13/EU of the European Parliament and the Council of 22 May 2012 on the right to information in criminal proceedings, "Right to Information Directive"1. It lays down the rules as to the information which suspects must be provided upon arrest and charge and the provision of access to case-file documents.

The directive is an act addressed to Member States and must be transposed by them into their national laws. However, in certain cases the European Court of Justice recognizes the direct effect of directives in order to protect the rights of individuals. Therefore, the Court laid down in its case-law that a directive has direct effect when its provisions are unconditional and sufficiently clear and precise2. However, it can only have a vertical direct effect3 and it is valid if the Member States have not transposed the directive by the deadline4.

1 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:142:0001:0010:en:PDF

2 ECJ, Judgment of 4 December 1974, *Van Duyn*, n° 41/74

3 Between an individual and the State, not between individuals.

4 ECJ, Judgment of 5 April 1979, Ratti, n° 148/78, p. 1646

There are a certain number of consequences that flow from the principle of the direct effect. Applied to the Right to Information Directive, which had to be transposed in national legislation by 2 June 20145, it means that: 1) Swedish courts are required to interpret national law in conformity with the purpose of the directive6, 2) a sufficiently clear and precise provision of the Directive can be invoked and applied directly in Swedish courts in a dispute against the state7 and, 3) that a provision of national law which would lead to a result contrary to the directive should be set aside by the Swedish courts8.

The Right to Information Directive thus creates the possibility for individual defendants to invoke **directly** this EU law defence right in national courts, and for those national courts the opportunity to cooperate with the European Court of Justice through the preliminary ruling procedure.

The Right to Information Directive seeks to clarify and reinforce pre-existing ECHR standards, which have been elaborated in the case-law of the European Court of Human Rights. According to recital 8 of the Directive: *"Strengthening mutual trust requires detailed rules on the protection of the procedural rights and guarantees arising from the Charter and from the ECHR."* Recital 14 also mentions that *" this Directive builds on the rights laid down in the Charter, and in particular Articles 6, 47 and 48 thereof, by building upon Articles 5 and 6 ECHR as interpreted by the European Court of Human Rights. (...) "*.

The recitals mention in various places that the Directive sets up *"common minimum rules"* which should be respected and which should not prevent Member States to apply higher standards. Moreover, recital 40 indicates that the *"level of protection should never fall below the standards provided by the ECHR as interpreted by the case-law of the European Court of Human Rights"*.

5Article 11 of the Right to Information Directive

6ECJ, Judgment of 10 April 1984, Von Colson, n° 14/83 and Judgment of 13 November 1990, Marleasing, n° 106/89

7ECJ, Judgment of 5 April 1979, Ratti, n° 148/78, p. 1646

8ECJ, Judgment of 22 May 2003, Connect Austria, n° 462/99, § 42

Content of the Directive applicable to the case

One of the basic requirements of a fair trial is the equality of arms, which implies disclosure of documents essential to challenging detention effectively9.

Article 7(1) of the Directive codifies Article 5(4) ECHR case-law according to which the pre-trial judicial review of detention needs to meet basic fair trial standards and therefore that access to the case-file is needed. That is reflected in recital 30, which provides that documents provided under Article 7(1) of the Directive need to be supplied at the latest when the judicial authority is called upon to decide upon the lawfulness of the arrest or detention in accordance with Article 5(4).

In short, article 7 provides that Member States should make available to arrested persons and their lawyers all material evidence in the possession of the competent authorities. Access to the materials shall be granted in due time to allow the effective exercise of the rights of the defence and at the latest upon submission of the merits of the accusation to the judgment of a court. By way of derogation access to certain materials may be refused if such access may lead to a serious threat to the life or the fundamental rights of another person or if such refusal is strictly necessary to safeguard an important public interest.

Recital 30 of the Directive adds that material evidence covers documents and photographs, audio and video recordings, which are essential to challenging effectively the lawfulness of an arrest or detention of suspects.

In order to determine the precise scope of the right to access the materials of the case, one may refer to parliamentary work and the ECHR case-law.

Point 32 of the Proposal for a Directive (2010/0215 (COD) COM (2010) 392 final of 20/07/2010 mentions that: *"Access to the case-file should not be limited to a one-off inspection. If the accused person or his lawyer deems it necessary, further access should be granted. If a file is particularly voluminous or where the interests of justice so require it, the accused person should be provided with an index of the documents contained in the case-file to enable him to decide to which documents he wishes to be given access"*10.

9See for example: ECtHR, Lamy v. Belgium, 30 March 1989, Series A no. 151, point 29

10Page 9 of the Proposal,

http://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:52010PC0392&from=EN

At the stage of proposal of the Directive, the Legal Affairs Commission of the European Parliament had delivered an Opinion in which an amendment to article 7 was put forward which stated that any suspect or accused person, or their lawyers, should be granted an access to the case-file, and should, on demand, receive a copy11. However, the amendment was not adopted.

Case-law from ECtHR has repeatedly confirmed the right to have access to the case-file.

Case-law article 5§4 of the ECHR

As stated by the ECtHR, *"Although it is not always necessary that the procedure under Article 5 § 4 be attended by the same guarantees as those required under Article 6 for criminal or civil litigation, it must have a judicial character and provide guarantees appropriate to the kind of deprivation of liberty in question (see, for instance, Assenov and Others v. Bulgaria, judgment of 28 October 1998, Reports of Judgments and Decisions 1998 VIII, p. 3302, § 162, and Włoch v. Poland, no. 27785/95, § 125, ECHR 2000-XI, both with a reference to Megyeri v. Germany, judgment of 12 May 1992, Series A no. 237 A, p. 11, § 22)".*

"(...) In view of the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned, proceedings conducted under Article 5 § 4 of the Convention should in principle meet, to the largest extent possible under the circumstances of an ongoing investigation, the basic requirements of a fair trial (Shishkov v. Bulgaria, no. 38822/97, § 77, ECHR 2003 I (extracts))".

The ECtHR 2014 Case-Law Guide on article 5 Right to liberty and security mentions in points 203 and following that :

"203. The requirement of procedural fairness under Article 5 § 4 does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances. Although it is not always necessary that an Article 5 § 4 procedure be attended by the same guarantees as those required under Article 6 for criminal or civil litigation, it must have a judicial character and provide guarantees

11Amendment 21 of the Legal Affairs Opinion of 27 January 2011 http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2011-0408+0+DOC+XML+V0//EN

appropriate to the type of deprivation of liberty in question (A. and Others v. the United Kingdom [GC], § 203; Idalov v. Russia [GC], § 161).

204. In the case of a person whose detention falls within the ambit of Article 5 § 1 (c), a hearing is required (Nikolova v. Bulgaria [GC], § 58). The opportunity for a detainee to be heard either in person or through some form of representation features among the fundamental guarantees of procedure applied in matters of deprivation of liberty (Kampanis v. Greece, § 47).
However, Article 5 § 4 does not require that a detained person be heard every time he lodges an appeal against a decision extending his detention, but that it should be possible to exercise the right to be heard at reasonable intervals (Çatal v. Turkey, § 33; Altınok v. Turkey, § 45).

205. The proceedings must be adversarial and must always ensure "equality of arms" between the parties (Reinprecht v. Austria, § 31; A. and Others v. the United Kingdom [GC], § 204). In remand cases, since the persistence of a reasonable suspicion that the accused person has committed an offence is a condition sine qua non for the lawfulness of the continued detention, the detainee must be given an opportunity effectively to challenge the basis of the allegations against him. This may require the court to hear witnesses whose testimony appears to have a bearing on the continuing lawfulness of the detention (Turcan v. Moldova, §§ 67-70).
Equality of arms is not ensured if the applicant, or his counsel, is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his detention (Ovsjannikov v. Estonia, § 72; Fodale v. Italy, § 41; Korneykova v. Ukraine, § 68). It may also be essential that the individual concerned should not only have the opportunity to be heard in person but that he should also have the effective assistance of his lawyer (Cernák v. Slovakia, § 78).

206. The principle of adversarial proceedings and equality of arms must equally be respected in the proceedings before the appeal court (Çatal v. Turkey, §§ 33-34 and the cases referred to therein)". 12

Case-Law article 6 of the ECHR

The ECtHR 2014 Case-Law Guide on article 6 Right to a fair trial (criminal limb)13 indicates in point 271, page 42 that in some cases the court has even spoken about the right to obtain copies of the file or at least certain parts of it.

12http://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis&c=#n13693846752619364551309_pointer

"271. In order to facilitate the conduct of the defence, the accused must not be hindered in obtaining copies of relevant documents from the case file and compiling and using any notes taken (Rasmussen v. Poland, §§ 48-49; Moiseyev v. Russia, §§ 213-218; Matyjek v. Poland, § 59; Seleznev v. Russia, §§ 64-69).

272. The right of access to the case file is not absolute. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest such as national security or the need to protect witnesses or safeguard police methods of investigation of crime. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1. The Court will scrutinise the decision-making procedure to ensure that it complied with the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused (Natunen v. Finland, §§ 40-41; Dowsett v. the United Kingdom, §§ 42-43; Mirilashvili v. Russia, §§ 203-209).

273. Failure to disclose to the defence material evidence containing items that could enable the accused to exonerate himself or have his sentence reduced may constitute a refusal of the facilities necessary for the preparation of the defence, and therefore a violation of the right guaranteed in Article 6 § 3(b) of the Convention. The accused may, however, be expected to give specific reasons for his request and the domestic courts are entitled to examine the validity of these reasons (Natunen v. Finland, § 43; C.G.P. v. the Netherlands.)

In the Matyjek v. Poland case mentioned above (point 271), the ECtHR decided that even though the accused had been granted a restricted access to the case-file and had a limited chance to take notes (he had to rely solely on his memory): *"Regard being had to what was at stake for the applicant in the lustration proceedings (...) the Court considers that it was important for him to have unrestricted access to those files and unrestricted use of any notes he made, including, if necessary, the possibility of obtaining copies of relevant documents"* 14.

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13 http://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf

14 ECtHR, Matyjek v. Poland, Judgment of 24 April 2007, n° 38184/03, point 59

A recent decision, Igna v. Romania,15 might also be of interest in the Julian Assange case.

In this case, *"one of the main pieces of incriminating evidence submitted by the prosecution was a summary of various telephone conversations which had been recorded. (...) The prosecution submitted the summary to the court during the hearing with the recommendation that it should not be consulted by the defence. The defence's request to examine the recordings was refused by the court on the grounds that the recordings concerned the merits of the case and that this was irrelevant to the extension of detention"*16. *(...) Relying on Article 6 § 1 of the Convention, the applicant complained that the proceedings for the extension of his pre-trial detention had not been truly adversarial. In this respect, he claimed that without full access to the file and knowledge of the tape recordings included in the file, his lawyer had been unable to defend him against the charges of being a member of an organised criminal group, blackmail and favouring offenders"*17.

The Court found that:

> *"26. Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his client's detention (see Lamy v. Belgium, 30 March 1989, § 29, Series A no. 151, and Nikolova v. Bulgaria [GC], no. 31195/96, § 58, ECHR 1999-II).*
>
> *27. The Court acknowledges the need for criminal investigations to be conducted efficiently, which may imply that part of the information collected during them is to be kept secret in order to prevent suspects from tampering with evidence and undermining the course of justice. However, this legitimate goal cannot be pursued at the expense of substantial restrictions on the rights of the defence. Therefore, information which is essential for the assessment of the lawfulness of a detention should be made available in an appropriate manner to the suspect's lawyer (see Mooren v. Germany [GC], no. 11364/03, § 124, 9 July 2009). (...)*

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15 ECtHR, Igna v. Romania, 20 November 2013, No 21249/05.

16 Igna v. Romania, pt 12.

17 Igna v. Romania, pt 20.

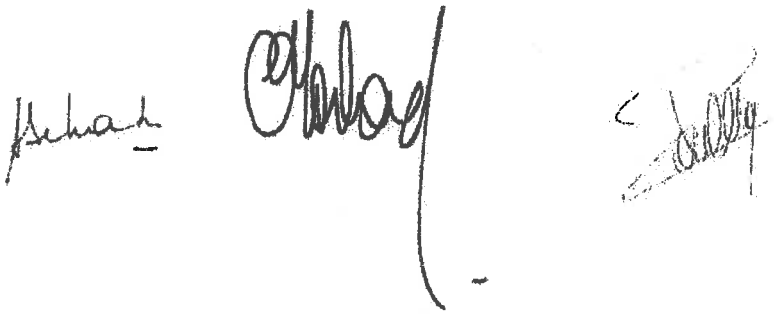
31. The Court notes that the prosecution submitted the summary of the recorded telephone conversations during the hearing of 3 December 2004 with the recommendation that it should not be consulted by the defence. The applicant's request to examine the summary was dismissed by the court on the grounds that it concerned only the merits of the case. In the absence of other evidence in the file, apart from the statements given by the three co-defendants, it appears that the summary of the recorded telephone conversations played a key role in the Alba-Iulia Court of Appeal's decision to prolong the applicant's detention. However, while the public prosecutor and the court were familiar with the recordings, the applicant and his counsel did not have cognisance of their precise content at that stage.

32. Furthermore, the Court notes that the defence lawyer's express request to have access to the rest of the evidence mentioned in the proposal for the prolongation of the detention was ignored by the Alba-Iulia Court of Appeal without providing any explanation for its absence from the file.

33. The Court does not lose sight of the fact that the refusal to grant the applicant's counsel access to all the documents in the case file was based on the risk that the success of the ongoing investigations might be compromised. However, that legitimate goal may not be pursued at the expense of substantial restrictions on the rights of the defence. Counsel must therefore be given access to those parts of the case files on which the suspicion against the applicant was essentially based. It follows that the applicant, assisted by counsel, did not, at that stage of the proceedings, have an opportunity adequately to challenge the findings referred to by the Public Prosecutor or the courts as required by the principle of "equality of arms".

34. The foregoing considerations are sufficient to enable the Court to conclude that the procedure by which the applicant sought to challenge the lawfulness of his pre-trial detention violated the fairness requirements of Article 5 § 4 of the Convention".

Annemie SCHAUS Christophe MARCHAND Zouhaier CHIHAOUI[18]



18 Member of the Law firm "*Just Rights*".

BILAGA 4

JUSCOGENS
avocats-advocaten

ANNEMIE SCHAUS
as@juscogens.be

CHRISTOPHE MARCHAND
+32 (0)486 32 22 88
cm@juscogens.be

VINCENT LETELLIER
+32 (0)477 20 61 91
vl@juscogens.be

DOUNIA ALAMAT
+32 (0)470 57 59 25
da@juscogens.be

NICOLAS COHEN
+32 (0)470 02 65 41
nc@juscogens.be

CHARLOTTE MORJANE
+32 (0)498 60 72 45
cmo@juscogens.be

CRÉPINE UWASHEMA
+32 (0)488 31 39 13
cu@juscogens.be

LOUISE LAPERCHE
+32 (0)472 45 00 65
ll@juscogens.be

JA Swed. Litigation - LEGAL NOTE 2 – February 2015 – Schaus, Marchand and Chihaoui - Brussels

Violation of article 2 of Protocol 4 ECHR: Freedom of movement

To be inserted in the submission at the Swedish Supreme Court

1) The interferences

According to the ECtHR, "the difference between deprivation of and restriction upon liberty is (nonetheless) merely one of degree or intensity, and not one of nature or substance"1.

The opinion of the Swedish Court of Appeal is that "Julian Assange's stay at the Embassy of Ecuador means that his freedom of movement is restricted in practice". That statement drives us directly to the application of article 2, §2 of Protocol No. 4, ratified by Sweden,2 which states that:

> "1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
> 2. Everyone shall be free to leave any country, including his own.
> 3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety for the maintenance of 'ordre public', for the prevention of crime, for the protection of rights and freedoms of others.
> 4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society."

1ECtHR, 6/11/1980, Guzzardi v. Italy, No. 7367/76, §93. "Although the process of classification into one or other of these categories sometimes proves to be no easy task in that some borderline cases are a matter of pure opinion, the Court cannot avoid making the selection upon which the applicability or inapplicability of Article 5 (art. 5) depends"

2http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=046&CM=8&DF=18/01/2015&CL=FRE

Article 2, § 2 of Protocol No. 4 guarantees to any person the right to leave any country for any other country of that person's choice to which he or she may be admitted.

The right of freedom of movement has been violated in two ways:

a) The seizure of the passport and forbidding Julian Assange to acquire travel documents, "as a result of the issuance of the arrest warrant"3, must be considered as a violation of that provision.
b) Moreover, the special surveillance that Julian Assange has been subjected to is, as a result of the Swedish arrest warrant, a violation of his right to leave a country.4

Interferences to that fundamental right can be justified if it "was 'in accordance with law', pursued one or more of the legitimate aims set out in Article 2 § 3 of Protocol No. 4, and (if) it was 'necessary in a democratic society' for the achievement of such an aim"5, in other words, the restrictions must be proportionate6. The imposition and maintenance of this restrictions over this considerable period are not objectively justified by the aim of the maintenance of 'ordre public', for the prevention of crime nor for the protection of rights of the alleged victims.

2) "In accordance with law": the Swedish principle of proportionality

The detention order was delivered in the context of an investigation governed by Chapter 24, Section 1, §3 of the Swedish Code of Legal Procedure. Liberty of movement was restricted in accordance with the law.

According to that law, "detention may only occur if the reasons for detention outweigh the intrusion or other detriment to the suspect or some other opposing

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3Stockholm District Court Protocol, 16/07/2014

4ECtHR, 6/11/1980, Guzzardi v. Italy, No. 7367/76, §92 ; ECtHR, 22/02/1994, Raimondo v. Italy, No. 12954/87, § 39.

5ECtHR, 27/11/2012, Stamose v. Bulgary, No. 29713/05, §30.

6Christoph GRABENWARTER, European Convention on Human Rights - Commentary, München, Beck/Hart, 2014, p.415. (Annexe 1)

interest"7. In other words, "a coercive measure shall in terms of its **nature, force, scope and duration** be in reasonable proportion to what stands to be gained from the measure", as an application of the Swedish principle of proportionality8.

The ECtHR considers that "in any event, the domestic authorities are under an obligation to ensure that a breach of an individual's right to leave his or her country is, from the outset and throughout its duration, justified and proportionate in view of the circumstances. They may not extend for long periods measures restricting an individual's freedom of movement without *regular re-examination* of their justification. Such review should normally be carried out, at least in the final instance, *by the courts*, since they offer the best guarantees of the independence, impartiality and lawfulness of the procedures. The scope of the judicial review should enable the court to take account of all the factors involved, including those concerning the proportionality of the restrictive measure"9.

Therefore, the concrete evidence should be "gathered at trial"10 so the Supreme Court should be in a position to examine in detail the elements that the suspicions are founded on11.

According to the Stockholm District Court, "that he (Julian Assange) has chosen to remain at the Ecuador embassy in Great Britain is not to be seen as a deprivation of liberty, and shall therefore, not be regarded as a *notable consequence* of the

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7Chapter 24, Section 1, §3 of the Code of Legal Procedure http://www.regeringen.se/content/1/c4/15/40/472970fc.pdf

8Svea Court of Appeal, 17/11/2014, p.6.

9ECtHR, 26/11/2009, Gochev v. Bulgary, No. 34383/03, §50.

10ECtHR, 6/11/2000, Labita v. Italy, No.26772/95, §195.

11Alastair Mowbray, Cases and Materials on The European Convention on Human Rights, OUP Oxford, 2007, p. 995 (Appendix 2) citing ECtHR, 23/05/2006, Riener v. Bulgaria, No. 46343/99, §124: "In the Court's view, the authorities are not entitled to maintain over lengthy periods restrictions on the individual's freedom of movement without periodic reassessment of their justification in the light of factors such as whether or not the fiscal authorities had made reasonable efforts to collect the debt through other means and the likelihood that the debtor's leaving the country might undermine the chances to collect the money".

decision to arrest him in his absence"12. As for the Court of Appeal, although it recognises that "the restriction is linked to the detention order in the sense that the police guard outside the embassy is intended to guarantee enforcement of the order for his extradition to Sweden", it refuses to consider that restriction "as a consequence of the detention order", and arrived at the conclusion that "it should not be taken into account in the assessment of proportionality"13.
This line of reasoning contains some clear logical problems.

First, the link between the restriction of liberty and the detention order can only be one of consequence, even if the question remains whether it is a direct or an indirect consequence.
Second, the seizure of Julian Assange's passport is also a consequence of the detention order.
Third, a violation of a "fundamental right, namely the (applicant's) freedom to come and go as he pleased"14 is always a *notable* consequence, even if it is an indirect one.

If the Supreme Court remains reluctant to examine the concrete elements of the situation in the light of the principle of proportionality in the Swedish procedural code15, the Supreme Court has to examine if the restrictions on Julian Assange's freedom of movement are justified according to European Human Rights law and its autonomous concept of proportionality.

In fact, the ECtHR had decided that even if the measures pursue legitimate aims, they also have to be "necessary in a democratic society" for those legitimate aims to be achieved16.

3) Necessity of the measure "In a democratic society" in the pursuit of legitimate aims (The European proportionality principle)

12Stockholm District Court Protocol, 16/07/2014.

13Svea Court of Appeal, 17/11/2014.

14ECtHR, 22/02/1994, Raimondo v. Italy, No. 12954/87, §39.

15Whether the violation of his right to freedom of movement and to leave a country is proportionate to what stands to be gained from the detention order, which is not to put him on trial but instead to pursue an investigation on a suspect that has not yet been charged.

16ECtHR, 6/11/2000, Labita v. Italy, No.26772/95, §195.

"Necessary" means that the restrictive measure addresses a "pressing social need"17.

As long as Julian Assange is not charged, there is no pressing social need that can justify prolonging the detention measure which had initially been taken as part of the investigation and resulted in the deprivation of the applicant's passport and the continuing interference with his right to liberty of movement18.

The ECtHR has decided that when no proceedings were brought for an offence allegedly committed, "by not pursuing their initial motivation for the seizure of the applicant's passport the authorities lost any further ground for keeping the passport"19.

Moreover, the European Court says that "having regard (...) the fact that a passport is a strictly personal document, the Court does not see any reason to accept that the requirements of the investigation under way, on which the Government relied until the judgment of the Criminal Court of 13 June 1994, could validly justify the decision not to return the applicant's passport" and decided that the "interference (seizure of the passport) with the liberty of movement was not a measure "necessary in a democratic society" proportionate to the aims pursued".20

Concerning the detention order, the restriction of the freedom to move freely can become unreasonable "particularly if the proceedings are protracted", because "the necessity will diminish with the passage of time"21. The ECtHR states that the length of the proceedings can upset the balance that has "to be struck between the general interest (...) and the applicant's personal interest in having freedom of movement"22. The Court reiterates that a restrictive measure "is justified only so long as it furthered the pursued aim"23, i.e. the questioning of Julian Assange.

17ECtHR, 7/12/1976, Handyside v. The United Kingdom, No. 5493/72, §48 (Leading case on Article 10 of the ECHR).

18ECtHR, 22/08/2001, Baumann v. France, §66-67

19ECtHR, 13/11/2003, Napijalo v. Croatia, No. 66485/01, §79.

20ECtHR, 22/08/2001, Baumann v. France, §66-67.

21ECtHR, 17/07/2003, Luordo v. Italie, No. 32190/96, §96.

22ECtHR, 17/07/2003, Luordo v. Italie, §96.

23ECtHR, 13/11/2003, Napijalo v. Croatia, No. 66485/01, §78-82; ECtHR, 20/04/2010, Villa v. Italy, No. 19675/06, §47; ECtHR, 26/11/2009, Gochev v. Bulgary, No. 34383/03, §49.

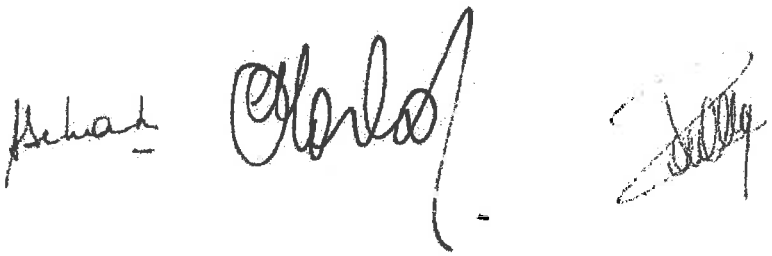
Considering the fact that the restrictive measure has not reached its aim after a period of two years, one can ask whether the aim is still pursued today.

According to the ECtHR, "even were it justified at the outset, a measure restricting an individual's freedom of movement may become disproportionate and breach that individual's rights if it is automatically extended over a long period"24. It also considered that a person "subjected to measures of an automatic nature", "with no limitation as to their scope or duration" is a violation of article 2 of Protocol No.425.

Conclusion:

1. the restriction of movement is not necessary in a democratic society (in the autonomous sense of the ECHR)
2. the review of the restriction did not enabled the Court to examine in detail the elements that the suspicions are founded on.

Annemie SCHAUS Christophe MARCHAND Zouhaier CHIHAOUI[26]



24ECtHR, Gochev v. Bulgary, No. 34383/03, §49; Luordo v. Italy, no. 32190/96, §96; ECtHR 2003-IX; Földes and Földesné Hajlik v. Hungary, no. 41463/02, §35, ECHR 2006-...; and Riener, cited above, §121

25ECtHR, 26/11/2009, Gochev v. Bulgary, No. 34383/03, §§ 53, 57.

26 Member of the Law firm *"Just Rights"*.

BILAGA 5

ANNEMIE SCHAUS
as@juscogens.be

CHRISTOPHE MARCHAND
+32 (0)486 32 22 88
cm@juscogens.be

VINCENT LETELLIER
+32 (0)477 20 61 91
vl@juscogens.be

DOUNIA ALAMAT
+32 (0)470 57 59 25
da@juscogens.be

NICOLAS COHEN
+32 (0)470 02 65 41
nc@juscogens.be

CHARLOTTE MORJANE
+32 (0)498 60 72 45
cmo@juscogens.be

CRÉPINE UWASHEMA
+32 (0)488 31 39 13
cu@juscogens.be

LOUISE LAPERCHE
+32 (0)472 45 00 65
ll@juscogens.be

JA Swed. Litigation - LEGAL NOTE 3 – February 2015 – Schaus, Marchand and Chihaoui- Brussels

Application of urgent preliminary procedure

To be inserted in the submission at the Swedish Supreme Court

The preliminary ruling proposed concerns respect by Sweden of the European Directive 2012/13/UE of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings under Title V of the third part – area of freedom, security and justice - of the Treaty on the functioning of the European Union.

Given the factual situation wherein is Julian Assange since the month of June 2012, which undoubtedly constitutes a deprivation of liberty, the Supreme Court of Sweden can ask for application of the urgent preliminary ruling procedure under article 23bis on the statute of the Court of Justice of the European Union and article 107 of the Rules of procedure of the Court.

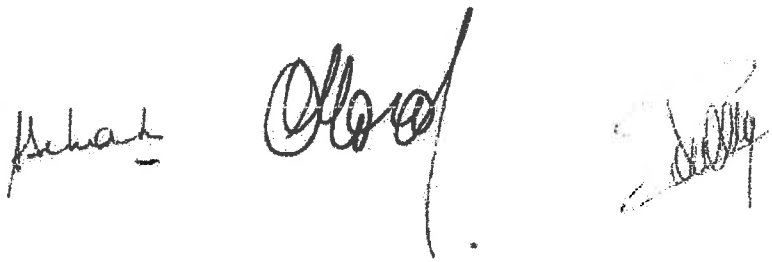
It is established in case-law of the Court of Justice to apply this procedure when a person is being detained and further detention depends on the answer to be given by the Court.

A report of the European Council on the use of the urgent preliminary ruling procedure analyses the circumstances of fact and of law in which the urgent preliminary ruling procedure has been approved and notes that it is applied "where a person is being detained and further detention depends on the answer to be given by the Court" (C-296/08 PPU Santesteban Goicoechea; C-388/08 PPU Leymann and Pustovarov; C-357/09 PPU Kadzoev; C-105/10 PPU Gataev and Gataeva; C-61/11 PPU El Dridi Hassen)i.

It is sufficient for application of the urgent procedure under article 107, as decided by the Court of Justice in its judgment of 30 May 2013, that "the applicant in the main proceedings is currently deprived of liberty, and the resolution of the main proceedings may have considerable influence on the length of that deprivation"ii.

This is consistent with the assumptions considered by the Court in its information note on references from national courts for a preliminary rulingiii and to the invitation of the European Council to apply the urgent preliminary ruling procedure in situations involving deprivation of libertyiv, which was included in Article 267, paragraph 4 of the Treaty on the Functioning of the European Unionv.

Annemie SCHAUS Christophe MARCHAND Zouhaier CHIHAOUI[1]



[i] Report to the European Council on the use of the urgent preliminary ruling procedure by the Court of Justice annexed to its decision of 20 December 2007 (OJ L 24 of 29 January 2008, p. 44), page 7.

[ii] Case C-168/13 PPU, Jeremy, point 31.

[iii] OJ C 160 28 May 2011, point 37: "... a national court or tribunal might, for example, consider submitting a request for the urgent preliminary ruling procedure to be applied in the following situations: in the case, referred to in the fourth paragraph of Article 267 TFEU, of a person in custody or deprived of his liberty, where the answer to the question raised is decisive as to the assessment of that person's legal situation or, in proceedings concerning parental authority or custody of children, where the identity of the court having jurisdiction under European Union law depends on the answer to the question referred for a preliminary ruling."

[iv] Council declaration annexed to its decision of 20 December 2007, OJ L 24 of 29 January 2008, p. 44

[v] Article 267 (ex Article 234 TEC) "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay."

[1] Member of the Law firm *"Just Rights"*.

BILAGA 6

ANNEMIE SCHAUS
as@juscogens.be

CHRISTOPHE MARCHAND
+32 (0)486 32 22 88
cm@juscogens.be

VINCENT LETELLIER
+32 (0)477 20 61 91
vl@juscogens.be

DOUNIA ALAMAT
+32 (0)470 57 59 25
da@juscogens.be

NICOLAS COHEN
+32 (0)470 02 65 41
nc@juscogens.be

CHARLOTTE MORJANE
+32 (0)498 60 72 45
cmo@juscogens.be

CRÉPINE UWASHEMA
+32 (0)488 31 39 13
cu@juscogens.be

LOUISE LAPERCHE
+32 (0)472 45 00 65
ll@juscogens.be

JA Swed. Litigation - LEGAL NOTE 4 – February 2015 – Schaus, Marchand and Chihaoui- Brussels

Detention Conditions / art. 3 ECHR

To be inserted in the submission at the Swedish Supreme Court

1. Facts

Julian Assange has been detained since June 2012 in a 30 square metre room of the Ecuadorian Embassy in London. He does not have access to fresh air except through a window and has no possibility to exercise or enjoy physical adequate activity. The Embassy has one floor in a building in the heart of London. Julian Assange does not have access to a garden, rooftop or balcony. The Embassy does not have large premises and the possibility to move around is limited as Julian Assange is not in a position to disturb the Embassy' activities.

Julian Assange is deprived of his liberty in the sense of article 5 of the European Convention of Human Rights (ECHR), or at least he suffers a restriction of liberty in the sense of the Protocol 4. In that context, one has to determine whether the detention conditions are likely to constitute inhuman and degrading treatment in the sense of article 3 of the ECHR and of the other applicable international norms, notably the standards set by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

2. Applicable norms

Article 3 of the ECHR indicates that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

Article 12 of the International Covenant on Economic, Social and Cultural Rights: "1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

The United Nations has adopted minimal rules for the protection of detainees. *The Body of principles for the protection of all persons under any form of detention or imprisonment* was adopted by the General Assembly resolution 43/173 of 9 December 1988. Its principle 24 concerns access to medical care and indicates that: "A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or

imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge."1

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) was set up under the 1987 Council of Europe Convention. In 2002, it adopted CPT Standards.2 These standards apply generally where persons are deprived of their liberty by a public authority. The CPT's mandate thus extends beyond prisons and police stations to encompass, for example, psychiatric institutions, detention areas at military barracks, holding centres for asylum seekers or other categories of foreigners, and places in which young persons may be deprived of their liberty by judicial or administrative order.3 Point 48 of page 18 of this report indicates that: *"Specific mention should be made of outdoor exercise. The requirement that prisoners be allowed at least one hour of exercise in the open air every day is widely accepted as a basic safeguard (preferably it should form part of a broader programme of activities). The CPT wishes to emphasise that all prisoners without exception (including those undergoing cellular confinement as a punishment) should be offered the possibility to take outdoor exercise daily. It is also axiomatic that outdoor exercise facilities should be reasonably spacious and whenever possible offer shelter from inclement weather."*

The Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies4 advocates that: *"27.1 Every prisoner shall be provided with the opportunity of at least one hour of exercise every day in the open air, if the weather permits" and "39. Prison authorities shall safeguard the health of all prisoners in their care".*

These non-binding rules are destined to be applied to any detained person irrespective of the grounds of detention. These sources are destined to inspire Member States in the protection of the fundamental rights of

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1http://www.ohchr.org/EN/ProfessionalInterest/Pages/DetentionOrImprisonment.aspx

2http://www.cpt.coe.int/en/documents/eng-standards-scr.pdf

3CPT Standards, page 5.

4https://wcd.coe.int/ViewDoc.jsp?Ref=Rec(2006)2&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864

detained persons. The European Court of Human Rights refers to these rules or norms in some of its judgments.5

3. Article 3 ECtHR case-law related to detention conditions

The European Court of Human Rights case-law is well established when it comes to fundamental rights related to detention conditions. It takes into consideration a range of cumulative factors such as: the available space, access to health care, ventilation and daylight, hygiene, duration of detention, ...6

The lack of personal space, the impossibility to take outdoor exercise, the absence of natural ventilation, of sufficient daylight are elements which are taken into consideration to assess whether detention conditions are likely to be contrary to article 3 of the ECHR.7

In the *Chkhartishvili v. Greece* judgment of 3 May 2013, the Court mentioned that the conditions regarding the possibility of outdoor exercise, the restoration conditions as well as lack of entertainment were problematic.8

Similarly, in *Canali v. France*, a judgment of 25 April 2013, the Court considered that the cumulative effect of the cramped conditions and the failings in respect of hygiene regulations had aroused in the applicant feelings of despair and inferiority capable of debasing and humiliating him. These conditions of detention amounted to degrading treatment, leading to a violation of Article 3.

The Court noted that Mr Canali had been held for six months in this prison. He had shared a cell measuring 9 square metres with one other prisoner; the cell contained sanitary facilities (a sink and WC) and furniture (a table, bunk bed and two chairs). Such a surface area corresponded to the minimum standard recommended by the Committee for the Prevention of Torture (CPT). In its 2010 Report, the CPT stated that two-prisoner occupation of an individual cell measuring 10.5 square metres was acceptable provided that the prisoners had the possibility of spending a reasonable part of the day (at least eight hours) outside the cell. The living area in question did not in itself justify the finding of a violation of Article 3. The Court reiterated that other aspects of the conditions of detention had to be taken into consideration. The Court noted, firstly, that Mr Canali had only very limited

5ECtHR, Glowacki v. Poland, 30/10/2012, n°1608/08, pts 77 and 84 and ECtHR, Chervenkov v. Bulgary, 27/11/2012, n°45358, pt 44.

6ECtHR, Alver v. Estonia, 08/11/2005, n°64812/01 and ECtHR, Dougoz v. Greece, 06/03/2001, n° 40907/98.

7ECtHR, Popandopulo v. Russia, 10/05/2011, n°4512/09

8ECtHR, Chkhartishvili v. Greece, 03/05/2013, n°22910/10, pts 59 and 60 (excl. in French).

opportunities to spend time outside the cell. He was locked in his cell for most of the day without freedom of movement, and with one hour in the morning or afternoon for exercise, in a courtyard measuring 50 square metres.9

In *Fakailo v. France*, the Court mentioned the CPT standards once again. The ECtHR press release summarises the case as follows: *"On this point the Court noted at the outset that the space afforded to the applicants during their detention at the police headquarters had fallen far short of the European standard. It further observed that those applicants held in shared cells had not had a toilet that was closed off from the main room. Lastly, the cells had either had no ventilation system or had been inadequately ventilated, and had lacked natural light. The Court went on to observe that the fact that a period of detention was extremely short did not preclude a finding of a violation of Article 3 of the Convention if the conditions of detention were so serious as to undermine the very meaning of human dignity (...)."*10

4. A positive obligation to protect health and well-being

Moreover, on the basis of article 3 of the ECHR, the Court has construed through a well-established case-law, a positive obligation on Member States to protect detainees' health.

In the Kudla case, the Court decided there was no violation of article 3 but reiterated that even if *"Article [3 cannot] be interpreted as laying down a general obligation to release a detainee on health grounds or to place him in a civil hospital to enable him to obtain a particular kind of medical treatment. Nevertheless, under this provision the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are*

9ECtHR, Canali v. France, 25/04/2013, n°40119/09, see pts 50 and 51 in French version as well as press release in English. (file:///C:/Users/AC/Downloads/Chamber%20judgment%20Canali%20v.%20France%20%20detention%20conditions.pdf)

10ECtHR, Fakailo (Safoka) and others v. France, 02/10/2014, n°2871/11, press release in English (file:///C:/Users/AC/Downloads/udgment%20Fakailo%20dit%20Safoka%20and%20Others%20v.%20France%20%20conditions%20of%20detention%20in%20custody%20at%20Noumea%20police%20(1).pdf)

adequately secured by, among other things, providing him with the requisite medical assistance (...)."[11]

In *A. v. the United Kingdom*, the Court indicated again that: *"it nonetheless imposes an obligation on the State to protect the physical and mental well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance."*[12]

5. A temporary and immediate response to the positive obligation of the Member States? Urgent interim measures

The Court may, under Rule 39 of its Rules of Court, indicate interim measures to any State party to the Convention. Interim measures are urgent measures which, according to the Court's well-established practice, apply only where there is an imminent risk of irreparable harm. Such measures are decided in connection with proceedings before the Court without prejudging any subsequent decisions on the admissibility or merits of the case in question.

Rule 39 of the Rules of Court reads as follows: *"Article 39 – Interim measures 1. The Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it. 2. Where it is considered appropriate, immediate notice of the measure adopted in a particular case may be given to the Committee of Ministers. 3. The Chamber may request information from the parties on any matter connected with the implementation of any interim measure it has indicated."*

Although interim measures are provided for only in the Rules of Court and not in the ECHR, States are under an obligation to comply with them.

For example, the European Court of Human Rights decided on 15 March 201213 to indicate to the Ukrainian Government, under Rule 39 of the Rules of Court, to ensure that former Ukrainian Prime Minister Yulia Tymoshenko receive adequate medical treatment in an appropriate institution. She had asked to be transferred to an appropriate medical institution in view of her health.

11ECtHR, Kudla v. Poland, 26 October 2000, n°30210/96, pts 93 and 94.

12ECtHR, A. and others v. the United Kingdom, 19/02/2009, n°3455/05, pt 128.

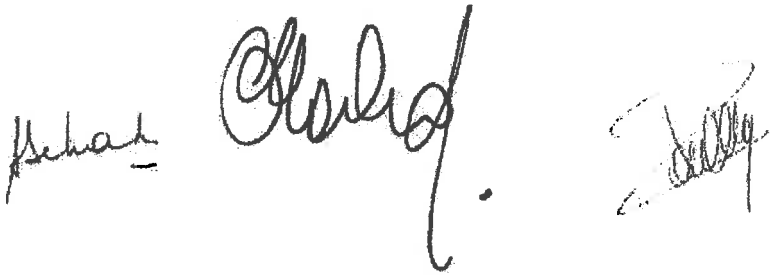
13ECtHR, Tymoshenko v. Ukraine, 15/03/2012, n° 49872/11

6. Conclusion

Considering that in the present case Julian Assange has been detained for more than two years without having had the opportunity to do outside physical exercise and with no outside access at all (access to natural ventilation and direct access to daylight), and noting that these elements are taken into account by the ECtHR in the appreciation of detention conditions in regard of article 3 of the ECHR:

The present situation is causing serious damage to the physical and mental health of the detainee. Consequently, Julian Assange is submitted to a degrading treatment which undermines his human dignity and thus violates article 3 of the ECHR. Considering the positive obligation set on the States to protect the health and well-being of their detainees, every Council of Europe Member State must remedy the situation within a very short time-frame, if it has any possibility to put an end to this situation.

Annemie SCHAUS Christophe MARCHAND Zouhaier CHIHAOUI[14]



14 Member of the Law firm "Just Rights".

BILAGA 7

ANNEMIE SCHAUS
as@juscogens.be

CHRISTOPHE MARCHAND
+32 (0)486 32 22 88
cm@juscogens.be

VINCENT LETELLIER
+32 (0)477 20 61 91
vl@juscogens.be

DOUNIA ALAMAT
+32 (0)470 57 59 25
da@juscogens.be

NICOLAS COHEN
+32 (0)470 02 65 41
nc@juscogens.be

CHARLOTTE MORJANE
+32 (0)498 60 72 45
cmo@juscogens.be

CRÉPINE UWASHEMA
+32 (0)488 31 39 13
cu@juscogens.be

LOUISE LAPERCHE
+32 (0)472 45 00 65
ll@juscogens.be

JA Swedish Litigation - LEGAL NOTE 5 – February 2015

Schaus, Marchand and Chihaoui- Brussels

Deprivation of liberty / art. 5 ECHR

To be inserted in the submission at the Swedish Supreme Court

This short memo is of a general scope considering the precise facts of the case and Swedish legislation are not available to us.

According to the ECtHR, in order to determine whether someone has been « **deprived of his liberty** » within the meaning of Article 5 of the European Convention on Human Rights, the starting-point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation of and restriction upon liberty is merely one of degree or intensity, and not one of nature or substance. Such confinement is acceptable only if it is accompanied by safeguards for the persons concerned and is not prolonged excessively. Otherwise, a mere restriction on liberty is turned into a deprivation of liberty (see *Amuur v. France*, 25 June 1996, § 42, and *Guzzardi v. Italy*, 6 November 1980, § 92).

These criteria were also set out by the ECtHR in the *Shamsa v. Poland* judgment of 27 November 2003 (see §44) as well as in the *Mogos v. Romania* judgment of 6 May 2004 and in the *Mahdid and Haddar v. Austria* judgment of 8 December 2005.

The ECtHR regards a situation as a deprivation of liberty if **two elements** concur: first, **objective elements** (type, duration and manner) and second, a **subjective element**: the choice of the person to be placed in such a situation[1].

In order to determine whether Mr. Assange's situation must be qualified as a deprivation of liberty in the sense of article 5 of the European Convention on Human Rights, both aspects must be analysed :

- the objective elements, and
- the subjective aspect.

[1] : ECtHR, Guzzardi v. Italy, 6/11/1980, Raimondo v. Italy, 22/2/1994, Amuur v. France, 25/10/1996, Labita v. Italy, 6/11/2000, Baumann v. France, 22/8/2001, Luordo v. Italy, 17/7/2003 , Shamsa v. Poland, 27/11/2003, Mogos v. Poland, 6/5/2004, Mahdid and Haddar v. Austria, 8/12/2005, Riad and Idiab v. Belgium, 24/1/2008, Gochev v. Bulgary, 26/11/2009, Stamose v. Bulgary, 27/11/2012.

The **objective aspect** (see below point 1) of the deprivation of liberty is the confinement of a person in a restricted area, during a certain amount of time. The ECtHR indicates moreover that the elements which may be taken into account are: the possibility to leave the area of confinement, the intensity of the surveillance and control on the person's movements, the degree of isolation and the possibility of social contacts (see, for example, *Guzzardi v. Italy, 6 November 1980,* § 95 ; *H.M. v. Switzerland, 26 February 2002,* § 45 ; *H.L. v. the U.K.,5 October 2004,* § 91, and *Storck v. Germany, 16 June 2005,* § 73).

The **subjective aspect** (see below point 2) of the deprivation of liberty constitutes the lack of will of the individual to find himself in that situation or, in other words, the fact that the person has not validly consented to his confinement.

1. Objective aspect of the notion of deprivation of liberty.

As mentioned above, to define a situation as a deprivation of liberty, certain objective elements must be considered, as for example : the possibility to leave the area of confinement, the intensity of the surveillance and control on the person's movements, the degree of isolation and the possibility of social contacts.

In respect of these factors, the situation of Mr. Assange has been described as follows in the submission to the United Nations Working Group on Arbitrary Detention:

"For nearly four years, Mr. Assange has been deprived of a number of his fundamental liberties. For more than 900 days, he has been confined to the Embassy of Ecuador in London, in an area of 30m2, he has no access to fresh air or sunlight, his communications are restricted and often interfered with, he does not have access to adequate medical facilities, he is subjected to a continuous and pervasive form of round the clock surveillance, and he resides in a constant state of legal and procedural insecurity. (...)

Mr. Assange has been deprived of the ability to exercise a range of fundamental physical and personal liberties. He has no access to any outside area, which is contrary to the requirement that all detained persons must have access to an outside area for at least one hour per day[2]. Mr. Assange has a usable living space of approximately 30m². The Embassy is approximately 200m². (...)

Due to the physical set up of the space allocated to him in the Embassy, he is also subjected to constant visual and aural surveillance by the British police who are

[2] Article 21(1) of the Standard Minimum Rules for the Treatment of Prisoners, https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf.

stationed in the immediate proximity of the Embassy. There is no indication that any judicial warrant (either by Sweden or the United Kingdom) has been issued for such continuous and intrusive surveillance.

In many instances, the degree of the surveillance has intruded into Mr. Assange's right to privileged communications with his Counsel. British police officers are stationed inside the Embassy building, but out of its protected diplomatic space ; as well as immediately outside the embassy, and are positioned to survey its interior through the street-facing windows. They are therefore able to overhear conversations conducted therein. Mr. Assange's visitors are also recorded by the police operation and are often questioned as to their identities upon ingress and egress from the embassy, regardless of their age or sex".

Thus, Mr. Assange is subject to certain measures which clearly fall under the objective definition of the notion of deprivation of liberty in the sense of article 5 of the European Convention on Human Rights :

- he is detained in the Ecuadorian Embassy in London for more than two and a half years;
- he is confined in a 30m² room ;
- his passport has been seized ;
- he is subject to constant special and intrusive police surveillance (24/7) ;
- he has no access to fresh air and direct sunlight ;
- his communications are restricted and under control ;
- he has no access to adequate medical equipment.

These elements are sufficient to conclude to the objective definition of a deprivation of liberty.

2. Subjective aspect of the notion of dep^rivation of liberty

One must pursue by analyzing the subjective aspect of the notion of deprivation of liberty. As indicated above, this second aspect is related to the question of the valid consent to confinement, which has been principally developed by the ECtHR in cases regarding psychiatric internment and "transit zones".

In the present case, the subjective elements should be assessed in relation to the possibility granted to the person to leave the detention zone voluntarily. One should thus consider whether Mr. Assange could voluntarily leave the Embassy and put an end to his confinement situation or whether he does not face a real choice.

Before analysing the particular situation of Mr. Assange, it should be mentionned that to date, there is no ECtHR case-law that could be regarded as similar to Mr. Assange's situation. However, the ECtHR has build comprehensive case-law related to persons detained in "transit zones". The principles developed in these decisions and specifically on the subjective aspect of detention may help us define whether Mr. Assange's situation must be regarded as detention in the sense of article 5 of the European Convention on Human Rights.

Three significant judgements of the ECtHR may be pointed out as to the subjective aspect of the notion of deprivation of liberty :

- *Amuur v. France* of 25 June 1996 (point A) ;
- *Mogos and others v. Romania* of 13 October 2005 (point B) ; and
- *Shamsa v. Poland* of 27 November 2003 (point C).

A. In *Amuur v. France* of 25 June 1996[3], the Strasbourg Court first analyses the possibility for the applicants to leave the transit zone and considers that if the possibility exists, one may not speak of deprivation of liberty. However, in this case, the ECtHR considered that in view of the risks of persecution and the fear of persecution in the event of a return to the country of origin, the opportunity of voluntarily leaving the transit zone was fictitious. This allowed to consider that the migrants were "deprived of their liberty".

The Court then had to decide whether article 5 of the ECHR was applicable to the specific case. In doing so, the Court first analysed the context (see §41 of the decision): *"The Court also notes that many member States of the Council of Europe have been confronted for a number of years now with an increasing flow of asylum-seekers. It is aware of the difficulties involved in the reception of asylum-seekers at most large European airports and in the processing of their applications. (...) Contracting States have the undeniable sovereign right to control aliens' entry into and residence in their territory. The Court emphasises, however, that this right must be exercised in accordance with the provisions of the Convention, including Article 5 (art. 5)".*

Considering the above-mentioned elements, the Court underlined that:

"48. The mere fact that it is possible for asylum-seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction on liberty, the right to leave any country, including one's own, being guaranteed, moreover, by Protocol No. 4 to the Convention (P4). ***Furthermore, this possibility becomes theoretical if no other country offering protection comparable to the protection they expect to find in the country where they are seeking asylum is inclined or prepared to take them in.***

[3] ECtHR, Amuur v. France, 25 June 1996, n° 19776/92.

Sending the applicants back to Syria only became possible, apart from the practical problems of the journey, following negotiations between the French and Syrian authorities. The assurances of the latter were dependent on the vagaries of diplomatic relations, in view of the fact that Syria was not bound by the Geneva Convention relating to the Status of Refugees.

49. The Court concludes that holding the applicants in the transit zone of Paris-Orly Airport was equivalent in practice, in view of the restrictions suffered, to a deprivation of liberty. Article 5 para. 1 (art. 5-1) is therefore applicable to the case".

Therefore, the Court rejected the French Government's argument that the applicants still benefitted from their freedom to come and go **taking into consideration the impossibility for these persons to return in a country they had fled.**

The ECHR did not, for that matter, evaluate in detail the risk of refoulement or persecution of the applicants in their country of origin, the Court simply indicated that the applicants had requested asylum and that, on this basis, the **voluntary basis for leaving the transit zone becomes theoretical.** In doing so, the Court establishes a presumption of risk, but does not carry out a complete evaluation of the risk.

B. In the *Mogos v. Romania* case of 13 October 2005[4], Court was seized of a dispute relating to the existence of a "detention" situation of the applicants as well as to the detention conditions in a transit zone in regard of article 3 of the ECHR.

In this case, the Court considered that the fact that the applicants persisted in remaining in a transit zone in order to avoid entering on the territory of a State after having been expelled from another state was not a deprivation of liberty considering the possibility of the applicants to leave the transit zone voluntarily at any time. In this specific case, the applicants did not fear being refouled to a country where they would be subjected to treatment contrary to article 3 of the Convention (see §111 of the judgment, available only in French).

In short, if the individual concerned is liable for the injury he is invoking and that there is no fear of refoulement or persecution, it can be held against him. **On the other hand, if he is not at the origin of the claimed injury (i.e. he detention) and that there is a legitimate fear of refoulement or persecution, it cannot be held against the applicant.**

[4] ECtHR, Mogos and others v. Romania, 13 October 2005, n°20420/02

C. In the *Shamsa v. Poland* case of 27 November 2003, the ECtHR analysed factually the restrictions of liberty suffered by the applicants and concluded, on the basis of the constant surveillance to which they were subjected, that they were not free to come and go and had to remain at the disposal of the Polish authorities. Not allowed to move freely, restricted in their movements, it was concluded that they had not voluntarily consented to their confinement[5].

A parallel may be drawn between the above cases and the situation of Mr. Assange, making use of the principles established by the ECtHR.

In doing so, some precise questions should be addressed:

- Does Mr. Assange have a possibility to leave the Embassy voluntarily, that is without being exposed to any risk of refoulement or any risk of persecution?
- Is Mr. Assange liable for the detention he is suffering? Is he in a position to put an end to this situation in a voluntary and non theoretical way?
- Are there any extraneous causes, as for example a judicial decision against him, emanating from a State, which prevent him from leaving the Embassy in a voluntary way?
- Is Mr. Assange, taking into account the restrictions imposed on him, really free to come and go?
- Are there other external reasons which prevent Mr. Assange from voluntarily leaving the Embassy, whilst it is not unreasonable to believe that he would be subject to a direct or indirect refoulement to the United States of America?

In the *Amuur v. France* case mentionned above, the possibility for the applicants to leave the transit zone voluntarily was linked to a risk of refoulement to their contry of origin.

Regarding Mr. Assange, the way to determine the subjective element of the notion of deprivation of liberty is connected with the question **whether he could voluntarily leave the Ecuadorian Embassy in London.**

In the present case, it is important to recall that in order to answer this question, one must first analyse whether there are reasonnable grounds to believe, on the basis of objective elements, that Mr. Assange would be refouled to the United States by Sweden.

[5] see §§ 44 à 47, only in French and Polish

Another evaluation criteria of the risk of refoulement should be used in the application of article 5 of the ECHR. One should distinguish the latter criteria from the one required for the application of article 3 of the Convention (reasonable grounds to believe) in order to avoid linking article 3 and 5 of the Convention. As these two articles do not pursue the same goal, each should be considered or else the protection granted by article 5 of the Convention would be illusory.

The purpose of article 5 of the Convention is essentially to protect individuals against arbitrary detention whilst the purpose of article 3 of the Convention is protecting individuals against refoulement in country where they would be submitted to inhuman and degrading treatment.

The evaluation criteria applied for article 3 of the Convention is one of "reasonable grounds to believe that one faces refoulement in a country where there is a risk of inhumane and degrading treatment".

Regarding article 5 of the Convention, the risk of refoulement must be based on the fact that *« it was not unreasonable to believe »* that a refoulement will occur. This risk must be founded on **objective elements**, in order to avoid a trivialisation of the application of the Convention.

One must thus answer the question whether it was not unreasonable to believe that, on objective grounds, he would face refoulement to the USA where on reasonable grounds, based on Article 3, he would be submitted to inhuman or degrading treatment.

Firstly, the objective elements which conclude that it is not unreasonable to believe that the person risks a refoulement to the USA by Sweden, will be analysed (see point a below).

Secondly, it must be pointed out that there are reasonable grounds to believe that he will be submitted to inhumane and degrading treatment if he were to be refouled to the United States (see point b below).

On a subsidiary basis, if the Court should consider that the objective elements are not sufficient to state that it was not unreasonable for the person to believe that there is a risk of direct or indirect refoulement to the United States, then, taking into account the subjective aspect of the notion of deprivation of liberty, account should also be taken of the vulnerability of Mr. Assange, in order to evaluate the realistic possibility of voluntarily leaving the Embassy (see point c below).

a. Objective elements – Not unreasonable to beleive in a risk of refoulement to the United States

There are, in the present case, **objective elements**, which allow us to conclude that it is not unreasonable to believe in a risk a refoulement to the USA.

The following objective elements lead us to the conclusion that these is an important risk of refoulement of Mr. Assange to the USA by Sweden, the latter overlooking the asylum granted to Mr. Assange by Ecaudor.

- This appears from the Swedish record of unlawful refoulement in general as stated in recent condemnations by the ECtHR (Bader and Kanbor v. Sweden, 8/11/2005, N. v. Sweden, 20/7/2010 and I. v. Sweden, 5/9/2013) or by the UN Committee against Torture (CAT) (A.S. v. Sweden, 15/2/2001). The same situation has occurred regarding refoulement of political opponents as mentioned in recent condemnations at the ECtHR (R.C. v. Sweden, 9/3/2010, S.F. and others v. Sweden, 15/5/2012 and F.N. v. Sweden, 18/12/2012) or by the UN Committee against Torture (CAT) (Karoui v. Sweden, 25/5/2002, T.A. and S.T. v. Sweden, 27/5/2005, C.T. and K.M. v. Sweden, 22/1/2007, Njamba and Balikosa v. Sweden, 3/6/2010 and Aytulun and Güclü v. Sweden, 3/12/2010).
- Furthermore it can be recalled that Sweden has an old record of prosecution of journalists for "espionage offences", that Sweden participated between 2001 and 2006 to the US extraordinary rendition program, that the asylum proceeding is harshly criticized as appeal proceedings does not have a suspensive effect, and it would appear that Swedish intelligence (SAPO) recently collaborated closely with the US police and intelligence to unlawful renditions (Kassir case, 2005, Djibouti case, 2013 and Fikre case, 2015).
- Last but not least academics consider that Swedish authorities never refuse an extradition demand to the US.

b. Elements realted to the risk if inhumane and degrading treatment, unfair trial or flagrant denial of justice - Not unreasonnable to beleive in a risk of inhumane or degrading tratment in case of refoulement to the USA

In the same circumstances, Mr. Assange has reasonable grounds to believe, that he will be subjected to inhumane and degrading treatment, an unfair trial or flagrant denial of justice in the United States.

This is based on **six reasons**.

- First, the concrete evidence of an ongoing Criminal Investigation of WikiLeaks and Julian Assange now in its fifth year.
- Second, the declarations by US high ranking officials on threats to harm and execute (sometimes extrajudicialy) Julian Assange, to prosecute him for espionage, to get WikiLeaks classed as 'enemy combatants' or to place WikiLeaks staff on a proscribed list.
- Third, the situation of Bradley MANNING (Wikileaks source) who has been subjected to inhumane and degrading treatment and unfair trial in the US. He has been sentenced to 35 year imprisonment.
- Fourth, the unlawful action by US and UK police and intelligence services against Julian Assange and Wikileaks.
- Fifth, the attacks on Julian Assanges and Wikileaks financial means.
- Sixth, the other legal actions against Wikileaks, Julian Assange and his partners or associates.

These elements allow us to conclude that Mr. Assange is not in a position where he can voluntarily leave the Embassy because it is not unreasonable to believe that he will be refouled to the United States, where he has reasonable grounds to believe he will face inhumane and degrading treatments.

The consequence of this situation is that the detention of Julian Assange within the Ecuadorian Embassy in London is not a free choice. And it cannot be considered for this reason that article 5 ECHR does not apply in this situation.

c. <u>On a subsidiary basis: vulnerability of Mr. Assange</u>

If the Court should consider that the above elements are not sufficiently objectivated to determine that there is a risk of refoulement to the United States, then, one should consider that it was not unreasonable for Mr. Assange himself, taking into account his vulnerability, to believe, based on the elements supra, that he would face a risk of direct or indirect refoulement.

The elements justifying his vulnerability are as follows:

- His confinement conditions : 30m² room with no direct access to fresh air or sunlight;
- The duration of his confinement: more than two and a half years ;
- The constant and pervasive surveillance around him ;
- The lack of medical care and access to appropriate medical infrastructures ;
- Limited and controlled communictions with the outside world ;
- Stigmatisation in medias around the world ;
- Constant fear of being submitted to inhumane and degrading tratments in case of refoulement to the United States;

- Status as «human rights defense minded persons associated and engaged in exposing gross abuses through whistleblowing and publishing".

Taking into account the factual elements developped in point a and b above, even if the Court does not consider them as sufficiently objective - *quod non*- one should also consider, in appreciating the voluntary or unvoluntary nature of the detention, taking into account the concrete situation of the person, which means, in the present case, considering the state of vulnerability of the person and the factual examination of the risk of refoulement with regard to the specific status of the person concerned.

For Mr. Assange, considering his personality, what he stands for and what he represents, it is not unreasonable for him to believe in a risk of refoulement. On the contrary, it his very likely. This makes it impossible for him to leave the Ecuadorian Embassy.

⇨ **The consequence of this situation is that the detention of Julian Assange within the Ecuadorian Embassy in London is not a free choice. And it cannot be considered for this reason that article 5 ECHR does not apply in this situation.**

3. Conclusion on the notion of deprivation of liberty

The analysis conducted above allows us to consider that the confinement of Mr. Assange does not constitute a mere "restriction of liberty" but is a situation of "deprivation of liberty". Indeed, the situation of Mr. Assange entails the objective and subjective aspects of the notion of deprivation of liberty and benefit as such from the protection of article 5 of the European Convention on Human Rights. In addition to the violations of article 5 mentioned in Legal Note 1, one may also add :

1. <u>Violation of article 5 of the Convention considering that Swedish judicial authorities have not concluded that Mr. Assange was in detention</u>

One should determine on what basis Mr. Assange is detained. Considering the existence of a European arrest warrant, one may conclude that article 5, §1er, c) of the ECHR is applicable.

Taking into account the content of the remainder of article 5 (article 5, §1er, a), b), d), e) et f)), any other conclusion would lead us to consider that if article 5, §1er, c) is not applicable to the present case, then the detention of Mr. Assange is not provided for by article 5 and thus violates in any case, the said article 5.

One must thus presume that **article 5, §1, c) of the Convention** is applicable in its entirety, as well as the procedural guaranties attached to it and provided for in article 5, §3 et 5, §4 of the Convention.

2. Violation of article 5 § 3 of the ECHR

2.1. Lack of diligence

Article 5 §3 of the Convention requires that the authority which prosecutes acts diligently. If there is lack of diligence, one must conclude to a violation of article 5, §3 of the Convention (see *Scott v. Spain*, § 74 and *Wemhoff v. Germany*, §§ 16-17).

In the present case, as confirmed by the Swedish jurisdictions, the Prosecutor has not acted promptly.

2.2 Absence of reasonable suspicion

The reasonable suspicion held by the Prosecutor against Mr. Assange in the european arrest warrant (which has caused the detention), became at one point insufficient to justify Mr. Assange's lenghty detention.

The initial reasonable suspicion is a *sine qua non* condition to detain a person on the basis of article 5, §, c) of the ECHR.

However, for the continued detention, it is important that new evidence whether of an incriminating or of an exculpatory nature (after a diligent inquiry), strengthen or weaken the initial legitimate suspicion.

In this case, after more than 4 years, no new evidence has reinforced the initial suspicion and the inquiry seems to be at a halt.

2.3. Alternative Mesures

In the present case, the other party, being the Swedish prosecution has demonstrated no will to explore whether alternative measure to the detention could be put into place. Indeed, article 5, §3 of the Convention indicates that release may be conditioned by guarantees to appear in trial.

In this case, no analysis has been carried out to check whether Mr. Assange could be submitted to an alternative measure, less prejudicial to his liberty, and ensuring appearance in trial.

The ECtHR has indicated that when authorities decide whether a person should be detained or released, they should examine whether other measures could guarantee appearance in trial (see *Idalov v. Russia* [GC] , § 140).

Moreover, the Court has precised that article 5 § 3 of the Convention not only establishes the right to be brought before a judge within a reasonable time or released pending trial but also enshrines that release may be conditioned by guarantees to appear in trial (see *Khoudoïorov v. Russia*, § 183 ; *Lelièvre v. Belgium*, § 97 ; *Shabani v. Switzerland*, § 62).

The Swedish authorities should have examined alternative measures to the European arrest warrant. Not having done so, they have violated article 5§3 of the Convention.

3. Violation of article 5 § 4 in combination with article 5 § 1 .c of the Convention : verifying the lawfulness of the detention

Moreover, the judge, acting in the process of checking the legality of the detention, did not have access to the essential material of the investigation, the SMS exchanges from the victims. The judge was thus prevented of legally checking the legality of the detention in respect of article 5, §1, c) of the Convention. Indeed, the judge must found his decision on all evidence available in the case, incriminating or of an exculpatory nature, in order to decide whether the reasonnable suspision is still grounded or not.

On the other hand the procedings at the appeal court did not met the standards of ECtHR case law : there was no hearing and the court did not have the investigation file of the prosecutor during its deliberation.

> *"39. The Court recalls that arrested or detained persons are entitled to a review bearing upon the procedural and substantive conditions which are essential for the "lawfulness", in the sense of the Convention, of their deprivation of liberty. This means that the competent court has to examine "not only compliance with the procedural requirements set out in domestic law but also the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention". A court examining an appeal against detention must provide guarantees of a judicial procedure. The proceedings must be adversarial and must always ensure "equality of arms" between the parties, the prosecutor and the detained person. Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which*

are essential in order effectively to challenge the lawfulness of his client's detention. In the case of a person whose detention falls within the ambit of Article 5 § 1 (c), a hearing is required (see, among other authorities, the Lamy v. Belgium judgment of 30 March 1989, Series A no. 151, pp. 16-17, § 29 and the Nikolova v. Bulgaria [GC], no. 31195/96, § 58, ECHR 1999-II).

These requirements are derived from the right to an adversarial trial as laid down in Article 6 of the Convention, which means, in a criminal case, that both the prosecution and the defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. According to the Court's case-law, it follows from the wording of Article 6 – and particularly from the autonomous meaning to be given to the notion of "criminal charge" – that this provision has some application to pre-trial proceedings (see the Imbrioscia v. Switzerland judgment of 24 November 1993, Series A no. 275, p. 13, § 36). It thus follows that, in view of the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned, proceedings conducted under Article 5 § 4 of the Convention should in principle also meet, to the largest extent possible under the circumstances of an on-going investigation, the basic requirements of a fair trial, such as the right to an adversarial procedure. While national law may satisfy this requirement in various ways, whatever method is chosen should ensure that the other party will be aware that observations have been filed and will have a real opportunity to comment thereon (see, mutatis mutandis, the Brandstetter v. Austria judgment of 28 August 1991, Series A no. 211, p. 27, § 67)."[6]

In the present case, there has been a violation of article 5, §4 of the Convention combined with article 5, §1, c) of the Convention.

Annemie SCHAUS **Christophe MARCHAND** **Zouhaier CHIHAOUI**[7]

[6] ECtHR, Garcia Alva v. Germany, 13 Februari 2013, n°23541.
[7] Member of the Law firm *"Just Rights"*.

BILAGA 8
LEGAL NOTE 6

SUBMISSION TO THE WORKING GROUP ON ARBITRARY DETENTION BY MR. JULIAN ASSANGE

1. The applicant, Mr. Julian Assange, hereby submits an urgent request for relief to the United Nations Working Group on Arbitrary Detention (WGAD) and for an opinion regarding the arbitrary nature of the detention of Mr. Assange.

2. For nearly four years, Mr. Assange has been been deprived of a number of his fundamental liberties. For the last 816 days, he has been confined to the Embassy of Ecuador in London, in an area of 30m2, he has no access to fresh air or sunlight, his communications are restricted and often interfered with, he does not have access to adequate medical facilities, he is subjected to a continuous and pervasive form of round the clock surveillance, and he resides in a constant state of legal and procedural insecurity. Mr. Assange has not been charged.

3. The above has come about in the following circumstances, each aspect of which has contributed an arbitrary element whose consequence has been or has become arbitrary detention. The key elements are:

   i. His inability to access the full intended benefit of the grant of asylum by Ecuador in August 2012.

   ii. The continuing and disproportionate denial of such access over a period of time in which its impact has become cumulatively harsh and disproportionate.

   iii. The origins of the justification relied upon for his arrest to be pursued by Sweden under a European Arrest Warrant, and the way in which that request was validated and pursued with continuing effect to the present time.

   iv. The failure to acknowledge in Mr. Assange's case, that UK law and procedure has now been altered so that he would no longer, if facing arrest today, be liable to extradition under the European Arrest Warrant (and yet no benefit from that change in the law has been facilitated to him).

4. This is not by choice: Mr. Assange has an inalienable right to security, and to be free from the risk of persecution, inhumane treatment, and physical harm; Ecuador granted Mr. Assange political asylum in August 2012, recognizing that he would face those well-founded risks if he were extradited to the United States. The only protection he has from that risk at the time being is to

stay in the confines of the Embassy; the only way for Mr. Assange to enjoy his right to asylum is to be in detention. This is not a legally acceptable choice.

5. The WGAD has agreed in previous cases that a deprivation of liberty exists where someone is forced to choose between either confinement, or forfeiting a fundamental right—such as asylum—and thereby facing a well-founded risk of persecution.[1] The European Court of Human Rights (ECtHR)[2] and UN High Commissioner of Refugees (UNHCR)[3] similarly adhere to this principle.

The Circumstances Underlying the Application for Asylum and its Grant by Ecuador

6. Mr. Assange has been pursued and pilloried by United States authorities since his organisation commenced publishing documents, which revealed information which was perceived to be politically embarrassing for the United States Government (such as evidence that United States soldiers might have been implicated in potential war crimes).[4]

7. Notwithstanding the fact that the publication of such information was a

1 See, e.g., Al Jabouri v. Lebanon, Op No. 55/2011, A/HRC/WGAD/2011/55 (2011) (detention arbitrary despite source's refusal to return to Iraq); Abdi v. United Kingdom, Op No. 45/2006, A/HRC/7/4/Add.1 (2007) (detention arbitrary despite source voluntarily refusing to return to conflict zone).

2 See, e.g., Abdi v. United Kingdom [2013] Application no. 27770/08, paras. 55-75 (finding applicant's detention arbitrary despite his option to leave and face persecution in Somalia, because "the refusal to return voluntarily could not be seen as a trump card which enabled the Secretary of State to continue to detain until deportation could be effected, otherwise the refusal would justify as reasonable any period of detention, however long"); Mikolenko v. Estonia [2009] Application no. 10664/05 (finding Article 5 violation where applicant did not cooperate with signing a voluntary deportation, thereby making removal "virtually impossible"); Riad & Idiab v. Belgium [2008] Applications nos. 29787/03 and 29810/03, paras. 68, (finding deprivation of liberty where applicants were denied asylum and held in an airport transit zone in uncertainty, because "the mere fact that it was possible for the applicants to leave voluntarily cannot rule out an infringement of the right to liberty"); Storck v. Germany [2005] Application no. 61603/00 ("[T]he right to liberty is too important in a democratic society for a person to lose the benefit of the Convention protection for the single reason that he may have given himself up to be taken into detention."); Amuur v. France [1996],Application no. 19776/92 (finding violation of Article 5 of the European Convention where applicants, asylum seekers, could have left confines of an airport transit zone and returned to Syria where they risked extradition to, and persecution in, Somalia).

3 The UNHCR defines detention as "confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and *where the only opportunity to leave this limited area is to leave the territory.*" UN High Commissioner for Refugees (UNHCR) Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers (1999) (emphasis added). Thus UNHCR recognizes that detention can exist even where there is an option to leave the territory to face a well-founded risk of persecution.

protected act of free speech and political expression, the United States commenced investigating Mr. Assange and Wikileaks, and instigated a series of search and seizure and surveillance measures, which do not appear to be regulated by any meaningful due process in which Mr. Assange is able to assert his rights.[5]

8. The stated aim appears to have been to restrict Mr. Assange's movements by any means possible.[6] The investigation has been accompanied by a parallel public campaign of vilification, during which Mr. Assange has been identified as 'public enemy number one' by several prominent Americans, some of whom called for his assassination.[7]

9. The likely fate of Mr. Assange if he were to be extradited to the United States has been illustrated by the trial and detention of alleged WikiLeaks source Private First Class Bradley Manning (hereinafter referred to as Ms. Chelsea Manning), who was, as confirmed by the Special Rapporteur on Torture, subjected to inhuman and degrading treatment, and sentenced to 35 years imprisonment.[8]

10. These events were the catalyst and factual foundation for Mr. Assange's decision to apply for political asylum at the Embassy of Ecuador.

11. (In parallel, Sweden had issued a European Arrest Warrant against Mr. Assange for the purpose of obtaining his presence in Sweden for questioning in relation to an ongoing investigation.[9] Mr. Assange has never been charged

4 The complainant set out a detailed statement of facts, which was submitted as an affidavit in the legal proceedings in Sweden. This affidavit is attached to the application as Annex 1. Due to their size, the appendices to the affidavit have been sent to WGAD by mail. The crucial information is, however, set out in the affidavit itself.

5 Annex 1, pp. 3-28, 33-37,42-46. Affidavit of Mr Michael Ratner, (Annex 2).

6 Annex 1, paras..

7 Annex 1, pp. 18-22, Annex 3 .

8 Significant attempts were made by the prosecutor in that trial to establish a connection between Ms. Manning and Mr. Assange; Mr. Assange's name was mentioned [ ] times in closing arguments alone. Annex 1, pp. 8-10.

9 Prosecutor Marianne Ny, press conference following Stockholm District Court judgment, 16 July 2014: "When it comes to the criminal investigation, it was conducted vigorously, mostly in the Autumn of 2010. A number of of measures have been taken afterwards, and very few steps remain to be done, but they are very significant steps and we simply cannot come any further at this point, and then the question that immediately arises is why not then go to the United Kingdom? The answer is the same one we have given on a number of occasions. There are a number of measures that remain to be done and they might give rise to more interrogations, with several people including Assange. Even if it were possibly to hold interrogations with him at the embassy - I do not know whether it is legally

in Sweden).

12. On 19 June 2012, Ecuador granted Mr. Assange political asylum due to his well-founded fear of persecution, and the probable legal and physical mistreatment he would face if extradited to the United States of America.[10] A key factor in this decision was the refusal of either the United Kingdom or Sweden to issue any assurances that Mr. Assange would not be extradited onwards to the United States of America from Sweden. Mr. Assange had exhausted his domestic remedies in the UK, there having been findings against him in the High Court and the Supreme Court on two separate issues of law. There have now been decisions on those issues which have radically changed the position so that the Mr. Assange, if his extradition was sought by Sweden today, would no longer face extradition.

13. In the circumstances pertaining in June 2012, Mr. Assange, fearing the potential of onward extradition to the United States, sought asylum to Ecuador, which in turn announced that it had granted asylum to him. The United Kingdom issued a statement to the effect that it would arrest him if he tried to leave the confines of the Ecuadorian Embassy for any purpose or under any conditions.[11] That position has not been revised, nor any further statement made concerning his extradition to Sweden although the UK has now revised its practices (and the UK Supreme Court revised the law) so as to accommodate and agree with the challenges raised by Mr. Assange to his extradition. Thus he continues in a position of his extradition having been ordered, which would have been by now achieved had asylum not been granted by Ecuador, and yet where he would be the last individual to be extradited on a basis now acknowledged to be wrong in both law and in principle, and in violation of promises given to parliament at the time of the

possible -then the question still remains about how would a prosecution, if one were to be brought, be able to be held? How would we conclude this if we wish to prosecute and hold a trial when he has said that he absolutely refuses to come here? I cannot go into any further detail about the considerations I have made. But in short, these considerations have led to the conclusion that at present there are no reasons to try out this complicated process which would consist in repeated applications for legal assistance in criminal matters." Press conference transcription (translation from the Swedish), https://www.aftonbladet.se/nyheter/article19232981.ab (Annex 6).

10 Declaración del Gobierno de la República del Ecuador sobre la solicitud de asilo de Julian Assange Comunicado No. 042, Ministry of Foreign Affairs, Trade and Integration of Ecuador, 2012, http://www.webcitation.org/69xdGRSLN. An English translation of this Declaration is attached as Annex 5.

11 William Hague, Foreign Secretary statement on Ecuadorian Government's decision to offer political asylum to Julian Assange, (16 Aug 2012), https://www.gov.uk/government/news/foreign-secretary-statement-on-ecuadorian-government-s-decision-to-offer-political-asylum-to-julian-assange. Annex 1, paras. 165-167.

introduction of the Extradition Act relating to European Arrest Warrants. Sweden issued a European Arrest Warrant against Mr. Assange for the purpose of obtaining his presence in Sweden for questioning in relation to a claimed investigation. The claimed "complainants" have clearly indicated that at no time did either intend a criminal complaint to be made. Their respective complaints, (internally contradictory on the facts, and in the case of one indicating that pressure had been applied by the police, and further criminal proceedings shut down by a senior prosecutor), were nevertheless revived by a third prosecutor, sought out by a lawyer intent upon advancing a particular objective on behalf of the complainant. Mr. Assange has been denied rights of a defendant, including access to potentially exculpatory evidence.[12] The case has remained formally at the 'preliminary investigation' phase and has been frozen since 2010[13].

14. Mr. Assange made himself available to the Swedish authorities for questioning in the United Kingdom, and later at the Ecuadorian Embassy, or to be interviewed by video-link, but the Swedish Prosecutor has refused these requests and has failed to give a reasonable explanation as to why.[14] The prosecutor confirmed again recently that Ecuador's decision to grant asylum to Mr. Assange had no bearing on either her decision to rely on an arrest warrant to secure his presence for questioning.[15]

The Changed basis of UK Law

15. The Anti Social Behaviour, Crime and Policing Act 2014 now in force under Section 156 introduces a bar to extradition whereby an "accusation" will be insufficient to require extradition. Section 156 is clearly intended to (and will) change the way that UK courts approach the issues that arose in Mr. Assange's case in the High Court. Now a charge (rather than a preliminary accusation) will be required to facilitate extradition under a European Arrest Warrant. (A number of countries have long insisted upon this; the UK has now brought its legislation and practice into conformity with a number of other European countries. Mr. Assange is not charged, only accused, and

12 Annex 1, paras. 96-99. See also Annex 4, p. 8. Annex 6

13 Annex 6.

14 Annex 6.

15 Annexes 9 and 11. Annex 4, pp. 5-7.

could not now be extradited from the UK to Sweden.

16. The recent UK Supreme Court decision in *Bucnys v. Ministry of Justice Lithuania (and others)* decided that the "fifth reason" for refusal of the Mr. Assange's case in the challenge in the Supreme Court was wrongly decided. The court recognised that this fifth reason was, *"the only one that received any real endorsement even in the other majority judgments in the case."* Had the fifth reason not been factored into the decision in Mr. Assange's case, the result would have been different and by that route also, his extradition would now, if decided today, be decided differently. In that case the issue raised by Mr. Assange in the Supreme Court for the first time, had argued that the requesting judicial authority, could not be a prosecutor (as is the case in Sweden). Instead, the requesting authority must have the true hallmarks of a judicial authority, in particular independence from the executive.

Mr. Assange's continuing position

17. Mr. Assange has now been detained in the Ecuadorian Embassy for 816 days, but has spent a total of 3 years, 9 months and 6 days under different forms of detention.[16] This exceeds the maximum permissable sentence which he would serve if he was indicted and convicted in Sweden, and has become progressively increasingly incompatible with the presumption of innocence. His situation is uncertain and could be prolonged indefinitely.

18. Notwithstanding the diplomatic immunities inherent in the position of the Ecuadorian Embassy, Mr Assange is subjected to extensive 24 hour close visual and aural surveillance from British police officers who are stationed within one to two meters of the Embassy doors and windows. The scale of this surveillance effort is such that the UK government has spent £7.3 million on the operation to date.[17] This corresponds to approximately 16 persons monitoring Mr. Assange at the embassy at all times.[18] The Ecuadorian authorities have also discovered a listening device which was planted in the Embassy.[19]

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16 10 days in isolation in London's Wandsworth prison (7-10 December 2010), 550 days under house arrest, and thereafter detained in the Embassy. Annex 4.

17 *Policing Assange Embassy Has Cost £6.5m*, LBC, 19 June 2014, http://www.lbc.co.uk/cost-of-policing-assange-embassy-rises-to-65m-92344.

18 *UK Gov't Waste Explored*, http://govwaste.co.uk.

19 Haroon Siddique and agencies, *Ecuador says London embassy bug hidden in socket*, The Guardian, 4 July 2013, http://www.theguardian.com/world/2013/jul/04/ecuador-names-embassy-bug-surveillance.

19. Mr. Assange's detention and constant surveillance within the narrow confines allotted to him in the Ecuadorian Embassy have taken a significant toll on his physical and mental health. The Embassy self-evidently does not have the personnel or equipment to attend to him as and when, inevitably, a medical emergency will arise.

20. Mr. Assange therefore faces an impossible dilemma: if he continues to remain in the Ecuadorian Embassy, he risks irreparably damaging his health. If, however, he leaves at any juncture, he must – against his consent – renounce his fundamental right to asylum, and expose himself to the prospect of unfair proceedings and physical and mental mistreatment in the United States of America.

21. The British and Swedish authorities have evidenced no willingness to resolve this issue on a political level, or within the framework of their respective legal systems. Mr. Assange therefore turns to WGAD in order to obtain an urgent legal adjudication of this impasse.

22. This matter falls squarely within the jurisdiction of WGAD:

    1. Mr. Assange is detained against his will and his liberty has been severely restricted, against his volition. An individual cannot be compelled to renounce an inalienable right, nor can they be required to expose themselves to the risk of significant harm. Mr. Assange's exit from the Ecuadorian Embassy would require him to do exactly that: renounce his right to asylum and expose himself to the very persecution and risk of physical and mental mistreatment that his grant of asylum was intended to address.. His continued presence in the Embassy cannot, therefore, be characterised as 'volitional';

    2. Mr. Assange's detention is arbitrary, and falls under Categories I, II, III, and IV (as classified by WGAD).[20] In particular, the context of his deprivation of liberty has arisen:

        i. From the failure of Sweden by initiating a process against him to obtain his extradition, in the face of contradictory wishes expressed by "complainants", having not established a prima facie case, and refusing, unreasonably and disproportionately, to achieve a process of questioning of him, if desired, through the normal processes of mutual assistance. Further, by his offer of co-operation in facilitating a number of alternative methods short of

20 Fact Sheet No. 26, The Working Group on Arbitrary Detention, http://www.ohchr.org/Documents/Publications/FactSheet26en.pdf.

being extradited to Sweden – where it is further stated as a matter of record, that he will then be imprisoned in Sweden on arrival and as a foreigner with no ties to Sweden, in custody until trial.

ii. The failure of the UK to refuse to facilitate an extradition warrant where the accusation is self-evidently contradictory and unsafe, has not constituted a prima facie case, but moreover, where it is an accusation and not a charge, and has been issued by a prosecutor and not a judicial authority. The recognition of the UK that neither is a satisfactory basis for an extradition request to be complied with, has been stated as not applying retrospectively to Mr. Assange, but yet further, no attempts have been made in the light of these changed circumstances to resolve his case fairly, equitably, and in recognition that these are not only the current laws of the UK, but the principles upon which the UK intends to base its acceptance or progression of extradition requests for others but not for Mr. Assange, whose case raised both issues by which others have now benefited.

iii. Mr. Assange is under constant surveillance and the conditions in which he of necessity remains do not adhere to the minimum rules for detainees.

23. This situation is comparable with and likely more egregious than previous cases, which have elicited findings of arbitrary deprivation of liberty. As set out infra, the WGAD found in Abdi v. United Kingdom, and the ECtHR agreed, that a deprivation of liberty exists where someone is forced to choose between either confinement, or forfeiting a fundamental right and risking persecution. The WGAD defends the rights of asylum-seekers,[21] upholds the principle of *non-refoulement*,[22] and eschews indefinite detention without judicial review. It has found arbitrary deprivations of liberty in situations of house arrest where individuals have had greater freedom of movement than Mr. Assange. And, the WGAD has found the house arrest and extensive surveillance of Chinese activist Chen Guangcheng to be arbitrary detention; in 2012 the United States provided Mr. Guangcheng with diplomatic asylum in the U.S. Embassy in China.

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21 "By resolution 1997/50, the Working Group was requested by the Commission to devote all necessary attention to reports concerning the situation of immigrants and asylum-seekers who are allegedly being held in prolonged administrative custody without the possibility of administrative or judicial remedy." Deliberation No. 5, E/CN.4/2000/4, 28 December 1999.

22 E.g., Al Jabouri v. Lebanon, Op No. 55/2011, A/HRC/WGAD/2011/55 (2011).

24. Mr. Assange therefore requests the WGAD, on an urgent basis, to:

i. Issue a declaration that his current situation constitutes 'arbitrary detention';

ii. Require the United Kingdom authorities urgently to consider the effect of the changes in United Kingdom law and relevant legal precedent that, if previously implemented, would have resulted in the dismissal of the Order for his extradition;

iii. Require the authorities of the United Kingdom to give effect to Mr. Assange's right to asylum by allowing him safe passage to Ecuador;

iv. Require the Swedish authorities to ensure that any law enforcement actions taken by them are compatible with Mr. Assange's right to asylum; and

v. As urgent interim measures, require:

a. the United Kingdom authorities to give assurances that they will not arrest Mr. Assange if he leaves the Embassy for the purpose of receiving medical treatment, and that they will permit Mr. Assange to access open air and sunlight for the purpose of exercise, specifically, and at a minimum, in the roof space adjacent to the posterior part of the Embassy; and

b. the immediate removal of police surveillance, at the very least, the police posted inside the Embassy building,

25. Mr. Assange also respectfully invites the WGAD to visit the Embassy in order to assess both its propriety as a continued place of confinement (including the unavailability of medical facilities), and the level of surveillance to which Mr. Assange is subjected. However, in light of the urgency of this request, if such a visit would delay the ability of the WGAD to issue an expeditious resolution of the matter, Mr. Assange remains available to provide further evidence (for example, affidavits from medical professionals, and subject to the consent of Ecuador, videos or photographs of the amenities of the Embassy).

SUBMISSIONS

I. Mr. Assange has been deprived of fundamental liberties against his will.

A. Mr. Assange is Deprived of Liberty.

26. The current physical and legal circumstances of Mr. Assange can only be characterised as detention, predicated on a continuous deprivation of almost all of Mr. Assange's liberties.

27. In assessing a deprivation of liberty, the WGAD focuses on effect, rather than form. In Resolution 1997/50, the Human Rights Commission eschewed terminological constraints as to what constitutes 'detention' when it entrusted WGAD with the task of

> "investigating cases of deprivation of liberty imposed arbitrarily, provided that no final decision has been taken in such cases by domestic courts in conformity with domestic law, with the relevant international standards set forth in the Universal Declaration of Human Rights and with the relevant international instruments accepted by the States concerned."

28. Similarly, the ECtHR also underscored that the distinction between deprivation of liberty and restriction of liberty is one of intensity and degree.[23] In citing the Guzzardi case with approval, the UK House of Lords noted the particular emphasis on the level of supervision of Mr. Guzzardi, and the restrictions on his movements and contacts with other persons.[24]

29. Mr. Assange has been deprived of the ability to exercise a range of fundamental physical and personal liberties. He has no access to any outside area, which is contrary to the requirement that all detained persons must have access to an outside area for at least one hour per day.[25] Mr. Assange has a usable living space of approximately $30m^2$. The Embassy is approximately $200m^2$.

30. The Embassy of Ecuador can be a place of detention; in its Deliberation 5 on the situation regarding immigrants and asylum-seekers, the WGAD concluded that relevant places of custody covered a broad range of spaces:

> "House arrest under the conditions set forth in deliberation No. 1 of

23 Guzzardi v. Italy [1980] Application no. 7367/76 para. 92; see also Amuur v. France [1996] Application no. 19776/92, para 42.

24 Lord Carswell, Secretary of State for the Home Department v. JJ [2008] 1 AC 385, para. 75.

25 Article 21(1) of the Standard Minimum Rules for the Treatment of Prisoners, https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf

the Working Group (E/CN.4/1993/24, para. 20) and confinement on board a ship, aircraft, road vehicle or train are assimilated with custody of immigrants and asylum seekers. The places of deprivation of liberty concerned by the present principles may be places of custody situated in border areas, on police premises, premises under the authority of a prison administration, ad hoc centres ("centres de rétention"), so called "international" or "transit" zones in ports or international airports, gathering centres or certain hospital premises (see E/CN.4/1998/44, paras. 28-41)."[26]

31. The Ecuadorian Embassy (through no fault of its own) is unable to provide Mr. Assange with the range of medical treatment required by the United Nations Body of Principles for Detention and Standard Minimum Rules for Prisoners.[27]

32. Due to the physical set up of the space allocated to him in the Embassy, he is also subjected to constant visual and aural surveillance by the British police who are stationed in the immediate proximity of the Embassy. There is no indication that any judicial warrant (either by Sweden or the United Kingdom) has been issued for such continuous and intrusive surveillance.

33. In many instances, the degree of the surveillance has intruded into Mr. Assange's right to privileged communications with his Counsel. British police officers are stationed inside the Embassy building, but out of its protected diplomatic space; as well as immediately outside the embassy, and are positioned to survey its interior through the street-facing windows. They are therefore able to overhear conversations conducted therein. Mr. Assange's visitors are also recorded by the police operation and are often questioned as to their identities upon ingress and egress from the embassy, regardless of their age or sex.

34. WGAD has found that "house arrest may be compared to deprivation of liberty provided that it is carried out in closed premises which the person is not allowed to leave."[28] Mr. Assange is certainly confined in a closed premises. Since he faces immediate arrest if he attempts to leave, it is no more accurate to claim that Mr. Assange is 'allowed to leave' then it would be accurate to claim that a prisoner is free to attempt to escape from prison.

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26 Deliberation No. 5, E/CN.4/2000/4, 28 December 1999.

27 Principle 24 of the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, http://www.un.org/documents/ga/res/43/a43r173.htm; Article 22 of the Standard Minimum Rules for the Treatment of Prisoners.

B. The Deprivation of Liberty Does Not Have a Volitional Component

35. It is internationally recognized—in numerous WGAD and EctHR cases, and by the UN High Commissioner for Refugees—that detention includes circumstances in which the only alternative to confinement is to renounce the possibility of claiming asylum. Mr. Assange's continued residence at the Ecuadorian Embassy cannot be described as 'volitional'. If he leaves its perimeters – even to obtain fresh air or emergency medical treatment – he will be arrested and extradited – without assurances – to Sweden, and thereby subjected to the very risk (*refoulement* to the United States), which the asylum was afforded to him as a protection against.[29]

36. This risk extends to a likely prospect that Mr. Assange would be subjected to prolonged incommunicado detention,which falls foul of the prohibition on cruel and inhumane treatment.[30]

37. Forcing an individual to be indefinitely deprived of liberty, as a condition for seeking or enjoying asylum, violates the very principle behind ICCPR Article 9's protection of *both* liberty *and* security of the person.[31] States are subjected to particularly intense scrutiny in relation to whether they have fulfilled their

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28 Report of the Working Group on Arbitrary Detention, E/CN.4/1993/24, 12 January 1993; see also Hossein Mossavi et al. v. Islamic Republic of Iran, Op No. 30/2012, U.N. Doc. A/HRC/WGAD/2012/30 (2012) ("In opinions No. 2/2002, No. 9/2004, No. 2/2007 and No. 12/2010, the Working Group declared house arrest as arbitrary detention, in particular when it lacked any of the safeguards of arrest and detention under the Universal Declaration of Human Rights and, for State parties, the International Covenant on Civil and Political Rights.").

29 The United Kingdom has confirmed that they would arrest Mr. Assange if he were to leave the Embassy for the purpose of receiving medical treatment. E. Addley, *Julian Assange has had his human rights violated, says Ecuador foreign minister*, The Guardian, 17 August 2014, http://www.theguardian.com/media/2014/aug/17/julian-assange-human-rights-violated-ecuador; see FCO Note Verbale of October 2012 (Annex8), in which the Foreign Secretary indicated that Mr. Assange could be arrested if he were to seek medical treatment outside of the Embassy.

30 Jesselyn Radack, *How the US Military Tortured Bradley Manning*, The Daily Kos, 1 December 2012, http://www.dailykos.com/story/2012/12/01/1166253/-The-Torture-Techniques-Used-on-Bradley-Manning. The Military Judge seized of the case recognised that Ms. Manning had been subjected to mistreatment, as reflected in her ruling of 8 and 9 January 2013 that Ms. Manning's sentence should be reduced as compensation for such mistreatment. For transcripts of the ruling, see Alexa O'Brien, *US v Pfc. Manning | Court Ruling on defense Article 13 motion*, 9 January 2013, http://www.alexaobrien.com/secondsight/wikileaks/bradley_manning/appellate_exhib/us_v_pfc_manning_court_ruling_on_defense_article_13_motion.html.

obligation to secure both rights in relation to their treatment of human rights defenders, including journalists and publishers in this field, such as Mr. Assange.[32]

38. The UNHCR has long agreed with the principle that forcing one to choose between confinement or sacrificing a fundamental right to seek or enjoy asylum constitutes detention. It has long held that detention is:

> "confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and *where the only opportunity to leave this limited area is to leave the territory.*"[33]

39. In line with this principle, the WGAD has previously found deprivations of liberty in circumstances in which the only alternative to confinement is to renounce a right – such as the possibility of claiming asylum – and face a well-founded risk of persecution. The WGAD considers whether asylum seekers have a real (as opposed to illusory) option to depart from confined areas, in which they must reside in whilst their applications are processed.

40. In terms of the asylum seeker scenarios, the key aspects, which transform such types of custody into an arbitrary deprivation of liberty, are the existence of guarantees for those persons held in custody, as well as the conditions of detention. These include the right to know the legal basis for the refusal to allow entry, the right to communicate with the outside world (including with

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31 Article 9 of the ICPPR protects both liberty and security of the person. These two rights cannot be opposed: a person cannot be required to sacrifice fundamental aspects of their security in order to exercise their right to liberty. To even present a person with such a choice would be contrary to States' positive duty to take necessary steps to ensure the security of particularly vulnerable persons, such as human rights defenders and journalists, 1560/2007, Marcellana and Gumanoy v. Philippines, para. 7.7; see Concluding observations Jamaica 2012, para. 15; Philippines 2003, para. 8; Guatemala 2001, para. 21., and to protect the right to liberty of person against deprivations by third parties. See Concluding observations Guatemala 1996, para. [232]; Yemen 2012, para. 24; Philippines 2012, para. 14.

32 Op No. 62/2012 (Ethiopia), para. 39.

33 UN High Commissioner for Refugees (UNHCR) Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers (1999) (emphasis added). This definition has been consistently adopted by UNHCR. See, e.g., UNHCR Manual on Security of Persons of Concern, p. 175 (1st ed 2011), http://www.refworld.org/docid/4f6313032.html; UNHCR Manual on Refugee Protection and the European Convention on Human Rights 2-3 (Apr 2003, Updated Aug 2006), http://www.refworld.org/docid/3f4cd5c74.html. It has also been relied upon by domestic authorities. See for example, Attorney-General v. Refugee Council of New Zealand, Inc. [2003] 2 NZLR 577, New Zealand: Court of Appeal, 16 April 2003, http://www.refworld.org/docid/40cec4c84.html.

lawyers, and family), the right to be brought before a judicial authority, the right to contest the legal basis of the confinement and to seek a remedy as concerns it, protection against excessive or lengthy confinement, and the right to be housed in a suitable environment.[34]

41. For instance, in the case of *Abdi v. United Kingdom*,[35] WGAD found that the United Kingdom had violated Article 9 in circumstances in which a Somali asylum seeker was kept in indefinite detention because of his refusal to sign a letter agreeing to return to Somalia. WGAD rejected the argument that Mr. Abdi's confinement was 'volitional' because of his refusal to sign such a letter and thereby consent to being returned to a 'conflict zone.' In WGAD's view, the case "raises in stark terms the question whether or not the State is entitled to detain an individual indefinitely if he refuses to return voluntarily to a conflict zone. In any event it is questionable whether a return to Somalia made under threat of indefinite detention could be said to be voluntary in any real sense." The WGAD found Abdi's detention to be arbitrary.

42. The ECtHR also confirmed that Mr. Abdi's situation amounted to arbitrary detention.[36] In terms of the volition aspect, the Court agreed that the option to leave and risk persecution is not a 'trump card' justifying the United Kingdom's Home Secretary to detain someone indefinitely.[37]

43. In *Al Jabouri v. Lebanon*, the WGAD instructed Lebanon to respect the principle of *non-refoulement*, even where the applicant "refused to voluntarily return to Iraq," because "no Contracting State may expel an asylum seeker or return a refugee to a territory where his or her life or freedom may be at risk."[38]

44. Similarly, in the case of *Amuur v. France*, the ECtHR rejected the argument of the French Government that because the asylum seekers were free to depart from a French airport transit zone, where they were held for twenty days, the restrictions on their liberty should not be qualified as an arbitrary deprivation

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34 Deliberation No. 5, E/CN.4/2000/4, 28 December 1999.

35 Op No. 45/2006, A/HRC/7/4/Add.1 (2007), para 19.

36 Abdi v. United Kingdom [2013] Application no. 27770/08, paras. 65-75.

37 "If there were no outstanding legal challenges, the refusal to return voluntarily could not be seen as a trump card which enabled the Secretary of State to continue to detain until deportation could be effected, otherwise the refusal would justify as reasonable any period of detention, however long." *Ibid.* para. 73.

38 Op No. 55/2011, U.N. Doc. A/HRC/WGAD/2011/55 (2011), para. 28.

of liberty for the purposes of Article 5 of the Convention.[39] The key factors in the Court's ruling were the prolonged nature of the applicants' confinement in the airport zone,[40] the failure of the Government to facilitate the applicants' right to apply for asylum,[41] and the existence of strict and constant police surveillance.[42]

45. In *Mikolenko v. Estonia,* the ECtHR found a violation of Article 5 where an applicant refused to cooperate with his deportation, making his expulsion "virtually impossible as for all practical purposes it required his co-operation, which he was not willing to give."[43] This was in view of the extraordinary length of the applicant's detention and the fact that the situation made removal impossible, and therefore the continued detention was not serving any purpose.[44]

46. Finally, the ECtHR also found a violation of Article 5 in the case of *Riad and Idiab v. Belgium* due to the lack of legal certainty or procedural safeguards in relation to the applicants' continued confinement in an airport transit zone for fifteen and eleven days, respectively, after their asylum requests had been rejected.[45] Despite the fact that the applicants refused on numerous occasions to board flights that had been booked for them, the Court dismissed Belgium's arguments that the applicants "had been free to move and, in particular, to leave Belgian territory."[46] The Court held that "the mere fact that it was possible for the applicants to leave voluntarily [could not] rule out an infringement of the right to liberty."[47] The Court noted in particular that the zone was an unsuitable place for residence, and lacked adequate social or humanitarian assistance.[48]

47. The grounds for finding an arbitrary deprivation of liberty are even more

39 Amuur v. France [1996] Application no. 19776/92.

40 *Ibid.* para. 43.

41 *Ibid.* para. 43.

42 *Ibid.* para 45.

43 Mikolenko v. Estonia [2009] Application no. 10664/05, paras. 65, 68.

44 The applicant was detained for three years and eleven months. *Ibid.* para. 64.

45 Riad & Idiab v. Belgium [2008] Application nos. 29787/03 & 29810/03, paras. 64-80.

46 *Ibid.* para. 66.

47 *Ibid.* para 68.

pronounced in the case of Mr. Assange. Unlike Mr. Abdi or the applicants in the *Amuur* case, Mr. Assange has been formally granted asylum. It is therefore neither necessary nor appropriate as a matter of law for the WGAD to second-guess whether Mr. Assange will face a real risk of persecution or physical harm.[49] This must be presumed for the purposes of this application. It therefore follows that as in the case of Mr. Abdi, neither the United Kingdom nor Sweden are entitled to present Mr. Assange with the non-choice of remaining within the confines of the Ecuadorian Embassy, or subjecting himself to the risk of persecution and harm. As in the *Amuur* case, Mr. Assange cannot be expected to leave the Ecuadorian Embassy of his own volition as concrete and reliable assurances regarding *non-refoulement* have been refused.

48. The duration of Mr. Assange's confinement in the Ecuadorian Embassy greatly exceeds the length of confinement in the *Amuur* and *Riad* cases. The Ecuadorian Embassy also lacks the necessary facilities and humanitarian services for prolonged residence. Mr. Assange has also been subjected to severe and prolonged uncertainty regarding his status. His detention is indefinite, and therefore arbitrary.

49. In line with the *Amuur* case, the refusal of the British and Swedish authorities to acknowledge or give effect to the political asylum granted to Mr. Assange has frustrated both his right to asylum and his right to an effective remedy.

II. The deprivation of Mr. Assange's liberty is arbitrary and illegal.

50. The WGAD has interpreted its mandate to extend to the following forms of arbitrary deprivation of liberty:

> (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his sentence or despite an amnesty law applicable to him) (category I);
>
> (b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the

48 *Ibid.* para.77.

49 This will be developed in Section II of this application.

International Covenant on Civil and Political Rights (category II);

(c) When the total or partial non observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV); and

(e) When the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or other status, and which aims towards or can result in ignoring the equality of human rights (category V).[50]

51. In the present case, the arbitrary nature of Mr. Assange's confinement in the Ecuadorian Embassy is grounded in the following factors:

a.i. The failure of the United Kingdom authorities to give effect to the changes in its own law, both in the Supreme Court decision and in legislation, either to provide Mr. Assange with an assurance regarding *non-refoulement,* or safe passage to Ecuador (Categories II and IV);

a.ii. The disproportionate nature of the actions taken by the Swedish prosecutor, including the insistence upon the issuing of a European Arrest Warrant rather than pursuing questions with Mr. Assange in the United Kingdom as provided for my mutual assistance protocols (Categories I and III);

a.iii. The indefinite nature of this detention, and the absence of an effective form of judicial review or remedy concerning the prolonged confinement and the extremely intrusive surveillance, to which Mr. Assange has been subjected (Categories I, III and IV) ; and

a.iv. The absence of minimum conditions accepted for prolonged detention of this nature (such as medical treatment and access to outside areas) (Category III).

50 Fact Sheet No. 26, The Working Group on Arbitrary Detention, http://www.ohchr.org/Documents/Publications/FactSheet26en.pdf.

Each will be addressed in turn.

i. British and Swedish authorities refuse to either provide Mr. Assange with an assurance regarding non-refoulement, or safe passage to Ecuador.

52. Mr. Assange has been deprived of his liberty by virtue of his attempt to exercise his fundamental and inalienable right to seek asylum from political persecution and physical harm.

53. After the Ecuadorian authorities announced that they had granted political asylum to Mr. Assange, the Foreign Secretary of the United Kingdom, Mr. William Hague, issued the following statement:

> "We will not allow Mr Assange safe passage out of the UK, nor is there any legal basis for us to do so. The UK does not accept the principle of diplomatic asylum. It is far from a universally accepted concept: the United Kingdom is not a party to any legal instruments which require us to recognise the grant of diplomatic asylum by a foreign embassy in this country."[51]

54. This statement is wrong for two reasons. First, even if the UK does not recognise diplomatic asylum, it cannot escape its obligation to recognise the asylum granted to Mr. Assange as a protection against *refoulement* and the risk of cruel and inhumane treatment.[52] To the extent there are exceptions, they do not apply. Second, the UK is wrong to not recognize Mr. Assange's asylum, because customary international law requires it to do so. These arguments will be explored in detail.

A. The United Kingdom and Sweden are obliged by applicable law and Convention obligations to recognise the asylum granted to Mr. Assange, and no exceptions apply

55. Article 14 of the UDHR sets out that "Everyone has the right to seek and to enjoy in other countries asylum from persecution."

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51 William Hague, Foreign Secretary statement on Ecuadorian Government's decision to offer political asylum to Julian Assange, (16 Aug 2012), https://www.gov.uk/government/news/foreign-secretary-statement-on-ecuadorian-government-s-decision-to-offer-political-asylum-to-julian-assange.

52 See Annex 16 – Guy Goodwin Gill legal opinion the Matter of the Application of the 1951 Convention and 1967 Protocol relating to the Status of Refugees.

56. The mandate of the WGAD recognises the binding nature of the right to asylum, set out in Article 14 of the UDHR, through its explicit recognition that a violation of this right can give rise to a claim for arbitrary detention (Category II). The establishment of a further category of arbitrary detention pertaining to asylum seekers (Category IV) must also be considered to be reflective of the WGAD's recognition of the binding nature of States' obligation to firstly, consider and ensure an effective remedy for asylum seekers, and secondly, ensure that the mechanisms for considering such applications do not consign the applicants to prolonged or arbitrary deprivation of their liberty.[53]

57. The most important aspect concerning Mr. Assange's right to asylum is that he faces a real risk of cruel and inhumane treatment. The Special Rapporteur on Torture has found that at a minimum, Mr. Assange's alleged source, Ms. Manning, was subjected to cruel and inhuman treatment.[54] He also expressed the opinion that Ms. Manning had been subjected a prolonged period of isolated confinement with a view to coercing her "into 'cooperation' with the authorities, allegedly for the purpose of persuading [her] to implicate others."[55]

58. The only reasonable inference from this is that Ms. Manning was subjected to such mistreatment in order to obtain evidence against Mr. Assange.

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53 Human Rights Committee Resolution 1997/50; See also Deliberation No. 5 on situation regarding immigrants and asylum-seekers,

54 "I conclude that the 11 months under conditions of solitary confinement (regardless of the name given to his regime by the prison authorities) constitutes at a minimum cruel, inhuman and degrading treatment in violation of article 16 of the convention against torture. If the effects in regards to pain and suffering inflicted on Manning were more severe, they could constitute torture." E. Pilkington, *Bradley Manning's treatment was cruel and inhuman, UN torture chief rules*, The Guardian, 12 March 2012, http://www.theguardian.com/world/2012/mar/12/bradley-manning-cruel-inhuman-treatment-un; see also Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, Addendum, 29 February 2012, A/HRC/19/61/Add.4, http://image.guardian.co.uk/sys-files/Guardian/documents/2012/03/12/A_HRC_19_61_Add.4_EFSonly-2.pdf?guni=Article:in%20body%20link.

55 E. Pilkington, *Bradley Manning's treatment was cruel and inhuman, UN torture chief rules*, The Guardian, 12 March 2012, Mr. Assange's central role in the Manning proceedings is also exemplified by the fact that "[i]n the course of making that argument, the government's prosecutors keep mentioning Assange's name. Over and over. So far in the trial, he has been referenced 22 times." Matt Sledge, *Julian Assange Emerges As Central Figure In Bradley Manning Trial*, Huffington Post, 19 June 2013, http://www.huffingtonpost.com/2013/06/19/julian-assange-bradley-manning-trial_n_3462502.html.

Accordingly, apart from the fact that the mistreatment meted out to Ms Manning acts as a litmus test concerning the fate of Mr. Assange if he were to be extradited to the United State, it can already be concluded that any proceedings in the United States would be tainted through the use of information extracted through such measures. These aspects, both cumulatively and independently, give rise to an *erga omnes* duty on all States to take necessary measures to protect Mr. Assange from such a fate.[56] Asylum – as a protection against *refoulement* – is one such measure. Conversely, non-recognition of Mr. Assange's asylum, undermines his protection against cruel and inhumane treatment, and is thus incompatible with the United Kingdom's and Sweden's respective obligations under the Convention against Torture.

59. As confirmed in official correspondence from the authorities of Ecuador, in granting Mr. Assange asylum,

> "The Government of Ecuador found Mr. Assange had a well-founded fear of being persecuted for reasons of his political opinions in the form of his WikiLeaks work. It was also found that there is a real risk of retaliation by the country or countries related to the information published by Mr. Assange, and that this retaliation may endanger Mr. Assange's safety, liberty, and even his life. It was also found that Mr. Assange's circumstances made him unable and/or unwilling to avail himself of the protection of Australia, the country of his nationality. [...] In his announcement of the asylum decision, Ecuador's Minister of Foreign Affairs, Chancellor Ricardo Patiño, explained that the principles applicable to the asylum case of Mr. Assange, mainly the principle of *non-refoulement*, are enshrined in the set of instruments, standards, mechanisms and procedures provided for the corpus of international law including the Convention on the Status of Refugees 1951 and its 1967 Protocol. The government of Ecuador notes that the Charter of Fundamental Rights of the European Union, in its article 18, recognizes the right to asylum."[57]

56 As observed by the Special Rapporteur on Torture, the obligation to take measures to prevent torture (and cruel and inhumane treatment " transcends the items enumerated specifically in the Convention. [against Torture]." The customary *non-refoulement* rule is one such measure, but "the *non-refoulement* obligation is a specific manifestation of a more general principle that States must ensure that their actions do not lead to a risk of torture anywhere in the world. There is a clear negative obligation not to contribute to a risk of torture." Report of the Special Rapporteur on Torture on the Exclusionary Rule A/HRC/25/60 , 10 April 2014, paras 44-46.

57 Letter to Julian Assange's Swedish lawyers from the Embassy of Ecuador to Sweden, 15 July 2014, Annex 13.

60. Ecuador's decision to grant asylum to Mr. Assange was clearly motivated by the risk he faced of political persecution and physical harm, and issued within the framework of the protection against *refoulement*, as set out in Article 14 of the UDHR, and numerous other conventions to which Ecuador is a party (which are detailed in its asylum decision), including the 1951 Convention, to which the United Kingdom and Sweden are contracting parties.[58]

61. If a Contracting State undermines the objective of the grant of asylum by extraditing a refugee, who has been granted asylum by another State, to the State which was the source of the risk which formed the basis for the asylum, "the protecting or asylum State may justifiably object to the potential *refoulement* of "its" refugee. In such a case, the refusal to accept the latter's determination of status, followed by extradition of the refugee, constitutes a putative wrong to the protecting State." [59]

62. Article 33(1) of the 1951 Convention further prohibits <u>any</u> Contracting States from expelling or returning a refugee (irrespective as to which State granted the refugee status) to a territory where his life or freedom could be threatened on account of political opinion *inter alia*. The broad wording of the article protects refugees from expulsion to <u>any territory</u> which constitutes such a risk.[60] The fact that a refugee has been granted asylum due to a risk linked to State A, protects the refugee from expulsion to State B if he would also face a similar risk to life or freedom there.

63. The terms of the 1951 Convention also do not specify or require that asylum applicants must be physically present in the State where asylum is requested.[61]

64. The prohibition on expulsion to <u>any</u> territories where the refugee could face a prohibited risk also applies to expulsion from Embassies.[62] The Human Rights Committee also accepted that the expulsion of a dual Iraqi-US national from the Romanian Embassy in Baghdad to the US authorities could have engaged Romania's responsibilities if it had been foreseeable at the time of the

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58 The United Kingdom ratified it on 11 March 1954 (without reservations), and Sweden ratified it on 26 October 1954 (without reservations).

59 G. S. Goodwin-Gill & J. McAdam, *The Refugee in International Law*, Oxford: Oxford University Press, 3rd ed., 2007, 554 (internal footnotes omitted).

60 W. Kalin, M. Caroni, L. Heim, 'Article 33, para.1', in A. Zimmerman, ed., *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) pp. 1327-95, 1380-81.

expulsion that there was a risk that the person's rights would be violated.[63] This case suggests that far from breaching international law by refusing to expel a person wanted by the territorial State, the Embassy authorities would in fact violate international law if they were to expel the person notwithstanding the existence of a real risk of harm or violation of the person's rights.

No Exceptions Apply to the Obligation to Recognize Mr. Assange's Asylum.

65. In a 1978 statement, UNHCR Executive Committee formally concluded that

> "the very purpose of the 1951 Convention and the 1967 Protocol implies that refugee status determined by one Contracting State will be recognized also by other Contracting States [...] refugee status as determined in one Contracting State should only be called into question by another Contracting State when it appears that the person

61 As observed by Zimmerman and Mahler, "Article 1A para. 2 only requires that the person seeking refugee status must be 'outside the country of his nationality.' A person possessing a nationality and seeking protection must therefore not necessarily be present in a foreign country in order to fall within the scope *ratione personae* of Art. 1A, para. 2. Rather, refugee status may be acquired, e.g., in the High Seas, in the coastal waters of another State, or on land territory which does not form part of any given State." A. Zimmerman and C. Mahler, ' Article 1A, para. 2', in A. Zimmerman ed. *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, 2011), pp. 281-465, 441-3. Given that any territorial limitation concerning the procedure for applying for asylum would have significant implications for the operation and efficacy of the 1951 Convention, if the drafters of the Convention had required or intended such a limitation, it should have been included *expressis verbis*. State practice in relation to the implementation of the 1951 Convention also demonstrates that there is no legal requirement that asylum seekers must be physically present in the State from which asylum is sought. See C. Hein, M. de Donato, *Exploring Avenues for Protected Entry in Europe*, Italian Council for Refugees, 2012, pp.52-60; G. Noll, J. Fagerland, *Safe Avenues to Asylum? The Actual and Potential Role of EU Diplomatic Representations in Processing Asylum Requests*, Danish Center for Human Rights, UNHCR, 2002, pp. 34 (Denmark), 42 (France), 57 (Spain), 80 (Canada), 89, 94 (United States of America).

62 According to a commentary by Lauterpacht and Bethleham, "The relevant issue will be whether it is a place where the person concerned will be at risk. This also has wider significance as it suggests that the principle of *non-refoulement* will apply also in circumstances in which the refugee or asylum seeker is within their country of origin but is nevertheless under the protection of another Contracting State. This may arise, for example, in circumstances in which a refugee or asylum seeker takes refuge in the diplomatic mission of another State or comes under the protection of the armed forces of another State engaged in a peacekeeping or other role in the country of origin. In principle, in such circumstances, the protecting State will be subject to the prohibition on *refoulement* to territory where the person concerned would be at risk." E. Lauterpacht and D. Bethlehem, *The Scope and Content of the Principle of Non-refoulement*, in E. Feller, V. Türk, F. Nicholson (eds.), Refugee Protection in International Law (Cambridge: Cambridge University Press, 2003) at para 114.

63 Mohammad Munaf v. Romania, CCPR/C/96/D/1539/2006, UN Human Rights Committee (HRC), 21 August 2009.

manifestly does not fulfil the requirements of the Convention".[64]

66. Both the United Kingdom and Sweden are contracting parties to the 1951 Convention.[65] Neither the United Kingdom nor Sweden have claimed that Ecuador committed a 'manifest' error in granting asylum to Mr. Assange, nor would there be any evidentiary basis for them to do so.

67. Apart from the 1951 Convention, Article 18 of the Charter of Fundamental Rights in the European Union also provides that all members of the European Union must guarantee the right to asylum "with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community."[66]

68. Article 14, paragraph two of the UDHR sets out a narrow[67] exception to the right to asylum, which may not be invoked for "the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations."

69. Mr. Assange falls outside of the scope of any reasonable interpretation of this exception. Over the last four years, he has been the subject of a highly politicised United States national security investigation "unprecedented in scale and nature."[68] The United States investigation arises out of Mr. Assange's publishing activities which are protected under the United States First Amendment, article 19 of the UDHR, article 19 of the ICCPR, and article 10 of

64 UNHCR Executive Committee, Conclusion no. 12 (XXIX), 1978 Report of the 29th Session: UN doc. A/AC.96/559, para. 68.2.

65 The United Kingdom ratified it on 11 March 1954 (without reservations), and Sweden ratified it on 26 October 1954 (without reservations).

66 (2000/C 364/01), http://www.europarl.europa.eu/charter/pdf/text_en.pdf.

67 The Permanent Court of International Justice observed in Nationality Decrees: "an exception does not ... lend itself to an extensive interpretation." *Nationality Decrees Issued in Tunisia and Morocco (French Zone)* (Advisory Opinion) (1923) PCIJ Series B No 4, 25. The European and Inter-American Human Rights Courts have also confirmed that exceptions must be narrowly interpreted: they should not be permitted to swallow the rule, or render the protection of guaranteed rights illusory. See *Klass v Germany* App. No. 5029/71, ECHR (1978) Series A, No. 28, at 21, para. 42, in which the ECHR ruled that exceptions to Convention rights must be narrowly interpreted. Similarly, Judge Cançado-Trindade stating in his Concurring Opinion in *Caesar v Trinidad v Tobago* concluded that 'permissible restrictions (limitations and derogations) to the exercise of guaranteed rights [of human rights conventions] are to be restrictively interpreted' (IACtHR (Ser. C), No. 123 (2005) para. 7).

68 The investigation comprises the FBI and at least 10 other US agencies. Annex 1, para 2, 19, 66-71 and Annex 2.

the ECHR. On 19 June 2014, 54 organisations, including Human Rights Watch, the American Civil Liberties Union (ACLU), and Article 19, signed an open letter to US Attorney General Eric Holder demanding that he drop the ongoing investigation against Mr. Assange.[69] The intervening Swedish arrest warrant has been issued for the purpose of questioning Mr. Assange in order to determine whether the preliminary investigation in Sweden will lead to an indictment.[70]

70. When Mr Assange entered the Ecuadorian Embassy, the Embassy released a statement that Mr. Assange's presence in the Embassy should "in no way be interpreted as the Government of Ecuador interfering in the judicial processes of either the United Kingdom or Sweden."[71] The Ecuadorian authorities granted asylum to Mr. Assange after two months of detailed consideration of his case, and after all attempts to secure diplomatic assurances concerning *refoulement* failed.[72]

71. Mr. Assange has also repeatedly attempted to ensure that the exercise of his fundamental right of asylum does not hinder the Swedish preliminary investigation, for example, by making himself available to be interviewed in the Ecuadorian Embassy or *via* video-link, by submitting a written statement, or by seeking assurances that he will not be *refouled* to the United States. There is therefore absolutely no basis for finding that it has been "invoked" in the sense implied by Article 14(2) of the UDHR. For the same reasons, the exceptions to the 1951 Convention are also inapplicable.

Mr. Assange Faces a Serious Risk of *Refoulement* to the United States.

72. Article 19(2) further provides that "No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."

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69 Annex 14

70 The Prosecutor stated in an interview on 5 December 2010, that "We have only heard one side [of the story], not Julian Assange's version about what happened. It's far too early to determine whether he will be charged." See Annex 6.

71 19 June 2012, http://www.ecuadorembassyuk.org.uk/news/statement-on-julian-assange. The statement is cited in: http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1059&context=mjil

72 See Declaración del Gobierno de la República del Ecuador sobre la solicitud de asilo de Julian Assange Comunicado No. 042, Ministry of Foreign Affairs, Trade and Integration of Ecuador, 2012. http://www.webcitation.org/69xdGRSLN, http://www.webcitation.org/69xdGRSLN. English translation in Annex 5.

73. Provisions such as these were relied upon by Ecuador as part of the basis for its decision to grant asylum to Mr. Assange.[73] Since both the United Kingdom and Sweden are members of the European Union, it would be unlawful and thus arbitrary for them to disregard these obligations.

74. The hypothetical possibility that diplomatic assurances might be obtained in the future (i.e. after the asylum seeker is expelled) has been rejected by the ECtHR as unacceptable. In *Amuur v. France,* the Court ruled that the fact that France had obtained diplomatic assurances from Syria prohibiting onward extradition to Somalia after asylum seekers had already been expelled from French territory, did not satisfy France's positive duty to protect the asylum seekers from harm:[74] the Court emphasised that the possibility of departure "becomes theoretical if no other country offering protection comparable to the protection they expect to find in the country where they are seeking asylum is inclined or prepared to take them in."[75]

75. Although the UK Foreign Secretary averred to Ecuador in October 2012 that the United Kingdom would work towards producing a legal text to secure Mr. Assange's human rights protections,[76] no such assurances or legal texts have been produced or finalised. In June 2013, the United Kingdom abandoned plans to form a legal commission in order to formulate such a legal text.[77] Its withdrawal from this process coincided with reports concerning the assistance provided by Mr. Assange to Edward Snowden in relation to the attempt by the latter to exercise his right to claim asylum.

76. Notably, Sweden has recently been found by the Committee against Torture to have contravened its obligation to take adequate steps to protect persons in its territory from the risk of torture, or cruel and inhumane treatment. In that particular case, Sweden allowed Mr. Agiza to be secretly apprehended and handed over to the CIA at Bromma airport in Sweden, where he was shackled and forcibly administered sedatives by suppository before being flown to his

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73 Letter from the ambassador of Ecuador to Sweden to Per E. Samuelson and Thomas Olsson, (15 July 2014) Annex 13.

74 *Amuur* v. France [1996] Application no. 19776/92, paras. 11 and 48.

75 *Ibid.* para. 48.

76 FCO *Note Verbale* October 2012, Annex 8.

77 The Foreign Minister of Ecuador stated in October 2013 (reported on 22 October 2013) that UK had pulled out of the plan to form a legal commission to resolve the matter. http://www.eluniverso.com/noticias/2013/10/22/nota/1619641/londres-desiste-crear-comision-resolver-caso-assange-dice-patino.

country of origin, Egypt, and subsequently imprisoned and tortured.[78] The Committee also concluded that the mere provision of diplomatic assurances was an insufficient measure to protect the applicant due to the absence of any binding mechanism for their enforcement.

77. The Human Rights Committee also found that in the *Alzery* case that Sweden had violated Article 2 and 7 of the ICCPR by allowing Mr. Alzery to be rendered by the CIA to Egypt (where he was subjected to ill-treatment), and failing to conduct an effective criminal investigation in relation to the actions of the Swedish authorities who had allowed the rendition to occur.[79]

78. The fact that these instances were not isolated cases is further underscored by reports that the Swedish Secret police recently facilitated the rendition of two of its nationals from a secret US-run prison in Djibouti to the United States.[80]

79. These cases evidence the fact that Swedish authorities are both highly susceptible to pressure from the United States of America, and willing to ignore their obligations under human rights treaties and conventions in order to maintain their relations with the United States. This is particularly the case with anything Wikileaks-related: for instance, a senior Swedish intelligence advisors expressed in state media the position that Sweden's close intelligence cooperation with the United States would be jeopardised by Mr. Assange's activities in Sweden.[81]

80. The United Kingdom has also demonstrated its willingness to assist the

78 Agiza v. Sweden (Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (2005).

79 Alzery v. Sweden, Human Rights Committee, No. 1416/2005, at para. 11.7 (Oct. 25, 2006), para. 11.7.

80 *Renditions continue under Obama, despite due-process concerns*, Washington Post, 1 January 2013, http://www.washingtonpost.com/world/national-security/renditions-continue-under-obama-despite-due-process-concerns/2013/01/01/4e593aa0-5102-11e2-984e-f1de82a7c98a_story.html; "SÄPO helped US prosecute Swedes" http://www.svd.se/nyheter/utrikes/sapo-hjalpte-usa-atala-svenskar_8205708.svd. Of further relevance is the case of Kassir, which wa summarised in a letter from Mr. Assange's UK solicitor Gareth Peirce to the Australian Foreign Minister Paul Rudd. Kassir was a Swedish national who successfully challenged a US extradition request in the Swedish courts on the grounds that the Swedish extradition treaty excludes Swedish nationals from extradition to the US. Kassir was freed from prison.Kassir was also a Lebanese national, and was subsequently arrested in Prague airport while in transit to Lebanon, and extradited to the US. According to Swedish press reports, the Swedish special police, SAPO, appeared to have cooperated in this manoeuvre: link: http://dn.se/nyheter/sverige/jag-alskar-bin-ladin); see Letter to Minister Kevin Rudd 15 September 2011 http://www.scribd.com/doc/72747954/Letter-Gareth-Peirce-to-Minister-Rudd.

81 *Piratpartiets samarbete med Wikileaks: 'Risk för sämre relation till USA'*, SVT, 18 August 2010, http://www.svt.se/nyheter/sverige/piratpartiets-samarbete-med-wikileaks-risk-for-samre-relation-till-usa (Archive: https://archive.today/hHc1e) See also Annex 1 at para 90.

United States of America in relation to its CIA extraordinary renditions program, which contravenes the United Kingdom's human rights obligations.[82]

81. The United Kingdom and Sweden have an obligation to ensure Mr. Assange's asylum and *non-refoulement*, or at the very least to consider it as a relevant factor when determining the necessity and proportionality of the continued execution of Sweden's arrest warrant.[83] Both Sweden and the United Kingdom have therefore violated their duty to provide concrete assurances that Mr. Assange will never face proceedings where he could be subjected to inhuman or degrading treatment or punishment.[84]

The right to asylum (and the related protection against refoulement) is recognised under customary international law.

82. States must prioritize claims of asylum over bilateral extradition obligations.[85]

83. Significantly, the International Criminal Court (ICC) has recently referred to the right to political asylum (and its related protection against *refoulement*) as having attained the status of *jus cogens*. The ICC found that although it was obliged, by virtue of the terms of Article 93(7) of the ICC Statute, to return three detained witnesses to the Democratic Republic of the Congo (DRC) to stand trial there, it could not fulfil this obligation if to do so would frustrate the right of the detained witnesses to claim asylum from the DRC in territory of The Netherlands.[86]

84. The ICC Appeals Chamber ruled that it was obliged to release witnesses from the ICC detention unit onto Dutch territory, in order to give effect to the

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82 *Globalizing Torture – CIA Secret Detention and Extraordinary Rendition*, Open Society Foundation (2013), pp. 113-117 (UK section), http://www.opensocietyfoundations.org/sites/default/files/globalizing-torture-20120205.pdf

83 In a letter to the Ecuadorian authorities, the Foreign Secretary of the United Kingdom confirmed that the "Government of Ecuador's purported decision to grant diplomatic asylum to Mr. Assange can have no impact on the decision of the UK Courts, and there is no basis for the Courts to re-examine the case." FCO *Note Verbale* October 2012, Annex 8. See also findings of the Swedish District Court, Annex 9.

84 In a press conference on 16 July 2014, the Swedish prosecutor stated "I am not aware of any investigations in the United States". Annex 6. See also Annex 1 and Annex 2.

85 Article 53 of the Vienna Convention on the Law of Treaties requires States to prioritise their duty to fulfil and repect *jus cogens* obligations over bilateral or multilateral treaty obligations.

witnesses' right to claim asylum in The Netherlands.[87] Since the claim was pending before the Netherlands, the ICC had no competence or legal authority to continue to detain them in the ICC detention unit, or to take measures that could interfere with the ability of the Dutch authorities to give effect the witness's right to an effective remedy as concerns their asylum claims.[88]

85. In the same manner that the ICC found that it would be illegal and arbitrary for it to continue to detain the witnesses in the ICC detention unit or to frustrate the ability of the witnesses to enjoy an effective remedy should their application be successful, it is illegal and arbitrary for the United Kingdom to obstruct the right of Mr. Assange to enjoy an effective remedy as concerns his asylum application addressed to Ecuador (i.e. through safe passage to Ecuador).

Diplomatic Asylum Under Customary International Law

86. Although diplomatic asylum is not the only basis for asylum asserted by Ecuador, states have a right under customary international law rule, to grant diplomatic asylum, and this right is universal. Whenever states had been asked to grant to an individual diplomatic asylum, they have done so, in a way that evidenced their belief in an existing customary norm. This is not only the general practice of States, but also a general practice accepted as law, as set out in Article 38(1)(b) of the Statute of the International Court of Justice.[89]

87. Numerous states have promoted the institution of diplomatic asylum, including Australia, Austria, Belgium, Canada, France, Jamaica, Norway

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86 *Prosecutor v. Katanga*, 'Decision on the application for the interim release of detained Witnesses DRC- D02-P-0236, DRC-D02-P-028 and DRC-D02-P-0350', 11 October 2013, ICC-01/04-01/07-3405-tENG, http://www.icc-cpi.int/iccdocs/doc/doc1679507.pdf, at para 30, citing "footnotes 35 and 36 of the Advisory Opinion of the UN High Commissioner for Refugees, cited at footnote 18 of the 9 June 201 Decision; see also Jean Alain, "The Jus Cogens nature of non-refoulement", 13(4) International Journal of Refugee Law (202), pp. 53-58."

87 Order on the implementation of the cooperation agreement between the Court and the Democratic Republic of the Congo concluded pursuant article 93 (7) of the Statute, ICC-01/04-02/12-158, 20 January 2014, para. 24., para. http://www.icc-cpi.int/iccdocs/doc/doc1714058.pdf.

88 Paras. 24-29. The legal basis for these conclusions was article 21(3) of the ICC Statute, which requires the ICC to apply its legal framework in a manner which is consistent with "internationally recognised human rights". Its decision must therefore be considered to be reflective of the international customary law position on this point.

89 Statute of the International Court of Justice, 26 June 1945, 1 UNTS 993.

Spain, Sweden, and the United States.[90] The United Kingdom has frequently granted diplomatic asylum on humanitarian grounds; famously, it was prepared to grant diplomatic asylum to a large number of persons in its Embassy in Tehran under the Shah.[91]

88. There is a rich history of states granting diplomatic asylum throughout the twentieth century. During the Spanish Civil War, fourteen embassies and legations granted asylum in embassies and legations in Spain; eight of these were Latin American, the rest European.[92] In August 1989, West Germany granted diplomatic asylum to numerous East Germans; several states granted diplomatic asylum to various Albanians in 1990. In China in 2002, several foreign embassies granted diplomatic asylum to North Korean defectors and ultimately secured their safe passage. The United States Embassy in Budapest granted diplomatic asylum to Cardinal Mindszenty in the period of 1956 until 1971, when a resolution was brokered by the Pope. In many of these cases the asylees were afforded safe conduct out of the embassy and out of the country.[93]

89. Reports and resolutions drawn up by bodies such as the International Law Association (ILA) and the *Institut de Droit International* point in the same direction as the general practice of states summarized above.[94]

90. The general practice of states in relation to the granting of refuge or asylum, in embassies or legations, is based on a *humanitarian* directive that has entered into general practice accepted as law.[95]

91. In order to be effective, this rule contains the duty of the territorial state to grant safe conduct. As Jamaica observed in 1975, the regime of diplomatic

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90 Annex 15, paras. 3-4.

91 P Sykes, *The Biography of Sir Mortimer Durand* (Cassel & Co, 1926) 233; I Roberts, *Satow's Diplomatic Practice* (6th edn, Oxford University Press, 2009) at [8.26].

92 The other countries included Belgium, Norway, the Netherlands, Poland, Romania, and Turkey. UN General Assembly, *Question of Diplomatic Asylum: Report of the Secretary-General*, 22 September 1975, A/101 39 (Part II) [148].

93 Specifically, the Western German case, the Albanian case, the South Korean case, and the US case granting diplomatic asylum to Chen Guancheng. For citations see generally Annex 15.

94 Annex 15, para. 6.

95 For a detailed analysis of the relevant humanitarian standards, see Annex 15, para. 7.

asylum "will be ineffective without the corresponding obligation of territorial states to grant safe-conduct of the asylees out of the country."[96]

92. Further, the rule of customary international law has been given expression in the Organization of American States (OAS) Treaty on Asylum and Political Refuge of 1939,[97] which has been ratified by 15 OAS states.[98] The 1954 Caracas Convention on Diplomatic Asylum,[99] which also codifies the right to grant diplomatic asylum, as well as the duty of the territorial state to guarantee to safe conduct, has been ratified by 14 OAS states.[100]

93. The Caracas Convention gives expression to this rule of logic and of general international law in Article XII: 'Once asylum has been granted, the state granting asylum may request that the asylee be allowed to depart for foreign territory, and the territorial state is under obligation to grant immediately, except in case of force majeure, the necessary guarantees, referred to in Article V, as well as the corresponding safe-conduct.'

94. Finally, the International Court of Justice in *Asylum*[101] recognized that asylum protects the political offender against any measures of a manifestly extra-legal character which a government might take or attempt to take against its political opponents'.[102] Nonetheless, Peru and many other Latin-American states subsequently became parties to the Treaty on Asylum and Political Refuge of 1939, which broadens the ambit of the right of states to grant diplomatic asylum, as compared to the 1933 Montevideo Convention.

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96 UN Doc A/101039 (1975) (Part I), 'Jamaica'.

97 Treaty on Asylum and Political Refuge, Montevideo, 4 August 1939 (in force, 29 September 1954), OEA/Ser.X/1 Treaty Series 34; (1943) 37 AJIL Supplement 99–103

98 Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, and Peru.

99 Convention on Diplomatic Asylum, Caracas, 28 March 1954 (in force, 29 December 1954), OEA Treaty Series 18.

100 Argentina, Brazil, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Mexico, Panama, Paraguay, Peru, Uruguay, and Venezuela.

101 *Colombian-Peruvian Asylum Case* (Colombia v. *Peru), Judgment, ICJ Reports 1950*, pp. 271–78. For a discussion of why the *Asylum* case does not limit the customary international law rule, see Annex 15, para. 9.

102 *Ibid.* pp. 284.

95. Even if, as a matter of substance, the United Kingdom and Sweden consider that they are not obliged to recognise or give effect to the asylum afforded to Mr. Assange, as a matter of process, they were still obliged to ensure that their disagreement did not effect of depriving Mr. Assange of his liberty in an arbitrary and protracted manner. At the very least, they were obliged to take steps to ensure that their disagreement with Mr. Assange's right to this remedy did not prejudice the following rights:

a.i. His presumption of innocence;

a.ii. His right not to be detained for an unreasonable length of time;

a.iii. His right to defend himself;

a.iv. His right to receive appropriate medical treatment;

a.v. His right to be housed in an appropriate a premises;

a.vi. His right to receive legal advice without being monitored (or without the fear of being monitored);

a.vii. His right to appropriate facilities to receive family visits; and

a.viii. His right to fresh air, sunlight and outside exercise.

ii. The disproportionate nature of the Swedish prosecutor's refusal to interview Mr. Assange outside of Sweden.

96. For over two years, the Prosecutor has refused to consider alternative mechanisms, which would allow Mr. Assange to be interviewed in a manner, which was compatible with his right to asylum. For example, the Prosecutor has rejected requests:

a.i. to interview him *via* video link;

a.ii. to interview him in the premises of the Embassy of Ecuador;

a.iii. to receive his written statement; or

a.iv. to secure assurances from the Swedish authorities regarding *non-refoulement* to the United States of America, should Mr. Assange travel to Sweden for the interview.

97. Even if the decision to issue an arrest warrant against Mr. Assange was in accordance with Swedish law at the time it was issued, the lawful character if this decision, has been vitiated by the disproportionate and grave nature of its consequences.

98. In a press conference delivered on 16 July 2014, and in response to the question why Mr. Assange had not been charged, the prosecutor replied:

> "The Swedish Code of Procedure places obstacles. The Procedural Code requires that we give the suspect a chance to give his version. The Procedural Code requires that the specific accusations are shared with the defendant at an interrogation. The Procedural Code further requires that we give the suspect access to the entire case file before we are able to lay charges. The suspect should have the ability to ask for additional investigative measures. Once all these steps have been taken, it is possible to indict. "[103]

None of the prospective steps detailed by the prosecutor have been taken.

99. The principle of proportionality is a fundamental principle of international law, which applies to the protection of human rights, particularly in the area of deprivation of liberty. For example, remand in custody on criminal charges must be reasonable and necessary in all the circumstances.[104] The WGAD has also referred to principle of proportionality as a principle of international law which influences the right not to be arbitrarily detained. In communications 55/2011 and 4/2011 the WGAD held that:

> "the principle of proportionality always requires that detention be used only as a last resort, and that when it is used, strict legal limitations and effective judicial guarantees must be in place."[105]

100. Mr. Assange has made himself fully available to be interviewed by the Swedish Prosecutor in a range of ways. The Prosecutor has refused to explore any of these options.[106] The arrest warrant should be considered to be a last resort when the Prosecutor has not explored any other possible options.

101. In this regard, even if the Prosecutor had concerns regarding the efficacy of such alternative options, the principle of proportionality dictates that the Prosecutor should first examine in practice whether the alternative methods are indeed inadequate. In a press conference on 16 July 2014, the

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103 See Annex 6

104 See, e.g., 305/1988, Van Alphen v. The Netherlands, para. 5.8; 1369/2005, Kulov v. Kyrgyzstan, para. 8.3.

105 Al Jabouri v. Lebanon, Op No. 55/2011 (2011), para 21; Yambala v. Switzerland, Op No. 4/2011 (2010), para. 18.

106 Annex 11.

Swedish prosecutor said:

> "Even if it were possibly to hold interrogations with [Mr. Assange] at the embassy- I do not know whether it is legally possible -then the question still remains about how would a prosecution, if one were to be brought, be able to be held? How would we conclude this if we wish to prosecute and hold a trial when he has said that he absolutely refuses to come here?
>
> I cannot go into any further detail about the considerations I have made. But in short, these considerations have led to the conclusion that at present there are no reasons to try out this complicated process which would consist in repeated applications for legal assistance in criminal matters. "[107]

It is grossly disproportionate and unreasonable that the Prosecutor simply dismissed these possibilities on the grounds of entirely hypothetical concerns that might never have eventuated.[108]

102. Chapter 23, §4 of the Swedish Code of Judicial Procedure, the primary instrument governing the rights of accused during preliminary investigation, provide that,

> "The investigation should be conducted so that no person is unnecessarily exposed to suspicion, or put to unnecessary cost or inconvenience. The preliminary investigation shall be conducted as expeditiously as possible. When there is no longer reason for pursuing the investigation, it shall be discontinued."

103. A review of Swedish practice, prepared by 16 prominent legal NGOs for submission to the United Nations Human Rights Council, demonstrates that Swedish Prosecutors routinely interview persons outside of Swedish territory, pursuant to international agreements which allow and facilitate such a process.[109] Suspects in both less serious and more serious preliminary investigations have been interviewed in Germany, the United Kingdom, Serbia, and even in the Swedish Consulate in the United States of America.[110]

104. The disproportionality of the Prosecutor's decision is also aggravated

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107 Annex 6.

108 Annex 11.

109 'Joint Submission for the 21st Session of the Universal Periodic Review of the Kingdom of Sweden', paras 31 and 32, http://justice4assange.com/IMG/pdf/NGOs_UPR_Sweden_English_.pdf.

by her failure to take into consideration Mr. Assange's fundamental right to asylum,[111] especially in the context of the refusal of the Swedish authorities to provide assurances regarding *non-refoulement*. The Prosecutor has alternative mechanisms to secure information from Mr. Assange. If Mr. Assange leaves the confines of the Embassy, he forfeits his most effective and potentially only protection against *refoulement* to United States of America. Any hypothetical investigative inconveniences regarding the interview of Mr. Assange by video link or in the Embassy pale into insignificance when compared to the grave risk that *refoulement* poses to Mr. Assange's physical and mental integrity.

105. Since the preliminary investigation has not progressed since 2010, it has not been completed in violation of Mr. Assange's right to a speedy resolution of the allegations against him (as per Article 14(1) of the ICCPR). The existence of a confidential preliminary investigation against Mr. Assange was unlawfully disclosed to the media by the Swedish Prosecution Authority within hours of its commencement, in August 2010[112]. Since that time, Mr. Assange has had no means to dispel this long shadow of suspicion. Whereas the "complainants" have been interviewed several times, Mr. Assange has been deprived of the ability to be heard, and to clear his name. The Prosecutor's refusal to interview him in the Ecuadorian Embassy is therefore contrary to the presumption of innocence and the right to fair proceedings as it prolongs the suspicion against Mr. Assange whilst simultaneously depriving him of the means to contest it.

106. By virtue of the fact that Mr. Assange has been denied the opportunity to provide a statement (which is a fundamental aspect of the *audi alteram partem* principle) and access to exculpatory evidence, Mr. Assange has also been denied the opportunity to defend himself against the allegations. This is contrary to Principle 11(1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.[113]

107. The Prosecutor is also fully aware that the practical consequence of

110 Joint Submission for the 21st Session of the Universal Periodic Review of the Kingdom of Sweden', para. 32.

111 Annex 11. See also Annex 9.

112 Resulting in more than 1.2 million Internet references to Mr. Assange's name and the word "rape", compared to 1.8 million with Mr. Assange's name alone, according to Google search (as of 12 September 2014).

113 See Report of the Working Group on Arbitrary Detention: compilation of national, regional and international laws, regulations and practices on the right to challenge the lawfulness of detention before court, 30 June 2014, para. 11.

this decision is that Mr. Assange is compelled to remain in the confinement of the Ecuadorian Embassy. The Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention, of 2012, stipulate that where asylum seekers are detained, the authorities must "justify it according the principles of necessity, reasonableness and proportionality, showing that less intrusive means of achieving the same objectives have been considered in the individual case".[114] The Prosecutor has failed to comply with this requirement.

108. This failure to consider alternative remedies has has therefore consigned Mr. Assange to a lengthy pre-trial detention, which greatly exceeds any acceptable length for an uncharged person. Mr. Assange has been confined in the Embassy for over two years (approximately 27 months). The maximum sentence which Mr. Assange would face if convicted in Sweden is four years,[115] and under European rules on sentencing, he would be released after two-thirds had been served (after 2 2/3 years or 32 months). Even without including the 10 days in prison and the 550 days under house arrest, Mr. Assange has been detained for 84.37% of the maximum time which he would serve if charged, sentenced, and convicted. Including his detention prior to entering the embassy brings the figure to well over 100%.

109. The duration of such detention is *ipso facto* incompatible with the presumption of innocence.[116] Even though the arrest warrant was issued for the purpose of questioning in order to determine whether the matter will proceed to a formal investigation, the fact that he has now been confined for almost four years due to these allegations will necessary affect and influence

114 Para. 47.v, cited in Report of the Working Group on Arbitrary Detention: compilation of national, regional and international laws, regulations and practices on the right to challenge the lawfulness of detention before court, 30 June 2014, para. 38.

115 Chapter 6 Section 1 of the Swedish Penal Code, http://www.government.se/content/1/c6/04/74/55/ef2d4c50.pdf: "If, in view of the circumstances associated with the crime, a crime provided for in the first or second paragraph is considered less aggravated, a sentence to imprisonment for at most four years shall be imposed for rape. "

116 The United Nations Human Rights Committee has found that "The holding in detention of accused persons pending trial for a maximum duration of a third of the possible sentence facing them, irrespective of the risk that they may fail to appear for trial is incompatible with the presumption of innocence and the right to be tried within a reasonable time or to be released on bail." Ecuador, ICCPR, A/53/40 vol. I (1998) 43 at para. 286. See also Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment 36; Adopted by General Assembly resolution 43/173 of 9 December 1988 ("A detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.").

the appearance of impartiality of Swedish decision-makers.

110. Since both the Swedish Prosecutor and the Stockholm District Court have refused to consider Mr. Assange's confinement under either house arrest or in the Embassy as a form of detention,[117] he has been denied the right to contest the continued necessity and proportionality of the arrest warrant in light of the length of this detention (i.e. his confinement in the Ecuadorian Embassy).

111. This constitutes a violation of the principle that detainees must have the right to contest the continued necessity of their detention on a regular basis in a court of law. This right applies to all situations of deprivation of liberty.[118]

112. In turn, the Courts, Prosecutor and domestic authorities must take measures to protect the detainee against an unreasonable length of pre-trial detention (and asylum seekers from prolonged periods of confinement).[119] Whether it is reasonable and necessary to continue to insist that a person be detained pursuant to an arrest warrant will necessarily change with the effluxion of time, during which the person has been detained.[120]

113. Mr. Assange is effectively serving a sentence for a crime for which he has not even been charged. The Swedish authorities have nonetheless refused to acknowledge that this confinement should be taken into consideration for the purposes of calculating sentence if Mr. Assange were to be convicted of any crime.[121] His continued confinement therefore exposes him to a likely violation of *nemo debet bis vexari pro una et eadem causa*; if convicted in Sweden, he will be forced to serve a further sentence in relation to conduct for which he has already been detained.[122] This is contrary to Article 14(7) of the

117 Annexes 9 and 11.

118 See Report of the Working Group on Arbitrary Detention: compilation of national, regional and international laws, regulations and practices on the right to challenge the lawfulness of detention before court, 30 June 2014, para. 15.

119 Mansour Ahani v. Canada, Communication No. 1051/2002, U.N. Doc. CCPR/C/80/D/1051/2002 (2004), para. 10.2.

120 Mansour Ahani v. Canada, Communication No. 1051/2002, U.N. Doc. CCPR/C/80/D/1051/2002 (2004, para. 10.2.

121 Annexes 9 and 11.

122 In the Prosecutor v. Blaskic, ICTY President Cassese observed that "it is widely specified in

ICCPR. His continued confinement in the Embassy beyond the period of 32 months (which will be February 2015) would also give rise to a category I form of arbitrary detention.

iii. The absence of any form of judicial review or remedy concerning the prolonged confinement and the extremely intrusive surveillance, to which Mr. Assange has been subjected.

114. Athough the United Kingdom indicated in 2012 that it would establish a working group to regulate Mr. Assange's situation, it has failed to do so, thus depriving Mr Assange and the Ecuadorian authorities of a mechanism through which they could attempt to resolve or mitigate violations of Mr. Assange's rights.[123] Both the United Kingdom and Sweden have refused to recognise Mr. Assange's confinement as a form of detention, and as such he has had no means to seek judicial review as concerns the length and necessity of such confinement in the Embassy.[124]

115. As set out above and in Annex 1, Mr. Assange has been continuously subjected to highly invasive surveillance for the last four years. Mr. Assange has never been disclosed the legal basis for these particular surveillance measures,[125] and in fact has little ability to do so as the United States national security investigation against him is still underway.

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national legislation and held by courts that house arrest is a form or class of detention, for all purposes including the right to impugn the legality of detention and the right to have the period spent under house arrest to be taken into account for determining the penalty". Decision on Motion of the Defence Filed Pursuant to Rule 64 of the Rules of Procedure and Evidence, 3 April 1996, para. 18 http://www.icty.org/x/cases/blaskic/tdec/en/960403.pdf.

123 E. Addley, *Julian Assange has had his human rights violated, says Ecuador foreign minister,* The Guardian, 17 August 2014, http://www.theguardian.com/media/2014/aug/17/julian-assange-human-rights-violated-ecuador.

124 Annexes 9 and 11, As confirmed in the above-cited Blaskic decision, international practice requires that all forms of house arrest must be subject to judicial review:Decision on Motion of the Defence Filed Pursuant to Rule 64 of the Rules of Procedure and Evidence, 3 April 1996, para. 18 http://www.icty.org/x/cases/blaskic/tdec/en/960403.pdf.

125 Annex 1, Annex 2. The legal procedures governing a monitoring regime must be publicly accessible: Liberty v. United Kingdom, Application no. 58243/00, Judgment, 1 July 2008, paras 60-69 The power to monitor communications or persons cannot be open-ended or unfettered, but must be regulated by appropriate safeguards: Weber and Saravia v. Germany, 54934/00, Admissibility decision of 29 June 2006.

116. He has thus been deprived of the ability to contest their necessity or proportionality. These intrusions must be considered in light of the context of Mr. Assange's work as a publisher, and the impact that they have had on his freedom of speech and the freedom of the press.[126]

117. The cost of policing the embassy has been estimated at £7.3 million to date (£9,000/day).[127] A Freedom of Information Act request submitted in April 2014, which requested a breakdown of the cost of policing the embassy, was rejected on "national security" grounds *inter alia*.[128] This expenditure and the related surveillance measures clearly exceed the range of measures, which are either necessary or proportionate as concerns the simple execution of an arrest warrant.

118. Such "round the clock" surveillance is a gross deprivation of privacy (and thus personal liberty), and, over a prolonged period, can constitute inhumane treatment due to its psychological effects.[129] The intrusive nature of this surveillance has also undermined his right to receive legal advice in a confidential setting. As noted above, listening devices have been discovered in the premises of the Embassy. As found by the ECtHR, the right to effective representation will be rendered illusory in circumstances in which the defendant could be monitored irrespective as to whether the defendant is monitored in each instance.[130]

119. It must also be emphasised that the current surveillance regime is part of an ongoing campaign of surveillance, and deprivation of liberty, which commenced in 2010. This campaign has targeted Mr. Assange's right to free speech and political belief, free movement, privacy, and privileged legal communications.[131]

120. Most importantly, by vilifying him as an enemy of the state and a "high

126 Letter from Press NGOs to AG Holder, Annex 14.

127 The cost estimate is based on this article: http://www.lbc.co.uk/cost-of-policing-assange-embassy-rises-to-65m-92344. The website http://govwaste.co.uk/ tracks the cost of policing the Ecuadorian embassy in London in real time. Accessed 9 September 2014

128 Freedom of Information Request to the Metropolitan Police Service (MPS) Reference No: 2014040002635;
https://www.whatdotheyknow.com/request/julian_assange_detention_costs#outgoing-359068.

129 Aguilar v. Bolivia, Op No. 12/2005 (2005), para 13; Op No. 13/2007 (Vietnam), para. 20.

130 *Castravet v. Moldavia*, ECHR,(Application no. 23393/05) 13 March 2007, para 51. See also S. v. Switzerland, judgment of 28 November 1991, Series A no. 220, pp. 15-16, § 48

tech terrorist", this campaign has engendered a significant risk as concerns his physical safety.[132] A columnist in the Washington Times wrote that "We should treat Mr Assange the same way as other high-value terrorist targets: Kill him."[133] The former Chief of Staff to Vice-President Dan Quayle proposed the following in the Weekly Standard: "Why can't we act forcefully against WikiLeaks? Why can't we use our various assets to harass, snatch or neutralize Julian Assange and his collaborators, wherever they are?"[134]

121. When the Washington Times published a blood spattered depiction of Mr. Assange in the cross-hairs of a rifle,[135] the United States authorities took no steps to condemn such actions, notwithstanding the Senator Gifford precedent.[136] The refusal of the United Kingdom and Sweden to either recognise Mr. Assange's asylum in a safe country such as Ecuador or provide assurances must be viewed as particularly arbitrary and unlawful in light of their positive duty to ensure that he is not subjected to such a clear risk of harm.[137]

122. Mr. Assange is also been deprived of the ability to be informed of the legal nature of these measures or to contest them in a court of law.[138]

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131 Annex 1, pp. 1-24

132 See Annex 3.

133 J. Kuhner, 'Assassinate Assange?', Washington Times 2 December 2010, http://www.washingtontimes.com/news/2010/dec/2/assassinate-assange/?page=2

134 W. Kristol, 'Whack WikiLeaks: *And there's a role for Congress*', The Weekly Standard 30 November 2010, http://www.weeklystandard.com/blogs/whack-wikileaks_520462.html

135 Available at: http://media.washtimes.com/media/image/2010/12/02/B1_Kuhner_GGa_s877x996.jpg?7342cecbb1aff29fb302ca9eefb175808a67a8af; The accompanying article (cited above) was at http://www.washingtontimes.com/multimedia/image/b1-kuhner-ggajpg/

136 Senator Gifford was shot at a political rally after a photograph was published of her in the 'cross-hairs' of her political opponents. http://gawker.com/5728545/shot-congresswoman-was-in-sarah-palins-crosshairs

137 As found by the Human Rights Committee in the context of asylum seekers, " the right to be free from torture requires not only that the State party not only refrain from torture but take steps of due diligence to avoid a threat to an individual of torture from third parties." Mansour Ahani v. Canada, Communication No. 1051/2002, U.N. Doc. CCPR/C/80/D/1051/2002 (2004), para. 10.6.

138 Silver and others v United Kingdom [1983].

Notwithstanding the submission of multiple Freedom of Information requests, neither the United Kingdom nor the United States authorities have provided him with any information on these matters under the basis that the investigations against him are ongoing. The fact that Mr. Assange has been denied the right to contest such measures is both a denial of his right to challenge such interference with his liberty and privacy, and a denial of his right to an effective remedy (which is a peremptory norm of international law).[139]

123. Mr. Assange is effectively in a legal vacuum concerning these issues, and is residing in prolonged state of uncertainty, which is in itself, severely deleterious to his mental health, and contrary to the due process requirements set out in the above *Amuur* and *Riad* cases.

124. The cumulative effect of the above conditions is the creation of a state of severe mental anguish and distress, particularly since this situation appears likely to continue indefinitely. As found by the ECtHR in relation to the situation of persons detained pursuant to indefinite immigration orders, "uncertainty regarding their position and the fear of indefinite detention must, undoubtedly, have caused the applicants great anxiety and distress, as it would virtually any detainee in their position."[140]

125. The prospect of indefinite confinement is, in itself, is a violation of the requirement set out by the Human Rights Committee that a maximum period of detention must be established by law, and upon expiry of that period, the detainee must be automatically released.[141]

iv. The absence of required conditions for prolonged detention of this nature (such as medical treatment and access to outside areas).

126. Notwithstanding Mr. Assange's appreciation for the ongoing

139 In the matter of El Sayed, 'Order Assigning the Matter to the Pre-Trial Judge', CH/PRES/2010/01, paras. 26 and 35, http://www.stl-tsl.org/en/the-cases/in-the-matter-of-el-sayed/main/filings/orders-and-decisions/president-s-office/f0001-6.

140 A. and Others v. The United Kingdom, Application no. 3455/05 , Judgment of the Grand Chamber, 19 February 2009, para. 130

141 A/HRC/13/30, para. 61, cited in Report of the Working Group on Arbitrary Detention: compilation of national, regional and international laws, regulations and practices on the right to challenge the lawfulness of detention before court, 30 June 2014, para. 40.

protection extended to him by the Embassy of Ecuador, the Embassy is nonetheless exactly that, an Embassy and not a house or detention center equipped for prolonged pre-trial detention.

127. For the purposes of this urgent application, the most concerning aspect is the lack of appropriate and necessary medical equipment or facilities. As can be verified by WGAD through a visit to the Embassy, Mr. Assange's health were to deteriorate or if he were to have anything more than a superficial illness, his life would be seriously at risk.

128. The lack of access to medical and dental facilities runs contrary to Principle 24[142] of the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and Article 22 of the Standard Minimum Rules for the Treatment of Prisoners.[143]

129. The likelihood of Mr. Assange''s health deteriorating increases the longer Mr. Assange remains detained in the Embassy. Mr. Assange has no access to direct sunlight (and thus Vitamin D) or fresh air. This in turn, violates the requirement that all detainees must be afforded at least one hour of exercise outside, weather permitting.[144] Further, it violates the requirements that in accommodating detainees there must be "due regard" to "climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation."[145]

130. Due to limited space within the Embassy, Mr. Assange is unable to meet with his lawyers in a privileged setting, contravening Article 93,[146] and it

142 "A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge."

143 "22. ... (2) Sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitable trained officers.(3) The services of a qualified dental officer shall be available to every prisoner."

144 Article 21(1) of the Standard Minimum Rules. ("Every prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits.").

145 Article 10 of the Standard Minimum Rules.

146 "93. For the purposes of his defence, an untried prisoner shall be allowed to apply for free legal aid where such aid is available, and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him confidential instructions. For these purposes, he shall if he so desires

is also not feasible to receive family visits in such an environment, contravening Article 92.[147]

CONCLUSION

131. This is an application framed by political events, but at its heart, it is about a person who has been deprived of his liberty in an arbitrary manner for an unacceptable length of time. If all the names, details and events were redacted, it could be distilled to the simple and irrefutable fact that a political refugee, who has never been charged, has been deprived of their liberty for nearly four years, and confined in a very small space for over two years. The matter has come to a head because his mental and physical health are imperiled. This situation does not only affect him, but also his young children who are being denied the protection and affection of their father. The situation is in urgent need of a remedy. WGAD has both the power and the duty to grant it.

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be supplied with writing material. Interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official."

147 "92. An untried prisoner shall be allowed to inform immediately his family of his detention and shall be given all reasonable facilities for communicating with his family and friends, and for receiving visits from them, subject only to restrictions and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution."

BILAGA 9

ANNEMIE SCHAUS
as@juscogens.be

CHRISTOPHE MARCHAND
+32 (0)486 32 22 88
cm@juscogens.be

VINCENT LETELLIER
+32 (0)477 20 61 91
vl@juscogens.be

DOUNIA ALAMAT
+32 (0)470 57 59 25
da@juscogens.be

NICOLAS COHEN
+32 (0)470 02 65 41
nc@juscogens.be

CHARLOTTE MORJANE
+32 (0)498 60 72 45
cmo@juscogens.be

CRÉPINE UWASHEMA
+32 (0)488 31 39 13
cu@juscogens.be

LOUISE LAPERCHE
+32 (0)472 45 00 65
ll@juscogens.be

JA Swed. Litigation - LEGAL NOTE 7 – February 2015 – Schaus, Marchand and Chihaoui - Brussels

Indirect Refoulement by Sweden

To be inserted in the submission at the Swedish Supreme Court

The Supreme Court of Sweden must examine the foreseeable consequences of bringing Julian Assange to Sweden in order to evaluate the grounds that sustain Julian Assange's reasonable fear and the real risk of his refoulement. Those grounds are based on Sweden's record on refoulement despite risks of torture or IDTP (A), on Sweden's attitude towards political opponents (B) and journalists (C). All these elements must be added to Julian Assange's fear of the high probability of being extradited (D) considering the Swedish Policy towards extradition with the USA (E). The Republic of Ecuador has assessed these risks and made a positive finding that the risk of refoulement, inhuman and degrading treatment, and of persecution on grounds of Mr. Assange's political beliefs exist and has granted him asylum on this basis.

A) Swedish Record of Refoulement: general

I. Condemnations by the EctHR [1]

a) In the case *Bader and Kanbor v. Sweden* (8 November 2005), the ECtHR recalls its principle established by the Grand Chamber in *Öcalan v. Turkey* that implies that "to impose a death sentence on a person after an unfair trial would generate, in circumstances where there exists a real possibility that the sentence will be enforced, a significant degree of human anguish and fear, bringing the treatment within the scope of Article 3 of the Convention"[2]. The Court found that the deportation by Sweden of the applicants to Syria would give rise to violations of Articles 2 and 3 of the Convention if it was implemented[3].

1 http://www.echr.coe.int/Pages/home.aspx?p=press/factsheets&c=#n1347951547702_pointer

2 ECtHR, 08/11/2005, Bader and Kanbor v. Sweden, No. 13284/04, para. 42.

3 Ibidem, paras. 43-48.

Tel +32 (0)2 213 60 70 | Fax +32 (0)2 503 62 08 | www.juscogens.be
Rue du Marché au Charbon 83 B-1000 Bruxelles | Kolenmarktstraat 83 B-1000 Brussel
Christophe Marchand SC-SPRL BCE 0839.841.638 | Nicolas Cohen : Avocat au barreau de Paris, établi à Bruxelles

b) In the *N. v. Sweden* case (20 July 2010), an Afghan woman applied for asylum because of her fear of gender-based persecution. Sweden rejected her application and found that the applicant had not demonstrated that she had a well-founded fear of persecution because of her previous work as a women's teacher since the previous Taliban ban on education for women had been removed[4]. The Court, unlike Sweden, found "that there are substantial grounds for believing that if deported to Afghanistan, the applicant faces various cumulative risks of reprisals which fall under Article 3 of the Convention from her husband X, his family, her own family and from the Afghan society"[5].

c) In the case of *I v. Sweden* (5 September 2013), the Court said that "in principle it is for the person to be expelled to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he or she would be exposed to a real risk of being subjected to treatment contrary to Article 3. Where such evidence is adduced, it is for the Government to dispel any doubts about it."[6]

2. Committee Against Torture (CAT)

In *A.S. v. Sweden*[7] (15 February 2001), the claimant, an Iranian national, has seen her asylum request refused because she "has not fulfilled her obligation to submit the verifiable information that would enable her to enjoy the benefit of the doubt"[8]. However, the Committee was "of the view that the author has submitted sufficient details regarding her *sighe* or *mutah* marriage and alleged arrest, such as names of persons, their positions, dates, addresses, name of police station, etc., that could have, and to a certain extent have been, verified by the Swedish immigration authorities, to shift the burden of proof. In this context, the Committee is of the view that the State party has not made

4 ECtHR, 20/07/2010, N. v. Sweden, No. 23505/09, para. 12.

5 Ibidem, para. 62.

6 ECtHR, 05/09/2013, I v. Sweden, No. 61204/09, para 62.

7 A.S. v. Sweden, CAT/C/25/D/149/1999, UN Committee Against Torture (CAT), 15 February 2001, available at: http://www.refworld.org/docid/3f588ecc7.html [accessed 20 February 2015]

8 Ibidem, para 8.6.

sufficient efforts to determine whether there are substantial grounds for believing that the author would be in danger of being subjected to torture". The Committee concluded by reminding Sweden about its "obligation, in accordance with article 3 of the Convention, to refrain from forcibly returning the author to Iran or to any other country where she runs a risk of being expelled or returned to Iran"[9].

Those cases demonstrate that Sweden had imposed an austere evidentiary burden of proof when it comes to assess a well-founded fear of torture or IDTP that its "interpretation on several aspects relating to the standard of proof is inconsistent with the international regulation"[10].

B) Swedish Record of Refoulement: political opponents

Julian Assange is a political refugee, and as such, he has a legitimate fear of political persecution in any form whatsoever. By a general review of Sweden's attitude regarding the particular category of political opponents, it appears most of the time that Sweden has a very restrictive point of view in its protection of this category of refugees compared with other institutions and countries:

1. ***Condemnations at the ECtHR:***

   a) In *R.C. v. Sweden* (9 March 2010) at the ECtHR the applicant was a Shia Muslim involved in activities critical of the governing political regime[11]. The Court decided that "having regard to its finding that the applicant has discharged the burden of proving that he has already been tortured, the Court considers that the onus rests with the State to dispel any doubts about the risk of his being subjected again to treatment contrary to Article 3 in the event that his expulsion proceeds"[12]. The Court found that there were substantial grounds for believing that he would be exposed to a real

9 Ibidem, para 9.

10 Ida Järvegren, The Principle of Non-Refoulement in Swedish Migration Law - Master thesis (Supervisor: Gregor Noll), Lund University, 2011, p.57.

11 ECtHR, 09/03/2010, R.C. v. Sweden, No. 41827/07, para 9.

12 ECtHR, 09/03/2010, R.C. v. Sweden, No. 41827/07, para 55.

risk of being subjected to treatment contrary to article 3. However, the Swedish judge Fura of the ECtHR stated a dissenting opinion by which he considers that: *"The fact that the applicant has in all probability been tortured in Iran is not enough in itself to substantiate that he runs a real risk of being tortured again if returned. Here my views differ from the majority (see paragraph 55). The majority's opinion that the onus rests with the State to dispel any doubts about the risk of the applicant's being subjected again to treatment contrary to Article 3 in the event that his expulsion proceeds does not follow the established case-law of the Court (see Saadi, among other authorities). Furthermore, I have difficulties to see how, in practice, a State should proceed in order to achieve this aim."*[13]

This opinion reflects the restrictive Swedish approach towards the question of the burden of proof when it comes to a risk of violation of article 3 related to a political persecution.

b) In the case of *S.F. and others v. Sweden* (15 May 2012), the ECtHR had to decide whether the decision of Sweden to deport an Iranian family was in violation of article 3 of the ECHR. The family was composed of a political singer (singing political music for the Kurdish cause in Iran) who has been sentenced to 12 months' imprisonment for political activity and his wife, who was a journalist working for Newroz TV, a Kurdish TV channel which was banned in Iran, and their son born in Sweden in 2009. Sweden considered that "it was not probable that the Iranian authorities would show an interest in someone at such a low level as the first applicant. Furthermore, the political activities in Sweden had been limited in scope and the applicants had not been able to show that these activities were of any interest to the authorities."[14]

c) In the case of *F.N. v. Sweden* (18 December 2012), Sweden had been contradicted by the Court stating that the applicants, four Uzbek nationals,

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13 Dissenting Opinion Of Judge Fura in R.C. v. Sweden, para 13. http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"docname":["\"CASE OF R.C. v. SWEDEN\""],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-97625"]}

14 ECtHR, 15/05/2012, S.F. and others v. Sweden, No. 52077/10, para 22.

would face a real and personal risk of being detained and subjected to ill-treatment contrary to article 3 of the Convention if returned to Uzbekistan[15].

2. *Condemnations by the Committee Against Torture (CAT)*

a) *Karoui v. Sweden* (25 May 2002). During the time before the Arab Spring occurred in Tunisia, Sweden rejected the application for asylum of a political opponent to the dictatorial regime, M. Karoui, because it questioned his credibility and that "the complainant's political activities were of minor character and at a low level within the organization"[16]. The Committee concluded instead that Mr. Karoui "has provided sufficient reliable information for the burden of proof to shift" and that his removal to Tunisia would have constituted a breach of article 3 of the Convention[17].

b) *T.A. and S.T. v. Sweden* (27 May 2005). Ms. T.A. was an active member of the Jatiya Party in Bangladesh. Although Sweden "did not dispute that she had been tortured and raped (...) (It) concluded that these acts could not be considered to be attributable to the State of Bangladesh but had to be regarded as the result of the actions of individual policemen"[18]. Sweden

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15 ECtHR, 18/12/2012, F.N. and others v. Sweden, No. 28774/09, par 79.

16 UN Committee Against Torture (CAT), 25 May 2002, Chedli Ben Ahmed Karoui v. Sweden, CAT/C/28/D/185/2001, para. 2.12, available at: http://www.refworld.org/docid/3f588ec03.html [accessed 18 February 2015].

17 UN Committee Against Torture (CAT), 25 May 2002, Chedli Ben Ahmed Karoui v. Sweden, CAT/C/28/D/185/2001, para 10, available at: http://www.refworld.org/docid/3f588ec03.html [accessed 18 February 2015].

18 UN Committee Against Torture (CAT), T.A. and S.T. v. Sweden, U.N.Doc. CAT/C/34/D/226/2003 (2005), Communication No. 226/2003, U.N. Doc., para 2.6.

added that "because of the political change in Bangladesh there were no reasonable grounds for believing that she would be subjected to arrest and torture by the police if returned to her country"[19], even though the Committee considered "that substantial grounds exist for believing that Ms T. A. may risk being subjected to torture if returned to Bangladesh".

c) *C.T. and K.M. v. Sweden*[20] (22 January 2007): Two Rwandan nationals, C.T. and her son K.M., complained about a violation of article 3 if deported to Rwanda because of her involvement in the PDRUbuyanja Party and because she attended political meetings, after which she has been tortured. Sweden refused her application for asylum due to lack of credibility and the political developments in Rwanda[21]. The Committee considered that substantial grounds existed for believing that the complainants would be in danger of being subjected to torture if expelled to Rwanda[22].

d) *Njamba and Balikosa v. Sweden*[23] (3 June 2010) is a case involving two Congolese nationals, a mother and her daughter. Ms. Njamba's husband and three of her children disappeared after having been threatened due to their political involvement on behalf of the rebels. While Sweden

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19 Ibidem., para 2.8

20 CAT, 22 January 2007, C.T. and K.M. v. Sweden, U.N. Doc. CAT/C/37/D/279/2005 (2007), Comm. No. 279/2005, available at: http://www1.umn.edu/humanrts/cat/decisions/279-2005.html

21 Ibidem, paras 1.1 and 2.1-2.2.

22 Ibidem, paras 7.6-7.7. "The Committee recalls its jurisprudence that complete accuracy is seldom to be expected by victims of torture and that such inconsistencies as may exist in the complainant's presentation of the facts are not material and do not raise doubts about the general veracity of her claims, especially since it has been demonstrated that she was repeatedly subjected to rape in detention".

23 Eveline Njamba and Kathy Balikosa v. Sweden, CAT/C/44/D/322/2007, UN Committee Against Torture (CAT), 3 June 2010, available at: http://www.refworld.org/docid/4eeb34202.html [accessed 21 February 2015]

considered that the risk of torture had not been substantiated, the Committee reminded that "the risk need not be highly probable, but it must be foreseeable, real and personal, and present"[24] and found that "substantial grounds exist for believing that the complainants are in danger of being subjected to torture if returned to the Democratic Republic of the Congo"[25].

e) *Aytulun and Güclü v. Sweden*[26] (3 December 2010). The claimants were active members in the Kurdish Worker's Party (the PKK) in Turkey. Sweden questioned "whether there is a risk of the first-named complainant being of interest to the PKK now, considering the time that had elapsed since he left Turkey. It submits that if such risk exists he would most certainly be able to obtain protection from the Turkish authorities"[27]. The Committee noted "that the complainant was a member of the PKK for 14 years; and that there are strong indications that he is wanted in Turkey, to be tried under anti-terrorist laws and thus is likely to be arrested upon arrival and subjected to enforced confessions. In light of the foregoing, the Committee considers that the complainants have provided sufficient evidence to show that the first-named complainant personally runs a real and foreseeable risk of being subjected to torture were he to be returned to his country of origin"[28].

This case-law justifies a well-founded fear of a real risk of ill-treatment related to the reluctance of Swedish authorities to extent its protection to political opponents.

C) Prosecution of journalists for espionage: a bad example from the past and the Press Act

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24 Ibidem, 9.4.

25 Ibidem, 9.6.

26 Munir Aytulun and Lilav Guclu v. Sweden, CAT/C/45/D/373/2009, UN Committee Against Torture (CAT), 3 December 2010, available at: http://www.refworld.org/docid/5034ec0b2.html [accessed 21 February 2015]

27 Ibidem, 4.13.

28 Ibidem, 7.7

In 1973 Sweden faced an important scandal in the popularly known "IB Affair". The journalists involved, Peter Bratt and Jan Guillou, who revealed the existence and the activities of a secret Swedish intelligence agency and its cooperation with the American Central Intelligence Agency, proceeded to publication of the information after they "considered what legal risks they might incur[29] (...) assured in general by the Freedom of the Press Act, and in particular by the advice of a penal law expert"[30]. Despite these precautions, the Swedish courts found them guilty of espionage. These decisions "effectively deprived the journalists of the array of press protections they expected would be available to them as Press Act defendants" while "it was clear that they might have been charged under the Press Act"[31].

A long time has passed since those embarrassing events occurred and, beside the fact that Julian Assange is not prosecuted for his journalistic activities in Sweden but likely will be in the United States, it is still a troubling precedent that raise legitimate concerns about the uncommonly aggressive prosecution that can be led towards journalists and the hostility that can emerge from Swedish officials.

Moreover, the Freedom of the Press Act appears to be of no help to stem Julian Assange's fear when it provides a list of circumstances in which official documents may be restricted from public dissemination that include situations involving "the security of

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29 Campbell, Dennis, "Free Press in Sweden and America: Who's the Fairest of Them All?", Southwestern University Law Review, Vol. 8, Issue 1 (1976), p.79 (pp. 61-108), citing Stockholms Tingsratt, B 653/73 at 8-23; Svea Hovratt, DB37, B 195/74 at 4-9.

30 Id., "The journalists consulted Professor Gbran Elwin, identified by the trial court as an expert on Swedish penal law. See Stockholms Tingsratt, B 653/73 at 8."

31 Campbell, Dennis, op.cit., p. 80 "By charging Bratt and Guillou under the Penal Code, the prosecution circumvented certain protections that would have attended a Press Act prosecution, such as a jury trial. The prosecution also limited the application of other protections, such as the right of anonymity and the system of designated responsibility that the journalists might have claimed. By characterizing Guillou's criminality in terms only of his information-gathering role, the court of appeal, notwithstanding that Guillou was a staff member of the magazine which published the articles, cast him as an informant, not an author, subjecting him to a Press Act exception by which informants in espionage cases may be prosecuted under the Penal Code."

the Realm or its relations with another state or an international organization"[32].

More concerningly yet, the Press Act contains a number of offences against the freedom of the press including espionage, trafficking, distribution, conspiracy and carelessness in relation to secret information, including "unauthorised trafficking in secret information, whereby a person, without due authority but with no intent to assist a foreign power, conveys, consigns or discloses information concerning any circumstance of a secret nature ... regardless of whether the information is correct; any attempt or preparation aimed at such unauthorised trafficking in secret information; conspiracy to commit such an offence" and "carelessness with secret information, whereby through gross negligence a person commits an act referred to".[33] These statements leave much room for interpretation and open up the possibility of satisfying the dual criminality requirement in a US extradition. It is possible that extraditing Mr Assange could be justified as maintaining relations with the United States[34].

D) Expedited Rendition Record

1. Swedish non-suspensive proceeding in asylum

It is important for the individual and the general assessment of Julian Assange's well-founded fear to understand that it is the prospect of an unfair trial in the United States for his political and journalistic activity, and the torture and persecution that would

32 See TRYCKFRIHETSFORORDNINGEN [TF] [CONSTITUTION] 2:2 (Swed.). "The Freedom of the Press Act allows the restriction of official documents in situations involving: (1) the security of the Realm or its relations with a foreign state or an international organization; (2) the central finance policy, monetary policy, or foreign exchange policy of the Realm; (3) the inspection, control or other supervisory activities of a public authority; (4) the interest of preventing or prosecuting crime; (5) the public economic interest; (6) the protection of the personal integrity or economic conditions of private subjects: or (7) the preservation of animal or plant species." Cited by, "The Prospect of Extraditing Julian Assange", North Carolina Journal of International Law and Commercial Regulation, Vol.37, 2011-2012, p. 902

33 Chapter 4(3) and 7.4(4) of the Press Act.

34Molly Thebes, ibidem. "Regardless, it is unclear whether Sweden's security interest could be extended to include the interests of allies, such as coalition forces in Iraq and Afghanistan" she adds.

follow.

Julian Assange's fear of expedited rendition is based on the fact that the Swedish judicial system does not provide for safeguard against it because of the accelerated procedures and the non-suspensive effect of appeals, which impacts upon the substantive examination of asylum claims[35]. Indeed, "in Sweden, accelerated procedures (even though this term is not used as such in Sweden) impacts upon the substantive examination of asylum claims, as no legal assistance is available for applicants in such procedures and there is no suspensive effect for appeals, in cases considered to be manifestly unfounded or related to the application of the Dublin II Regulation. When subsequent asylum applications are submitted because of new circumstances, there is a fast process in which the applicant has no right to legal assistance and there is no suspensive effect for appeals."[36]
The procedure of refoulement in security cases raises some concern since there is no possibility of review by a legal entity under a inquisitorial proceeding and a government "can give preference to national interest at the expense of individual human rights"[37] as has been revealed by the *Alzery and Agiza* case.

Indeed in the Alzery case, the applicant had been transferred from Sweden to Egypt **"on the same day** that their asylum applications were rejected by the Swedish government on security grounds"[38], where they were detained and subjected to extremely harsh prison conditions, beatings and electric shocks[39] in direct contravention of diplomatic assurances Egypt had provided to Sweden[40]. Sweden would also have assisted the CIA in the kidnapping of Agiza.

2. ***Disturbing behaviour of Swedish authorities revealed by the Alzery and***

35 ECRE/ELENA, Research on ECHR Rule 39 Interim Measures, April 2012, p. 59-60.

36 ECRE/ELENA, Research on ECHR Rule 39 Interim Measures, April 2012, p. 60, available at http://www.ecre.org/component/content/article/56-ecre-actions/272-ecre-research-on-rule-39-interim-measures.html [consulted on 21/02/2015].

37 Ida Järvegren, The Principle of Non-Refoulement in Swedish Migration Law - Master thesis (Supervisor: Gregor Noll), Lund University, 2011, p.57.

38 Alzery, Communication No. 1416/2005, 3.10-3.11; Agiza, Communication No. 233/2003, 2.5

39 Alzery, Communication No. 1416/2005, 3.15; Agiza, Communication No. 233/2003, 2.5-2.8

40 Alzery, Communication No. 1416/2005, 3.6-3.7; Agiza, Communication No. 233/2003, 4.12.

Agiza cases

a) **Politicians shirking their responsibility and the use of diplomatic assurances**

In the midst of the controversy over Agiza and Alzery, "the Swedish government continues to claim that if there were any breaches of the assurances, responsibility lies solely with Egypt."[41]

Human Right Watch reported that "in a telling interview on March 4, 2005, Hans Dahlgren, Sweden's State Secretary for Foreign Affairs stated: "Actually, we don't really know whether these guarantees have been adhered to by the Egyptian government. As you know, there have been accusations that they were broken. First of all, that both men have been subject to maltreatment, of the kind that would not be permissible under the guarantees that were given. However, the government of Egypt itself denies these allegations quite strongly."[42]

Though the nature of diplomatic assurances is controversial[43], they are 'unenforceable promises': a country that breaches them is unlikely to experience any serious consequences if the assurances are violated"[44]. They are, thus, unable to guarantee

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41 Human Rights Watch meeting with MFA officials, J2 June 2004, noted on file with Human Rights Watch, cited in Human Rights Watch, Still at Risk: Diplomatic Assurances No Safeguard Against Torture, April 2005, Vol. 17, No. 4(D), p. 62.

42 BBC Radio 4, Today Programme, [What would it mean for terrorist suspects if the government did get its Prevention of Terrorism Bill through parliament?], 4 March 2005, at 8:30 [online] http://www.bbc.co.uk/radio4/today/listenagain/zfriday_20050304.shtml (retrieved March 18, 2005).

43 Christopher Michaelsen, "The Renaissance Of Non-Refoulement? The Othman (Abu Qatada) Decision Of The European Court Of Human Rights", International and Comparative Law Quarterly, 61, pp 750-765

44 Amnesty International, 'Diplomatic Assurances: No Protection against Torture and Ill-Treatment', 2005, AI Index: ACT 40/021/2005 (1 December 2005) <http://www.amnesty.org/en/library/info/ACT40/021/2005>; Human Rights Watch, '"Empty Promises": Diplomatic Assurances No Safeguard Against Torture', 2004, HRW 16(4) (D) <http://www.hrw.org/sites/default/files/reports/diplomatic0404.pdf>; Human Rights Watch,

Julian Assange's safety.

In *Agiza v. Sweden,* the Committee Against Torture found that, due to Egypt's reputation for torturing detainees held for political and security reasons, Sweden knew or should have known at the time of Agiza's removal that he would be at a real risk of torture in Egypt; thus, Sweden had violated Article 3 of the CAT by allowing his removal."[45]

The Swedish Chief Parliamentary Ombudsman, Mats Melin, who investigated those cases, concluded that the Swedish security service and airport police "**were remarkably submissive to the American officials**" and "lost control of the enforcement", resulting in the ill-treatment of Ahmed Agiza and Mohammed El-Zari, including physical abuse and other humiliation, at the airport immediately before they were transported to Cairo."[46]

The former Commissioner for Human Rights, Swedish diplomat and human rights advocate Thomas Hammarberg, took a more hard-line position, opposing reliance on diplomatic assurances under any circumstances: "Diplomatic assurances (...) are not credible and have also turned out to be ineffective in well-documented cases. The governments concerned have already violated binding international norms and it is plain wrong to subject anyone to the risk of torture on the basis of an even less solemn undertaking to make an exception in an individual case. In short, the principle of non-refoulement should not be undermined by convenient, non-binding promises of such kinds."[47]

'Still At Risk: Diplomatic Assurances No Safeguard Against Torture', 2005, HRW 17(4) (D) http://www.hrw.org/sites/default/files/reports/eca0405.pdf, cited by C. Michaelsen, p.752.

45 Agiza, Communication No. 233/2003, 13.4.

46 Transportation and illegal detention of prisoners: European Parliament resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (2006/2200(INI)), Eur. Parl. Doc. P6_TA(2007) 0032, (Feb. 14, 2007), pt. 99-103.

47 Thomas Hammarberg, Council of Europe Commissioner for Human Rights, "Viewpoints: Torture Can Never, Ever Be Accepted," 27 June 2006, cited in Alice Izumo, "Diplomatic Assurances Against Torture And Ill-Treatment: European Court Of Human Rights Jurisprudence", Columbia Human Rights Law Review, vol.42, 2010-2011, p. 245 .http://www.coe.int/newssearch/Default.asp?p=nwz&id=8064&lmLangue=2.

b) **Withholding of information**

There are several situations in which Swedish authorities did not share crucial information or delayed the disclosure. The Committee against Torture found Sweden in violation of Article 22 of the CAT for initially failing to disclose to the Committee that Agiza had complained of ill-treatment to Swedish diplomatic personnel during their first monitoring visit with Agiza in prison."[48]

The European Parliament "acknowledges that the Swedish Government hindered the men from exercising their rights in accordance with the provisions of the ECHR, by not informing their lawyers until they had arrived in Cairo; deplores the fact that the Swedish authorities accepted a US offer to place at their disposal an aircraft that benefited from special overflight authorisation in order to transport the two men to Egypt; [49]

"The Swedish government has revealed little about why it suddenly decided to expel them, three months after the September 11, 2001, attacks in the United States. It has said only that the decision was made on the basis of secret intelligence information, some of it from foreign services, indicating that the men posed a security threat. Swedish officials have refused to disclose any of the evidence or reveal where the information came from[50]. Actually, without the first revelation of the case by the Swedish television programme *Kalla Fakta* (Cold Facts)[51] we may never have heard of the fate of Alzery and Agiza. Indeed, *Kalla Fakta* cited anonymous sources who claimed to have been present at Stockholm-Bromma Airport while masked US agents stripped,

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48 Agiza, Communication No. 233/2003 1 13.10.

49 Transportation and illegal detention of prisoners: European Parliament resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (2006/2200(INI)), Eur. Parl. Doc. P6_TA(2007) 0032, (14 Feb 2007), para 99.

50 Craig Whitlock, "New Swedish Documents Illuminate CIA Action", Washington Post, 21 May 2005,

http://www.washingtonpost.com/wp-dyn/content/article/2005/05/20/AR2005052001605.html

51 US Helped Deport Egyptians to Face Alleged Abused [sic]: Swedish TV, Agence France Presse, 17 May2004; Implication Directe des Etats-Unis dans l'Expulsion de Suède de deux Egyptiens (TV), Agence France Presse, 17 May 2004.

restrained, hooded, drugged, and removed the individuals in a small plane[52]."

c) **Impunity**

In the Alzery case, Muhammed Alzery, who was abused at Bromma airport in Sweden prior to being extraordinarily rendered to Egypt by the Swedish government (acting in concert with the United States), the Human Rights Committee observed that "the State party is under an obligation to ensure that its investigative apparatus is organized in a manner which preserves the capacity to investigate, as far as possible, the criminal responsibility of all relevant officials, domestic and foreign, for conduct in breach of article 7 committed within its jurisdiction and to bring appropriate charges in consequence." The committee found that Sweden's failure to conduct an effective investigation in this case violated its obligations under Article 7 of the ICCPR, read in conjunction with Article 2 of the covenant. The European Court of Human Rights has similarly found, with respect to breaches of Article 3 of the European Convention on Human Rights, that contracting states are required to conduct effective investigations capable of "eading to the identification and punishment of those responsible."[53]

Within Sweden, Parliamentary members initiated investigations into the government's handling of Agiza and Alzery's transfer, although criminal prosecutions did not go forward at that time.[54]

Despite the findings of illegal criminal activity, the Ombudsman has not called for the

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52 See Swedish TV4 Kalla Fakta Programme, http://www.hrw.org/legacy/english/docs/2004/05/17/sweden8620.htm (English-language transcript of first part of series, broadcast on Swedish television network TV4 on 17 May 2004). Kalla Fakta's account of the transfer was later verified by a Swedish parliamentary investigation, which further uncovered that the masked agents at Bromma included not only US but also Egyptian authorities. Alzery, Communication No. 1416/2005, 3.10.

53 Open Society Justice Initiative, "Globalizing Torture CIA Secret Detention And Extraordinary Rendition", Open Society Foundations, 2013, p.24. http://media.tcm.ie/media/documents/o/openSocietyJusticeInitiativeGlobalizingTortureReport.pdf

54 Alzery, Communication No. 1416/2005 1 3.20-3.32; Agiza, Communication No. 233/2003 12.10

prosecutions of the Swedish security service and police personnel involved in the illegal operation or possible violations of the ban on cruel, inhuman or degrading treatment or punishment.[55]

However, the US Senate report released in December 2014 "reveals new facts that reinforce allegations that a number of EU Member States, their authorities and officials and agents of their security and intelligence services were complicit in the CIA's secret detention and extraordinary rendition programme, sometimes through corrupt means based on substantial amounts of money provided by the CIA in exchange for their cooperation"[56]. MEPs (Members of the European Parliament) add that "the climate of impunity surrounding the CIA programme has 'enabled the continuation of fundamental rights violations', as further revealed by the mass surveillance programmes of the US National Security Agency (NSA) and secret services of various EU Member States", stressing that "there can be no impunity" for these violations. (...) On the EU side, MEPs express their concerns about the obstacles encountered by national parliamentary and judicial investigations, the abuse of state secrecy, and the undue classification of documents resulting in the termination of criminal proceedings. They again ask Member States to investigate the allegations that there were secret prisons on their territory and to prosecute those involved in the CIA-led operations."[57]

The fact that no prosecution were made despite the UN condemnations brings legitimate distrust when it comes to handling an extraordinary rendition that Mr. Assange may face.

3. Sweden's participation in CIA rendition since 2001

Documents disclosed by WikiLeaks exposed that Sweden's arrangements with the CIA renditions programme had in fact continued until 2006. Although the programme was reportedly suspended in 2006, some elements raise serious doubts about whether this

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55 Human Rights Watch, "Still At Risk: Diplomatic Assurances No Safeguard Against Torture", April 2005, Vol. 17, No. 4(D), p.63, http://www.hrw.org/sites/default/files/reports/eca0405.pdf

56 Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency 's Detention and Interrogation Program, Approved December 13, 2012, Updated for Release April 3, 2014 Declassification Revisions December 3, MI4 http://www.intelligence.senate.gov/study2014/sscistudy1.pdf

57 "Parliament to resume investigations into CIA:-led operations in EU countries Plenary sessions", Press release 11-02-2015, http://www.europarl.europa.eu/news/en/news-room/content/20150206IPR21212/html/Parliament-to-resume-investigations-into-CIA-led-operations-in-EU-countries

is, in fact, the case (see recent cases below). A WikiLeaks cable from 2006, prior to the suspension of the agreement revealed the attitude of the American Embassy in Stockholm about Swedish authorities trying to put a stop to CIA rendition flights. The ambassador, Steven V. Noble, seems to take this decision lightly: "What is not yet clear is whether the new requirements are simply an indication of a government sensitive to the renditions/prisoner transfer issue in the run-up to general elections in September, or if Sweden wants to make the clearance process so difficult that we will seek other refueling venues".

Mr. Assange shares the same concern of the US ambassador, who adds in the cable that "what is clear is that if we wish to continue using Sweden as a refueling point, we will have to become accustomed to these and perhaps more questions."[58]

4. *Close police cooperation between SAPO and US police authorities*

a) Kassir case (2005)

Oussama Kassir was a Swedish national who successfully challenged an extradition request by the United States. Apart from the fact that the Swedish extradition treaty excludes Swedish nationals from extradition to the United States, the Swedish prosecutor reportedly found that there was insufficient evidence presented by the extraditing authorities and then he was freed from prison.

However, Kassir was also a Lebanese national. He was arrested in Prague airport while in transit to Lebanon on 11 December 2005, on a warrant filed by United States federal prosecutors. Subsequently, he was extradited to the United States on 25 September

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58 "Sweden: The New Post-"CIA Planes" Reality -- Politicizing A Deportation Flight Clearance" http://wikileaks.org/plusd/cables/06STOCKHOLM527_a.html; Johan Nylander, "CIA rendition flights stopped by Swedish military", The Swedish Wire, 5 December 2010, available at http://www.swedishwire.com/politics/7497-cia-rendition-flights-stopped-by-swedish-military; See also "Svenskt motstånd stoppade CIAplanen- Fångtransporter stoppades", Svenska Dagbladets, 5 December 2010 (updated on 07/02/2014), http://www.svd.se/nyheter/inrikes/svenskt-motstand-stoppade-cia-planen_5778299.svd (consulted on 23/02/2015)

2007 from Prague to the United States to face trial[59].
Some raised questions about the participation of SAPO in his conviction in witness testimony at the US trial[60].

On 15 September 2009, Mr. Kassir was found guilty and sentenced to a term of life imprisonment despite the fact that several of the charges had been investigated and dropped in Sweden. The terrorism expert Magnus Ranstorp explained that: "There is a difference in respect to what kind of evidence is required for someone to be sentenced in European and American courts in cases like this."[61]

b) Djibouti case (2013)

The case concerns the rendition of two Swedish-Somalis, Ali Yasin Ahmed, 27, and Mohamed Yusuf, 29, who were captured in the East African country of Djibouti in August 2012 and placed under FBI custody there in secret prisons. They were subsequently renditioned to the United States in late 2012 to face terrorism charges in a New York court.

The USA turned to Sweden, requesting legal assistance, in the autumn of 2012. The chief prosecutor for security affairs, Hilding Qvarnström, said that: "there has to be serious reasons to not agree to provide legal assistance. The law is quite square and it says we should provide legal assistance if we can". By that, she considers that there is no problem with helping the United States to prosecute Swedes who have not been able to be prosecuted in Sweden, despite several years of surveillance and interception. "That's how the world works. It is not unusual."[62]

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59 AFP/The Local, "Swedish terror suspect extradited to United States", The Local, 25 Sep 2007, http://www.thelocal.se/20070925/8598, (consulted on 23/02/2015)

60 United States District Court, S.D. New York, U.S. v. KASSIR, (S.D.N.Y. Apr 09, 2009), https://casetext.com/case/us-v-kassir-6 (consulted on 23/02/2015)

61 TT, "Skillnad mellan europeiska och amerikanska domstolar", Dagens Nyheter, 12 May 2009, http://www.dn.se/nyheter/sverige/skillnad-mellan-europeiska-och-amerikanska-domstolar/ (consulted on 23/02/2015)

62 TT, "Säpo hjälpte USA åtala svenskar", Svenska Dagbladets, 24 May 2013, http://www.svd.se/nyheter/utrikes/sapo-hjalpte-usa-atala-svenskar_8205708.svd (consulted on 23/02/2015)

The two Swedish-Somali prisoners were taken to the United States after they had been indicted in secret and in their absence. The Swedish Foreign Ministry had previously claimed that the case was "a matter for Djibouti and the US, which Sweden had no way of influencing"[63].

It is said that "for some weeks before the rendition, there were secret negotiations between Djibouti and Stockholm for the return of the two Swedish nationals. Thomas Olsson, lawyer for the families, said that talks were well-advanced. *But then suddenly we got the information that they were sitting on a plane somewhere over the Atlantic on their way to the United States,'* he said"[64].

It appears that the men were interrogated for months in Djibouti with no charges pending against them because that would have been prohibited in the United States; "The Djiboutians were only interested in them because the United States of America was interested in them," said Yusuf's attorney. "The sequence described by the lawyers matches a pattern from other rendition cases in which US intelligence agents have secretly interrogated suspects for months without legal oversight before handing over the prisoners to the FBI for prosecution."[65]

On this case, the UN Working Group on Arbitrary Detention noted that "the Government of Sweden has not directly addressed the issues relating to cooperation between intelligence services and the provision of information, in particular where there is a danger of secret detention, torture, rendition or violations of the conditions necessary for a fair trial. The source has not addressed those elements in such detail that the Working Group can make any findings, but the Working Group will point out

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63 Ibidem.

64 Alice K Ross and Chris Woods, "European terrorism suspects secretly held in New York under false names", The Bureau Of Investigative Journalism, 11 January 2013, http://www.thebureauinvestigates.com/2013/01/11/european-terrorism-suspects-secretly-held-in-new-york-under-false-names/

65 Craig Whitlock, "Renditions continue under Obama, despite due-process concerns", The Washington Post, 2 January 2013, http://www.washingtonpost.com/world/national-security/renditions-continue-under-obama-despite-due-process-concerns/2013/01/01/4e593aa0-5102-11e2-984e-f1de82a7c98a_print.html

that such cooperation may provide grounds for responsibility in a case involving arrests abroad, such as the present case"[66].

c) Fikre case (2015)

This very recent case concerns the asylum seeker and American citizen Yonas Fikre who was transferred from Sweden to the United States on 13 February 2015. The "deportation" was executed by the Swedish security police (Säpo), on a chartered private jet. He claimed that he had been tortured in the United Arab Emirates on instruction of the FBI, after refusing to become an FBI informant. Charges in the United States have since been dropped[67].

The case began in 2010 when, he claims, he was approached by two FBI agents in Sudan. They pressured him to become an informant on the mosque and told him he'd face repercussions if he refused, he said. After he refused, a year later, secret police in United Arab Emirates picked him up, holding him for 106 days. He was tortured, made to sleep almost naked on a cold floor, beaten on the soles of his feet and forced into stress positions. "The FBI was behind it", Fikre said his interrogator told him. Fikre was released without charges and sought asylum in Sweden. Because he was on the no-fly list, he was barred from returning to the US on a commercial flight. Sweden rejected the request three years later, but chartered a private jet to return him to the United States, his attorney Thomas Nelson said"[68].

"Documents from the FBI, which SVT (Swedish National Television) has accessed, appear to confirm the torture in the United Arab Emirates a year later. His lawyer Hans Bredberg now claims that he never received a fair trial in Sweden - and thinks it is

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66 Mr. Mohamed Yusuf and Mr. Ali Yasin Ahmed v. Djibouti, Sweden and the United States of America, Working Group on Arbitrary Detention, Opinion No. 57/2013, U.N. Doc. A/HRC/WGAD/2013/57 (2014), para 68. http://www1.umn.edu/humanrts/wgad/57-2013.html

67 Fedor Zarkhin, "Portlander who claims he was tortured at FBI's behest and put on no-fly list back after 5 years", The Oregonian, 14 February 2015, http://www.oregonlive.com/portland/index.ssf/2015/02/portlander_allegedly_tortured.html

68 Ibidem. Fikre is suing the FBI, the National Security Agency and the federal government, among others, for putting him on the no-fly list and for the torture and other abuse he claims he suffered in United Arab Emirates.

wrong that his client was deported to the very country he had claimed had torture him.

"Nor is such that Sweden may be a country where one can contribute to support for terrorism, says Fredrik Milder, press secretary at the Swedish Security Police (Säpo).

"He would not disclose how much the case has cost or on what grounds Yonas Fikre was deemed a security risk in Sweden.

"International cooperation between countries is based on mutual trust, when a person is transferred between countries it occurs based on mutual trust. Obviously Swedish authorities have contacts with US authorities when it comes to stuff like this, says Fredrik Milder[69].

Importantly, the security police Säpo reportedly contacted Australian intelligence services after Julian Assange's residence application, which the Swedish Migration Board subsequently rejected.[70]

E) Swedish Policy towards extradition with US

Last but not least, Sweden, including courts and the executives, would have agreed to every extradition request that has been issued by the United States to Sweden since the year 2000.

Nils Rekke, senior prosecutor in Sweden, explained that authorities hold informal talks with the US regarding whether an extradition is possible prior to the extradition order being issued. Only if Swedish authorities think that there is no obstacle does the US formally file an extradition request[71][72].

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69 Victor Stenquist, "Hävdade att han torterats av FBI – utvisad av Säpo", Aftonbladet, 13 February 2015, https://www.aftonbladet.se/nyheter/article20314783.ab

70 Assange affidavit, 2 December 2013, paragraph 98

71 KARIN THURFJELL, "Assange: Sverige har inte motsatt sig USA under 00-talet", 22 December 2011, Svenska Dagbladet, available on http://www.svd.se/nyheter/inrikes/assange-sverige-har-inte-motsatt-sig-usa_6715051.svd (consulted on 21/02/2015)

Consideration should also be given to the fact that "informal discussions have already taken place between US and Swedish officials over the possibility of the WikiLeaks founder Julian Assange being delivered into American custody, according to diplomatic sources"[73].

Also to be considered is the fact that the Pentagon has welcomed the arrest of Julian Assange and that the US Defence Secretary, Robert Gates, said on a visit to Afghanistan that it was "good news".[74]

In 2010, the US State Department spokesman PJ Crowley said it was possible the United States would make an extradition request for Mr. Assange but he said it was premature as the criminal investigation into WikiLeaks was still ongoing[75]. On 28 January 2015, a spokesperson for the Eastern District of Virginia confirmed that the criminal investigation into WikiLeaks is into its fifth year and is ongoing. (see Legal note 8, Fear of Inhuman and Degrading Treatment USA).

According to Eva Joly, "the case of Chelsea Manning, and now Edward Snowden's exile in Russia, are proof that Julian Assange has credible reason to fear extradition to the US if he goes back to Sweden. If, as we have seen, countries like France and Germany are unable or unwilling to withstand pressure from the United States," she asks "why

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72 Neither criminal procedure law nor the Freedom of the Press Act can protect Julian Assange from extradition to the United States since the latest [ ] "provides a list of circumstances in which official documents may be restricted from public dissemination, including situations involving "the security of the Realm or its relations with another state or an international organisation". This statement leaves much room for interpretation, and therefore it is possible that extraditing Assange could be justified as maintaining relations with the United States. Regardless, it is unclear whether Sweden's security interest could be extended to include the interests of allies, such as coalition forces in Iraq and Afghanistan": Molly Thebes, "The Prospect of Extraditing Julian Assange", N.C.J.Int'l L. & COM. REG., Vol.37, 2011-2012, p. 902.

73 Kim Sengupta (Diplomatic Correspondent), 8 December 2010, "Assange could face espionage trial in US", http://www.independent.co.uk/news/uk/crime/assange-could-face-espionage-trial-in-us-2154107.html# (last consulted 13/02/2015)

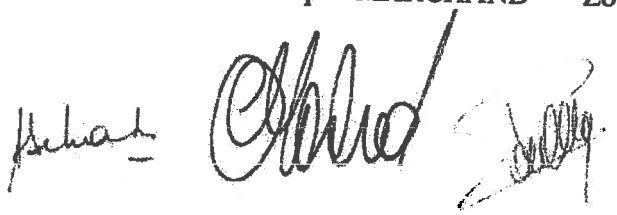
74 "Wikileaks founder Julian Assange refused bail", 8 December 2010, http://www.bbc.co.uk/news/uk-11937110

75 "Wikileaks founder Julian Assange refused bail", 8 December 2010, http://www.bbc.co.uk/news/uk-11937110

should we expect that a much smaller country like Sweden would be able to do so — or that its government would even want to?"[76]

Considering the points made above (A to E), it is more than reasonable to fear that Julian Assange will be extradited from Sweden to the United States..

Annemie SCHAUS Christophe MARCHAND Zouhaier CHIHAOUI[77]



76 Al Burke, "Solution to Assange case? Not interested - Swedish authorities decline to meet with distinguished visitor offering way out of legal impasse", Nordic News Network, 31 March 2014, http://www.nnn.se/nordic/assange/joly.pdf, (consulted on 21/02/2015)

77 Member of the Law firm "Just Rights".

BILAGA 1

ANNEMIE SCHAUS
as@juscogens.be

CHRISTOPHE MARCHAND
+32 (0)486 32 22 88
cm@juscogens.be

VINCENT LETELLIER
+32 (0)477 20 61 91
vl@juscogens.be

DOUNIA ALAMAT
+32 (0)470 57 59 25
da@juscogens.be

NICOLAS COHEN
+32 (0)470 02 65 41
nc@juscogens.be

CHARLOTTE MORIANE
+32 (0)498 60 72 45
cmo@juscogens.be

CRÉPINE UWASHEMA
+32 (0)488 31 39 13
cu@juscogens.be

LOUISE LAPERCHE
+32 (0)472 45 00 65
ll@juscogens.be

JA Swed. Litigation - LEGAL NOTE 8 – February 2015 – Schaus, Marchand and Chihaoui- Brussels

Refoulement to the USA of JA would violate article 3 ECHR – Serious fear

To be inserted in the submission at the Swedish Supreme Court

On 28 January 2015 the US officials confirmed that the attempts to bring a national security investigation against M. Assange continues for his WikiLeaks work.

JA is in unlawful and arbitrary detention in the Ecuadorian Embassy, not by choice but because he doesn't want to be sent to the Unites States (here after US) where he would inevitably be submitted to inhumane and degrading treatment and to an unfair trial. To this stage the UK and Sweden has refused to confirm or deny the existence of an American arrest warrant.
His direct or indirect refoulement to the USA, by the United Kingdom or Sweden would infringe article 3 ECHR. There are many reasonable grounds to believe that it would be the case.
JA can invoke the protection of article 3 ECHR as developed in the case VINTER, at the ECtHR : the Great Chamber of the ECtHR has decided that no clear evidence is necessary to demonstrate the risk of violation of article 3 but reasonable ground to believe is sufficient.

JA is subject of a criminal investigation and is wanted by the US for publishing on the internet embarrassing information for this State, showing its implication, in war crimes. The Department of Justice, National Security/Criminal Division are seeking to construct a prosecution against JA for conspiracy, espionage, theft/conversion of government property, and the Computer Fraud and Abuse Act. Some media and public opinion consider he should be wanted for treason, conspiracy, and terrorism.

Homeland Security Today (main information magazine on the national security of the US), has written a column in April/May 2014 on WikiLeaks. It considers that WikiLeaks is the greatest threat for the US national security.

The activity of JA and WikiLeaks constitutes the substance of "whistleblowing": a person or an organization disclose information on a gross unlawful action in the past or at present, committed by a public or private person (UBB (P.), "Whistleblowing: A restrictive definition and interpretation.", *Journal of Business Ethics 21.1 pp.* 77-94).

The Whistleblower has the moral conviction that he cannot do something else than to go in the media to alert the public opinion, knowing the risks he is taking. It is a difficult dilemma (J. JENSEN, « Ethical tension points in whistleblowing. » *Journal of Business Ethics*, 1987, vol. 6, no 4, p. 321-328).

This is the paradox of the whistleblower, and JA is the more important

representative of these, admired for the honesty of their word and courage, but at the same time marginalized and harshly under repressive pressure for the negative consequences for the State involved.

There is then a necessity to build a specific protective legal system to protect the whistleblowers. As underlined by the Council of Europe High Commissioner Hammarberg, the whistle blower must be encouraged to alert inside companies and state agencies as it is in the interest of democracy to permit revelations that would otherwise be impossible.

The legal protection has to meet this challenge between the necessity of the revelation of the information and the risks taken by the whistleblower.

Finally the necessity of whistleblowing lies in the heart of the freedom of expression focused on public interest (A. Katz, "Government information leaks and the First Amendment", *California Law Review*, 1976, p. 108-145. ; M. Opper, "WikiLeaks: Balancing First Amendment Rights with National Security.", *Loy. LA Ent. L. Rev.*, 2010, vol. 31, p. 237 ; POZEN (D.), "The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of information" *Harv. L. Rev.*, 2013, vol. 127, p. 512).

ECtHR has developed a specific whistleblower legal protection based on a large concept of the freedom of speech (article 10) through a pilot case law (V. JUNOD, « Lancer l'alerte : quoi de neuf depuis *Guja* ? », *RTDH*, 2014, p. 459 ; V. JUNOD, « La liberté d'expression du whistleblower », *RTDH*, 2009).

The Unites States, despite the call by many States to protect whistleblowers, submit JA and his partners at WikiLeaks, or Edward Snowden, to harsh criminal investigations and prosecutions for important crimes such as conspiracy, espionage, theft/conversion of government property, and the Computer Fraud, infringement of national security or even terrorism with a specific treatment contrary to article 3, 6 and 10 of the ECHR.

JA can be subjected to cumulative criminal offences that would de facto submit him to an life long sentence without decent hope for parole.

The Special Rapporteur on Torture has confirmed that the « first » informant of WikiLeaks, Chelsea Manning had been submitted to inhumane and degrading treatment and was condemned to a 35 year jail sentence. JA was constantly and expressly mentioned during the court hearings (See Legal Note 6 Submission by JA at UNWGAD).

In January 2015 CIA leaker Jeffrey Sterling was convicted of 9 counts of espionage carrying 90 years imprisonment. In the US Senate CIA report we can read: "General situation in US for whistleblowers/ "terrorists"/ "persons who harmed the national interests": pleading guilty 97 % + solitary confinement + prosecutions overcharge to aggregate to come to a prison sentence of 150 years" (CIA Senate Report, http://www.intelligence.senate.gov/study2014/sscistudy2.pdf)

The direct refoulement by the United Kingdom or indirect refoulement by Sweden to the US would lead to a serious problem concerning the respect of article 3 ECHR and would engage the responsibility of Sweden as there is a real risk that JA would be submitted to a treatment contrary to article 3 ECHR (*Soering c. Royaume-Uni*, 7 juillet 1989).

The circumstance that the illegal treatment wopuld be doine by a thirs party to the ECHJR convention is irrelevant (*Saadi c. Italie*, § 138). Article 3 ECHR implies that bit is forbidden, to send JA to the US (*Soering*, précité, § 91, *Mamatkoulov et Askarov c. Turquie* [GC], § 67, CEDH 2005-I, et *Saadi*, précité, § 126).

There is no distinction between extradition and refoulement (*Harkins et Edwards c. Royaume Uni*, § 120, et *Babar Ahmad et autres c. Royaume Uni*, § 168).

This risk concerns the prison condition and the disproportionate caracter of the condemnation (*Vinter et autres c. Royaume Uni*).

In it is not doubtful that the ECtHR protection of whistleblowers based on article 10 ECHR is not in line with prison condemnations of 35 to 95 years that are clearly disproportionate.
The ECtHR has considered that a prison condemnation of 2 years was disproportionate (*Bucur et Toma c. Roumanie*).

If someone is condemned to 90 years prison, it is a de facto life long sentence.

Finally, as decided in Great Chamber by ECtHR in the case *Vinter*, it is not necessary that the condemnation is already in force, but a real risk of condemnation is sufficient.

The reality of the investigation against JA has been recently confirmed: Google revealed in December 2014 that it turned over all e-mail content, subscriber information, and metadata of three WikiLeaks staff to the United States government in response to search warrants. The crimes investigated by the warrants include espionage and conspiracy. The warrants were issued in March 2012, and according to Google, it was prevented by court order from disclosing them sooner because the US government fought to ensure Google was muzzled (http://www.washingtonpost.com/world/national-security/google-says-it-fought-gag-orders-in-wikileaks-investigation/2015/01/28/e62bfd04-a5c9-11e4-a06b-9df2002b86a0_story.html)

Attached to the present Legal Note, we summarize some facts that demonstrate that it is for JA not unreasonable to believe on the basis of objective grounds, that he would be submitted to an inhumane and degrading treatment or unfair trial contrary to article 3, 6 and 10 ECHR if sent to the US.

Annemie SCHAUS Christophe MARCHAND Zouhaier CHIHAOUI[1]

1 Member of the Law firm "Just Rights".

Annex to Legal Note 8 - Fear of JA about unfair trial and inhumane and degrading treatment in the US.

1. Concrete evidence of an ongoing Criminal Investigation of WikiLeaks and JA now in its fifth year

1.1. On 28 January 2015, a spokesman for the Eastern District of Virginia confirmed that the criminal investigation into WikiLeaks remains ongoing after four years. http://www.washingtonpost.com/world/national-security/google-says-it-fought-gag-orders-in-wikileaks-investigation/2015/01/28/e62bfd04-a5c9-11e4-a06b-9df2002b86a0_story.html

1.2. On May 19, 2014 the Justice Department stated in court that the WikiLeaks investigation was 'ongoing' http://epic.org/foia/doj/wikileaks/37_Def_Rep_Sup_Brief.pdf. On Apr. 25, 2014 the Justice Department represented that there are 'criminal/national security investigation(s) in to the unauthorized disclosure of classified information that was published on the WikiLeaks website. The investigation of the unauthorized disclosure is a multi-subject investigation and is still active and ongoing.' http://epic.org/foia/doj/wikileaks/33_Def_Sup_Brief.pdf

1.3. Google revealed in December 2014 that it turned over all e-mail content, subscriber information, and metadata of three WikiLeaks staff to the United States government in response to search warrants. The crimes investigated by the warrants include espionage and conspiracy. The warrants were issued in March 2012, and according to Google, it was prevented by court order from disclosing them sooner because the US government fought to ensure Google was muzzled. http://www.washingtonpost.com/world/national-security/google-says-it-fought-gag-orders-in-wikileaks-investigation/2015/01/28/e62bfd04-a5c9-11e4-a06b-9df2002b86a0_story.html[2]

1.4. WikiLeaks Investigation 'unprecedented in scale and nature' - Pentagon's 'WikiLeaks War

[2] More : http://wikileaks.org/google-warrant.html

Room':http://www.smh.com.au/world/assange-targeted-by-fbi-probe-us-court-documents-reveal-20140520-38l1p.html

1.5. Jan 2011 government order for Dynadot records related to Julian Assange, WikiLeaks: http://www.wikileaks.org/IMG/pdf/Dynadot_2703_d_Order.pdf

1.6. December 2010 government orders for Twitter records of WikiLeaks, Julian Assange and individuals associated with WikiLeaks (associative rights violations) - Electronic Privacy Information Centre FOIA case: http://epic.org/foia/epic_v_doj_fbi_wikileaks.html

1.7. US government serves grand jury subpoenas related to WikiLeaks investigation: http://www.salon.com/2011/04/27/wikileaks_26/

1.8. Search warrants and orders for Google accounts of WikiLeaks affiliates: http://www.huffingtonpost.com/2013/06/24/google-wikileaks-smari-mccarthy-herbert-snorrason_n_3492076.html Google and Sonic accounts http://www.wsj.com/articles/SB10001424052970203476804576613284007315072 Additional Google and other accounts: http://alexaobrien.com/archives/1293 http://alexaobrien.com/archives/1308

1.9. An agent for Army CID testifed at Manning's pretrial hearing in December 2011 that seven civilians were investigated by the FBI, including the "founders, owners, or managers of WikiLeaks." The FBI file, lead military prosecutor, Major Fein said, was "42,135 pages or 3,475 documents http://alexaobrien.com/archives/1308

1.10. Prosecutors have failed to respond to a January 2015 letter from Julian's lawyers asking about the status of the investigation. Prosecutors have repeatedly declined to respond to requests from lawyers on the investigation's status.

1.11. NOTE: Over 50 free speech and human rights orgs (including Article 19, RSF, Human Rights Watch, EFF etc.) have condemned the ongoing investigation into WL for its chilling effects http://www.article19.org/resources.php/resource/37599/en/letter-to-eric-holder-in-support-of-wikileaks

2. Declarations by US high ranking officials, politicians and other persons of political influence

2.1. Threats to harm and execute (sometimes extrajudicially) of JA by prominent American politicians and media personalities:

https://www.youtube.com/watch?v=b-DIZvcK6Rc

2.2. Diane Feinstein, head of US the Senate Intelligence Committee, stating that JA should be

prosecuted for Espionage: http://www.wsj.com/articles/SB10001424052748703989004575653280626335258

2.3. Senator Lieberman and Congressman Peter T King attempted (but failed) to get WikiLeaks classed as 'enemy combatants' and to place WikiLeaks staff on a proscribed list (this did not succeed but the unlawful banking blockade was enforced by private companies without underlying legislation:

http://www.thenewamerican.com/usnews/congress/item/13762-documents-show-lieberman-king-behind-financial-blockade-of-wikileaks

3. Bradley MANNING (Wikileaks source) has been subjected to inhumane and degrading treatment and unfair trial in the US

3.1. Evidence obtained by torture in the case of Manning, prospectively to be used against JA - Manning's lawyer said in the media that the inhuman and degrading treatment of Manning was the US army attempting to pressure Manning to implicate JA:

http://www.wired.com/2012/03/manning-treatment-inhuman/

3.2. Search warrants in Chelsea Manning trial attempt to establish link to WikiLeaks: http://alexaobrien.com/archives/905

3.3. Also, 250+ law professors, including Barack Obama's professor, say

treatment of Manning was implicating JA:

http://www.nybooks.com/articles/archives/2011/apr/28/private-mannings-humiliation/

3.4. Chelsea Manning torture (Special Rapporteur findings):

http://www.theguardian.com/world/2012/mar/12/bradley-manning-cruel-inhuman-treatment-un

3.5. Targeting of Bradley Manning campaigners:

http://www.cnet.com/news/bradley-manning-supporter-targeted-by-feds-wins-early-victory/

4. Unlawful action by police and intelligence US and UK services

4.1. FBI attempted entrapment of JA through an Icelandic FBI informant:

http://www.slate.com/articles/technology/future_tense/2013/08/sigurdur_thordarson_icelandic_wikileaks_volunteer_turned_fbi_informant.html

4.2. FBI obtaining stolen harddrives belonging to WikiLeaks:

http://www.wired.com/2013/06/wikileaks-mole/all/

4.3. Evidence of spying on the whole organisation: GCHQ spying:

https://firstlook.org/theintercept/2014/02/18/snowden-docs-reveal-covert-surveillance-and-pressure-tactics-aimed-at-wikileaks-and-its-supporters/

4.4. Julian Assange is on a NSA 'manhunting' list:

https://firstlook.org/theintercept/2014/02/18/snowden-docs-reveal-covert-surveillance-and-pressure-tactics-aimed-at-wikileaks-and-its-supporters/

4.5. Theft of JA's suitcase in the protected area of Swedish airport:

http://www.theaustralian.com.au/in-depth/wikileaks/swedish-police-seek-wikileaks-founder-julian-assanges-lost-luggage/story-fn775xjq-1226710226571

5. Attack on JA's and Wikileaks financial means

5.1. Evidence of a plans to target supportive journalists and other associates of WikiLeaks by company HB Gary (for Bank of America):

https://www.techdirt.com/articles/20110209/22340513034/leaked-hbgary-documents-show-plan-to-spread-wikileaks-propaganda-bofa-attack-glenn-greenwald.shtml

5.2.- WikiLeaks, JA, placed on bank blacklists - there are articles and internal correspondence from one financial firm showing this:

http://www.thenewamerican.com/usnews/congress/item/13762-documents-show-lieberman-king-behind-financial-blockade-of-wikileaks

5.3.- Banking blockade against WikiLeaks by VISA, PayPal, MasterCard, Bank of America, Western Union - ruled to be unlawful in Iceland:

http://www.bbc.co.uk/news/business-22294108

6. Additional actions against Wikileaks, JA and associates

6.1. Placement by US authorities of JA's lawyer Jen Robinson on a restricted flying list:

http://www.crikey.com.au/2012/04/19/australian-wikileaks-lawyer-on-inhibited-person-travel-list/

6.2. Detention of Jake Appelbaum in airports interrogations about JA, WikiLeaks:

http://www.democracynow.org/2012/4/20/we_do_not_live_in_a

6.3. UK has launched a Snowden related terrorism investigation against

Guardian, David Miranda and WikiLeaks:

http://www.theguardian.com/world/2013/aug/19/david-miranda-detention-terrorism-law-watchdog

http://www.theguardian.com/world/2013/aug/20/nsa-snowden-files-drives-destroyed-london

BILAGA 11

AFFIDAVIT OF Julian Paul Assange

I, **Julian Paul Assange, a citizen of Australia, publisher, and political refugee** under the protection of the Embassy of Ecuador in London, AFFIRM THAT:

I am the Publisher of WikiLeaks and a director of associated organisations in a number of countries including Australia and Iceland.

I make this affidavit in relation to the monitoring of my journalistic activities by US military intelligence in Germany between 26 December 2009 and 30 December 2009 which was used to assist the prosecution an alleged WikiLeaks source, the US military intelligence officer Bradley Manning, who was sentenced to 35 years in military prison on 21 August 2013; and in relation to the likely unlawful seizure of property belonging to me and to WikiLeaks while it was under the control of the airport authorities of Arlanda (Stockholm) or Tegel (Berlin) on 27 September 2010, inter alia three encrypted laptops containing privileged journalistic and legal materials including evidence of a war crime; and this affidavit sets forth facts that form the basis of my belief that the aforementioned property was the subject of an unlawful search and seizure and that the monitoring of my activities in Germany was also illegal.

I am advised by my lawyers that, as well as the rights enjoyed by individuals, as a publisher and journalist, my work is protected by the corresponding rights and freedoms that are binding upon Sweden and Germany.

I write this affidavit to exercise my right to an effective remedy.

I make this affidavit to the best of my knowledge, information and belief.

Table of Contents

1. Summary of claims

1. I founded the WikiLeaks organisation in 2006. The publication specialises in the analysis of records under risk of censorship that are of political, diplomatic, historical or ethical importance. Among other countries, WikiLeaks publishes and analyses documents from the United States. These have included millions of sensitive documents relating to its diplomatic and security apparatus and its wars in Iraq, Afghanistan and elsewhere. The organisation has received numerous awards in relation to its publishing work, including the 2008 Index on Censorship Freedom of Expression Award, *The Economist* New Media Award (USA) 2008, the 2009 Amnesty International UK Media Award (New Media) (UK), the 2010 Sam Adams Associates for Integrity in Intelligence, Sam Adams Award (USA), the 2011 Sydney Peace Foundation Gold Medal (Australia), the 2011 Martha Gellhorn Prize for Journalism (UK), the 2011 Walkley Award for Most Outstanding Contribution to Journalism (Australia), the 2011 Blanquerna Award for Best Communicator (Spain), the 2011 International Piero Passetti Journalism Prize of the National Union of Italian Journalists (Italy), the 2011 Jose Couso Press Freedom Award (Spain), the 2012 Privacy International "Winston Smith Privacy Hero" Big Brother Award, the 2013 Yoko Ono Lennon Courage Award, and the 2013 Global Exchange Human Rights Awards, as well as formal nominations for the past three consecutive years of the Nobel Peace Prize and the support of the International Federation of Journalists (IFJ) Global Journalists' Union.

2. As a consequence of WikiLeaks' publishing work, the US government launched a multi-agency investigation into me and WikiLeaks in early 2010. The Obama administration has expended very substantial resources on the WikiLeaks investigation, which has been described by Australian diplomatic officials in official correspondence as being "unprecedented in scale and nature".[1] The Department of Justice recently confirmed to the *New York Times* that its investigation is active and ongoing.[2]

3. The subject of this affidavit concerns two events involving Sweden and Germany. These events occur within the context of publicly reported FBI activities against WikiLeaks in the UK, Denmark and Iceland from 2009 to the present, which concern my work as a publisher, journalist and editor.

4. In particular, this affidavit focuses on two previously unreported events. The first concerns the physical surveillance by US military intelligence of me at a congress in Berlin held on 26-30 December 2009. The US military used the results of this surveillance of me to convict Bradley Manning of 'Wanton Publication'. I understand by my lawyers that this testimony may also be used in the ongoing US Department of Justice action against myself and my publishing organisation. The second concerns the suspected illegal seizure on 27 September 2010 of my suitcase on a direct flight within the Schengen border-free area from Stockholm Arlanda to Berlin Tegel on SAS (Appendix D). The suitcase carried three laptops containing WikiLeaks material, associated data and privileged communications protected under client-attorney confidentiality laws and source protection laws. The suspected seizure or theft occurred at a time of intense attempts by the US to stop WikiLeaks' publications of 2010.

5. This affidavit is occasioned by the recent emergence of information about the aforementioned intelligence activities and events. A series of formal inquiries, case testimony and press revelations have entered the public domain in 2013. In connection with a 2013 parliamentary inquiry in Iceland I learnt that Iceland was aware that the Federal Bureau of Investigation (FBI) and other US government officers had conducted operations against me, WikiLeaks staff and alleged sources on European soil in connection with the Virginia-based federal investigation against WikiLeaks. I also learnt that the FBI's operations in Iceland were illegal, and potentially also those in Denmark. As a result, Iceland expelled the FBI agents and US Department of Justice prosecutors from Iceland. The FBI also led an operation in the United Kingdom in early July 2010 in connection with the WikiLeaks releases.[3] Recent press reports have publicly revealed that the FBI illegally acquired stolen organisational and personal data belonging to WikiLeaks, me, and other third parties in Denmark in March 2012.[4] The second major

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[1] Sydney Morning Herald, 'US targets WikiLeaks like no other organisation', 2 December 2011 http://www.smh.com.au/technology/technology-news/us-targets-wikileaks-like-no-other-organisation-20111202-1obeo.html#ixzz2RobeLeu0

[2] New York Times, 'Assange, Back in the News, Never Left U.S. Radar', 24 June 2013 https://www.nytimes.com/2013/06/25/world/europe/wikileaks-back-in-news-never-left-us-radar.html?smid=tw-nytmedia&pagewanted=all&_r=0

[3] See paragraph 62 regarding the FBI raid on the house of Bradley Manning's mother in Wales.

[4] The FBI travelled to Aarhus in Denmark to meet with Sigurdur Thordarson. In Denmark the FBI

event is the Bradley Manning[5] court martial, which commenced on 3 June 2013. Although much of the material presented at the trial has been withheld from the public, transcripts of the public sessions have nevertheless provided important information and testimony relating to US spying on WikiLeaks and me personally in Germany, which I refer to in this affidavit.

6. I am submitting this affidavit because I understand that the actions in Germany in 2009 and in Sweden in 2010 detailed in this complaint are likely to be unlawful. I understand by my lawyers that if the US military's surveillance of me in Germany was unlawful, then its use in Bradley Manning's trial may have also been unlawful and that such a use of illegally obtained evidence could have consequences for Bradley Manning's pending appeal to the US Army Court of Criminal Appeal. The suspected seizure and/or theft of my suitcase and its contents would appear to violate my legal rights, including my rights to privacy, to be free from searches and seizures without due process, and to freedom of association. The incidents may also violate the intelligence, property, privacy and/or source protection laws of the states where the actions occurred. Given that the suitcase contained privileged and confidential attorney-client correspondence, I believe that this may also violate laws in various jurisdictions concerning legal professional privilege.

7. No explanation has been given to me, directly or indirectly, as to the whereabouts or the reason for the disappearance of the WikiLeaks equipment and data, despite my efforts and the efforts of those acting on my behalf to recover it. None of the entities involved, including the Swedish police, the airline SAS, the airports Arlanda and Tegel and related handling companies GlobeGround and Acciona, have offered an explanation, and in one case refused to communicate at all.[6] The irregular response to inquiries is documented in this affidavit as well as the appendices section via the affidavits of Andy Muller-Maguhn (Appendix C), Kristinn Hrafnsson (Appendix D), Holger Stark and Marcel Rosenbach (Appendix F), and Johannes Wahlstrom (Appendix G).[7]

8. The WikiLeaks material taken on 27 September 2010 was of legal and historical significance and included shocking evidence of a serious war crime; the massacre of more than sixty women and children by US military forces in Garani, Afghanistan; evidence of a US military intelligence operation conducted against myself and the activist

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questioned him and obtained in exchange for money property belonging to WikiLeaks, which had been stolen at my residence in the UK. See The Copenhagen Post, 'FBI met WikiLeaks informant in Copenhagen', 15 August 2013 http://cphpost.dk/international/fbi-met-wikileaks-informant-copenhagen; Slate, 'WikiLeaks' Teenage Benedict Arnold', 9 August 2013 http://www.slate.com/articles/technology/future_tense/2013/08/sigurdur_thordarson_icelandic_wikileaks_volunteer_turned_fbi_informant.html; Wired magazine, 'WikiLeaks Volunteer Was a Paid Informant for the FBI', 26 June 2013 http://www.wired.com/threatlevel/?p=58974; and Mashable, 'Revealed: WikiLeaks Volunteer Doubled as FBI Mole', 27 June 2013 http://mashable.com/2013/06/27/wikileaks-volunteer-fbi-mole/. See section 7.1 below "Known US intelligence operations against WikiLeaks in Europe since 2011".

[5] In this affidavit I refer to Pvt. Manning as 'Bradley' when referring to past events and court documents which bear Manning's current legal name. I use the pronoun 'he' for consistency reasons. However, I note that Manning has expressed that she identifies as a female under the first name Chelsea.

[6] See Appendices C and D.

[7] See Appendices C, D, F, G.

Jeremie Zimmermann while on German soil (this operation has been subsequently corroborated by testimony in the Bradley Manning hearing[8]); and my privileged attorney-client communications, among other things. Other copies of this material have been rendered inaccessible to me by separate incidents that do not form part of this complaint.

9. In addition to the violation of my rights as a result of the suspected seizure of my suitcase while under the control of Swedish/German authorities, I have been advised that my rights were further violated when an effective remedy was not enforced after I and others made attempts to recover the suitcase, obtain an explanation and file a police report in relation to this matter. No explanation was ever given to me nor do I believe that authorities undertook an investigation of the disappeared property. This has prevented me from being able to effectively challenge the suspected seizure of privileged correspondence and WikiLeaks material and data.

10. Unlawful intelligence operations are common in Sweden, according to the Swedish government's own inquiry published earlier this year. By reading the English summary of proposed changes to Swedish Espionage laws, I learnt that:

> ***It is quite common for foreign powers to conduct prohibited intelligence activities in Sweden*** *and that the activities are associated with secret or conspiratorial methods that* ***make them difficult to detect and counteract***.[9]

11. I understand that if the suitcase was seized it may have been seized unlawfully, as part of an intelligence operation with the purpose of gathering information about me, WikiLeaks, and/or our upcoming publications and in an attempt to unlawfully establish the identity of WikiLeaks' sources.[10]

12. I understand that if the United States investigation has received the contents of my suitcase in connection with its investigation against me, WikiLeaks, and perhaps other accused sources, these investigations may be contaminated by their unlawful evidence-gathering or intelligence-gathering methods.

13. The seizure of WikiLeaks' property in the custody of Swedish and German

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[8] Bradley Manning court martial, testimony of witness for the prosecution Matthew Hosburgh, 11 June 2013 (see page 24) https://pressfreedomfoundation.org/sites/default/files/06-11-13-AM-session.pdf

[9] From the English summary of the Inquiry report into reforming the Espionage Act in Sweden, submitted for consideration to the Minister of Justice in February 2013. The English summary which includes the quote is available on pages 23-30 of the full report "Spioneri och annan olovlig underrättelseverksamhet", 6 February 2013 http://www.regeringen.se/sb/d/108/a/208622.

[10] It is my belief that this material was seized as part of the ongoing US investigation against WikiLeaks. It is also possible that a different country's intelligence agency may have been involved. For example, the US National Security Agency (NSA) disclosed in November 2010 that I was under close surveillance by the Russian Intelligence Agency FSB, see http://www.thedailybeast.com/articles/2010/11/30/moscows-bid-to-blow-up-wikileaks-russians-play-by-different-rules.html Private intelligence companies are also known to have planned operations against WikiLeaks and may plausibly have the capability to seize such material. See, for example, the unlawful measures proposed by private intelligence firm HB Gary to sabotage WikiLeaks (http://wikileaks.org/IMG/pdf/WikiLeaks_Response_v6.pdf), which led to an investigation by the US House Armed Services Subcommittee on Emerging Threats and Capabilities.

authorities occurred in the context of publicly acknowledged, ongoing intelligence activities conducted unlawfully against me and WikiLeaks.

14. There is a pattern of unlawful evidence-gathering or intelligence-gathering operations by US agencies in relation to myself, my staff and associated individuals in European countries and the US at least since 2009. In June 2013 it was reported that property and information belonging to WikiLeaks had been illegally obtained by the FBI on 18 March 2012 in Denmark.[11]

15. I understand that as a publisher and editor my publishing activities are protected by the corresponding rights and freedoms that are binding upon Sweden and Germany. Any knowledge of operations that interfere with my work and violate my rights is liable to investigation, and is challengeable in a court of law. The failure to investigate further violates my right to an effective remedy.

16. I understand that an investigation could prompt a clarification from Sweden and Germany as to the extent of their own authorities' involvement in the actions described in this affidavit. I understand that if these actions were carried out unlawfully at the behest of another state, this could amount to a violation of their sovereignty and it is in the public interest for the authorities to clarify this matter as did the state of Iceland earlier this year in connection with unlawful FBI operations against WikiLeaks in that country.

2. Present status

17. My lawyer Michael Ratner has stated publicly in interviews that it is likely that the US intends to prosecute me. The US has stated publicly that it is exploring how to prosecute me and others associated with the WikiLeaks publication,[12] even when

[11] See note 4 above.

[12] US Attorney General Eric Holder indicated on 30 November 2010 that "an active, ongoing criminal investigation" against me and WikiLeaks was under way. From a Washington Post article from the same date: "Holder was asked Monday how the United States could prosecute Assange, who is an Australian citizen. "Let me be very clear," he replied. "It is not saber-rattling." "To the extent there are gaps in our laws," Holder continued, "we will move to close those gaps, which is not to say . . . that anybody at this point, because of their citizenship or their residence, is not a target or a subject of an investigation that's ongoing." Other legislators, both Democrats and Republicans, have pressured for my prosecution under the Espionage Act, or under terrorist legislation. The head of the US Senate's powerful intelligence oversight committee, Dianne Feinstein, called for my prosecution under the Espionage Act on 7 December 2010 http://online.wsj.com/article/SB10001424052748703989004575653280626335258.html, and again in July 2012 http://www.smh.com.au/national/us-senator-calls-to-prosecute-assange-20120701-21b3n.html. On 1 December 2010, US Congresswoman Candice Miller called for the Obama administration to "[treat] WikiLeaks for what it is – A terrorist organization whose continued operation threatens our security" http://www.c-spanvideo.org/program/Candic. On 1 December 2010, CNN reported that US Congressman Peter T. King "said Assange should be prosecuted for espionage. He also said that the United States should classify WikiLeaks as a terrorist group so that "we can freeze their assets." And he called Assange an

prominent human rights groups, the Committee to Protect Journalists and others have condemned these attempts.[13] Some influential opinion writers have cheered on a prosecution against me[14] and some have gone as far as to call for my assassination.[15]

18. The US Department of Justice launched the criminal investigation into me and WikiLeaks in early 2010.[16] On 24 June this year, the *New York Times* reported that the Department of Justice had confirmed that the criminal investigation continues.[17] Diplomatic communications from the Australian mission in Washington characterise the US investigation into WikiLeaks as "unprecedented in scale and nature".[18]

19. On 28 September 2012 the Pentagon renewed its threats against WikiLeaks, stating "it is our view that continued possession by WikiLeaks of classified information belonging to the United States government represents a continuing violation of law" and "[w]e regard this as a law enforcement matter". The investigation comprises the FBI and at least 10 other US agencies. In official Australian government records the US probe is

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enemy combatant." http://www.cnn.com/2010/WORLD/europe/12/01/sweden.interpol.assange/index.html

13 See 'CPJ urges US not to Prosecute Assange', CPJ letter to Barack Obama, 17 December 2010 https://www.cpj.org/2010/12/cpj-urges-us-not-to-prosecute-assange.php; Human Rights Watch in 2010, http://www.hrw.org/news/2010/12/15/us-don-t-prosecute-wikileaks-founder; "Global Journalists' Union Supports WikiLeaks', 16 July 2013 http://www.alliance.org.au/global-journalists-union-supports-wikileaks. See also former New York Times lawyer Floyd Abrams and Harvard law professor Yochai Benkler, 13 March 2013 https://www.nytimes.com/2013/03/14/opinion/the-impact-of-the-bradley-manning-case.html?_r=0

14 For example, former publisher of the Wall Street Journal and former executive vice president of Dow Jones, Gordon Crovitz, calling for my prosecution for 'aiding the enemy' on 17 March 2013 http://online.wsj.com/article/SB10001424127887324532004578362593064526174.html

15 Journalists calling for my assassination include, most recently, Time's senior correspondent Michael Grunwald (see New Yorker, 'Michael Grunwald and the Assange Precedent Problem', 18 August 2013 http://www.newyorker.com/online/blogs/closeread/2013/08/michael-grunwald-and-the-assange-precedent-problem.html and Appendix M), and Jeffrey T. Kuhner, a columnist at The Washington Times and president of the Edmund Burke Institute (see Washington Times, 'Assassinate Assange', 2 December 2010 http://www.washingtontimes.com/news/2010/dec/2/assassinate-assange/ but compare this to the screenshot of the original headline in Appendix M).

16 These include: within the Department of Defense, Centcom, the Defense Intelligence Agency, the US Army Criminal Investigation Division, the United States Forces in Iraq, the First Army Division, The US Army Computer Crimes Investigative Unit (CCIU) and the Second Army Cyber-Command; the Department of Justice, most significantly, and its US Grand Jury in Alexandria Virginia and adjoined Federal Bureau of Investigation (FBI) file, which had, according to court testimony in early 2012, produced a file of 42,135 pages into WikiLeaks, of which less than 8,000 concern Bradley Manning; and the Department of State and Department of State's Diplomatic Security Services. In addition, WikiLeaks has been investigated by the Office of the Director General of National Intelligence (ODNI), the Director of National Counterintelligence Executive, the Central Intelligence Agency (CIA), the House Oversight Committee, the National Security Staff Interagency Committee, and the PIAB - the President's Intelligence Advisory Board.

17 See New York Times, 'Assange, Back in the News, Never Left U.S. Radar', 24 June 2013 https://www.nytimes.com/2013/06/25/world/europe/wikileaks-back-in-news-never-left-us-radar.html?smid=tw-nytmedia&pagewanted=all&_r=0

18 Sydney Morning Herald, 'US targets WikiLeaks like no other organisation', 2 December 2011. http://www.smh.com.au/technology/technology-news/us-targets-wikileaks-like-no-other-organisation-20111202-1obeo.html#ixzz2RobeLeu0

described as a "whole of government" investigation.[19]

20. In Alexandria, Virginia, a Grand Jury has been empanelled for the past three years to explore ways to prosecute WikiLeaks for its publishing work. It has identified seven civilians, including the "founders, owners or managers of WikiLeaks".[20] The Grand Jury's case number is 10GJ3793. Prosecutors Neil MacBride and Andrew Peterson are listed in motion filings associated with the Grand Jury.[21] Although the Grand Jury is held in secret, documents relating to the Grand Jury hearing have made their way into the public record[22] and one of the witnesses who was compelled to testify before the Grand Jury has come forward.[23]

21. I understand from the proceedings against the alleged WikiLeaks source Bradley Manning that the US administration has every intention of imprisoning me and other WikiLeaks associates as co-conspirators. The prosecution has repeatedly referred to me in the Manning court martial. Mr Manning stated in pre-trial testimony that he communicated anonymously with someone at WikiLeaks who he believed to be "likely Mr. Julian Assange... or a proxy representative of Mr. Assange...".[24] The prosecution in the Manning case has attempted to establish that Mr Manning acted as an an agent under my control rather than as a journalistic source of mine, even though in his own statement to the court Manning denies this.[25] The US military charged Manning with twenty-two counts in connection with the release of more than 700,000 classified or confidential documents to WikiLeaks. On 30 July 2013 Manning was convicted of twenty of these counts and sentenced to thirty-five years in prison on 20 August 2013.

22. I understand from my lawyers' analysis of my situation presented to the government of Ecuador in relation to my asylum application that the treatment of the alleged

[19] See http://www.smh.com.au/technology/technology-news/us-targets-wikileaks-like-no-other-organisation-20111202-1obeo.html

[20] See http://www.alexaobrien.com/secondsight/wikileaks/grand_jury/wikileaks_grand_jury_seven_civilians_targeted_by_fbi_for_criminal_activity_and_espionage.html

[21] The names are listed in the filings and/or court docket for a motion to stay an 18 USC. § 2703(d) Stored Communications Act request filed on 14 December 2010 in relation to case 10GJ3793. The request relates to the US Government asking Twitter to turn over information of my account www.alexaobrien.com/secondsight/wikileaks/grand_jury/legal_dockets_a/wikileaks_grand_jury_prosecutor_andrew_peterson_case_history.html

[22] See http://www.salon.com/news/opinion/glenn_greenwald/2011/06/09/wikileaks/subpoena.pdf ; http://www.salon.com/news/opinion/glenn_greenwald/2011/06/09/wikileaks/Ltr.House.pdf

[23] See http://www.democracynow.org/2011/7/11/david_house_on_bradley_manning_secret#transcript

[24] Pfc. Bradley E. Manning's Statement for the Providence Inquiry, 28 February 2013 http://www.alexaobrien.com/secondsight/wikileaks/bradley_manning/pfc_bradley_e_manning_providence_hearing_statement.html

[25] 'Pfc. Bradley E. Manning's Statement for the Providence Inquiry', 28 February 2013 http://www.alexaobrien.com/secondsight/wikileaks/bradley_manning/pfc_bradley_e_manning_providence_hearing_statement.html; See also: "In the course of making that argument, the government's prosecutors keep mentioning Assange's name. Over and over. So far in the trial, he has been referenced 22 times." 'Julian Assange Emerges As Central Figure In Bradley Manning Trial' by Huffington Post's Matt Sledge, 19 June 2013 http://www.huffingtonpost.com/2013/06/19/julian-assange-bradley-manning-trial_n_3462502.html

WikiLeaks source Bradley Manning shows that there is a real risk of being subjected to cruel, inhuman and degrading treatment if I am imprisoned in the United States. Manning was detained for more than 1,000 days before his trial commenced on 3 June 2013. During this time he remained for 258 days in solitary confinement.[26] The UN Special Rapporteur on Torture found that the conditions and length of Manning's confinement at Quantico, Virginia, amounted to inhuman and degrading treatment.[27] Manning's lawyer, David Coombs, said in court that the treatment of Manning was an attempt at breaking him so that he would implicate me.[28] The US military court system eventually found that Mr Manning was unlawfully punished as a result of this treatment while in US custody.[29]

23. The charges against Bradley Manning included 'aiding the enemy' and espionage. The 'aiding the enemy' charge carries with it a potential death sentence, or life without parole. There is a consensus among legal commentators that the application of the 'aiding the enemy' charge in the Bradley Manning trial constituted a serious threat to journalism.[30] While Manning was eventually acquitted of aiding the enemy, it remains a charge that the US government could still seek to employ against others, including me. Manning was convicted of espionage; the first whistleblower ever so convicted. He was sentenced to 35 years in prison on 20 August 2013 and has appealed to the US Army Criminal Court of Appeal.

24. Much of the proceedings in the Manning trial have been kept secret from the public, which led me and my publishing organisation earlier this year to challenge the military

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[26] 'Army transfers accused intel specialist to MDW', 30 July 2010 http://www.army.mil/article/43114/

[27] The Special Rapporteur's findings were included in the Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, United Nations Human Rights Council, 29 February 2012, A/HRC/19/61/Add.4
http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/19/61/Add.4&Lang=E
See also http://www.guardian.co.uk/world/2012/mar/12/bradley-manning-cruel-inhuman-treatment-un. The US State Department spokesman P.J. Crowley later resigned after voicing disagreement regarding Manning's treatment, remarking the measures imposed on Manning were "ridiculous and counterproductive and stupid". http://www.washingtonpost.com/blogs/44/post/pj-crowley-resigns-after-bradley-manning-comments/2011/03/13/AB1CvgT_blog.html

[28] See audio transcript of interview with Michael Ratner of the Center for Constitutional Rights: "The lawyer for Bradley Manning, David Coombs, has said openly in court that they are going after Manning with so much toughness, with wanting a 40-year sentence or whatever he said in court, because they want him to testify against Julian Assange", 13 September 2012 http://therealnews.com/t2/index.php?option=com_content&task=view&id=31&Itemid=74&jumival=8806

[29] The conditions of Manning's confinement were the subject of an unlawful pre-trial punishment motion hearing in which the US military conceded that it had subjected Manning to unlawful pre-trial punishment. http://www.bradleymanning.org/news/military-judge-rules-bradley-manning-was-illegally-treated-awards-112-days-credit

[30] See, for example, Yochai Benkler, law professor and director of the Berkman Center for Internet and Society at Harvard University, 'Bradley Manning 'aiding the enemy' charge is a threat to journalism', The Guardian, 19 July 2013 http://www.guardian.co.uk/commentisfree/2013/jul/19/bradley-manning-trial-aiding-the-enemy-charge; as well as Yochai Benkler's testimony in the court martial: https://pressfreedomfoundation.org/sites/default/files/07-10-13-AM-session.pdf See also 'Transparency, accountability at stake in Manning trial', Committee to Protect Journalists, 16 May 2013 https://www.cpj.org/blog/2013/05/transparency-accountability-at-stake-in-manning-tr.php; Floyd Abrams and Yochai Benkler, 'Death to Whistleblowers?', New York Times, 13 May 2013 https://www.nytimes.com/2013/03/14/opinion/the-impact-of-the-bradley-manning-case.html?_r=1&

court's secrecy alongside other journalists and the US Center for Constitutional Rights.[31]

25. I understand by my lawyer Gareth Peirce's assessment, expressed in a letter to foreign minister of Australia Kevin Rudd and subsequently released by the Australian government, that a sealed indictment is very likely to have been issued for me and that a sealed US extradition request is ready to be issued, if it has not been issued already. Internal emails from the "global intelligence" company Stratfor detail a sealed indictment against me issued in January 2011 or before.[32] According to a respected UK newspaper, the US and Sweden entered into informal talks about my extradition during December 2011 or before December 2011.[33]

26. In this context I have been granted asylum after a formal assessment by the government of Ecuador in relation to the current and future risks of persecution and cruel, inhuman and degrading treatment in the United States in response to my publishing activities and my political opinions.[34] I remain under the protection of the embassy of Ecuador in London for this reason.

3. Known intelligence operations prior to travelling to Sweden

December 2009 - August 2010

27. Because of the nature of our work, WikiLeaks journalists expect to be the subject of intelligence operations from time to time. US intelligence operations have been carried out against WikiLeaks for a number of years. Intelligence operations on European soil relating to my work include US covert monitoring of my person in Germany in 2009 (as detailed in this affidavit), and the publicly reported operations of FBI officers and others in the UK in August 2010, in Iceland in 2011 and in Denmark in 2012.

28. At the same time that the suitcase containing WikiLeaks property, associated data and my privileged client-attorney communications was seized or stolen, WikiLeaks and

[31] See 'Julian Assange Sues Military Over Bradley Manning Trial Secrecy', Huffington Post, 22 May 2013 http://www.huffingtonpost.com/2013/05/22/julian-assange-bradley-manning-lawsuit_n_3321302.html and Center for Constitutional Rights et al. v. United States & Lind, Chief Judge http://ccrjustice.org/ourcases/current-cases/ccr-et-al-v-usa-and-lind-chief-judge

[32] The person who wrote the email is Stratfor's Vice-President for Counterterrorism and Corporate Security, a former Deputy Chief of the Department of State's (DoS) counterterrorism division for the Diplomatic Security Service (DSS). See http://wikileaks.org/gifiles/docs/375123_fw-ct-assange-manning-link-not-key-to-wikileaks-case-.html

[33] "Informal discussions have already taken place between US and Swedish officials over the possibility of the WikiLeaks founder Julian Assange being delivered into American custody, according to diplomatic sources." - 'Assange could face espionage trial in US', The Independent, 8 December 2010 http://www.independent.co.uk/news/uk/crime/assange-could-face-espionage-trial-in-us-2154107.html

[34] Declaración del Gobierno de la República del Ecuador sobre la solicitud de asilo de Julian Assange, Comunicado No. 042, 16 August 2012, http://www.mmrree.gob.ec/2012/com042.asp

my person were the subject of heightened intelligence operations. The US government publicly displayed an intense interest in tracking my movements and in preventing WikiLeaks from publishing.[35] I followed closely news reports about the US investigations and the WikiLeaks Grand Jury. I became aware through a number of tip-offs from sources within the intelligence and diplomatic communities of the types of activities, including extraterritorial conduct, that were being entertained in relation to WikiLeaks.

29. Below I set out a chronology of the political, security and legal events that led up to the suspected seizure or theft of WikiLeaks material, data and privileged correspondence on 27 September 2010. It is necessary to establish the plausibility of extra-legal activity by the United States or other governments or individuals acting as its agents or on their own behalf.

26-30 December 2009

30. On 11 June 2013, US marine special intelligence system administrator (MoS 2651) Matthew Hosburgh, a witness for the prosecution in the Bradley Manning court martial, testified that he had engaged in an intelligence reporting activity in relation to me at the 26C3 meeting in Berlin (26-30 December 2009),[36] where I delivered a talk about WikiLeaks.[37] Hosburgh also engaged in intelligence-gathering at a talk by Jeremie Zimmermann at the same Congress.[38] Mr. Zimmermann is a personal friend of mine and a vocal supporter of WikiLeaks. In the beginning of 2012 he was targeted at a US airport by the FBI in an attempt to recruit intelligence about me and WikiLeaks.[39] Hosburgh subsequently wrote the report 'CCC Here Be Dragons Trip Report',[40] which has been withheld from the public records associated with Bradley Manning's case although it was submitted as evidence. The report was leaked to WikiLeaks and was being prepared for publication during September 2010. The report was among the WikiLeaks materials that had been kept encrypted in the suitcase that was seized on 27 September 2010 when I was travelling from Stockholm to Berlin.

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[35] See, for example, Philip Shenon reports in June 2010: "Anxious that Wikileaks may be on the verge of publishing a batch of secret State Department cables, investigators are desperately searching for founder Julian Assange": Philip Shenon, 'Pentagon Manhunt', The Daily Beast, 10 June 2010 http://www.thedailybeast.com/articles/2010/06/10/wikileaks-founder-julian-assange-hunted-by-pentagon-over-massive-leak.html. This followed earlier reports from Glenn Greenwald (then reporting for Salon, but who now writes for The Guardian) about the "increasingly aggressive war being waged against WikiLeaks by numerous government agencies, including the Pentagon" in March 2010: Glenn Greenwald, 'The war on WikiLeaks and why it matters', Salon, 27 March 2010 http://www.salon.com/2010/03/27/wikileaks/singleton/

[36] See pages 24-45, https://pressfreedomfoundation.org/sites/default/files/06-11-13-AM-session.pdf

[37] The video of my talk is available at: https://www.youtube.com/watch?v=VAfT0L0WyS4&list=PL5C1B15B103C45DEE

[38] The video of Mr. Zimmermann's talk is available at: https://www.youtube.com/watch?v=gy8TUFAhLVk

[39] See J. Assange with J. Appelbaum, A. Muller-Maguhn and J. Zimmermann, "Cypherpunks", ed. O/R Books at p. 27: 'Harassment of Jacob Appelbaum and Jeremie Zimmermann'.

[40] See pages 24-45 https://pressfreedomfoundation.org/sites/default/files/06-11-13-AM-session.pdf

31. The report was significant in that it formed the basis from which it would be possible to challenge the legality of the US intelligence activity on German soil at the 26C3. The report potentially raises legitimate concerns over whether this particular US surveillance operation fell within the agreed parameters of permitted intelligence activity by the US within German jurisdiction. Although the report is mentioned in the Bradley Manning court martial and some of its contents have been discussed, the report itself remains inaccessible to the public, along with much of the other evidence, motions and proceedings of the trial, due to the secrecy imposed on the Manning proceeding by the US military.

32. I understand that the agreement between Germany and the United States grants the US bases in Germany strictly limited surveillance powers to defend the bases from surveillance and terrorist attack.

33. I understand from having read the secret report – the same report that was submitted as evidence (Exhibit 43) in the Bradley Manning trial – that Germany may have grounds to challenge the legality of US military intelligence monitoring of me and Mr Zimmermann. The report used a doubtful chain of logic in an apparent attempt to justify its monitoring effort, which contrasts with the clearly defined parameters in which spying by a foreign power is permitted under German law.

34. The report, in what may be a deliberate attempt to evade legal limitations on the conduct of US military intelligence officers in Germany stated (from memory):

a) WikiLeaks helps whistleblowers publish safely.

b) This may encourage soldiers within US bases in Germany to use WikiLeaks.

c) Which might reveal security weaknesses at the bases.

d) Which might then increase the chance of attack on US bases in Germany.

35. The report also showed similar *mens rea* in its monitoring of Jeremie Zimmermann. It attempts to justify its possible violations of German law with the following chain of reasoning (paraphrased, from memory):

a) Jeremie Zimmermann and his organisation La Quadrature du Net are part of the campaign for 'Network Neutrality'.

b) 'Network Neutrality' is a legislative reform that mandates "the principle that internet service providers and governments should treat all data on the

internet equally, in the same way that electricity is charged the same regardless of whether the device is a TV or a power tool".

c) If there is no discrimination of services on the internet by telecommunications companies there may be less blocking (censoring) of internet services and sites.

d) If there is less internet censorship there may be more people communicating with terrorist websites.

e) If there are more people communicating with terrorist websites then there may be more terrorism. If there is more terrorism then US bases in Germany may be more likely to suffer a terrorist attack.

36. The author of the "after action" report (a report made after a military action, in this case, the monitoring in Berlin), US marine special intelligence system administrator (MoS 2651) Matthew Hosburgh, testified for the prosecution at the Manning trial on 11 June 2013 (see Annex N).

37. The prosecution used Hosburgh's testimony and report in an attempt to conflate WikiLeaks with terrorism in order to convict Bradley Manning on the most serious charge which carries the death penalty or life in prison, *aiding the enemy*, and in relation to what the defence called the "made up offense" of *wanton publication*[41].

38. In relation to net neutrality, Hosburgh made the link to terrorism in arguing that terrorists can better hide their communications with net neutrality. In relation to WikiLeaks, however, the link to terrorism is implied.

39. According to the Manning trial transcripts, the report states in relation to terrorists and the use of the internet that "the internet is an essential communication tool for terrorists" (page 2). Page 3 of the report claims that WikiLeaks poses a large threat, not only from the actual external disclosure, but from the insider.[42]

2010

40. In early 2010 the US government publicly displayed an intense interest in my whereabouts and my publishing activities.[43]

41 See 'Overview of Charge of Wanton Publication and USG Classified Witnesses' http://www.alexaobrien.com/secondsight/wikileaks/bradley_manning/us_v_pfc_manning_overview_of_wanton_publication_and_classified_government_witnesses.html

42 Bradley Manning court martial, 25 July 2013 https://pressfreedomfoundation.org/sites/default/files/07-25-13-PM-session.pdf

43 Glenn Greenwald wrote about the "increasingly aggressive war being waged against WikiLeaks by numerous government agencies, including the Pentagon" in March 2010: Glenn Greenwald, 'The war on WikiLeaks and why it matters', Salon, 27 March 2010

41. On 18 February 2010, WikiLeaks released a classified cable from the US Embassy in Reykjavik dated 13 January 2010. The witness statement of US Under-Secretary of State Patrick Kennedy at the Manning trial explained that the release of this cable prompted an investigation by the US Diplomatic Security Service (DSS) and other elements of the US government:

> *Our diplomatic security service, which is **the security arm of the State Department, worked with other elements of the United States government** to determine what the source of that [Reykjavik 13 cable] leak might have been.*[44]

March 2010

42. In March 2010 I was based in Iceland. Together with a team of people, I prepared WikiLeaks' release of a video that depicted the indiscriminate slaying of more than a dozen people in the Iraqi suburb of New Baghdad, including two Reuters news staff, by US forces.[45] Two young children were also critically wounded in the attack. Also in March, WikiLeaks published an intelligence report from 2008 prepared by the US Army Counterintelligence Center.[46] The report detailed numerous ways which it believed could be used to destroy or marginalise WikiLeaks – essentially by subjecting the organisation and those associated to it to political persecution. These methods include:

> ***The identification, exposure, termination of employment, criminal prosecution, legal action against current or former insiders, leakers, or whistleblowers** could potentially damage or destroy this center of gravity and deter others considering similar actions from using the Wikileaks.org Web site.*[47]

24 March 2010

43. The team working in Iceland were subjected to physical surveillance during this time, which led to the organisation alerting the public on 24 March 2010 via its twitter account that our physical security and the security of our work was at risk.[48]

5 April 2010

44. On 5 April 2010, I held a press conference at the Washington National Press Club to announce the release of the Baghdad helicopter video, *Collateral Murder*.[49]

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http://www.salon.com/2010/03/27/wikileaks/singleton/

44 See Under-Secretary of State Patrick Kennedy's testimony in the Bradley Manning trial on 5 August 2013 https://pressfreedomfoundation.org/sites/default/files/08-05-13-AM-session.pdf

45 See http://collateralmurder.org/

46 See http://file.wikileaks.org/file/us-intel-wikileaks.pdf

47 See http://file.wikileaks.org/file/us-intel-wikileaks.pdf

48 See www.gawker.com/5500703/is-the-us-spying-on-a-tiny-secret+sharing-website

49 See http://collateralmurder.com

29 May 2010

45. Bradley Manning was placed in pre-trial confinement at Camp Arifjan, Kuwait by US forces.[50]

7 June 2010

46. At the daily press briefing on 7 June 2010, US State Department spokesperson P.J. Crowley addressed journalists' questions regarding WikiLeaks' possession of yet unpublished US State Department cables: "State Department is working closely with the US Army Criminal Investigative Division, or CID".[51]

8 June 2010

47. A news report entitled 'The State Department's Worst Nightmare' said that the Pentagon was "conducting an aggressive investigation" into whether WikiLeaks had 260,000 US diplomatic cables and the material's whereabouts.[52]

48. Neil H. MacBride, United States Attorney for the Eastern District of Virginia, announced that Andrew Peterson was joining the Terrorism and National Security Unit as a prosecutor. Both MacBride and Peterson are involved with the WikiLeaks Grand Jury.[53] MacBride's controversial prosecutorial tactics include the extraterritorial application of US criminal law.[54] MacBride explained in a *Washington Post* article:

> *"Criminals today aren't confined by borders, and neither are we... A criminal organization is as much a threat to us from across the ocean as it is across the street. That's why* ***we made the strategic decision to go after networks and their leadership wherever they are found****."*[55]

10 June 2010

50 See http://www.alexaobrien.com/timeline_us_versus_manning_assange_wikileaks_2010.html#may

51 See http://www.state.gov/r/pa/prs/dpb/2010/06/142797.htm

52 Philip Shenon, 'The State Department's Worst Nightmare', The Daily Beast, 8 June 2010 http://www.thedailybeast.com/articles/2010/06/08/state-department-anxious-about-diplomatic-secrets-bradley-manning-allegedly-downloaded.html

53 MacBride has announced he will step down in September 2013, see http://www.washingtonpost.com/local/us-attorney-neil-macbride-to-leave-office-as-va-governor-probe-heats-up/2013/08/22/17797f9e-0aa8-11e3-8974-f97ab3b3c677_story.html. See also www.alexaobrien.com/secondsight/wikileaks/grand_jury/legal_dockets_a/wikileaks_grand_jury_prosecutor_andrew_peterson_case_history.html and http://www.alexaobrien.com/timeline_us_versus_manning_assange_wikileaks_2010.html#may

54 Audio of Neil H. MacBride at the American Bar Association from 17 April 2013: http://www.americanbar.org/content/dam/aba/multimedia/law_national_security/podcast_macbride_04172013.mp3

55 See http://www.washingtonpost.com/world/national-security/in-vas-eastern-district-us-attorneys-reach-transcends-geographic-bounds/2012/12/15/a3f8f992-4625-11e2-9648-a2c323a991d6_story_1.html

49. The article 'Pentagon Manhunt' described Pentagon investigators desperately trying to track me down in relation to the US diplomatic cables that we would begin to release on 28 November 2010: "Anxious that Wikileaks may be on the verge of publishing a batch of secret State Department cables, investigators are desperately searching for founder Julian Assange".[56] The officials "would not discuss the methods being used to find Assange, nor would they say if they had information to suggest where he is now."[57] On reading this, I became concerned for our continued ability to publish effectively.

17 June 2010

50. US Department of Defense spokesman Geoff Morrell said in relation to WikiLeaks that there was an "ongoing criminal investigation involving the Army Criminal Investigation Division, as well as, I believe, some other law enforcement agencies."[58]

16 July 2010

51. US Department of Homeland Security agents appeared at the HOPE computer conference in NYC looking for me.[59] I was supposed to give a keynote speech at the conference.[60] My friend Jacob Appelbaum gave the keynote speech in my place.[61]

25 July 2010

52. I was part of a team in the United Kingdom that published the *Afghan War Diaries*: 75,000 secret Pentagon documents about the war in Afghanistan, which included the detailed records about the deaths of nearly 20,000 people.

53. With our publication of the *Afghan War Diaries* and the news that WikiLeaks intended to publish hundreds of thousands of US diplomatic cables, US government officials started an attempt to delegitimise the legal protections WikiLeaks enjoys as a publisher by casting WikiLeaks as an adversary opposed to US national interests. The White House attempted to induce other news outlets into referring to WikiLeaks in these terms. The *New York Times* reported that the White House emailed reporters with suggested "reporting tacks to take" on WikiLeaks and its disclosures.

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56 See 'Pentagon Manhunt', The Daily Beast, 10 June 2010 http://www.thedailybeast.com/articles/2010/06/10/wikileaks-founder-julian-assange-hunted-by-pentagon-over-massive-leak.html

57 See 'Pentagon Manhunt', The Daily Beast, 10 June 2010 http://www.thedailybeast.com/articles/2010/06/10/wikileaks-founder-julian-assange-hunted-by-pentagon-over-massive-leak.html

58 See http://www.alexaobrien.com/timeline_us_versus_manning_assange_wikileaks_2010.html#may

59 See 'Feds look for Wikileaks founder at NYC hacker event', CNet, 16 July 2010 http://news.cnet.com/8301-1009_3-20010861-83.html?tag=mncol;txt

60 See 'Feds look for Wikileaks founder at NYC hacker event', CNet, 16 July 2010 http://news.cnet.com/8301-1009_3-20010861-83.html?tag=mncol;txt

61 See 'Feds look for Wikileaks founder at NYC hacker event', CNet, 16 July 2010 http://news.cnet.com/8301-1009_3-20010861-83.html?tag=mncol;txt

*The White House e-mailed the following statement with the subject line "Thoughts on Wikileaks" to reporters on Sunday evening. In the memo, the **White House advised journalists on possible reporting tacks to take** on the [Afghan War Diaries] documents [...].*[62]

54. The White House memo reportedly included:

*As you report on this issue, it's worth noting that wikileaks is not an objective news outlet but rather **an organization that opposes US policy in Afghanistan**.*[63]

26 July 2010

55. White House Press Secretary Robert Gibbs states that WikiLeaks "poses a very real and potential threat [...]".[64]

27 July 2010

56. A Pentagon press release indicated that the US Army's Criminal Investigation Division (CID) is in charge of the WikiLeaks investigation:

*The current **investigation into the leak of the documents to WikiLeaks isn't focused on any one, specific individual**," Lapan said. "**It's much broader. They're going to look everywhere to determine what the source may be.**"*[65]

57. In my home country Australia *The Canberra Times* reported that:

*Australian security authorities are assisting a United States intelligence probe into the whistleblower website Wikileaks and its Australian founder and editor, Julian Assange. The **US request for support in what Australian national security sources described as "a counter-espionage investigation" preceded Wikileaks' dramatic publication yesterday** of a leaked US military operations log, described as an "extraordinary compendium" of 91,000 reports by United States and allied soldiers fighting in Afghanistan.*[66]

28 July 2010

[62] See 'The War Logs: Reaction to Disclosure of Military Documents on Afghan War "6:46 p.m. | White House Offers Advice to Reporters"', 25 July 2010 http://atwar.blogs.nytimes.com/2010/07/25/the-war-logs/#Jones

[63] See 'The War Logs: Reaction to Disclosure of Military Documents on Afghan War "6:46 p.m. | White House Offers Advice to Reporters"', 25 July 2010 http://atwar.blogs.nytimes.com/2010/07/25/the-war-logs/#Jones

[64] See http://www.c-spanvideo.org/program/WhiteHouseDailyBriefing1571

[65] See http://www.defense.gov/news/newsarticle.aspx?id=60187

[66] See 'Australia aids US probe into war log leak', Philip Dorling, The Canberra Times, 27 July 2010 (only available in print).

58. US Department of Defense Secretary Gates "called FBI Director Robert Mueller and asked for the FBI's assistance in [the WikiLeaks] investigation as a partner."

> *Calling on the FBI to aid the investigation ensures that the department will have all the resources needed to investigate... noting that use of the bureau ensures* ***the investigation can go wherever it needs to go****."*[67]

30 July 2010

59. The immediate former head of the Central Intelligence Agency (CIA) and the National Security Agency (NSA), Michael V. Hayden, denounced my work in a CNN article entitled 'WikiLeaks disclosures are a "tragedy"'.[68]

60. A US Army press release announced that Bradley Manning had been moved from Camp Arifjan, Kuwait to Quantico, Virginia, where he was put in solitary confinement.[69]

61. The *New York Times* reported that US Defense Secretary Robert Gates

> *declined to comment about the investigation beyond noting that he had enlisted the* ***Federal Bureau of Investigation to assist Army investigators, a move that is seen as a precursor to potentially charging people who are not uniformed service members****[...] A person familiar with the investigation has said that Justice Department lawyers are exploring whether* ***Mr. Assange and WikiLeaks could be charged with inducing, or conspiring in, violations of the Espionage Act, a 1917 law*** *that prohibits the unauthorized disclosure of national security information.*[70]

62. That same week, while I was still in the United Kingdom, I discovered that the FBI was carrying out operations on UK soil in relation to its investigation into WikiLeaks' publishing activities. On 1 August 2010, the press reported that the FBI and British police were carrying out searches and interrogations in the UK.[71] These facts concerned me. The FBI was conducting operations in the UK, where I found myself at the time, in connection with the WikiLeaks disclosures.

63. Over the next days, the US counter-attack against WikiLeaks intensified. Certain prominent commentators and former White House officials championed extraterritorial

[67] See http://www.defense.gov/news/newsarticle.aspx?id=60238 For more details about the FBI's extraterritorial, and unauthorised, activities against WikiLeaks, see s. 7.1 "Known US WikiLeaks intelligence operations in Europe since 2011"

[68] See http://www.cnn.com / 2010/OPINION/07/30/hayden.wikileaks.secrets/index.html

[69] See http://www.army.mil/article/43114/

[70] See http://www.nytimes.com/2010/07/30/world/asia/30wiki.html

[71] See 'FBI question WikiLeaks mother at Welsh Home: Agents interrogate 'distressed' woman then search her son's bedroom', Mail Online, 1 August 2010 http://www.dailymail.co.uk/news/article-1299311/FBI-question-WikiLeaks-mother-Welsh-home-Agent-interrogate-distressed-woman-search-sons-bedroom.html

measures and the violation of international law "if necessary". These actions would directly infringe the basic rights and freedoms of those associated with the organisation and myself.[72]

3 August 2010

64. Influential former speech writer for President George W. Bush, Marc Thiessen, published a *Washington Post* article entitled 'WikiLeaks Must be Stopped'. Thiessen, who is described by Scott Horton, a human rights attorney and Columbia Law School lecturer, as the "mouthpiece of senior Bush-era intelligence community figures",[73] asserted that even though I am a non-US citizen working outside of the territory of the US

> *...the government has a wide range of options for dealing with him. It can employ not only law enforcement but also intelligence and military assets to bring Assange to justice.*[74]

Thiessen further advocated for the US to put pressure on any state in which I was located and that the US should, if necessary, arrest me even without the consent of that state. To support his position, he cited legal advice from the Department of Justice regarding FBI operations abroad:

> *The United States should make clear that it will not tolerate any country -- and particularly NATO allies such as Belgium and Iceland -- providing safe haven for criminals who put the lives of NATO forces at risk.*
>
> ***With appropriate diplomatic pressure, these governments may cooperate in bringing Assange to justice. But if they refuse, the United States can arrest Assange on their territory without their knowledge or approval.***

Thiessen further asserted that the FBI could violate international law in order to stop me and apprehend other people associated with WikiLeaks' publishing activities. Thiessen cited a Department of Justice memo:[75]

> *"the FBI may use its statutory authority to investigate and arrest individuals for violating United States law,* ***even if the FBI's actions contravene customary international law****" and that an "arrest that is inconsistent with international or foreign law does not violate the Fourth Amendment." In other words,* ***we do not need permission to apprehend Assange or his co-conspirators anywhere in the world.***

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[72] See the following paragraphs for examples.

[73] Scott Horton, 'WikiLeaks: The National-Security State Strikes Back', Harper's, 3 August 2010 http://harpers.org/blog/2010/08/wikileaks-the-national-security-state-strikes-back/

[74] Marc Thiessen, 'WikiLeaks Must Be Stopped', Washington Post, 3 August 2010 http://www.washingtonpost.com/wp-dyn/content/article/2010/08/02/AR2010080202627.html

[75] Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities: http://www.fas.org/irp/agency/doj/fbi/olc_override.pdf

*Arresting Assange would be a major blow to his organization. But taking him off the streets is not enough; **we must also recover the documents he unlawfully possesses** and disable the system he has built to illegally disseminate classified information.*

This should be done, ideally, through international law enforcement cooperation. But if such cooperation is not forthcoming, the United States can and should act alone.

65. My personal safety was also at risk. Scott Horton, who is also the legal affairs and national security contributor at *Harper's*, wrote 'WikiLeaks: The National-Security State Strikes Back':

> ***[Assange] will certainly be targeted for petty harassment and subject to steady surveillance, and efforts to kidnap him are almost certainly being spun at this very moment.***[76]

5 August 2010

66. Pentagon Press Secretary Geoff Morrell announced an anti-WikiLeaks task force at the Department of Defense: "a 24-hour operation. They have roughly -- they're up to about 80 personnel".[77]

67. The task force mushroomed over the next weeks. It grew from 80 to 120 agents by 12 September 2010.[78]

68. The "distinct responsibility" of the Information Review Task Force – dubbed by some occupants as the "WikiLeaks War Room" – was:[79]

> *...to gather evidence about the workings of WikiLeaks that might someday be used by the Justice Department to prosecute Assange and others on espionage charges.*

69. I read the article 'The General Gunning for WikiLeaks', which described the task force:[80]

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[76] Scott Horton, 'WikiLeaks: The National-Security State Strikes Back', Harper's, 3 August 2010 http://harpers.org/blog/2010/08/wikileaks-the-national-security-state-strikes-back/

[77] Department of Defense Press Briefing, 5 August 2010 http://www.defense.gov/transcripts/transcript.aspx?transcriptid=53001

[78] Philip Shenon, 'The General Gunning for WikiLeaks', The Daily Beast, 12 September 2010 http://www.thedailybeast.com/articles/2010/09/12/pentagons-wikileaks-war-room-readies-for-new-document-dump.html

[79] Philip Shenon, 'The General Gunning for WikiLeaks', The Daily Beast, 12 September 2010 http://www.thedailybeast.com/articles/2010/09/12/pentagons-wikileaks-war-room-readies-for-new-document-dump.html

[80] Philip Shenon, 'The General Gunning for WikiLeaks', The Daily Beast, 12 September 2010 http://www.thedailybeast.com/articles/2010/09/12/pentagons-wikileaks-war-room-readies-for-new-

*In a nondescript suite of government offices not far from the Pentagon, **nearly 120 intelligence analysts, FBI agents, and others are at work—24 hours a day, seven days a week—on the frontlines of the government's secret war against WikiLeaks.***

*Dubbed the WikiLeaks War Room by some of its occupants, **the round-the-clock operation is on high alert this month** ...*

70. The same article states that Brig. General Robert A. Carr, who runs "the Pentagon's equivalent to the CIA", the Defense Counterintelligence and Human Intelligence Center of the Defense Intelligence Agency (DIA), was "handpicked" by Defense Secretary Robert Gates to head the team because he "is highly respected …and **a fitting adversary to Assange**".[81]

71. General Carr's "central assignment" was reportedly "to try to determine exactly what classified information might have been leaked to WikiLeaks".[82] General Carr testified at the Bradley Manning sentencing hearing on 31 July 2013.[83]

10 August 2010

72. I followed closely how pressure mounted on US allies to track my movements and to stop our publications. Official sources within the administration revealed to the press that the US was not only considering how to prosecute me in relation to WikiLeaks' publications in the US, but was also requesting their allies to prosecute me under their own national security laws:[84]

***American officials confirmed last month that the Justice Department was weighing a range of criminal charges against Assange and others** [...]*

*Now, the officials say, **they want other foreign governments to consider the same sorts of criminal charges.***

*The Obama administration is pressing Britain, Germany, Australia, and other allied Western governments to **consider opening criminal investigations of WikiLeaks founder Julian Assange and to severely limit his nomadic travels***

document-dump.html

81 Philip Shenon, 'The General Gunning for WikiLeaks', The Daily Beast, 12 September 2010 http://www.thedailybeast.com/articles/2010/09/12/pentagons-wikileaks-war-room-readies-for-new-document-dump.html

82 Philip Shenon, 'The General Gunning for WikiLeaks', The Daily Beast, 12 September 2010 http://www.thedailybeast.com/articles/2010/09/12/pentagons-wikileaks-war-room-readies-for-new-document-dump.html

83 See https://pressfreedomfoundation.org/sites/default/files/07-31-13-AM-session.pdf

84 See Philip Shenon, 'U.S. Urges Allies to Crack Down on WikiLeaks', The Daily Beast, 10 August 2010 http://www.thedailybeast.com/articles/2010/08/10/a-western-crackdown-on-wikileaks.html

across international borders, American officials say.[85]

73. In addition to the stated intention to restrict my freedom of movement, the US government attempted to convince its allies not to allow me entry into their territory as a warning to me, to those working with me and WikiLeaks, and to our supporters:[86]

> ***Through diplomatic and military channels, the Obama administration is hoping to convince Britain, Germany, and Australia, among other allied governments, that Assange should not be welcome on their shores*** *either, given the danger that his group poses to their troops stationed in Afghanistan, American officials say.*
>
> ***They say severe limitations on Assange's travels might serve as a useful warning to his followers*** *that their own freedom is now at risk.*

74. The Australian government publicly entertained the possibility of cancelling my passport, reportedly as a result of pressure placed on Australia by the United States. Australian Attorney General Robert McClelland assured the United States that the Australian government would "provide every assistance to United States law-enforcement authorities", including by exploring the possibility of cancelling my passport.[87]

75. Not only was the US seeking to put pressure on me and other individuals associated with my organisation directly and pressuring its allies to do the same, the US also considered reviewing its diplomatic relations with Iceland because of the connection WikiLeaks had with that country:

> *An American military official tells The Daily Beast that* ***Washington may also want to closely review its relations with Iceland in the wake of the release of the Afghan war logs.***[88]

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85 Philip Shenon, 'U.S. Urges Allies to Crack Down on WikiLeaks', The Daily Beast, 10 August 2010 http://www.thedailybeast.com/articles/2010/08/10/a-western-crackdown-on-wikileaks.html

86 Philip Shenon, 'U.S. Urges Allies to Crack Down on WikiLeaks', The Daily Beast, 10 August 2010 http://www.thedailybeast.com/articles/2010/08/10/a-western-crackdown-on-wikileaks.html#sthash.K900qoyI.dpuf

87 Mr McClelland also said the Australian government had considered cancelling Mr Assange's passport, but there were "issues in respect of serving a notice of cancellation":
"More importantly, there (are) issues as to whether it would be constructive or counter-productive to the law enforcement," he said.
Assange's passport would set off alarms if presented at an airport, and Mr McClelland questioned "whether it would be counter-productive to remove the identification that would in fact trigger the law-enforcement process". http://news.smh.com.au/breaking-news-national/australia-to-help-us-over-assange-20101204-18k3w.html

88 See 'U.S. Urges Allies to Crack Down on WikiLeaks', The Daily Beast, 10 August 2010 http://www.thedailybeast.com/articles/2010/08/10/a-western-crackdown-on-wikileaks.html

11 August 2010

76. On 11 August 2010, former CIA general counsel Jeffrey Smith told National Public Radio that although the law does not permit the US government to go after me with the sole intent of harassment or putting me out of business, "I think it is entirely appropriate for us to be very aggressive".[89] He went on to say:

> *If I were the US government, I would be trying to make it as difficult as possible for the WikiLeaks founder to continue to do business... **To the extent we can persuade our allies to consider prosecution**, I think that's all to the good.*

77. US pressure even resulted in public attempts to influence decisions based on human rights considerations where I and WikiLeaks were concerned. The US pressured Switzerland not to grant me political asylum:[90]

> *The United States ambassador to Switzerland, Donald Beyer, has also entered the Wikileaks debate. He has warned the Swiss government against granting Assange asylum, which the Australian founder of Wikileaks has said he was considering requesting. "Switzerland should very carefully consider whether to provide shelter to someone who is on the run from the law," Beyer told the newspaper Sonntag.*

78. Friends and associates of mine and volunteers of the organisation were regularly targeted at borders from this moment on.[91] Border searches and interrogations have affected security researcher Jacob Appelbaum, who had given the keynote speech in my

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89 See 'WikiLeaks Faces Growing Pressure Over War Files', NPR, 11 August 2010 http://www.npr.org/templates/story/story.php?storyId=129135378

90 For example, the Swiss paper NZZ am Sontag published an article entitled 'Pressure mounts on WikiLeaks and Assange': http://www.swissinfo.ch/eng/politics/Pressure_mounts_on_WikiLeaks_and_Assange.html?cid=28956246 and in June 2012 the Washington Post Editorial Board advocated applying coercive measures (suspending special trade preferences) to influence Ecuador's sovereign decision, based on human rights considerations, as to whether to grant me asylum http://articles.washingtonpost.com/2012-06-20/opinions/35460325_1_asylum-for-julian-assange-ecuadoran-extradition

91 On 29 July 2010 US citizen Jacob Appelbaum was detained at Newark Liberty International Airport and questioned about me for three hours by Department of Homeland Security and Army CID agents. His laptop and three cell phones were seized. https://www.nytimes.com/2010/08/02/world/02wiki.html?_r=2&
31 July 2010 – US citizen Jacob Appelbaum was questioned by two FBI agents at Defcon. http://news.cnet.com/8301-27080_3-20012253-245.html
September 2010 onwards – US citizen David House of the Bradley Manning Support Network was detained and questioned at the border on each of the seven occasions he re-entered the US after foreign travel. On 3 November 2010 – he was detained on the border by two agents, one from Homeland Security and a second from the FBI Joint Terrorism Task Force: http://www.democracynow.org/2011/3/3/bradley_manning_hit_with_new_charges The American Civil Liberties Union (ACLU) filed a civil lawsuit, which resulted in a settlement with the US government.
Early 2012 – Jeremie Zimmermann, who appears in the Collateral Murder video credits, and Smari MacCarthy, who briefly volunteered for WikiLeaks in Iceland, were both detained and questioned in US airports. http://www.abc.net.au/4corners/stories/2012/07/19/3549280.htm

place at the HOPE conference on 16 July 2010.[92] In an interview for *Democracy Now!*, Appelbaum described the targeting he experiences at airports:

> *In the period of time since [the HOPE conference on 16 July 2010] they've started detaining me, around a dozen-plus times... I was put into a special room, where they frisked me, put me up against the wall. One guy cupped me in a particularly uncomfortable way. Another one held my wrists. They took my cellphones. I'm not really actually able to talk about what happened to those next.... And they took my laptop... then they interrogated me, denied me access to a lawyer. And when they did the interrogation, they have a member of the U.S. Army, on American soil. And they refused to let me go. They ... implied that if I didn't make a deal with them, that I'd be sexually assaulted in prison."*

79. This practice has even affected my legal advisor, Jennifer Robinson, who was placed on an 'inhibited' list at Heathrow airport.[93] Robinson has been affected in other ways as well. In November 2010 she received an inappropriate letter from the State Department, which prompted the Lawyers Rights Watch Canada (LRWC) to issue a statement to US Secretary of State Hillary Clinton and Attorney General Eric Holder that the State Department letter had interfered with my right to counsel.[94]

80. Jeremie Zimmermann, who was reported on by US intelligence at the 2009 26C3 meeting in Berlin alongside me, was subsequently ambushed at Washington Dulles airport, by individuals purporting to be FBI agents. The agents attempted to gain cooperation from Mr Zimmermann in relation to WikiLeaks through intimidating tactics. Mr Zimmermann was told that his name was mentioned in the Virginia Grand Jury against WikiLeaks. Mr Zimmermann was allowed to board his plane but was asked to contact the agents upon his arrival in France, where Mr Zimmermann lives.[95]

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92 Philip Shenon, 'U.S. Urges Allies to Crack Down on WikiLeaks', The Daily Beast, 10 August 2010 http://www.thedailybeast.com/articles/2010/08/10/a-western-crackdown-on-wikileaks.html

93 See 'Who stopped Robinson? The inhibition of responsibility', Crikey, 20 April 2012 http://www.crikey.com.au/2012/04/20/who-stopped-robinson-the-inhibition-of-responsibility/ See also the transcript of ABC 4 Corners, 'Sex, Lies and Julian Assange' http://www.abc.net.au/4corners/stories/2012/07/23/3549280.htm

94 The statement notes that the LRWC was "alarmed by actions of US State Department Legal Advisor Harold Hongju Koh that put British barrister Jennifer Robinson in jeopardy and interfere with the right of her client Julian Assange to be represented." http://www.lrwc.org/statement-linking-lawyer-jennifer-robinson-with-her-client-julian-assange-violates-advocacy-rights-2/

95 See J. Assange with J. Appelbaum, A. Muller-Maguhn and J. Zimmermann, "Cypherpunks", ed. O/R Books at p. 27: 'Harassment of Jacob Appelbaum and Jeremie Zimmermann'.

4. Extended stay in Sweden

11 August 2010 - 27 September 2010

81. In the context of my heightened concerns about US activities in the United Kingdom I left the country on 11 August 2010. Within days of arriving in Sweden I became concerned about my safety and security there, in particular because of the pressure being brought to bear on US allies, including Sweden.

82. I was aware of the publicly stated attempts to track my movements. I used a number of risk minimisation procedures, including relying on the goodwill of friends and their circles for my safety and to protect the confidentiality of my whereabouts and communications.

83. My contacts in Sweden had arranged for me to stay in two safe houses during the few days I had intended to stay in Sweden. One of the safe houses belonged to a journalist who I knew and another to a Social Democrat party figure unknown to me who had lent her apartment while she was away. However, because these two original safe houses arranged prior to my arrival became known very soon, I stayed in three additional safe houses between 11 and 20 August 2010.

11 August 2010

84. I travelled to Sweden to put in place a legal strategy to try to protect our publishing servers, some of which were in Sweden. I believed these assets were at risk as a result of the intense political pressure from the US described above. I met with representatives of the Swedish Pirate Party, which is represented in the European Parliament, who agreed to host WikiLeaks servers in order to further protect our publishing work.[96] I also felt it was best to leave the United Kingdom at that time because the FBI was known to be carrying out operations in connection with the investigation into our publications.[97] I intended to stay in Sweden for less than a week.

85. On the same day I arrived in Sweden, 11 August 2010, I received information from an Australian intelligence source that extra-legal actions might be taken against me by the US or its allies. This was later reported in the Australian newspaper *The Age*:

> *An Australian intelligence official privately warned Wikileaks on August 11 last year that Assange was the subject of inquiries by the Australian Security Intelligence Organisation, and that information relating to him and others associated with Wikileaks had been provided to the US in response to requests through intelligence liaison channels.*

[96] See 'Swedish Pirate Party to Host New WikiLeaks Servers', Christian Engstrom, Pirate Party Member of the European Parliament, 17 August 2010 https://christianengstrom.wordpress.com/2010/08/17/swedish-pirate-party-to-host-new-wikileaks-servers/

[97] See http://www.dailymail.co.uk/news/article-1299311/FBI-question-WikiLeaks-mother-Welsh-home-Agent-interrogate-distressed-woman-search-sons-bedroom.html

The Australian intelligence official is also claimed to have specifically warned that Assange could be at risk of "dirty tricks" from the US intelligence community. [98]

13 August 2010

86. My dependency on other people while in Sweden was aggravated when, shortly after my arrival in Stockholm, my personal bank cards were blocked. On 13 August 2010, the WikiLeaks organisation's Moneybookers account could no longer be accessed. That same day, I contacted the company, who replied: "following recent publicity and the subsequently (sic) addition of the Wikileaks entity to blacklists in Australia and watch lists in the USA, we have terminated the business relationship". I requested further information from MoneyBookers on 13 August and 16 August regarding the closure, including which blacklists and watchlists my accounts and/or WikiLeaks' account had been added to, but I was refused this information (Appendix H).

87. The freezing of WikiLeaks' Moneybookers account was an early example of what in December 2010 would become a concerted extra-judicial global economic blockade against WikiLeaks by US financial service companies, including VISA, MasterCard, PayPal, Bank of America, Western Union and American Express. The blockade is the subject of several court actions, a European Commission investigation, a resolution by the European Parliament, and condemnation by the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression and the Inter-American Commission on Human Rights Special Rapporteur for Freedom of Expression.[99] On 24 April 2013 the Supreme Court of Iceland found the blockade to be unlawful.[100]

88. As a result of being suddenly cut off from personal and organisational funds upon arriving in Sweden, I had to rely on others not only for shelter, but also for food, safety and telephone credit. Unfortunately, my closest associates were reporters who were only sporadically in the country.

89. On 13 August 2010 one of the main Swedish newspapers, *Svenska Dagbladet*, published an article entitled 'Defence ministry prepared for the next leak', which detailed that a group within the Swedish Ministry of Defence was preparing for WikiLeaks' next publication and had analysed 76,000 previous publications from WikiLeaks in relation to

[98] See 'Assange told of ASIO snooping', The Age, 11 March 2011 http://www.theage.com.au/national/assange-told-of-asio-snooping-20110315-1bvyb.html

[99] See, for example, UN Special Rapporteur on the Promotion and Protection the Right to Freedom of Opinion and Expression and the Inter-American Commission on Human Rights Special Rapporteur for Freedom of Expression, 'Joint Statement On Wikileaks', http://www.oas.org/en/iachr/expression/showarticle.asp?artID=829&lID=1 and the European Parliament resolution of 20 November 2012 on 'Towards an integrated European market for card, internet and mobile payments' (2012/2040 (INI)) http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0426+0+DOC+XML+V0//EN

[100] Reporters Without Borders, 'Court orders Visa subcontractor to lift block on payments to WikiLeaks', 26 April 2013 http://en.rsf.org/iceland-court-orders-visa-subcontractor-to-26-04-2013,44440.html

Swedish troops in Afghanistan.[101]

18 August 2010

90. Swedish state television published a segment entitled 'We risk United States relationship deteriorating', which argued that the presence of WikiLeaks in Sweden would negatively affect the strategic relationship between Sweden and the United States.[102]

91. Through the diplomatic cables I also learned of secret, informal arrangements between Sweden and the United States. The cables revealed that Swedish intelligence services have a pattern of lawless conduct where US interests are concerned. The US diplomatic cables revealed that the Swedish Justice Department had deliberately hidden particular intelligence information exchanges with the United States from the Parliament of Sweden because the exchanges were likely unlawful.[103]

92. The US diplomatic cables, reports by major human rights organisations, and the UN's own findings made me aware that Sweden had been complicit in torture as a result of its participation in secret CIA renditions from 2001 through to at least 2006.[104] The rendition of the Swedish political refugees Agiza[105] and Alzery resulted in strong condemnation by the UN Committee Against Torture, Amnesty International, Human Rights Watch, and others.[106] There is still complete impunity for the officers of the Swedish state involved and their US counterparts. No charges have been laid although the complicity of the Swedish state has been well established in successful civil litigation. I recently learnt that Sweden was partly implicated in CIA renditions of its own citizens

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101 See 'Försvarsmakten redo för nästa läcka', SvD, 13 August 2010 http://www.svd.se/nyheter/inrikes/forsvarsmakten-redo-for-nasta-lacka_5130211.svd

102 See 'Piratpartiets samarbete med Wikileaks: "Risk för sämre relation till USA"' http://www.svt.se/nyheter/sverige/piratpartiets-samarbete-med-wikileaks-risk-for-samre-relation-till-usa

103 See http://wikileaks.org/cable/2008/11/08STOCKHOLM748; http://wikileaks.org/cable/2007/05/07STOCKHOLM506.html

104 See http://wikileaks.org/cable/2006/04/06STOCKHOLM527.html

105 On 18 December 2001, 45-year-old Ahmed Agiza was secretly apprehended in Sweden by Swedish Security Police. Agiza was then handed over to agents of the US CIA, who stripped him, dressed him in overalls and chained and shackled him before transporting him in a Gulfstream V aircraft to Egypt, where he was severely tortured. At the time of his unlawful rendition, Agiza, an Egyptian citizen, was living in Sweden with his wife and five young children, waiting for a determination on their political asylum application. See Binyam Mohamed et al. vs. United States and JEPPESEN DATAPLAN, INC. https://t.co/Bi85LEMX6k

106 *Agiza v. Sweden*, Committee Against Torture, No. 233/2003, at para. 13.4, UN Doc. CAT/C/34/D/233/2003 (May 20, 2003) http://www.unhcr.org/refworld/docid/42ce734a2.html; *Mohammed Alzery v. Sweden*, CCPR/C/88/D/1416/2005,UN Human Rights Committee (HRC),10 November 2006, available at: http://www.refworld.org/docid/47975afa21.html. The EU Parliamentary report from 2007 endorsed the findings from both the Human Rights Council and the Committee Against Torture that Sweden had violated the ban on torture in both cases: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2007-32. It also suggests that Sweden's refusal to investigate or indict a single person in the matter is likely an ongoing breach of its international obligations. See also, Binyam Mohamed et al. vs. United States and JEPPESEN DATAPLAN, INC., of which Agiza was a petitioner. See https://t.co/Bi85LEMX6k

from Djibouti earlier this year.[107]

93. Through an intelligence source, I became aware that on 19 August 2010, the Swedish Security Service (SÄPO) requested information about me from an Australian intelligence organisation. The Australian intelligence organisation responded to the request with information about me on 21 August 2010.

20 August 2010

94. On 20 August 2010, Swedish police opened a 'preliminary investigation' against me. The next day, the more serious allegation was dropped, but after an intervention police authorities reopened the closed preliminary criminal investigation against me on 1 September 2010. Three years have passed. Although I have not been charged with any crime, I have spent ten days in solitary confinement, more than 500 days under house arrest and over a year unable to leave the protection of the embassy of Ecuador in London as the British government refuses to abide by its international law asylum obligations.

95. According to the 'Agreed Facts' filed to the UK Supreme Court, to which the prosecutor in Sweden has agreed, the circumstances of the opening of the investigation are as follows:

[redacted]

96. My lawyers in Sweden, Per E. Samuelson and Thomas Olsson, were able to review the phone records that are part of the investigation, including SMS traffic between the

[redacted]

[107] Two Swedish citizens, Ali Yasin Ahmed and Mohamed Yusuf, and one Briton, Mahdi Hashi, were held without charge for three months, physically abused, and then unlawfully renditioned to the US from Djibouti. Just days before their detention in Djibouti, Sweden dropped their own criminal investigation into these individuals, which suggests Swedish cooperation in the seizure of its own citizens in Djibouti for their subsequent rendition to the US. The case has been reported in the Independent newspaper's article 'Rendition gets ongoing embrace from Obama administration' from 2 January 2013 (http://www.independent.co.uk/news/world/americas/rendition-gets-ongoing-embrace-from-obama-administration-8434963.html) and in the Open Society Justice Initiative's 'CIA Secret Detention and Extraordinary Rendition' from February 2013 http://www.opensocietyfoundations.org/sites/default/files/globalizing-torture-20120205.pdf

[108] See paragraph 4, 'Agreed Statement of Facts and Issues' Submission by the parties to the Supreme Court of the United Kingdom http://www.scribd.com/doc/80912442/Agreed-Facts-Assange-Case [redacted]

[redacted] My lawyers notified me via email on 8 December 2011 of the content of twenty-two of these messages.[109]

97. [redacted]

and that

[redacted]

98. [redacted]

99. [redacted]

100. Although the police initially opened an investigation into 'rape' in relation to [redacted]

101. The press was immediately and unlawfully informed that there was a warrant for

[109] My lawyers have been refused a copy of the phone records in full; the citation is paraphrased and is a direct quote from my lawyers' email.

[110] My lawyers have been refused a copy of the phone records in full; the citation is paraphrased and is a direct quote from my lawyers' email.

[111] My lawyers have been refused a copy of the phone records in full; the citation is paraphrased and is a direct quote from my lawyers' email.

[112] [redacted]

[113] My lawyers have been refused a copy of the phone records in full; the citation is paraphrased and is a direct quote from my lawyers' email. [redacted]

[114] [redacted]

my arrest for the "rape o[redacted]". The Swedish government prosecutor unlawfully, and without any subsequent explanation or remedy, immediately confirmed to the press that there was a live warrant for my arrest. The prosecutor's breach triggered an avalanche of news reports.[115] Within days there were millions of references online which associated my name with the word 'rape'. Immediately the police accusations were used to attack WikiLeaks' work and my reputation as its publisher.[116] US Defense Secretary Robert Gates celebrated the news of my arrest warrant with a smile, telling reporters that the arrest "sounds like good news to me".[117] Various twitter accounts officially associated with the Pentagon spread descriptions of me as a "rapist" and a "fugitive".[118]

21 August 2010

102. Less than 24 hours after the arrest warrant was issued, the chief prosecutor of Stockholm was appointed to take over the investigation and cancelled the arrest warrant, stating "I don't believe there is any reason to suspect that he has committed rape".[119] The Agreed Statement of Facts and Issues submitted to the UK Supreme Court states:[120]

> *A preliminary investigation was commenced and [redacted] At the conclusion of those interviews, on 21st August 2010, the case was taken over by the Chief Prosecutor of Stockholm (Eva Finne). Having assessed the evidence, she cancelled the arrest warrant against the Appellant; she having made the assessment that the evidence did not disclose any offence of rape.*

25 August 2010

103. Four days later, Chief Prosecutor Eva Finne dismissed the 'rape' investigation altogether: "I have discontinued the preliminary investigation of the charge (sic) originally designated as rape. There is no suspicion of any crime whatsoever." The Agreed Statement of Fact and Issues submitted to the Supreme Court:

> *The conduct allege[redacted] disclosed no crime at all and that file[redacted] would be closed.*[121]

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115 Briefing to the Australian Parliament, 2 March 2011 http://wlcentral.org/node/1418

116 See http://thelede.blogs.nytimes.com/2010/12/17/interviews-with-freed-wikileaks-founder/

117 See http://www.nytimes.com/2010/12/08/world/08military.html

118 See https://twitter.com/allmilitarynews/status/5284064529481729; https://twitter.com/allmilitarynews/status/5315609218785280; https://twitter.com/allmilitarynews/status/6020879939010560; https://twitter.com/AllMilitaryNews/status/6020879939010560.

119 See 'Assange inte längre misstänkt för våldtäkt', Svenska Dagbladet (SvD), 21 August 2010 http://www.svd.se/nyheter/inrikes/assange-inte-langre-misstankt-for-valdtakt_5167469.svd

120 See paragraph 7, 'Agreed Statement of Facts and Issues' Submission by the parties to the Supreme Court of the United Kingdom http://www.scribd.com/doc/80912442/Agreed-Facts-Assange-Case.

121 Paragraph 9, 'Agreed Statement of Facts and Issues' Submission by the parties to the Supreme Court of the United Kingdom http://www.scribd.com/doc/80912442/Agreed-Facts-Assange-Case.

27 August 2010

104. A Swedish high profile Social Democrat politician Claes Borgström, who was running as a candidate in Sweden's imminent general elections along with [redacted] was appointed counsel for the [redacted] on 27 August 2010. He applied to re-open the investigation with a different prosecutor in the otherwise unrelated city of Gothenberg.

30 August 2010

105. I cancelled my other appointments and remained in Sweden where I appointed a Swedish lawyer, Leif Silbersky. I gave an interview to the police on 30 August 2010 in relation to the only remaining allegation. The Agreed Statement of Facts and Issues submitted to the Supreme Court of the UK states:

> *On 30th August 2010, the Appellant, who had voluntarily remained in Sweden to cooperate with the investigation, attended for police interview in respect of the ongoing Preliminary Investigation in respect of [redacted] He answered all questions asked of him.*[123]

106. I was highly concerned for my personal safety and the safety of WikiLeaks' operations while I remained in Sweden, but I stayed for another five weeks after the 'preliminary investigation' was initiated in order to clear my name and to cooperate with the police investigation. Only after I had obtained an assurance from the prosecutor Marianne Ny that I could leave the jurisdiction did I prepare to leave the country.

1 September 2010

107. In response to the Borgström application, Prosecutor Marianne Ny, decided to "resume" [redacted]

8 September 2010

108. The head of the Swedish military intelligence service ("MUST") publicly denounced WikiLeaks in an article entitled 'WikiLeaks a threat to our soldiers'.[125] I

[122] Claes Borgström appeared continuously in the media talking about my case in the run-up to the Swedish general elections, which were three weeks away. [redacted] applied for a new lawyer on 28 February 2013 because, [redacted] Borgström had "prioritised communicating with the media instead of with me... I no longer trust him." According to his own estimation, Claes Borgström spent "at least 80 hours" speaking to the media about my case. See Claes Borgström's costing estimate submitted to Stockhom district court on 22 March 2013 http://www.scribd.com/doc/134650160/Borgström-Assange-kostnadsrakning-2013

[123] Paragraph 10, 'Agreed Statement of Facts and Issues' Submission by the parties to the Supreme Court of the United Kingdom http://www.scribd.com/doc/80912442/Agreed-Facts-Assange-Case.

[124] See 'Agreed Statement of Facts and Issues' Submission by the parties to the Supreme Court of the United Kingdom http://www.scribd.com/doc/80912442/Agreed-Facts-Assange-Case.

[125] See 'Wikileaks ett hot mot våra soldater', NyTeknik, 8 September 2010

became increasingly concerned about Sweden's close relationship to the US in military and intelligence matters.

109. Around this time I was warned by a trusted intelligence source that the Swedish intelligence service SÄPO had been privately told by its US counterparts that US–Sweden intelligence-sharing arrangements would be "cut off" if Sweden was viewed to be sheltering me. This is consistent with the reports I had read in the US press outlined above. I considered my continued presence in Sweden to be a serious risk to my personal safety and a risk to WikiLeaks' continued publications. I asked my lawyer to request permission for me to leave Sweden to attend planned engagements.

12 September 2010

110. While in Sweden, I continued to follow closely the international press, especially news about the US investigation against WikiLeaks and me. The article entitled 'The General Gunning for WikiLeaks' from 12 September demonstrated that my movements were being tracked and that there was intense interest in my actions and whereabouts. Pentagon officials said that: [126]

> *[Assange] has been living openly in Europe for much of the summer and his newfound global celebrity means that he can be easily tracked.*

111. I learnt that WikiLeaks' publications had created "anxiety" in the Obama administration and that, as a result, the Pentagon's "WikiLeaks War Room" had grown by 50 per cent since its announcement a month earlier:

> *Officials say that in a sign of the anxiety WikiLeaks has created within the Obama administration, the staff of Carr's operation, known formally as the Information Review Task Force, **has grown by nearly 50 percent since its existence was first revealed by the Pentagon last month.**[127]*

112. The purpose of the Task Force was to determine what classified information WikiLeaks had received, as well as to gather information on "the workings of WikiLeaks that might someday be used by the Justice Department to prosecute Assange and others on espionage charges".[128] I understand, having spoken to my legal advisors, that the mandate of the Pentagon's task force interferes with basic protections afforded to

http://www.nyteknik.se/asikter/debatt/article2468311.ece

126 Philip Shenon, 'The General Gunning for WikiLeaks', The Daily Beast, 12 September 2010 http://www.thedailybeast.com/articles/2010/09/12/pentagons-wikileaks-war-room-readies-for-new-document-dump.html

127 Philip Shenon, 'The General Gunning for WikiLeaks', The Daily Beast, 12 September 2010 http://www.thedailybeast.com/articles/2010/09/12/pentagons-wikileaks-war-room-readies-for-new-document-dump.html

128 Philip Shenon, 'The General Gunning for WikiLeaks', The Daily Beast, 12 September 2010 http://www.thedailybeast.com/articles/2010/09/12/pentagons-wikileaks-war-room-readies-for-new-document-dump.html

publishers where free speech and freedom of the press are enforced, including the First Amendment in the US.

15 September 2010

113. My lawyer in Sweden Bjorn Hurtig obtained an agreement from the prosecutor Marianne Ny that I was free to leave Sweden.[129] I left Sweden on 27 September 2010.

5. Suspected seizure of suitcase, Stockholm/Berlin

27 September 2010

114. I had two long-standing appointments in Berlin relating to WikiLeaks' work scheduled for 27 September 2010, which I was required to attend. I had also scheduled to be in London by 30 September 2010 in order to give a prominent public talk on censorship at London's City University organised by Index on Censorship. Although there were risks attached to returning to the United Kingdom, intelligence treaties and practice meant that it would be unlikely that I would be harmed or kidnapped by the US while on UK soil. The talk offered political cover for re-entry into the UK.

115. On 27 September 2010 I arrived at Stockholm's Arlanda airport shortly after noon. It was on this flight that my suitcase, laptops, privileged attorney-client communications and other important information belonging to WikiLeaks disappeared.

116. I implement counter-intelligence practices when I am aware that there is an active intelligence interest in my activities and movements. As I have explained above, I had learned through WikiLeaks' own sources and through media reports that there were heightened activities of this nature directed at me. As an investigative journalist who specialises in intelligence reporting, one of the methods I use to reduce the chance of post-flight surveillance of my work is to buy or exchange tickets immediately before a flight, often at the airport, so that intelligence services do not have sufficient time to observe, understand, alert, authorise, equip and deploy.

117. I followed my routine counter-intelligence practice in this instance as well. I arrived at the airport just after noon with the intention of purchasing a ticket shortly before the departure on the early afternoon flight. However, I was not able to gain a seat on my preferred flight and had to wait until a later flight, SAS SK2679 departing at 17.25. As a result, I was forced to wait at the airport for many hours longer than I would prefer, given my security concerns.

118. I knew that Swedish intelligence services, and possibly other countries' intelligence

[129] See Agreed Statement of Facts and Issues, UK Supreme Court (February 2012) http://www.scribd.com/doc/80912442/Agreed-Facts-Assange-Case

agencies, were likely to monitor Arlanda airport and its ticketing system.[130] I was concerned that my continued presence at Arlanda would be noticed and would permit those monitoring the airport to inform US authorities of my presence, take action themselves and/or alert German counterparts or services operating unlawfully in Germany of my pending arrival.

119. I checked in one suitcase on SAS flight SK2679 to Berlin. I was in the middle of the check-in queue. The suitcase was a medium-size soft suitcase with tan colour, trolley wheels and an extendable handle. It weighed 13 Kg and contained three encrypted laptops, telephone power supplies, assorted electronics, additional encrypted hard drives, telecommunications equipment and clothing. The phones, documents and other materials, including a laptop, which were the most difficult to protect I carried with me on my person, up to the allotted carry-on weight.

120. My boarding pass states that I took flight "SK2679", scheduled to depart 17:25 and shows that I had checked one bag weighing 13 Kg, PNR "ZR37P", with tracking number "0117 SK 847249 SK 2679 /27SEP" (Appendix A).

121. I had no issues during check-in for the flight. The luggage that had been checked in was easily identifiable because it was under my name. Boarding was briefly delayed for reasons unknown to me.

122. When I arrived at Berlin Tegel airport I went directly to the designated luggage carousel. My luggage did not appear. I then immediately went to the airport luggage claim office. The claim office said there was no unclaimed luggage there and that no one else from my flight, a direct flight within the Schengen area, was missing their luggage. The office also told me that it was extremely unusual that luggage had disappeared from a direct SAS flight within the Schengen open border area between Stockholm Arlanda and Berlin Tegel. This was also conveyed to Mr Wahlstrom (Appendix G) and Mr Stark and Mr Rosenbach (Appendix F)

6. Efforts to recover the suitcase and file a police complaint

130 See the controversial agreements between the US Department of Homeland Security and the EU in relation to sharing Passenger Name Records (PNR) with the US and the debate regarding the sharing deal. www.rue89.com/2008/03/04/a-divided-europe-wants-to-protect-its-personal-data-wanted-by-the-us. See also Sweden's controversial signals surveillance 'FRA' law introduced in 2008: http://www.redicecreations.com/article.php?id=4076. The US diplomatic cables show data retention reforms in Sweden were driven by US foreign policy http://cablegatesearch.net/cable.php?id=09STOCKHOLM141&version=1314326040&q=09stockholm141. See Rickard Falkvinge, 'Sweden's new wiretapping law "much worse than the Stasi"', The Local, 10 June 2008 http://www.thelocal.se/article.php?ID=12334&print=true

123. I filed a formal property irregularity report and received a copy of the complaint (Appendix B), which lists the baggage tag number as "SK847249" and the reference number as "TXLSK11342/27SEP10/1742GMT". I provided details about how to contact me. The luggage claims office also gave me a small black bag containing toiletries and a T-shirt. I was told that the disappearance was highly unusual and that my suitcase would most likely arrive on the next flight from Stockholm. Over the next days, six people (including myself) made inquiries to try to track down the suitcase.

124. I sent a message through to a journalist colleague, Johannes Wahlstrom, who was in Sweden, informing him of the situation. I asked him to make inquiries in Sweden. His affidavit is attached in Appendix G.

125. From the airport I travelled to meet Stefania Maurizi of *L'Espresso*, who has also submitted an affidavit (attached in Appendix E) and Kristinn Hrafnsson of WikiLeaks (Appendix D). We met at Berlin's Best Western Hotel. I told Ms Maurizi that my luggage had disappeared without trace from a direct SAS flight flying Stockholm to Berlin. The next day I met again with the Italian journalist Stefania Maurizi to start a publishing partnership between WikiLeaks and her publication in relation to 15,000 unpublished documents relating to the war in Afghanistan. Stefania Maurizi subsequently wrote about our meeting and the suspected seizure of my luggage in an article published in the Italian newspaper *l'Espresso.*[131]

126. On 28 September 2010, I called my then-Swedish lawyer Bjorn Hurtig in Sweden to inform him of the suspicious disappearance of the luggage containing the WikiLeaks equipment and to ask him to make inquiries. Ms Stefania Maurizi was present during this call.

127. That same day, Kristinn Hrafnsson and I met as planned with Holger Stark and Marcel Rosenbach (whose affidavit is attached in Appendix F) from the publication *Der Spiegel.* We met at the home of Andy Muller-Maghun (affidavit in Appendix C) from the Wau Holland Foundation. The purpose of the meeting with *Der Spiegel* was to discuss the publishing partnership between *Der Spiegel* and WikiLeaks, which involved the publication of 400,000 secret documents of the Iraq War and more than 251,000 confidential US diplomatic cables. I informed Mr Stark and Mr Muller-Maguhn about the disappearance of the WikiLeaks equipment and asked for their advice about how to track it from Germany.

128. The meetings with Stefania Maurizi of *l'Espresso* and Holger Stark and Marcel Rosenbach from *Der Spiegel* were pre-scheduled. WikiLeaks shares material it has obtained with publishing partners in order to maximise the coverage of WikiLeaks' material. In practice, entering a partnership has two components. The first is the signing of a document agreeing to the terms of publishing the material, such as the publishing schedule and information-sharing relating to the coverage of the material. The second is a handover of material. These meetings had been arranged through various means of

131 See 'L'eversore' published in L'Espresso magazine, 9 December 2010 (available in print only, see Appendix J).

communication. Mr Muller-Maguhn's affidavit estimates that the meetings were set up in early September 2010 (Appendix C). The meeting with Stefania Maurizi was arranged over open email, which meant that this correspondence was interceptable. The intelligence services could have had ample time to prepare an operation through monitoring these communications, for example by trying to seize material which was going to be handed over (just such an interception and seizure operation occurred on 18 September 2013 of alleged US classified documents being carried by David Miranda for journalistic purposes – a matter also connected to me and to the *Guardian* newspaper[132]). The first contact was made by Stefania Maurizi on 26 July 2010, and I replied on 7 August, four days before flying to Stockholm. The date of the meeting was confirmed for 27 and 28 of September over a month before, on 25 August 2010 (Appendix L).

129. On my behalf, Mr Muller-Maguhn, Holger Stark and Marcel Rosenbach made several calls that night and over the coming days to those responsible in Germany for lost property claims. They told me that these inquiries revealed that there was no record of the suitcase after it entered Stockholm Arlanda airport.

130. I refer to Appendix F, in which the affidavit of Mr Stark and Mr Rosenbach explains that they spoke to a Miss Kahland, the supervisor for lost and found luggage at Tegel airport. Miss Kahland was reachable on the phone number +493088756140. Mr Stark and Mr Rosenbach explain in their affidavit that they were told that the company in charge was GlobeGround. GlobeGround in Berlin made multiple inquiries with the ground staff at Stockholm Arlanda, but were given no response at all. (See Appendix D and page 4 of Appendix C.)

131. The only information the GlobeGround company could provide was that the suitcase was correctly labelled and scanned when I checked in at Stockholm Arlanda (Appendix C).

132. Further inquiries by Mr Stark and Mr Rosenbach led to a company called Acciona. The Duty Manager at Acciona, who was reachable on +493041013718, claimed that according to the records, my suitcase appeared not to have left Stockholm. Neither Acciona nor GlobeGround could provide a reason why (Appendix F).

133. Andy Muller-Maguhn (Appendix C) learned through his inquiries that the disappearance of my luggage on a flight with these characteristics was highly unusual: where luggage goes missing there is a 12-hour policy in place for the Star-Alliance partners. If inquiries are not dealt with within this time frame, the inquiry is prioritised. It seemed that this had not happened in my case. My suitcase had simply disappeared from the system. The lack of response or resolution on the part of the authorities and handling companies compounded these unusual characteristics.

134. Kristinn Hrafnsson, who was with Mr Muller-Maguhn at the time, said that the latter "quoted someone working for the luggage handler saying that he had never

[132] Glenn Greenwald, 'Detaining my partner will have the opposite effect to that intended', The Guardian, 18 August 2013 http://www.theguardian.com/commentisfree/2013/aug/18/david-miranda-detained-uk-nsa

encountered anything like this before" (Appendix D).

135. Mr Wahlstrom (Appendix G) called the air carrier SAS from Sweden to inquire about my luggage. The airline representative said that the bag was checked in but she didn't know where it was. The representative told Mr Wahlstrom that it was the first time in her life that she had seen this happen, because usually the computer system will give an indication of where the luggage has been misplaced. Since the representative could not see the bag in her computer system she said that there was nothing she could do, but if it showed up she would contact him. He left his address and telephone number (Appendix G). Mr Wahlstrom called the airline on several other occasions in the subsequent days. He informed me that the luggage had not been found.

136. Given that Johannes Wahlstrom's inquiries had not yielded any results, I asked him to report the matter to the Swedish police. Mr Wahlstrom explains in his affidavit that he contacted the police approximately one week after the luggage went missing (Appendix G). Mr Wahlstrom spoke to police detective Mats Gehlin. He explained that I was concerned that an intelligence operation was behind the seizure and that I was concerned that WikiLeaks' material had been stolen. He also explained that I felt uneasy about trusting the Swedish authorities with this matter, given the possible involvement of the Swedish secret services and the previous events. Detective Mats Gehlin told Johannes Wahlstrom that if the security services were involved in the seizure of my luggage, he would be aware of it. Gehlin promised to make inquiries. Mr Wahlstrom was given no explanation or contacted thereafter (Appendix G). Police detective Gehlin was actively involved in the 'preliminary investigation' of the sex case against me. He had easy access to my lawyer. He could have contacted my lawyer if he was unwilling to contact Mr Wahlstrom regarding the matter. Mr Wahlstrom was not contacted, and my lawyer Bjorn Hurtig informed me that he had not been contacted about this matter either.

137. I understand by my lawyers that the failure to explain or remedy this situation by all of the authorities involved, including the Swedish police, constitutes a failure to enforce my right to an effective remedy. I understand that I am within my rights to challenge those authorities that were responsible for the safe delivery of my property across borders.

7. Continued US efforts to stop WikiLeaks' publications

October – December 2010

138. A large escalation of resources in the military and intelligence community occurred during my stay in Sweden and following my departure. As the reported spying and tracking intensified it became clear that the US was attempting to stop our publishing activities, as we had yet to publish the *Iraq War Logs* and the US diplomatic cables. This

resource escalation was matched by US officials' belligerent messages.[133]

22 October 2010

139. WikiLeaks published the *Iraq War Logs* from London. The War Logs record 109,000 violent deaths, including 66,081 civilian deaths. The release was later credited as ultimately leading to the end of the Iraq War.[134] The UN High Commissioner for Human Rights, Navi Pillay, stated formally on 26 October 2010 that the US is under an obligation to investigate the human rights violations documented in WikiLeaks' *Iraq War Logs*:[135]

> ***The files reportedly indicate that the US knew**, among other things, **about widespread use of torture and ill-treatment of detainees** by Iraqi forces, and yet proceeded with the transfer of thousands of persons who had been detained by US forces to Iraqi custody between early 2009 and July 2010. The files also allegedly include information on many undisclosed **instances in which US forces killed civilians at checkpoints and during operations.***
>
> ***The US and Iraqi authorities should take necessary measures to investigate** all allegations made in these reports **and to bring to justice those responsible**... in line with **obligations under international human rights law**, including the International Covenant on Civil and Political Rights to which both the US and Iraq are parties.*

140. During this time, the intelligence activities against me and WikiLeaks by the US and other governments made known to me increased. US National Security Agency (NSA) officials reportedly stated[136] that they had evidence that the Russian intelligence agency FSB was closely surveilling WikiLeaks and myself:

> *National-security officials say that the **National Security Agency**, the US government's eavesdropping agency, has already picked up tell-tale electronic evidence that **WikiLeaks is under close surveillance by the Russian FSB***

who, it was reported, was

> *capable of organizing "the right team" to target WikiLeaks and "shut it down forever."*

133 See footnotes 12, 35 and 144.

134 See 'Obama: Iraq war will be over by year's end; troops coming home', CNN, 22 October 2011 http://edition.cnn.com/2011/10/21/world/meast/iraq-us-troops; and 'WikiLeaks cables and the Iraq War', Salon, 23 October 2011 http://www.salon.com/2011/10/23/wikileaks_cables_and_the_iraq_war/ and 'Iraq refuses to extend US military diplomatic immunity after WikiLeaks exposed crimes', Bradley Manning Support Network http://www.bradleymanning.org/press/update-102511-iraq-refuses-to-extend-u-s-military-diplomatic-immunity-after-war-crimes-exposed-through-wikileaks-cable

135 See http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10477

136 See http://www.thedailybeast.com/articles/2010/11/30/moscows-bid-to-blow-up-wikileaks-russians-play-by-different-rules.html

4 November 2010

141. I continued to give talks, believing publicity to be partly protective against the assassination and kidnapping threats levelled against me and my staff, and to travel, but I took increased precautions: I moved around with professional bodyguards. On 4 November 2010 I gave a talk in Geneva on the theme "The USA and Human Rights" at the United Nations Universal Periodic Review (UPR). I was invited to speak because the human rights record of the United States was being reviewed as part of the ninth session of the UPR, and because WikiLeaks was in the process of exposing human rights violations in different countries.[137] United Nations and Swiss security officials, also concerned for my safety, supplemented my two bodyguards with another four (two Swiss, two working for the United Nations).

22 November 2010

142. On 22 November 2010, the WikiLeaks Twitter account announced that the coming publication would be seven times bigger than the *Iraq War Logs*.[138] The tweet was referring to the imminent publication of *Cablegate*.

28 November 2010

143. WikiLeaks commenced publishing *Cablegate*, 251,287 US diplomatic cables of the period 1966-2010.[139] The classified diplomatic dispatches related to every country in the world. In terms of content, it was the largest set of classified documents ever to be published.

29 November 2010

144. State Department spokesman P.J. Crowley stated that "we are investigating aggressively" into WikiLeaks and that a State Department "War Room", which is different from the Pentagon "War Room", had been set up.[140]

30 November 2010

145. On 30 November 2010, two days after WikiLeaks started publishing *Cablegate*, Interpol issued a Red Notice to 188 countries for my arrest in relation to the Swedish "preliminary investigation" (for which no charges or indictment existed). Interpol also

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137 See http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRSessions.aspx

138 See 'WikiLeaks Promises Release 7x the Size of Iraq War Logs Leak', PCMag, 22 November 2010 http://www.pcmag.com/article2/0,2817,2373147,00.asp

139 See http://wikileaks.org/cablegate.html

140 Daily Press Briefing, Washington DC, 29 November 2010 http://www.state.gov/r/pa/prs/dpb/2010/11/152085.htm

published a press release translated into five languages promoting the Red Notice.

2 December 2010

146. Sweden issued a European Arrest Warrant on 2 December 2010, which was certified by the UK Serious Organised Crimes Agency (SOCA).

147. Days later in early December 2010, the economic persecution against WikiLeaks and me personally started to commence.[141] VISA, MasterCard, Bank of America, Western Union, PayPal and others implemented an arbitrary blockade against WikiLeaks' donations at the peak of the donations period. The blockade was imposed outside of any administrative or legal process. The blockade also affected my personal economic freedoms. I was placed into Thomson Reuters World-Check's database, which has prevented me from opening new bank accounts or registering new businesses. World Check is a confidential blacklisting service used by banks and accountancies to check for "Politically Exposed Persons" or PEPs. I was placed on World-Check's list without my knowledge, even though I do not fit the formal definition of a PEP.[142]

148. The blockade against WikiLeaks is imposed without an underlying judicial or administrative order in the United States or anywhere else, although instances of political pressure on these companies have come to light.[143] The effects of this persecution are global. Prominent politicians in the United States attempted to formalise the blockade in law.[144] These attempts failed after the US Treasury found that there were no lawful

[141] Paypal discontinued its service on 3 December 2010 and the next day blocked the German Foundation Wau Holland Stiftung's (WHS) access to its PayPal account, which received donations for other projects in addition to WikiLeaks. PayPal also attempted to freeze the remaining money in the account for 180 days. The money was released immediately after a WHS lawyer intervened. On 6 December, Swiss Post Finance froze my Legal Defence Fund account. The following day, VISA and MasterCard stopped processing donations to WikiLeaks (7 December). On 15 December, Germany's FA Kassel tax authority initiated an investigation into WHS's charitable status. The investigation, WHS representatives were privately told, was politically motivated. On 18 December, Bank of America discontinued "transactions of any type that we have reason to believe are intended for WikiLeaks". Three days later, Western Union added WikiLeaks to its 'Interdiction List'. See http://www.spiegel.de/international/germany/hamburg-revokes-2010-tax-exemption-for-wikileaks-supporter-a-865671.html; http://wikileaks.org/Banking-Blockade.html

[142] *"Politically Exposed Persons" (PEPs) are individuals who are or have been entrusted with prominent public functions in a foreign country, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials.",* World-Check, "Refining the PEP Definition" (Ed. II), 2008 http://www.world-check.com/media/d/content_whitepaper_reference/Refining_the_PEP_Definition_-_EditionII.pdf

[143] "MasterCard Incorporated had conversations with certain Congressional staff" (Congress Homeland Security Committee Chairman, Peter T. King). MasterCard's submission to the European Commission, 25 August 2011 http://wikileaks.org/IMG/pdf/EUPreliminaryDecision1.pdf

[144] The Chairman of the US Congress Committee on Homeland Security, Peter T. King, called for WikiLeaks, and me personally, to be placed on the Specially Designated National and Blocked Persons List (SDN List), and stated "The US government should be making every effort to strangle the viability of Assange's organization." 'King Calls on Treasury Secretary Geithner to Act to Disrupt WikiLeaks', 12 January 2011 http://homeland.house.gov/press-release/king-calls-treasury-secretary-geithner-act-disrupt-wikileaks and 'Congressman wants WikiLeaks listed as terrorist group', CNet, 28 November 2010 http://news.cnet.com/8301-13578_3-20023941-38.html#ixzz16keYyAPb

grounds to blacklist the WikiLeaks organisation.[145] The blockade has been in force since December 2010, but has been weakened significantly after WikiLeaks won a Supreme Court case in Iceland against VISA subcontractor Valitor in April 2013.[146]

7 December 2010

149. The day after UK authorities certified the Swedish arrest warrant, I appeared at the police station, having made a prior appointment. This is the first time I was informed of the accusations against me in Sweden. I was arrested and placed in solitary confinement in Wandsworth high security prison for ten days.

8 December 2010

150. One day after I was imprisoned, the UK newspaper *The Independent* reported that the US and Sweden had entered informal talks regarding my extradition from Sweden to the United States in connection with the US Grand Jury and FBI investigation against WikiLeaks.[147]

151. The matter of whether the warrant issued by the Swedish prosecutor was valid would become the subject of three UK court cases over the next year and a half.[148]

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[145] See 'Treasury: We 'don't have the evidence' to launch WikiLeaks embargo', The Hill, 14 January 2011 http://thehill.com/blogs/hillicon-valley/technology/137969-treasury-dept-we-dont-have-the-evidence-to-launch-wikileaks-embargo

[146] The economic blockade remains in place, but it has been weakened as a result of WikiLeaks' ability to challenge the blockade before the courts in certain jurisdictions, Iceland in particular. On 24 April 2013, Iceland's Supreme Court ordered VISA subcontractor Valitor to reopen the gateway for WikiLeaks donations, one of the arms of the economic blockade (http://en.rsf.org/iceland-court-orders-visa-subcontractor-to-26-04-2013,44440.html). The Supreme Court of Iceland confirmed the previous ruling that Valitor had breached its contract in discontinuing the processing of donations to WikiLeaks. Valitor complied with the Supreme Court order and reopened its payment gateway, but gave formal legal notice that it would terminate its contract and re-close the gateway on 1 July 2013, citing a unilateral termination clause in the contract. Valitor subsequently reversed its position after MasterCard notified Valitor that it has decided to put an end to its WikiLeaks blockade. The blockade of VISA and others is still in force (http://wikileaks.org/MasterCard-breaks-ranks-in.html; https://www.datacell.com/news/victory-over-credit-card-companies-wikileaks-donations-possible-again/). The European Parliament has similarly expressed that credit cards may not arbitrarily cease processing payments. The Parliament passed a resolution on 20 November 2012 'Towards an integrated European market for card, internet and mobile payments' (2012/2040 (INI)) to remedy this (http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0426+0+DOC+XML+V0//EN). A court claim for compensation is currently being prepared. Damages are estimated at $72.7m USD.

[147] See 'Assange could face espionage trial in US', The Independent, 8 December 2010 http://www.independent.co.uk/news/uk/crime/assange-could-face-espionage-trial-in-us-2154107.html

[148] See http://www.supremecourt.gov.uk/news/379.html

7.1. *Known US intelligence operations against WikiLeaks in Europe since 2011*

152. I learnt through a Parliamentary Inquiry in Iceland in February this year details of illegal FBI operations in Iceland in connection with its investigation into WikiLeaks. WikiLeaks spokesman Kristinn Hrafnsson was present at the inquiry. On 24 August 2011, six FBI agents and two US Department of Justice prosecutors flew by private jet to Iceland. Over the next days the Interior Minister was made aware that the operations being carried out were different from those initially presented by the US authorities. The FBI purported to be investigating a breach of the Icelandic Parliament's computer system, while in reality it was carrying out interrogations relating to the FBI's WikiLeaks investigation. The Icelandic Interior Minister stated that the FBI operations were illegal and violated Icelandic sovereignty. The FBI and US prosecutors were then expelled from the country.

153. A recent article in Slate magazine about the incident interviewed the then-Interior Minister, Ögmundur Jónasson, who explained that:

> *Icelandic authorities initially believed the FBI agents had come to the country to continue their investigation into the impending LulzSec hacking attack on Icelandic government computers. But **once it became clear that the FBI agents were in fact engaged in a broader swoop to gather intelligence on WikiLeaks... the agents were asked to immediately remove themselves from the country**.*[149]

154. According to newspaper reports, the inquiry revealed that

> *The FBI agents interrogated the man, who is twenty years old, **for five days after the Ministry of the Interior declined to cooperate with the FBI**. The interrogations took place in hotels around Reykjavik but never at the US embassy.*[150]

155. The Icelandic government considered the FBI's unauthorised activities in Iceland illegal:

> ***Mr. Ossur Skarphedinsson, the Minister of Foreign Affairs, said** to a local newspaper today that **the FBI's stay in Iceland was illegal**.*
>
> *Mr. Skarphedinsson added: "Therefore, we at the Ministry of Foreign Affairs thought that these conversations should be prevented, to protect this Icelandic*

[149] Slate, 'WikiLeaks' Teenage Benedict Arnold', 9 August 2013 http://www.slate.com/articles/technology/future_tense/2013/08/sigurdur_thordarson_icelandic_wikileaks_volunteer_turned_fbi_informant.single.html

[150] News of Iceland, 'FBI told to leave Iceland – Took a boy with them', 5 February 2013 http://www.newsoficeland.com/home/politics/foreign-affairs/item/691-fbi-told-to-leave-iceland-took-a-boy-with-them

*citizen, because **the conversations took place at very unusual places and without authorization**.*[151]

156. The Icelandic Parliamentary inquiry into the incident, held in February 2013, revealed that the FBI was attempting to entrap me through Sigurdur Thordarson:[152]

*Minister of the Interior [of Iceland] Ögmundur Jónasson stated his opinion at Alþingi, the Icelandic parliament, that **the FBI had intended to use the young man they questioned**, known as Siggi 'the hacker', as **bait in their investigation of WikiLeaks**.*[153]

157. Then-Interior Minister Jónasson told Slate:

"I think it was a question of trying to frame Julian Assange... And they wanted Icelandic authorities to help them with that."

158. In a different article, Jónasson said that:

"We made clear to the American authorities that this was not well-seen by us".[154]

159. After the FBI was expelled from Iceland, Thordarson was flown to Denmark. There he stayed at the Hilton hotel near Copenhagen airport, where the FBI interrogated him further. He was flown to Copenhagen for further FBI interrogations on 3 October 2013, and on 18 March 2012. I understand by my lawyers that if these interrogations were not approved by the state of Denmark then they would be unlawful.[155]

160. Thordarson was flown to Washington where he was interrogated for four more days. During this time he reportedly stayed at the Marriott hotel in Arlington, Virginia.[156]

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151 News of Iceland, 'FBI told to leave Iceland – Took a boy with them', 5 February 2013 http://www.newsoficeland.com/home/politics/foreign-affairs/item/691-fbi-told-to-leave-iceland-took-a-boy-with-them

152 Iceland Review, 'Iceland Minister: FBI Used Hacker to Bait WikiLeaks', 14 February 2013 http://www.icelandreview.com/icelandreview/daily_news/Iceland_Minister_FBI_Used_Hacker_to_Bait_WikiLeaks_0_397837.news.aspx

153 Iceland Review, 'Iceland Minister: FBI Used Hacker to Bait WikiLeaks', 14 February 2013 http://www.icelandreview.com/icelandreview/daily_news/Iceland_Minister_FBI_Used_Hacker_to_Bait_WikiLeaks_0_397837.news.aspx

154 Associated Press, 'Minister: Iceland refused to help FBI on WikiLeaks', 1 February 2013 http://bigstory.ap.org/article/minister-iceland-refused-fbi-aid-over-wikileaks

155 The Copenhagen Post, 'FBI met WikiLeaks informant in Copenhagen', 15 August 2013 http://cphpost.dk/international/fbi-met-wikileaks-informant-copenhagen

156 Slate, 'WikiLeaks' Teenage Benedict Arnold', 9 August 2013 http://www.slate.com/articles/technology/future_tense/2013/08/sigurdur_thordarson_icelandic_wikileaks_volunteer_turned_fbi_informant.single.html

161. Further details about the FBI's dealings with Thordarson have recently emerged after Thordarson has agreed to give interviews about his FBI collaboration:[157]

> *Thordarson says the agents also wanted information about WikiLeaks' technical and physical security and the locations of WikiLeaks' servers; they asked him, too, for names of individuals linked to WikiLeaks who might be open to becoming informants if approached by the FBI.*
>
> *Once, he says, he told the agents that he was planning a visit to see Assange at Ellingham Hall. Eager to take advantage of the trip, they asked him to wear a recording device and make copies of data stored on laptops used by WikiLeaks staff.*
>
> *Before his penultimate meeting with US authorities, in early February 2012, Thordarson says he was instructed to build relationships with people close to WikiLeaks in order to gather information for the feds.*[158]

162. Thordarson's final meeting with the FBI took place in Aarhus in Denmark, where the FBI acquired data that had been stolen from staff, friends and associates of WikiLeaks. At least some of the material had been stolen at Ellingham Hall, the house where I was staying under house arrest in Norfolk. The material allegedly included information relating to publishing partnerships, chat communications and private information such as copies of passports, video footage taken in secret, and bills. The FBI allegedly obtained the material in exchange for two payments amounting to US$5,000.

163. Danish authorities have refused to comment on whether they were aware that the FBI repeatedly conducted interrogations with Thordarson in Denmark and whether they authorised the FBI's operation, which involved acquiring stolen property belonging to a publishing organisation. I understand by my lawyers that conducting such operations without the authorisation of the Danish authorities would be illegal.

164. Danish media reports have speculated over whether the FBI's acquisition of the stolen material may have compromised the protections of Danish publications and journalists.[159] Wikileaks entered into publishing partnerships and I had had dealings with several Danish journalists in relation to *Cablegate*.[160]

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157 Thordarson has also tweeted about his collaboration: http://archive.is/KHWhZ, http://archive.is/fovxc, http://archive.is/582eA.

158 Slate, 'WikiLeaks' Teenage Benedict Arnold', 9 August 2013 http://www.slate.com/articles/technology/future_tense/2013/08/sigurdur_thordarson_icelandic_wikileaks_volunteer_turned_fbi_informant.single.html

159 See 'FBI spionerede mod Assange via Danmark' [FBI spied on Assange via Denmark], Journalisten.dk, 14 August 2013 http://journalisten.dk/search/node/assange%20fbi

160 See 'FBI met WikiLeaks informant in Copenhagen', The Copenhagen Post, 15 August 2013 http://cphpost.dk/international/fbi-met-wikileaks-informant-copenhagen

7.2. *Known intelligence operations in the United Kingdom*

June 2013 – present

165. On 24 August 2012 I gave a public speech from the Ecuadorian embassy. A high resolution camera operated by the British Press Association captured a police document (Appendix I). The document indicated that the Metropolitan Police's counter-terrorism protective security command (S020) and the unknown 'SS10' unit were involved in surveilling the embassy. In addition to the unexplained presence of the counter-terrorism unit and other police units deployed on this day, the document revealed that the police force was instructed to violate the Vienna Convention on Diplomatic Relations in order to arrest me:

> *"Action required Assange to be arrested under all circumstances"* including if *"He comes out with dip immune [diplomatic immunity] as dip bag in dip bag in dip vehicle."*

166. UK reports speculated whether SS10 was in fact S010 – the Metropolitan Police's covert operations group, given that the leaked police document states:

> *"Discuss possibilities of distraction [in relation to arresting Assange] - SS10 to liaise."*

167. These instructions to police units were revealed after a week of diplomatic tension between the UK and Ecuador. Ecuador's Foreign Minister disclosed on 15 August 2012 that an official communication from the UK Foreign Office had threatened to breach the embassy mission if Ecuador did not hand me over to the UK police.[161] Resolutions by ALBA, UNASUR and the OAS condemned the UK's communication.[162] The real intent to enter the embassy was confirmed by a former UK ambassador.[163]

168. The UK has reportedly spent more than £4 million on embassy police surveillance alone between June 2012 and June 2013, not including the constant covert surveillance of the mission.[164] The mayor of London, Boris Johnson, commented in an ethics committee this year that the expenditure of surveillance on the embassy is

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161 'Ecuador ratifica su posición frente a amenaza del Reino Unido', 15 August 2012 http://cancilleria.gob.ec/es/ecuador-ratifica-su-posicion-frente-a-amenaza-del-reino-unido/ ; 'Canciller Patiño denuncia amenaza del Gobierno británico de arrestar a Julián Assange en la Embajada del Ecuador', 18 August 2012 http://cancilleria.gob.ec/es/canciller-patino-denuncia-amenaza-del-gobierno-britanico-de-arrestar-a-julian-assange-en-la-embajada-del-ecuador/

162 'Declaracion del IX Consejo Político Extraordinario de la Alianza Bolivariana para los Pueblos de Nuestra América', 18 August 2012 http://cancilleria.gob.ec/es/declaracion-del-ix-consejo-politico-extraordinario-de-la-alianza-bolivariana-para-los-pueblos-de-nuestra-america/

163 See http://www.craigmurray.org.uk/archives/2012/08/americas-vassal-acts-decisively-and-illegally/

164 See 'Julian Assange police guard cost nears £3m', BBC, 15 February 2013 http://www.bbc.co.uk/news/uk-21480648

"absolutely ridiculous, that money should be spent on frontline policing... It's completely wasted."[165]

169. On 14 June this year a hidden microphone was discovered by Ecuadorian security staff inside the embassy where I live.[166] According to the information disclosed at a press conference in Quito, the device had GSM activation and was discovered in an electrical socket, where it had been active for two months. The UK private company Surveillance Group Ltd was said to be associated with the make of the bugging device. Ecuador initiated an investigation and sought the cooperation of the UK authorities to ascertain the origin of the device and the circumstances of the breach of the Vienna Convention in relation to the inviolability of diplomatic premises.

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[165] See http://www.london24.com/news/politics/mayor_s_office_may_launch_ethics_committee_to_deal_with_police_complaints_1_2271509

[166] 'UK security firm bugged our embassy: Ecuador', Sydney Morning Herald, 4 July 2013 http://www.smh.com.au/it-pro/security-it/uk-security-firm-bugged-our-embassy-ecuador-20130704-hy0pw.html

8. Concluding remarks

170. I am submitting this affidavit for the reasons set out in the opening section. My legal advisors have informed me that as well as the rights enjoyed by individuals, as a publisher and journalist, my work is protected by the corresponding laws that are binding upon Sweden and Germany and other European countries as well as the US. I have also been informed that in submitting this document, I am seeking to exercise my right to an effective remedy, which has so far been denied to me in relation to this matter. Icelandic authorities have confirmed that the FBI acted illegally in Iceland in relation to their intelligence activities against me and the WikiLeaks organisation in August 2011. The FBI also potentially acted unlawfully in Denmark during 2011 and 2012, where it interrogated Sigurdur Thordarson and obtained stolen material belonging WikiLeaks and other publishing organisations and private information belonging to third parties. Those who bugged the embassy in which I reside acted with evident illegality. There is a clear pattern of extraterritorial and extra-legal interference with my work. This contributes to a view that the US likely acted in an unlawful manner in its monitoring of me and Mr Zimmermann in Germany during December 2009 and that my and WikiLeaks' property was likely unlawfully seized on 27 September 2010

171. A White House press release announced on 15 August 2013 that US President Barack Obama will travel to Sweden on 4 and 5 September together with a US delegation, which is expected to contain numerous US officials from the White House and US State Department.[167] President Obama and other senior officials from the White House and the State Department have been directly involved in the US response to WikiLeaks' publications. Members of the delegation may have information relevant to an investigation of this matter.

172. I am informed by my legal advisors that this formal document may trigger an investigation and that independent judicial bodies may seek explanations of the responsible authorities as a result. I file this affidavit in the knowledge that there will likely be pressures for this matter not to be investigated, but in the knowledge that the law requires an investigation. I request that Swedish judicial authorities act swiftly to question and arrest if necessary those who are likely to have information about or bear criminal responsibility for the actions taken against WikiLeaks and my person as detailed in this affidavit.

Julian Paul Assange
AFFIRMED this 2nd day of September 2013
at the Embassy of Ecuador in London

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167 See 'Statement by the White House Press Secretary on the President's Travel to Sweden', 15 August 2013 http://www.swedenabroad.com/en-GB/Embassies/Washington/Current-affairs/News/President-Obama-to-Sweden-sys/

9. Appendices

9.1 Appendix A: Airline ticket Flight SK2679

9.2 Appendix B: Property Irregularity Report (Ref. TXLSK11342/27SEPT10/1742GMT)

9.3 Appendix C: Affidavit of Andy Muller-Maguhn

9.4 Appendix D: Affidavit of Kristinn Hrafnsson

9.5 Appendix E: Affidavit of Stefania Maurizi

9.6 Appendix F: Affidavit of Marcel Rosenbach and Holger Stark

9.7 Appendix G: Affidavit of Johannes Wahlstrom

9.8 Appendix H: Moneybookers correspondence relating to termination of services and indication of WikiLeaks appearing on a hidden watchlist and blacklist

9.9 Appendix I: Photo of police clipboard indicating intelligence operations directed at apprehending me in the Ecuadorian embassy

9.10 Appendix J: Articles by Stefania Maurizi containing references to our meeting in Berlin on 27 and 28 September 2010

9.11 Appendix K: [redacted]

9.12 Appendix L: Correspondence between Stefania Maurizi establishing meeting in Berlin on 27 and 28 September 2010

9.13 Appendix M: Washington Times article snapshot "Assassinate Assange" and illustration "Wanted Dead (or Alive)"

9.14 Appendix N: Relevant excerpts from Bradley Manning's trial transcript 10 and 11 June 2013

PROTOKOLL
2015-03-10
Föredragning i
Stockholm

Aktbilaga 18
Mål nr Ö 5880-14

NÄRVARANDE JUSTITIERÅD

Lars Edlund

FÖREDRAGANDE OCH PROTOKOLLFÖRARE

Charlotte Edvardsson

KLAGANDE

Julian Assange, 710703

Frihetsberövande: Häktad i sin frånvaro

Ecuadors Ambassad i London

Flat 3 B, 3 Hans Crescent

London, SW1X 0NT

Storbritannien

Ombud: Advokat Thomas Olsson

Fria Advokater KB

Box 12706

112 94 Stockholm

Ombud: Advokat Per E Samuelson

Advokatfirman Samuelson, Schönmeyr & Wall HB

Box 12704

112 94 Stockholm

HÖGSTA DOMSTOLEN
Riddarhustorget 8

Postadress
Box 2066
103 12 Stockholm

Telefon 08-561 666 00
Telefax 08-561 666 86
E-post: hogsta.domstolen@dom.se
www.hogstadomstolen.se

Expeditionstid
08:45-12:00
13:15-15:00

MOTPART

Allmän åklagare

SAKEN

Häktning m.m.

ÖVERKLAGAT AVGÖRANDE

Svea hovrätts beslut 2014-11-20 i mål Ö 8290-14

Målet föredras.

Högsta domstolen förordnar att riksåklagaren skyndsamt ska inkomma med svarsskrivelse i målet, särskilt gällande frågan om bedrivandet av utredningsarbetet och proportionalitetsprincipen.

Charlotte Edvardsson

Charlotte Edvardsson

Föredraget 2015-03-10

Uppvisat och lämnat för expediering 2015-03-10

Lars Edlund

JUSTICE(S) OF THE SUPREME COURT PRESENT
Lars Edlund

PRESENTER OF THE CASE AND REPORTER
Charlotte Edvardsson

APPELLANT
Julian Assange, date of birth 3 July 1971
Deprivation of liberty: Remanded to custody in his absence
Embassy of Ecuador in London
Flat 3 B, 3 Hans Crescent
London, SW 1X 0NT
United Kingdom

Attorney: Thomas Olsson, Member of the Swedish Bar
Fria Advokater KB
Box 12706
112 94 Stockholm

Attorney: Per E Samuelson, Member of the Swedish Bar
Advokatfirman Samuelson, Schönmeyr & Wall HB
Box 12704
112 94 Stockholm

Supreme Court
Riddarhustorget 8

Mailing address
Box 2066
103 12 Stockholm

Telephone No. +46 (0)8 – 561 666 00
Fax No. +46 (0)8 – 561 666 86
Email: hogsta.domstolen@dom.se
www.hogstadomstolen.se

Office hours
8:45 -12:00
13:15 – 15:00

RESPONDENT
Public Prosecutor

NATURE OF CASE
Remand to custody, etc.

DECISION APPEALED
Decision of the Svea Court of Appeal, dated 20 November 2014 in case Ö 5880-14

The case is reviewed.

The Supreme Court orders that the Prosecutor-General expeditiously submit a written response in this case, particularly focusing on the issue of the conduct of the investigation work, and the principle of proportionality.

(Signature)

Charlotte Edvardsson

Presented on 10 March 2015

Shown and submitted for processing on 10 March 2015.

(Signature)

Lars Edlund

ÅKLAGARMYNDIGHETEN
Rättsavdelningen

Byråchefen Hedvig Trost

Svarsskrivelse
Datum
2015-03-24
Ert datum
2015-03-10
Er beteckning
Ö 5880-14 R 14

Högsta domstolen
Box 2066
103 12 Stockholm

Julian Assange ./. riksåklagaren ang. häktning m.m.

(Svea hovrätts beslut den 20 november 2014 i mål nr Ö 8290-14)

Högsta domstolen har förelagt mig att skyndsamt inkomma med svarsskrivelse, särskilt gällande frågan om bedrivandet av utredningsarbetet och proportionalitetsprincipen.

Jag vill anföra följande när det gäller dessa frågor.

Min inställning

Jag bestrider ändring av hovrättens beslut. Jag tillstyrker dock att Högsta domstolen meddelar prövningstillstånd när det gäller frågan om häktning.

Bakgrund

Stockholms tingsrätt beslutade den 18 november 2010 att Julian Assange skulle häktas i sin utevaro. Sedan beslutet överklagats till Svea hovrätt beslutade hovrätten den 24 november 2010 att avslå Julian Assanges överklagande. Hovrätten angav i beslutet att Julian Assange är på sannolika skäl misstänkt för i vart fall

1) olaga tvång den 13-14 augusti 2010 i Stockholm,
2) sexuellt ofredande den 13-14 augusti 2010 i Stockholm,
3) sexuellt ofredande den 18 augusti 2010 eller dagarna däromkring i Stockholm och
4) våldtäkt, mindre grovt brott, enligt 6 kap. 1 § tredje stycket brottsbalken, den 17 augusti 2010 i Enköping.

Som särskild häktningsgrund angav hovrätten att det finns risk för att Julian Assange avviker eller på annat sätt undandrar sig lagföring eller straff. Hovrätten fann också att skälen för häktning uppväger det intrång eller men i övrigt som åtgärden innebär för Julian Assange eller för något annat motstående intresse. Julian Assange överklagade hovrättens beslut till Högsta domstolen som den 2 december 2010 beslutade att inte meddela prövningstillstånd.

En europeisk arresteringsorder för lagföring utfärdades av åklagaren den 2 december 2010 med en begäran om att Julian Assange ska gripas och överlämnas från Storbritannien till Sverige. Till stöd för arresteringsordern åberopades hovrättens beslut om häktning i Julian Assanges utevaro. Som en

Postadress
Box 5553
114 85 STOCKHOLM

Gatuadress
Östermalmsgatan 87 C

Telefon
010-5625000

Telefax

E-post
registrator@aklagare.se

Webbadress

följd av utfärdandet av den europeiska arresteringsordern greps Julian Assange av brittisk polis och frihetsberövades den 7 december 2010. Han frigavs den 16 december 2010 mot borgen och blev i stället ålagd elektronisk övervakning med fotboja, daglig anmälningsplikt hos polismyndigheten mellan kl. 08.30 och 11.00 och förbud mot att vistas utanför bostaden kl. 22.00-08.00. Han var också tvungen att lämna ifrån sig sitt pass. Arresteringsordern har prövats av tre instanser brittiska domstolar. Den 24 februari 2011 tillkännagav City of Westminster Magistrates' Court sitt beslut om att överlämna Julian Assange till Sverige enligt arresteringsordern. I beslutet konstaterade domstolen bl.a. att Julian Assange inte varit tillgänglig för förhör i Sverige. Sedan också High Court i London prövat ärendet och kommit till samma slut slog Supreme Court den 14 juni 2012 slutligt fast att Julian Assange ska överlämnas till Sverige i enlighet med åklagarens framställan.

Julian Assange begärde politisk asyl på Ecuadors ambassad i London den 19 juni 2012. Den ecuadorianska regeringen beviljade den 16 augusti 2012 Julian Assange politisk asyl. Julian Assange har sedan dess vistats på Ecuadors ambassad. Ambassadens utgångar har bevakats av brittisk polis. Varken den europeiska arresteringsordern eller häktningsbeslutet har kunnat verkställas.

Sedan Julian Assange begärt hos Stockholms tingsrätt att beslutet om häktning i utevaro ska undanröjas och åklagaren bestritt ändring beslutade Stockholms tingsrätt den 16 juli 2014 att Julian Assange fortsättningsvis ska vara häktad i sin utevaro för samma misstankar och på grund av samma särskilda häktningsskäl som tidigare.

Julian Assange överklagade tingsrättens beslut till hovrätten och yrkade att hovrätten skulle upphäva tingsrättens beslut om häktning, att åklagaren skulle föreläggas att till honom utge, alternativt till hovrätten inge, kopior av målsägandenas SMS samt inhämta ett förhandsavgörande från EU-domstolen. Svea hovrätt har den 20 november 2014 beslutat att avslå samtliga Julian Assanges yrkanden.

Överklagandet

Julian Assange har överklagat hovrättens beslut och yrkat att Högsta domstolen ska upphäva beslutet om utevarohäktning, förelägga åklagaren att till Julian Assange utge, alternativt till Högsta domstolen inge, kopior av målsägandenas SMS samt, för det fall Högsta domstolen inte anser att yrkandet om utfående av SMS kan bifallas, inhämta ett förhandsbesked från EU-domstolen rörande frågan om det av EU-direktivet om rätten till information vid straffrättsliga förfaranden följer en skyldighet för åklagaren att överlämna kopior av det material som den misstänkte fått del av och önskar åberopa till stöd för sitt bestridande av beslutet om frihetsberövande.

Julian Assange har till stöd för sitt överklagande när det gäller frågan om häktning bl.a. anfört att åklagaren inte iakttagit den omsorg, effektivitet och skyndsamhet som åligger åklagaren i fall där den misstänkte är frihetsberövad och att detta förhållande sammantaget med åklagarens underlåtenhet att pröva att hålla förhör med Julian Assange i Storbritannien fått till följd att verkställigheten dragit ut orimligt långt på tiden, vilket medför att det är oproportionerligt att upprätthålla beslutet om häktning. Julian Assange har gjort gällande att de förhållanden under vilka han sedan den 19 juni 2012 lever på Ecuadors ambassad utgör ett frihetsberövande enligt Europadomstolens praxis. Om dessa förhållanden inte utgör ett frihetsberövande ska de ändå beaktas vid proportionalitetsbedömningen eftersom han tvingats stanna kvar på ambassaden för att kunna utnyttja den asyl som beviljats honom samt att han, om han lämnar ambassaden, riskerar att utlämnas till USA för att lagföras där. Julian Assange har anfört att han har rimliga skäl att tro, alternativt att han inte har orimliga skäl att tro, på objektiva grunder, att Sverige kan komma att utlämna honom till USA utan att respektera den asyl som har beviljats honom av Ecuador för att förhindra att han utlämnas till och utsätts för politisk förföljelse i USA.

Som skäl för prövningstillstånd har Julian Assange bl.a. anfört att det vore av vikt för ledning av rättstillämpningen att Högsta domstolen prövar frågan om tillämpning av proportionalitetsprincipen, däribland om Julian Assanges vistelse på ambassaden utgör ett frihetsberövande. Julian Assange har även anfört att det föreligger synnerliga skäl för prövningstillstånd.

Grunderna för min inställning

Kortfattad beskrivning av den rättsliga regleringen

Regleringen om häktning m.m. i rättegångsbalken
Häktning får enligt 24 kap. 1 § rättegångsbalken ske bl.a. av den som på sannolika skäl är misstänkt för ett brott för vilket det är föreskrivet fängelse i ett år eller mer, om det med hänsyn till brottets beskaffenhet, den misstänktes förhållanden eller någon annan omständighet finns risk för att han eller hon avviker eller på något annat sätt undandrar sig lagföring eller straff. Innan beslut fattas om att någon ska vara häktad ska en proportionalitetsbedömning alltid göras. Den s.k. proportionalitetsprincipen vid häktning är lagfäst i 24 kap. 1 § tredje stycket rättegångsbalken. Enligt denna bestämmelse får häktning endast ske om skälen för frihetsberövandet uppväger det intrång eller men i övrigt som frihetsberövandet innebär för den misstänkte eller för något annat motstående intresse. Proportionalitetsbedömningen innebär en avvägning mellan olika hänsyn. Rent allmänt betyder det att den tilltänkta åtgärden i fråga om art, styrka, räckvidd och varaktighet ska stå i rimlig proportion till vad som kan vinnas med åtgärden (prop. 1988/89:124 s. 26).

Proportionalitetsprincipen ger uttryck för att minsta möjliga tvång ska användas för att nå det avsedda syftet och innebär samtidigt en erinran om att tvångsmedlet får användas endast om syftet med åtgärden inte kan tillgodoses genom mindre ingripande åtgärder. Prövningen kan leda till att man väljer ett annat, lindrigare tvångsmedel än det man först hade tänkt sig, men kan också leda till att man avstår från att utnyttja tvångsmedlet (a. prop. s. 27 och 65). Om prövningen avser att häkta någon i sin utevaro ska proportionaliteten i att beröva den misstänkte friheten bedömas (Gunnel Lindberg, Straffprocessuella tvångsmedel, tredje uppl., s. 310).

I 24 kap. 18 § tredje stycket rättegångsbalken finns föreskrifter om s.k. omhäktningsförhandling (ibland kallad häktningskontrollförhandling). Syftet med sådan förhandling är att rätten ska utöva viss kontroll över förundersökningens bedrivande och underkasta häktningsfrågan en förnyad prövning. Vid en omhäktningsförhandling ska prövas dels om de förhållanden som föranlett häktningen fortfarande föreligger, dvs. om den häktade fortfarande är på sannolika skäl misstänkt för det brott som utredningen gäller och om den särskilda häktningsgrund som befunnits motivera häktning fortfarande är aktuell, dels om förundersökningen bedrivs med den skyndsamhet som är nödvändig. (Peter Fitger m.fl., Rättegångsbalken I s. 24:56 a.)

Så snart ett beslut att häkta någon i hans eller hennes utevaro har verkställts ska anmälan om detta göras hos rätten som utan dröjsmål ska hålla förhandling i häktningsfrågan. Vid en sådan förhandling ska den misstänkte närvara personligen. (24 kap. 17 § rättegångsbalken.)

Enligt 23 kap. 4 § rättegångsbalken ska en förundersökning bedrivas så skyndsamt som omständigheterna medger och på ett sätt som innebär att inte någon onödigt utsätts för misstanke eller får vidkännas kostnad eller olägenhet. Enligt 5 § förundersökningskungörelsen (1947:948) ska förhör, om inte därigenom förundersökningens behöriga gång motverkas eller polisens eller åklagarens arbete avsevärt försvåras, hållas på tid och plats som antas medföra minsta olägenhet för den som ska höras.

I rättsfallet NJA 2007 s. 337 begärdes en i utlandet bosatt person häktad i syfte att möjliggöra slutförandet av förundersökningen och fatta beslut i åtalsfrågan. Endast ett avslutande förhör med den misstänkte återstod, varefter det kunde bli fråga om s.k. slutdelgivning enligt 23 kap. 18 § rättegångsbalken. Högsta domstolen fann att man först borde pröva om dessa syften kunde tillgodoses genom telefonsamtal och skriftväxling. Enligt Högsta domstolen skulle det stå i god överensstämmelse med principen att ingen i onödan bör drabbas av kostnader och olägenheter på grund av förundersökningen (23 kap. 4 § första stycket rättegångsbalken) om så kunde ske. Högsta domstolen fann det oproportionerligt att besluta om häktning utan att först försöka föranstalta om

telefonförhör eller ställa frågor skriftligen till den misstänkte, varför häktningsyrkandet avslogs.

I NJA 2011 s. 518 har Högsta domstolen gjort vissa allmänna uttalanden om proportionalitetsprincipens tillämpning vid häktning. Därvid har Högsta domstolen slagit fast att när fråga om fortsatt häktning uppkommer har det betydelse hur lång tid frihetsberövandet har pågått och hur lång tid behovet av häktning kan förväntas bestå. Ju längre tid frihetsberövandet har varat, desto starkare skäl måste det föreligga för fortsatt häktning. Särskilt vid allvarlig brottslighet kan utredningssvårigheter få betydelse för den bedömningen. Enligt Högsta domstolen ligger i kravet på att en häktning inte får fortgå längre än vad som är nödvändigt att berörda myndigheter eller organ med rimlig effektivitet ska verka för att häktningstiden blir så kort som möjligt. Av betydelse är hur det förfarande som den fortsatta häktningen är beroende av (t.ex. en förundersökning) har fortskridit och kan förväntas fortlöpa. Hänsyn ska tas till det sätt på vilket berörda myndigheter och organ har agerat eller inte har agerat, liksom till om de fortsättningsvis kan förväntas agera med den skyndsamhet som är påkallad med hänsyn till såväl den misstänktes intresse som intresset av att ärendet blir ordentligt utrett och avgörs på ett säkert underlag. Om utredningen i ärendet inte ger stöd för bedömningen att tillräcklig skyndsamhet har iakttagits, utgör det ett skäl mot fortsatt häktning. Den misstänkte ska alltså inte bära bördan av oklarheter i detta hänseende. Högsta domstolen uttalade vidare att ett frihetsberövande om mer än tre år i sig inger tvekan om fortsatt häktning är försvarbar. Denna omständighet samt att det rådde osäkerhet om när ärendet kunde avgöras gjorde att den misstänkte försattes på fri fot, trots att han fortfarande var misstänkt för synnerligen allvarlig brottslighet (bl.a. folkmord och brott mot mänskligheten genom mord och utrotning).

Regleringen om en europeisk arresteringsorder

De i målet aktuella brottsmisstankarna gäller brott begångna i Sverige. Intresset av att beivra ett brott försvinner inte enbart för att den misstänkte gärningsmannen lämnat landet (se Karin Påle, Villkor för utlämning, 2003, s. 30). Bevisningen om brottet finns i Sverige och en effektiv och rättssäker utredning av god kvalitet erfordrar i normalfallet att en misstänkt person finns tillgänglig för förhör och andra utredningsåtgärder i Sverige. En utredning som gäller brott av allvarligt slag kräver ofta ett flertal förhör vid skilda tillfällen med den som misstänks för brottet. För att en person som misstänks för brott i Sverige ska kunna förhöras och lagföras här finns nationell och internationell reglering om utlämning liksom om det förenklade utlämningsförfarandet inom EU benämnt europeisk arresteringsorder.

För att beslutet att häkta Julian Assange i sin utevaro ska kunna verkställas har åklagaren som ovan anförts utfärdat en arresteringsorder för lagföring enligt förordningen (2003:1178) om överlämnande till Sverige enligt en europeisk

arresteringsorder. En arresteringsorder får utfärdas för brott för vilket den eftersökte är häktad på sannolika skäl misstänkt för brottet och för vilket är föreskrivet fängelse i ett år eller mer. Den eftersökte ska överlämnas till Sverige så snart som möjligt, dock senast tio dagar efter det slutgiltiga beslutet om verkställighet. Åklagarmyndigheten ansvarar för att den eftersökte förs till Sverige.

Grunden för systemet med en europeisk arresteringsorder är EU:s rambeslut 2002/584/RIF av den 13 juni 2002 om en europeisk arresteringsorder och överlämnande mellan medlemsstaterna. Rambeslutet bygger på principen om ömsesidigt erkännande mellan EU:s medlemsstater. Detta innebär i korthet att ett beslut som fattas i ett land (den utfärdande staten) ska erkännas och verkställas i ett annat land (den verkställande staten). Principen bygger på att staterna har ömsesidigt förtroende för varandra och inte ifrågasätter varandras rättssystem. I sin mest renodlade form innebär principen att den verkställande staten inte ska eller ens får göra någon prövning av om ett beslut ska verkställas eller inte. Rambeslutet om överlämnande enligt en europeisk arresteringsorder innehåller dock ett antal obligatoriska och fakultativa grunder för att vägra överlämnande. Utrymmet för avslag är dock betydligt mindre än inom det traditionella utlämningssystemet.

Min bedömning

Inledande ställningstaganden
Till en början vill jag anföra att jag anser att hovrättens beslut att avslå Julian Assanges yrkande om att förelägga åklagaren att till honom utge kopior av målsägandenas SMS liksom att avslå Julian Assanges yrkande om inhämtande av förhandsavgörande av EU-domstolen ska stå fast.

När det gäller frågan om häktning av Julian Assange vill jag inledningsvis anföra att jag delar hovrättens bedömning att Julian Assange alltjämt är på sannolika skäl misstänkt för

1) olaga tvång den 13-14 augusti 2010 i Stockholm,
2) sexuellt ofredande den 13-14 augusti 2010 i Stockholm
3) sexuellt ofredande den 18 augusti 2010 eller dagarna däromkring i Stockholm och
4) våldtäkt, mindre grovt brott, enligt 6 kap. 1 § tredje stycket brottsbalken, den 17 augusti 2010 i Enköping.

Jag delar också hovrättens bedömning att det finns risk för att Julian Assange avviker eller på något annat sätt undandrar sig lagföring eller straff.

Frågorna i målet
Högsta domstolen har förelagt mig att inkomma med svarsskrivelse gällande frågan om bedrivandet av utredningsarbetet och proportionalitetsprincipen.

Frågorna i målet är vilken betydelse det ska ha för proportionalitetsbedömningen att Julian Assange, efter beslutet år 2010 att han skulle häktas i sin utevaro, har varit föremål för vissa frihetsinskränkningar i Storbritannien och vistats på Ecuadors ambassad i London samt att förundersökningen inte har kunnat föras framåt i önskvärd utsträckning.

Vid prövningen av en häktningsfråga ska en proportionalitetsbedömning alltid göras. Skälen för frihetsberövandet ska ställas i relation till det intrång eller men i övrigt häktningsbeslutet innebär för den misstänkte eller för något annat motstående intresse. Vid denna bedömning måste i den ena vågskålen läggas målsägandenas och statens intresse av att de misstänkta brotten utreds och avgörs på ett gediget och säkert underlag. Av betydelse är därvid brottens karaktär och svårhet samt hur stor risken är för att den misstänkte ska undandra sig lagföring om han inte är häktad. I den andra vågskålen läggs den brottsmisstänktes intresse av att inte åsamkas inskränkningar i sin rätt till frihet och frid. Av betydelse härvid är de frihetsinskränkningar och andra olägenheter som häktningsbeslutet medför för den misstänkte eller för något annat motstående intresse.

Som hovrätten anfört är Julian Assange misstänkt för bl.a. sexualbrott av förhållandevis allvarlig art. Som hovrätten också anfört finns stor risk för att Julian Assange kommer att avvika och därmed undandra sig lagföring om häktningsbeslutet hävs. Dessa skäl för frihetsberövandet ska ställas emot de olägenheter häktningsbeslutet medför för Julian Assange. Härvid är av betydelse i första hand de olägenheter häktningsbeslutet innebär för honom i form av frihetsberövande och andra frihetsinskränkningar. Vidare är av betydelse huruvida berörda myndigheter fört utredningen framåt i erforderlig utsträckning och effektivt verkat för att häktningstiden ska bli så kort som möjligt.

Beaktande av de frihetsberövanden Julian Assange varit underkastad i Storbritannien

Jag delar hovrättens uppfattning att det vid bedömningen av om häktningsbeslutet är proportionerligt ska beaktas att Julian Assange som en följd av häktningsbeslutet och den europeiska arresteringsordern dels varit frihetsberövad i Storbritannien under tiden den 7-16 december 2010, dels under ett och ett halvt års tid haft ett flertal restriktioner i Storbritannien i form av elektronisk övervakning med fotboja, daglig anmälningsplikt hos polismyndigheten och förbud att vistas utanför bostaden mellan kl. 22.00 och 08.00. Dessa frihetsinskränkande åtgärder har varit av förhållandevis ingripande natur.

Har Julian Assange beaktansvärda skäl att vägra inställelse i Sverige?
Enligt Julian Assange ska också hans vistelse på Ecuadors ambassad anses som ett frihetsberövande till följd av häktningsbeslutet eller i vart fall som en beaktansvärd följd av häktningsbeslutet, varför den ska beaktas vid proportionalitetsbedömningen. För att kunna ta ställning till denna fråga är det enligt min uppfattning av vikt att slå fast den objektiva styrkan i Julian Assanges skäl att vägra inställelse i Sverige. Enligt Julian Assange finns en risk för att han, om han inställer sig i Sverige, kommer att utlämnas för lagföring till USA där han riskerar politisk förföljelse, omänsklig och förnedrande behandling, orättvis rättegång eller en uppenbar rättsvägran.

Regler om utlämning för brott från Sverige till en annan stat finns i lagen (1957:668) om utlämning för brott (utlämningslagen). För att en utlämning för brott från Sverige till USA ska aktualiseras erfordras för det första att en skriftlig framställning om utlämning lämnas in till det svenska Justitiedepartementet (14 § utlämningslagen). Någon sådan framställning har enligt uppgift inte inlämnats. Hos Justitiedepartementet görs en preliminär granskning av om hinder mot utlämning föreligger. Är det uppenbart att utlämning inte bör beviljas fattar regeringen omedelbart beslut om avslag. Om detta inte är fallet, överlämnas ärendet till riksåklagaren för yttrande (15 § utlämningslagen). Om den som begärs utlämnad motsätter sig utlämning lämnas ärendet till Högsta domstolen för prövning om det finns något hinder enligt 1-10 §§ utlämningslagen mot utlämning (15 och 18 §§ utlämningslagen). Hinder mot utlämning kan föreligga exempelvis om gärningen inte utgör brott enligt svensk lag, om det är fråga om politiska brott eller om personen i fråga riskerar att utsättas för förföljelse i den främmande staten (4 och 6-7 §§ utlämningslagen). Om en person har beviljats asyl i förhållande till det land som begär utlämning är det en indikation på att hinder för utlämning föreligger. De skäl som kan ligga till grund för ett beslut om asyl prövas inom ramen för utlämningsärendet, dels i ljuset av befintliga avslagsgrunder i utlämningslagen, dels i ljuset av Sveriges internationella åtaganden. Det är regeringen som fattar beslut om utlämning till USA ska ske. Om Högsta domstolen konstaterat att det föreligger hinder mot utlämning får regeringen inte besluta att utlämning ska ske (20 § utlämningslagen). Den svenska lagstiftningen om utlämning förutser inte några möjligheter att på förhand ge besked om utlämning ska ske eller inte.

Om Storbritannien verkställer Supreme Court's beslut att överlämna Julian Assange till Sverige enligt en europeisk arresteringsorder är Sverige bundet av den så kallade specialitetsprincipen. Den innebär bl.a. att Sverige inte får utlämna Julian Assange till ett tredje land, t.ex. USA, utan tillstånd från Storbritannien (se art. 28 i rambeslutet om en europeisk arresteringsorder). Eftersom utlämning till USA således förutsätter samtycke från Storbritannien löper Julian Assange inte större risk att utlämnas från Sverige än från Storbritannien.

Ett utlämningsförfarande till USA föregås alltså av en solid och rättssäker granskning av bl.a. Högsta domstolen. Med hänsyn härtill och då det i nuläget inte föreligger någon skriftlig begäran om utlämning av Julian Assange till USA från Sverige anser jag att Julian Assanges skäl att vägra inställelse i Sverige rent objektivt inte är av sådan styrka att de kan tillmätas relevans vid bedömningen av om hans vistelse på ambassaden ska räknas som ett frihetsberövande eller som ett men i övrigt till följd av häktningsbeslutet. Jag delar således hovrättens bedömning att Julian Assanges vistelse på ambassaden inte är att jämställa med ett frihetsberövande samt kan vistelsen inte heller betraktas som en beaktansvärd följd av häktningsbeslutet, varför den inte heller bör vägas in vid proportionalitetsbedömningen.

Ska Julian Assanges egen uppfattning för sin vägran till inställelse i Sverige beaktas?

Julian Assanges vistelse på Ecuadors ambassad har medfört att verkställigheten av häktningsbeslutet och arresteringsordern och därmed också förundersökningen har dragit ut på tiden. Oavsett vilka objektiva skäl som Julian Assange har haft för sin vägran att inställa sig i Sverige har hans åtgärd att söka skydd på Ecuadors ambassad drabbat honom personligen. Således har han, under hittills drygt två och ett halvt års tid, levt under förhållanden som säkerligen inneburit en stor påfrestning för honom. Därmed har han försatt sig i en situation som, åtminstone sedd i ett tidsperspektiv, är sämre än om han redan från början hade inställt sig här för förhör och eventuell lagföring. Utifrån en uppskattning av de åtalade gärningarnas straffvärde kan nämligen slutsatsen dras att han i så fall sedan länge kunnat lämna Sverige efter avslutade utredningsåtgärder och avtjänande av ett eventuellt straff.

Frågan blir då om Julian Assanges subjektiva uppfattning om nödvändigheten av att hålla sig undan verkställighet av beslutet om överlämnade till Sverige ska tillmätas någon betydelse. Det skulle kunna hävdas att de påfrestningar som hans ställningstagande i förlängningen har medfört är sådana att de ska betraktas som men inom ramen för en proportionalitetsbedömning. Omständigheter av detta slag skulle möjligen också kunna anses utgöra sådana s.k. billighetsskäl som kan beaktas i mildrande riktning vid straffmätning och påföljdsbestämning enligt 29 kap. 5 § brottsbalken respektive 30 kap. 4 § brottsbalken. Enligt min uppfattning finns det emellertid knappast något stöd i gällande rätt för att vid proportionalitetsbedömningen väga in sådana konsekvenser av häktningen som är en följd av den häktades egna åtgärder.

Finns det legala verkställighetshinder som innebär att häktningsbeslutet bör hävas?
Jag delar hovrättens bedömning att Julian Assanges vistelse på ambassaden inte innebär att det finns ett legalt verkställighetshinder som innebär att häktningsbeslutet bör hävas.

Bör kostnaden för bevakningen av Julian Assange tillmätas betydelse?
Som en följd av att Julian Assange har tagit sin tillflykt till Ecuadors ambassad i London bevakar brittisk polis ambassadens utgångar dygnet runt. Kostnaderna för denna bevakning kan sammantaget antas vara betydande. Beslutet att bevaka ambassaden har emellertid fattats självständigt av berörda myndigheter i Storbritannien, utan någon medverkan från Sverige. Det får förutsättas att brittiska myndigheter fortlöpande överväger vilka åtgärder de anser vara motiverade för att kunna verkställa Supreme Court's beslut om överlämnade. Detta är inte en fråga för det svenska rättsväsendet. Något önskemål om att Sverige ska ompröva sin begäran om överlämnande på grund av kostnaderna för bevakningen har heller inte framställts inom ramen för de kontakter som har förekommit mellan Sverige och Storbritannien i ärendet. Av dessa skäl bör enligt min uppfattning kostnaden för polisbevakningen inte beaktas vid proportionalitetsbedömningen och därmed inte tillmätas betydelse vid prövningen av om häktningsbeslutet ska bestå.

Bedrivs utredningen med den skyndsamhet som är nödvändig?
En häktning får aldrig pågå längre än vad som är nödvändigt med hänsyn till syftet. I detta ligger att berörda myndigheter med rimlig effektivitet ska verka för att häktningstiden blir så kort som möjligt. Ineffektivitet och resursbrist från myndigheternas sida bör aldrig få gå ut över den misstänkte. Det är alltså av betydelse hur det förfarande som den fortsatta häktningen är beroende av har fortskridit och kan förväntas fortlöpa. En åklagares underlåtenhet att på visst sätt föra förundersökningen framåt kan under vissa förhållanden leda till att ett häktningsbeslut anses oproportionerligt och därför bör hävas. (Se rättsfallen NJA 2007 s. 337 och NJA 2011 s. 518).

Ett brott som har begåtts i Sverige ska som huvudregel utredas och lagföras här. Intresset av att beivra brottet minskar inte för att den misstänkte har lämnat Sverige. I detta fall finns de bägge målsägandena samt alla vittnen liksom beslagtagna föremål i Sverige. I Sverige finns också polisens utredare samt övriga utredningsresurser. Det är bl.a. för att en brottsutredning ska kunna bedrivas på ett så effektivt och rättssäkert sätt som möjligt som det finns lagliga förutsättningar att begära en i Sverige brottsmisstänkt person utlämnad till Sverige enligt exempelvis regleringen om en europeisk arresteringsorder.

Julian Assange har förhörts i Sverige beträffande en av de fyra brottsmisstankarna som ligger till grund för häktningsbeslutet. Förhöret ägde rum den 30 augusti 2010. Trots upprepade försök att nå Julian Assange via

hans försvarare kom något ytterligare förhör inte till stånd i Sverige. Den 27 september 2010 lämnade Julian Assange Sverige.

Utredningsåtgärder har vidtagits i Sverige bl.a. i form av ett flertal förhör med målsägandena och förhör med ett antal andra personer. Föremål har tagits i beslag och analyserats av Statens Kriminaltekniska Laboratorium. Vidare har IT-forensiska utredningsåtgärder vidtagits.

Förundersökningsledaren har gjort bedömningen att det är av vikt att förhören med Julian Assange med hänsyn till brottens och utredningens karaktär äger rum i Sverige. Eftersom det är fråga om i vart fall ett relativt allvarligt sexualbrott som Julian Assange inte tidigare har hörts om är det inte lämpligt med förhör per telefon eller via videolänk. Ett förhör på begäran av Sverige med en person som befinner sig i Storbritannien skulle normalt genomföras av engelsk polis som i förväg har fått besked om vilka frågor som ska ställas. Oavsett hur och på vilken plats ett förhör med Julian Assange i London skulle kunna komma att genomföras leder ett förhör med en misstänkt i ärenden av den här typen vanligtvis till att ytterligare utredningsåtgärder behöver vidtas, till exempel förhör med andra inblandade. Dessa nya utredningsåtgärder måste sedan jämföras med uppgifterna i förhöret med den misstänkte, dvs. i praktiken nya förhör med Julian Assange och eventuellt ytterligare personer. Enligt förundersökningsledaren skulle ett förhör med Julian Assange i Storbritannien inte på ett effektivt sätt leda förundersökningen framåt. Vidare bygger ett förhör i Storbritannien på den misstänktes samtycke och medverkan till de åtgärder som vidtas. Ett sådant samtycke kan också närsomhelst återkallas. Det är alltså inte möjligt att med tvångsmedel verkställa ett beslut att genomföra ett förhör eller ett beslut om kroppsbesiktning (s.k. topsning) i syfte att göra en DNA-analys för jämförelse av spår som hittats på en brottsplats.

Om Julian Assange skulle förhöras i London och utredningen därigenom skulle leda till åtal mot honom krävs vidare att han kommer till Sverige för att en rättegång ska kunna genomföras och ett eventuellt straff kunna verkställas. Enligt svensk lag krävs att den åtalade är personligen närvarande vid rättegången vid den här typen av brott. Julian Assange har själv uppgett att han inte har för avsikt att inställa sig till en eventuell rättegång i Sverige.

Enligt min mening har förundersökningsledaren haft fog för sitt ställningstagande att avvakta med att tillmötesgå Julian Assanges begäran att hålla förhör på Ecuadors ambassad i London. Systemet med en europeisk arresteringsorder innehåller inga villkor om att åklagaren ska vidta utredningsåtgärder i den verkställande staten. Tvärtom är avsikten att ett överlämnande ska ske snabbt och enkelt, så att fortsatta åtgärder för lagföring kan ske i den utfärdande staten utan onödig tidsutdräkt. Detta ligger i både den utfärdande statens och den misstänktes intresse. Att så inte har skett i detta fall är inte något som kan tillskrivas åklagarens agerande. Utifrån bedömningen att

förundersökningens kvalitet ökar om förhöret hålls i Sverige har åklagaren därför haft grund för att invänta att beslutet om överlämnande verkställs.

Svea hovrätt konstaterade emellertid i det överklagade beslutet att utredningen om brottsmisstankarna har stannat upp och fann att åklagarnas underlåtenhet att pröva alternativa vägar inte stämmer överens med deras skyldighet att – i alla berördas intresse – driva förundersökningen framåt.

Efter att noga ha övervägt hovrättens synpunkter och efter nya överväganden om hur förundersökningen bäst bör bedrivas samt då flera av de brott Julian Assange misstänks för kan komma att preskriberas i augusti 2015 har förundersökningsledaren beslutat att försöka få till stånd ett förhör med Julian Assange i London. Engelsk lag kräver att den som ska förhöras inom ramen för regelverket om internationell rättslig hjälp också samtycker. Förundersökningsledaren har därför ställt en begäran till Julian Assanges advokater om Julian Assange samtycker till att förhöra honom i London och till att genomföra en kroppsbesiktning i syfte att göra en DNA-analys. Om Julian Assange ger sitt samtycke till de vidare utredningsåtgärderna kommer förundersökningsledaren att sända en begäran om rättslig hjälp från Storbritannien för att inhämta samtycke från Storbritannien för att få genomföra utredningsåtgärderna. En framställan om rättslig hjälp kommer att skickas till Ecuador om tillstånd att genomföra åtgärderna på Ecuadors ambassad i London. Om Julian Assange ger tillstånd till fortsatta utredningsåtgärder i London kommer dessa att genomföras av den biträdande förundersökningsledaren i ärendet samt en utredare från polisen. Därefter kommer förundersökningsledaren att ta ställning till vilka ytterligare utredningsåtgärder som behöver vidtas. Frågan om häktning av Julian Assange kommer då givetvis också att på nytt övervägas.

Mot denna bakgrund kan jag inte komma till någon annan slutsats än att utredningen bedrivits framåt med den skyndsamhet och effektivitet som omständigheterna i ärendet medger samt att utredningen framdeles kan förväntas bedrivas framåt med nödvändig skyndsamhet.

Sammanfattande bedömning
Sammanfattningsvis är det min uppfattning att det inte finns någon enskild omständighet som vid prövningen av häktningsfrågan bör föranleda att proportionalitetsbedömningen utfaller på annat sätt än vid det ursprungliga beslutet om häktning 2010. Således är Julian Assange fortfarande på sannolika skäl misstänkt för de brott som omfattas av häktningsbeslutet. Skälen för häktning uppväger de men och intrång som han har underkastats i form av inlåsning i häkte, anmälningsskyldighet och reseförbud. Vistelsen på ambassaden kan inte likställas med ett frihetsberövande. Inte heller bör den påfrestning som den frivilliga tillflykten till ambassaden innebär vägas in vid proportionalitetsbedömningen. Kostnaden för bevakningen i Storbritannien är

en fråga för de brittiska myndigheterna inom ramen för överlämnandeärendet och är därför inte relevant vid prövningen av häktningsfrågan i Sverige. Utredningen har bedrivits med den skyndsamhet och effektivitet som omständigheterna har medgett.

Fråga är emellertid om en samlad bedömning av omständigheterna i ärendet kan leda till en annan utgång vid prövningen av häktningsfrågan. Mer än fyra år har nu förflutit sedan häktning beslutades utan att beslutet har kunnat verkställas. Preskription av vissa av de misstänkta brotten kan inträda inom en relativt snar framtid. Det framstår alltjämt som oklart om och i så fall när ett överlämnade till Sverige kan komma till stånd.

Vid en sådan samlad bedömning ställs målsägandenas intresse av att få sina anmälningar utredda och prövade liksom principen om absolut åtalsplikt mot intresset av att ärendet kan avslutas inom rimlig tid samt det intrång och men som häktningsbeslutet kan anses innebära.

Jag kan inte se annat än att tingsrätten och hovrätten därvid har gjort en riktig avvägning med utgångspunkt från gällande rätt. Häktningsbeslutet bör därför kvarstå. Dock ska häktningsfrågan fortlöpande omprövas utifrån hur ärendet utvecklas.

Prövningstillstånd

Prejudikatdispens
Enligt 54 kap. 10 § första stycket 1 rättegångsbalken får prövningstillstånd meddelas om det är av vikt för ledning av rättstillämpningen att överklagandet prövas av Högsta domstolen (prejudikatdispens). För att bevilja prövning enligt denna punkt krävs alltså att ett avgörande av Högsta domstolen blir av generell betydelse för bedömningen av framtida mål som innehåller liknande frågeställningar. Den enskildes intresse av att få till stånd en prövning i Högsta domstolen kan alltså inte föranleda prövningstillstånd på denna grund (Fitger, Rättegångsbalken, s. 54:26).

Som framgår ovan har Högsta domstolen i NJA 2007 s. 337 och NJA 2011 s. 518, gett vissa allmänna riktlinjer för bedömningen av proportionalitetsprincipens tillämpning vid häktning som pågått under en mycket lång tid respektive vid beslut om häktning i den misstänktes utevaro.

Det vore enligt min uppfattning av värde för rättstillämpningen att Högsta domstolen ytterligare utvecklar vilka hänsyn som bör tas vid den proportionalitetsbedömning som alltid ska göras vid beslut om häktning. Högsta domstolen har inte tidigare prövat proportionalitetsprincipens tillämpning vid utevarohäktning som pågått under mycket lång tid. I detta mål vore av vikt att få prövat om och i så fall i vilken utsträckning Julian Assanges

långa och säkerligen påfrestande vistelse på ambassaden bör beaktas vid proportionalitetsbedömningen. Det vore även av värde att få belyst i vilken utsträckning de frihetsinskränkande åtgärder Julian Assange varit underkastad i Storbritannien i form av anmälningsplikt och utegångsförbud m.m. ska beaktas vid proportionalitetsbedömningen. Slutligen kan frågan om huruvida åklagarna har drivit förundersökningen framåt i erforderlig utsträckning få generell betydelse för framtida frågor om häktning i någons utevaro. När det gäller denna fråga synes tingsrätten och hovrätten, på samma underlag, ha gjort olika bedömningar.

Mot denna bakgrund anser jag att det vore av vikt för ledning av rättstillämpningen att Högsta domstolen prövar frågan om häktning. Jag tillstyrker därför att Högsta domstolen meddelar prövningstillstånd i frågan om häktning.

Några andra frågor av prejudikatintresse kan jag inte finna i målet.

Extraordinär dispens
Enligt 54 kap. 10 § första stycket 2 rättegångsbalken får prövningstillstånd också meddelas om det finns synnerliga skäl för en sådan prövning, såsom att det finns grund för resning eller att domvilla förekommit eller att målets utgång i hovrätten uppenbarligen beror på grovt förbiseende eller grovt misstag (s.k. extraordinär dispens).

Vid en genomgång av materialet i detta mål kan jag inte finna att det föreligger något skäl för Högsta domstolen att meddela extraordinär dispens.

Anders Perklev

Hedvig Trost

Kopia till:
Överåklagaren Marianne Ny, Utvecklingscentrum Göteborg (AM-131226-10)
Chefsåklagaren Ingrid Isgren, Västerås åklagarkammare
Utvecklingscentrum Malmö

SWEDISH PROSECUTION AUTHORITY
Legal Department

Senior Legal Manager Hedvig Trost

Official Letter of Reply

Date:
24/03/2015
Your date:
10/03/2015

Ref. no
ÅM 2015/1759
Your ref. no
Ö 5880-14 R 14

The Supreme Court
Box 2066
103 12 Stockholm

Julian Assange V the Prosecutor-General regarding detention etc.

(Decision of the Svea Court of Appeal of 20 November 2014 in case no. Ö 8290-14)

The Supreme Court has ordered me to speedily submit an official letter of reply, particularly regarding the matter of conducting the investigation and the principle of proportionality.

I wish to state the following regarding these matters.

My opinion

I contest the amendment to the Court of Appeal decision. However, I recommend the Supreme Court to issue leave to appeal regarding the matter of detention.

Background

On 18 November 2010, Stockholm City Court decided that Julian Assange was to be detained in absentia. After the decision was appealed in the Svea Court of Appeal, the Court decided on 24 November 2010 to reject Julian Assange's appeal. The Court of Appeal stated in the decision that Julian Assange is suspected on probable cause, in any case, of

1) Unlawful coercion, on 13–14 August 2010 in Stockholm.
2) Sexual molestation, on 13–14 August 2010 in Stockholm.
3) Sexual molestation, on 18 August 2010 or the days around that date, in Stockholm and
4) Rape, less serious offence, in accordance with Chapter 6, Section 1, third paragraph of the Penal Code, on 17 August 2010 in Enköping.

As special grounds for detention, the Court of Appeal stated that there was a prevalent risk of Julian Assange absconding or otherwise evading legal proceedings or punishment. The Court of Appeal also found that the grounds for detention counterbalance the encroachment or other detriment that the measure would entail for Julian Assange or for any other opposing interest. Julian Assange appealed the decision of the Court of Appeal to the Supreme Court, which decided on 2 December 2010 to not grant leave to appeal.

A European arrest warrant for legal proceedings was issued by the prosecutor on 2 December 2010, with a request for Julian Assange to be arrested and extradited from Britain to Sweden. The Court of Appeal's decision regarding detention in Julian Assange's absence was cited in support of the arrest warrant. As a result of the European arrest warrant being issued, Julian Assange was arrested by British police and was deprived of liberty on 7 December 2010.

Postal address
Box 5553
114 85 Stockholm

Street address
Östermalmsgatan 87 C

Telephone
+46 (0)10 5625000

Fax
+46 (0)10 5625299

E-mail
registrator@aklagare.se

Website
www.aklagare.se

He was released on bail on 16 December 2010 and was instead imposed with electronic surveillance with an electronic tag, daily duty to report to the police authority between the hours of 08:30 and 11:00 and prohibited to spend time outside his place of residence between 22:00 and 08:00. He also had to surrender his passport. The arrest warrant has been examined by three instances of the British courts. On 24 February 2011 the City of Westminster Magistrates' Court announced its decision to extradite Julian Assange to Sweden in accordance with the arrest warrant. In its decision, the Court established, among other things, that Julian Assange had not been available for questioning in Sweden. After the High Court in London also examined the case and reached the same conclusion, the Supreme Court established on 14 June 2012 that Julian Assange was to be extradited to Sweden in accordance with the prosecutor's application.

Julian Assange requested political asylum at the embassy of Ecuador in London on 19 June 2012. The Ecuadorian government granted Julian Assange political asylum on 16 August 2012. Julian Assange has since then remained at the Ecuadorian embassy. The embassy exits have been monitored by British police. Neither the European arrest warrant nor the detention order has been possible to execute.

After Julian Assange requested Stockholm City Court to quash the decision for detention in absentia and the prosecutor contested that amendment, Stockholm City Court made a decision on 16 July 2014 that Julian Assange was to remain detained in absentia on the same suspicions and on the basis of the same special grounds for detention as previously.

Julian Assange appealed the City Court decision to the Court of Appeal and petitioned for the Court of Appeal to reverse the City Court's decision for detention, and for the prosecutor to be ordered to submit to him, or alternatively to the Court of Appeal, copies of the injured parties' text messages as well as collect a preliminary ruling from the Court of Justice of the European Union. The Svea Court of Appeal decided on 20 November 2014 to reject all of Julian Assange's petitions.

The appeal

Julian Assange has appealed the decision of the Court of Appeal and petitioned for the Supreme Court to reverse the City Court's decision for detention in absentia, order the prosecutor to submit to Julian Assange, alternatively to the Court of Appeal, copies of the injured parties' text messages and, in case the Supreme Court is of the opinion that the submission of text messages cannot be approved, collect a preliminary ruling from the Court of Justice of the European Union regarding the matter of whether the Directive of the European parliament on the right to information in criminal proceedings obligates the prosecutor to hand over copies of the material that has been presented to the suspect and which he wishes to cite in support of his contestation of the decision for deprivation of liberty.

In support of his appeal regarding the matter of detention , Julian Assange has stated, among other arguments, that the prosecutor has not exercised the care, efficiency and speediness that a prosecutor is obligated to in cases where the suspect is deprived of liberty, and that this circumstance, along with the prosecutor's failure to try questioning Julian Assange in the United Kingdom has led to an unreasonably long procrastination of the execution , which makes it disproportionate to maintain the decision for detention. Julian Assange has explained that the conditions under which he has been living at the Ecuadorian embassy since 19 June 2012 constitute depravation of liberty in accordance with the practice of the Court of Justice of the European Union. If these conditions do not amount to depravation of liberty they should still

be considered at the assessment of proportionality as he has been forced to remain at the embassy in order to benefit from the asylum granted to him and that he, if he leaves the embassy, risks being extradited to the USA to be prosecuted there. Julian Assange has stated that he has plausible reasons to believe, alternatively that he does not have implausible reasons to believe, on objective grounds, that Sweden could come to extradite him to the USA without respecting the asylum that has been granted to him by Ecuador in order to prevent him from being extradited to the USA and being subject to political persecution.

Among his stated grounds for leave to appeal, Julian Assange has argued that it would be of importance to the adjudication process that the Supreme Court examines the matter of applying the principle of proportionality; for example, the matter of whether Julian Assange's stay at the embassy constitutes a deprivation of liberty. Julian Assange has also stated that there are special reasons for granting leave to appeal.

The basis of my opinion

Brief description of the judicial regulation

Regulation regarding detention etc. in the Code of Judicial Procedure
In accordance with Chapter 24, Section 1 of the Code of Judicial Procedure, any person suspected on probable cause of an offence punishable by imprisonment for a term of one year or more may be placed in detention if, in view of the nature of the offence, the suspect's circumstances, or any other factor, there is a reasonable risk that the person will flee or otherwise evade legal proceedings or punishment. Prior to making a decision to detain a person, a proportionality assessment shall always be carried out. The "principle of proportionality" in detention is legislated in Chapter 24, Section 1, paragraph 3 of the Code of Judicial Procedure. In accordance with this provision detention may only occur if the reason for detention outweighs the intrusion or other detriment to the suspect or some other opposing interest. The proportionality assessment means weighing different considerations against each other. In general, it means that the considered measure, in nature, force, range and permanence, shall stand in reasonable proportion to what may be gained by it (prop. 1988/89:124 p. 26). The principle of proportionality states that the least possible amount of force shall be applied to reach the intended purpose and simultaneously serves as a reminder that coercive measures may only be used if the purpose of the measure cannot be reached through less encroaching measures. The assessment may lead to the choice of another, lighter coercive measure than the one first considered, but it could also lead to a decision not to use a coercive measure (a. prop. p. 27 and 65). If the intent of the assessment is to detain someone in their absence, the proportionality of depriving the suspect of liberty shall be assessed (Gunnel Lindberg, *Straffprocessuella tvångsmedel* (Procedural coercive measures), third edition, page 310).

Chapter 24, Section 18, paragraph 3 of the Code of Judicial Procedure has regulations pertaining to new hearings on the issue of detention. The purpose of such a hearing is for the court to exercise some control over how the preliminary investigation is being conducted and subject the matter of detention to renewed examination. A new hearing on the issue of detention shall examine whether the circumstances that causes the decision to detain still prevail, i.e. whether the detained is still suspected on probable cause of the offences pertaining to the investigation, and if the special grounds for detention that was found to justify detention are still applicable. It also examines whether the preliminary investigation is conducted with the speediness necessary. (Peter Fitger et. al. Code of Judicial Procedure I p. 24:56 a.)

As soon as a decision to detain someone in absentia has been executed, this shall be reported to the court, which without delay shall hold a hearing in the matter of detention. At such a hearing the suspect shall appear in person. (Chapter 24, Section 17 of the Code of Judicial Procedure)

In accordance with Chapter 23, Section 4 of the Code of Judicial Procedure the investigation should be conducted as speedily as possible and in a manner so that no person is unnecessarily exposed to suspicion, or put to unnecessary cost or inconvenience. In accordance with Section 5 of the Decree on Preliminary Investigations (1947:948), hearings shall, unless the authorised course of the preliminary investigation is counteracted or the work of the police or prosecutor is significantly obstructed, be held at a time and a place that is supposed to carry the least possible inconvenience for the person being heard.

In the legal case NJA 2007 p. 337, a person residing abroad was detained for the purpose of enabling the conclusion of the preliminary investigation and making a decision in the prosecution matter. Only one concluding hearing with the suspect remained, after which it could have been a matter of a special conference in accordance with Chapter 23, Section 18 of the Code of Judicial Procedure. The Supreme Court found that it should first be established whether these purposes could be satisfied through telephone conversations or letter writing. According to the Supreme Court it would agree with the principle that no person should be unnecessarily exposed to cost or inconvenience due to the preliminary investigation (Chapter 23, Section 4, first paragraph of the Code of Judicial Procedure) if possible. The Supreme Court found it disproportional to make a decision regarding detention without first making arrangements for telephone hearings or ask the suspect questions in writing, which is why the petition for detention was rejected.

In NJA 2011 p. 518 the Supreme Court made certain general statements regarding the application of the principle of proportionality to detention. In connection thereto, the Supreme Court established that when the matter of continued detention is raised, it is of importance how long the deprivation of liberty has been and for how long the need for detainment can be expected to last. The longer the deprivation of liberty has lasted, the stronger the reasons for continued detention must be. For serious offences especially, investigation difficulties may be of significance for the assessment. According to the Supreme Court, the requirement for a detention not to last longer than necessary means that concerned authorities or bodies shall, with reasonable efficiency, endeavour to keep the detention period as short as possible. It is of significance how the process on which the continued detention depends (e.g., a preliminary investigation) has proceeded and can be expected to continue. Consideration shall be given to the way concerned authorities and bodies have acted or not acted, and to whether they can continuously be expected to act with the speediness required, taking into consideration the interests of the suspect as well as the interest of the matter being properly examined and determined on a safe investigation basis. If the investigation of the matter does not support the assessment that sufficient speediness has been observed, this constitutes grounds for continued detention. The suspect shall therefore not bear the burden of any ambiguities in this respect. The Supreme Court furthermore stated that deprivation of liberty for more than three years in itself conveys hesitation as to whether continued detention is defendable. This circumstance and the fact that it was uncertain when the case could be determined resulted in the suspect being released, despite the fact that he was still suspected of particularly serious offences (including genocide and crimes against humanity by means of murder and extermination).

The regulation of a European arrest warrant

The suspicions of an offence in the case in question apply to offences committed in Sweden. The interest of taking measures against an offence does not disappear because the suspected perpetrator has left the country (see Karin Påle, *Villkor för utlämning* (Conditions for extradition), 2003, p. 30). The evidence of the offence is in Sweden and conducting an efficient investigation in line with the rule of law and of good quality normally requires a suspect to be available for questioning and other investigational measures in Sweden. An investigation that applies to offences of a serious nature often requires questioning the suspect several times on separate occasions. To make it possible for a person suspected of offences in Sweden to be heard and to be subject to legal proceedings here, there are national and international regulations of extradition, as well as the simplified extradition procedure within the EU known as the European arrest warrant.

For the decision to detain Julian Assange in his absence to be executed, the prosecutor has, as stated above, issued an arrest warrant for legal proceedings in accordance with the Ordinance (2003:1178) on surrender to Sweden according to the European arrest warrant. An arrest warrant may be issued for offences for which the person sought is detained on probable cause suspected of the offence, and for which the prescribed sanction is imprisonment for a year or more. The person sought shall be extradited to Sweden as soon as possible, but no later than ten days after the final decision for execution. The Swedish Prosecution Authority is responsible for bringing the suspect to Sweden.

The basis for the system of a European arrest warrant is the EU Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. The framework decision is based on the principle of joint acknowledgement between EU member states. In brief, this means that a decision made in a country (the issuing member state) shall be acknowledged and executed in another country (the executing member state). The principle rests on the states having mutual trust in each other and not questioning each other's judicial systems. In its purest form, the principle means that the executing member state shall not, and is not even allowed to, make an assessment as to whether a decision shall be executed or not. The framework decision regarding extradition in accordance with a European arrest warrant does contain a number of mandatory and optional grounds for refusing extradition; however, the scope for rejection is significantly smaller than within the traditional extradition system.

My assessment

Initial standpoints

I would like to start by stating that I am of the opinion that the Court of Appeal's decision to reject Julian Assange's petition of ordering the prosecutor to provide him with copies of the injured parties' text messages, as well as to reject Julian Assange's petition of collecting a preliminary ruling from the Court of Justice of the European Union should stand.

Regarding the matter of detaining Julian Assange, I initially want to state that I share the assessment made by the Court of Appeal that Julian Assange is still suspected on probable cause of

1) Unlawful coercion on 13-14 August 2010 in Stockholm.
2) Sexual molestation on 13-14 August 2010 in Stockholm.
3) Sexual molestation on 18 August 2010 or the days around that date, in Stockholm and
4) Rape, less serious offence, in accordance with Chapter 6, Section 1, third paragraph of the Penal Code, on 17 August 2010 in Enköping.

I also share the assessment made by the Court of Appeal that there is a prevalent risk of Julian Assange absconding or otherwise evading legal proceedings or punishment.

The questions in the case

The Supreme Court has ordered me to submit an official letter of reply regarding the matter of conducting the investigation and the principle of proportionality.

The questions in the case relate to what significance, in relation to the proportionality assessment, shall be given to the fact that Julian Assange, after the decision in 2010 to detain him in absentia, have been the subject of certain deprivations of liberty in the United Kingdom and have spent time at the Ecuadorian embassy in London, as well as the fact that the preliminary investigation has not been able to move forward to the desired extent.

When examining a detention matter, a proportionality assessment shall always be conducted. The reasons for deprivation of liberty shall be weighed against the encroachment or other detriment that the detention decision would mean for the suspect or for any other opposing interest. On one side of the scales are the interests of the injured parties and the state for the suspected offences to be investigated and settled based on solid and certain grounds. Of significance here is the character and severity of the offences as well as the risk of the suspect evading legal proceedings if they are not detained. On the other side of the scales is the suspect's interest of not being subject to encroachments in their right to freedom and peace. Of significance here are the encroachments or other detriment the detention decision would entail for the suspect or for any other opposing interest.

As the Court of Appeal has stated, Julian Assange is suspected of offences including sexual offences of a relatively serious nature. As the Court of Appeal has also stated, there is a great risk that Julian Assange will abscond and thereby evade legal proceedings if the decision to detain him is revoked. These reasons for deprivation of liberty shall be weighed against the inconvenience the decision to detain him causes Julian Assange. In this respect, importance is primarily given to the inconvenience the detention decision causes him in terms of deprivation of liberty and other restrictions to his freedom. Furthermore, it is of importance whether the concerned authorities have moved the investigation forward to the requisite extent and efficiently worked to keep the period of detention as short as possible.

Taking into consideration the deprivation of liberty Julian Assange has been subject to in the United Kingdom
I share the opinion of the Court of Appeal that the assessment of whether the decision to detain is proportional shall take into consideration that Julian Assange, as a result of the decision to detain him and the European arrest warrant, has been deprived of liberty during the period between 7–16 December 2010, and for a year and a half has had several restrictions imposed on him in the United Kingdom in the form of electronic surveillance with electronic tag, daily duty to report with the police authority and a prohibition from spending time outside his place of residence between 22:00 and 08:00. These coercive measures have been of a relatively interfering nature.

Does Julian Assange have notable reason to refuse appearance in Sweden?
According to Julian Assange, his stay at the embassy of Ecuador shall be seen as a deprivation of liberty due to the decision to detain him, or at least as a notable consequence of the decision to detain him, which is why it should be taken into consideration in the proportionality assessment. In order to take a position in this matter it is my perception that it is important to objectively establish the solidity of Julian Assange's reasons for refusing an appearance in Sweden. According to Julian Assange, there is a risk, if he was to make an appearance in Sweden, of him being extradited to the USA to be prosecuted there, at the risk of being subject to political persecution, inhuman and humiliating treatment, unjust trial or an obvious denial of justice.

Regulations regarding extradition for offences from Sweden to another state can be found in the Extradition for Criminal Offences Act (1957:668). For an extradition for criminal offences from Sweden to the USA to be considered, a written statement regarding extradition must first be submitted to the Swedish Ministry of Justice (Section 14 of the Extradition for Criminal Offences Act). According to the information received, no such statement has been submitted. The Ministry of Justice will make a preliminary examination into whether there are any obstacles to extradition. If it is obvious that an extradition should not be granted, the Government immediately makes a decision for its rejection. If this is not the case, the matter will be submitted to the prosecutor general for a statement (Section 15 of the Extradition for Criminal Offences Act). If the person subject to the extradition request opposes the extradition, the case will be submitted to the Supreme Court for examination of any obstacles for extradition in accordance with Sections 1–10 of the Extradition for Criminal Offences Act (Sections 15 and 18 of the Extradition for Criminal Offences Act). Obstacles for extradition may occur, e.g., if the act does not constitute an offence according to Swedish legislation, if it is a matter of political crimes or if the person in question risks being subject to political persecution in the foreign state (Sections 4 and 6–7 of the

Extradition for Criminal Offences Act). If a person has been granted asylum in relation to the country that requests extradition, it is an indication that an obstacle to extradition exists. The possible grounds for an asylum decision will be examined within the framework of the extradition case, on the one hand in light of existing grounds for rejection in the Extradition for Criminal Offences Act, on the other hand in light of Sweden's international commitments. It is the Government that makes the decision as to whether extradition to the USA shall take place. If the Supreme Court finds that there is an obstacle to extradition, the Government may not decide that extradition shall take place (Section 20 of the Extradition for Criminal Offences Act). The Swedish legislation on extradition does not foresee any possibilities to give an advance decision on whether extradition will occur or not.

If the United Kingdom executes the Supreme Court decision to extradite Julian Assange to Sweden in accordance with a European arrest warrant, Sweden will be bound by the speciality rule. It means, among other things, that Sweden may not extradite Julian Assange to a third state, e.g., the USA without British permission (see art. 28 in the framework decision on the European arrest warrant). As extradition to the USA requires approval from the United Kingdom, Julian Assange is at no greater risk of being extradited from Sweden than he is from the United Kingdom.

An extradition proceeding to the USA is preceded by a solid and legally secure examination by the Supreme Court, among other instances. Taking this into consideration and that the fact that there currently is no written request of extraditing Julian Assange to the USA from Sweden, I am of the opinion that Julian Assange's reasons for refusing an appearance in Sweden purely objectively are not of such a strength that they can be given relevance when assessing whether his stay at the embassy shall be considered as deprivation of liberty or as another detriment resulting from the decision to detain him. I therefore share the assessment of the Court of Appeal that Julian Assange's stay at the embassy is not to be equalled with a deprivation of liberty and that the stay cannot be considered a notable consequence of the decision to detain him, which is also why it cannot be considered in the proportionality assessment.

Shall Julian Assange's own perception of his refusal to make an appearance in Sweden be taken into consideration?

Julian Assange's stay at the Ecuadorian embassy has meant that the execution time for the decision to detain him, the arrest order and ultimately the preliminary investigation has been prolonged. Regardless of the objective reasons Julian Assange has had to justify his refusal to make an appearance in Sweden, his action in seeking protection at the Ecuadorian embassy has had personal consequences for him. Consequently he has, for two and a half years now, lived under circumstances that surely have put great strain on him. Hence, he has put himself in a situation that, at least from a time perspective, is worse than if he had appeared in Sweden for questioning and possible legal proceedings when first summoned to do so. Based on an estimate of the penal value of the prosecuted acts he would have long since been able to leave Sweden after a concluded investigation and possible served sentence.

The question then is whether Julian Assange's subjective perception of the necessity to evade execution of the decision to extradite him to Sweden shall be given any significance. It could be argued that the strains that his position has brought over the course of time are such that they shall be considered as detriments within the framework of a proportionality assessment. Circumstances of this kind could possibly also be considered to constitute such grounds of equity as can be considered to constitute extenuating factors when meting out a punishment and setting a sanction in accordance with Chapter 29, Section 5 of the Penal Code and Chapter 30, Section 4 of the Penal Code respectively. In my opinion there is hardly any support in applicable law for taking the consequences of a detention resulting from the detained person's own measures into account in the proportionality assessment.

Are there judicial obstacles to execution warranting the reversal of the decision to detain?
I share the assessment of the Court of Appeal that Julian Assange's stay at the embassy does not entail a legal obstacle to execution that warrants the reversal of the decision to detain him.

Should the cost of surveilling Julian Assange be taken into consideration?
As a consequence of Julian Assange having taken refuge in the Ecuadorian embassy in London, British police are guarding the embassy exits 24 hours a day. The total cost of this surveillance can be assumed to be significant. However, the decision to guard the embassy has been taken independently by the concerned authorities in the United Kingdom, without any influence from Sweden. It must be assumed that British authorities continuously consider what options they find justified in order to execute the Supreme Court's decision for extradition. This is not a matter for the Swedish judicial system. No wish for Sweden to re-evaluate its request for extradition due to the costs of the surveillance has been submitted within the framework for the contacts between Sweden and United Kingdom in this matter. Due to these reasons, the cost of the police surveillance should not, in my opinion, be taken into consideration in the proportionality assessment and therefore not be given importance when examining whether the decision to detain shall remain.

Is the investigation being conducted with the requisite speediness?
A detention may never continue longer than what is necessary considering the purpose. An aspect of this is that concerned authorities, with reasonable efficiency, shall ensure that the detention period is as short as possible. Inefficiency and lack of resources on the part of the authorities should never have an impact on the suspect. it is therefore of significance how the proceedings, which the continued detention is dependent on, have gone and can be expected to progress. A he prosecutor's failure to move the preliminary investigation forward in some way can under certain circumstances lead to a detention decision being considered disproportionate, which means it should be revoked. (See legal cases NJA 2007 p. 337 and NJA 2011 p. 518).

An offence committed in Sweden shall, as a rule, be investigated and settled through legal proceedings here. The interest in taking legal measures against the offence does not decrease just because the suspected perpetrator has left Sweden. In this case, both injured parties and all witnesses as well as seized objects are in Sweden. As are the police investigator and other investigation resources. Legal prerequisites for requesting a person suspected of an offence in Sweden to be extradited to Sweden in accordance with, e.g., the regulations regarding European arrest warrants, have been put in place specifically to ensure that a criminal investigation can be conducted as efficiently as possible, and with the greatest possible respect for the rule of law.

Julian Assange has been questioned in Sweden regarding one of the four suspected offences that form the basis of the decision to detain him. The questioning took place on 30 August 2010. Despite repeated attempts to contact Julian Assange via his defence counsel, no further questioning was conducted in Sweden. Julian Assange left Sweden on 27 September 2010.

Investigative measures have been taken in Sweden, including several interviews with the injured parties as well as with a number of other persons. Objects have been seized and analysed by the National Forensics Centre. Furthermore, IT forensic investigative measures have been taken.

The investigation officer has made the assessment that it is of importance that the questioning of Julian Assange takes place in Sweden, considering the nature of the offences and the investigation. Since it is a matter, in any case, of a relatively serious sexual offence, regarding which Julian Assange has not previously been questioned, it is not suitable to conduct questioning via telephone or video link. A questioning requested by Sweden of a person who is in the United Kingdom would normally be conducted by British police provided with a list of question in advance. Regardless of how and in what location a questioning of Julian Assange in London could come to be

conducted, a questioning with a suspect in a case of this type normally leads to further investigative measures, e.g., interviews with other involved parties. These new investigative measures must then be compared with the information from the questioning of the suspect, which in practice would entail new questionings of Julian Assange and possible interviews with other persons. According to the investigation officer, a questioning of Julian Assange in the United Kingdom would not lead the preliminary investigation forward in an efficient way. Furthermore, a questioning in the United Kingdom is based on the suspect's consent and participation in the measures taken. Such consent could be withdrawn at any time. It is thus not possible to use coercive measures to conduct questioning or a decision for an intimate search (swabbing) for the purpose of conducting a DNA analysis for a comparison of traces found at a crime scene.

If Julian Assange was to be questioned in London and the investigation, as a result, was to lead to a prosecution, it will require of him to come to Sweden in order for a hearing to be conducted and a possible sentence to be executed. In accordance with Swedish law, the accused must be present in person at the hearing for these types of offences. Julian Assange has stated that he has no intention to be present for a possible hearing in Sweden.

In my opinion, the investigation officer has had valid reasons for the stance of holding off complying with Julian Assange's request to hold questioning at the Ecuadorian embassy in London. The system of the European arrest warrant contains no stipulations for the prosecutor taking investigative measures in the executing member state. On the contrary, the intention is for the extradition to happen quickly and easily so that continued measures for legal proceedings can take place in the issuing member state without unnecessary delay. This is in the interest of both the issuing member state and the suspect. The fact that this has not happened in this case is not something that can be attributed to the actions of the prosecutor. Based on the assessment that the quality of the preliminary investigation will be increased if the questioning is held in Sweden, the prosecutor has had valid reason to await the decision for extradition to be executed.

However, Svea Court of Appeal established in the appealed decision that the investigation into the suspected offences has been halted and found that the prosecutors' failure to try alternative routes does not agree with their responsibility to – in the interest of everyone concerned – move the preliminary investigation forward.

After having carefully considered the Court of Appeal's opinions and after several new considerations as to how the preliminary investigation should best be conducted, as well as the fact that several of the offences Julian Assange is suspected of may be barred by limitation in August 2015, the investigation officer has decided to try to arrange a questioning of Julian Assange in London. British law requires the person who is to be questioned within the framework of international legal aid to give their consent. The investigation officer has therefore posed a request to Julian Assange's legal counsels to determine whether Julian Assange consents to questioning in London and to an intimate search for the purpose of a DNA analysis. If Julian Assange consents to the continued investigative measures, the investigation officer will send a request of legal aid to the United Kingdom to collect consent from the United Kingdom to conduct the investigative measures. A request for legal aid will be sent to Ecuador for permission to execute the measures at the Ecuadorian embassy in London. If Julian Assange consents to continued investigative measures in London, these will be conducted by the deputy investigation officer in the case as well as an investigator from the police. Thereafter the investigation officer will consider which further investigative measures will need to be taken. The matter of Julian Assange's detention will naturally also be reconsidered then.

In light of this, I cannot come to any other conclusion than that the investigation has been moved forward with the speediness and efficiency the circumstances in the case permits, and that the investigation in the future can be expected to move forward with the requisite speediness.

Concluding assessment
In conclusion, it is my opinion that there is not one individual circumstance that, when assessing the detention matter, should cause the proportionality assessment to reach any other conclusion than the original decision for detention in 2010. Consequently, Julian Assange is still suspected on probable cause of the offences constituted in the decision to detain him. The reasons for detention outweighs the detriments and encroachments that he has been subject to in terms of detention in custody, duty to report and travel ban. His stay at the embassy cannot be placed on a par with deprivation of liberty. Nor should the strain of the voluntary refuge in the embassy be a factor in the proportionality assessment. The cost of the surveillance in the United Kingdom is a matter for the British authorities within the framework of the extradition case and is thus irrelevant when assessing the detention matter in Sweden. The investigation has been conducted with the speediness and efficiency permitted by the circumstances.

However, there is a question of whether a collected assessment of the circumstances in the matter can lead to another result when assessing the detention matter. More than four years have now passed since the decision for detention, without it being possible to execute the decision. Statutory limitation for some of the offences could come to pass in a relatively near future. It is still unclear whether, and if so when, an extradition to Sweden could happen.

At such a collected assessment, the interests of the injured parties to have their reports investigated and examined as well as the principle of absolute obligation to prosecute is posed against the interest of having the case concluded within reasonable time and the detriments and encroachments that the decision to detain can be seen to involve.

I cannot come to any other conclusion than the City Court and Court of Appeal having struck a correct balance in this regard based on applicable law. The decision to detain should therefore remain. The detention matter should be continuously re-examined based on the developments of the case, however.

Leave to appeal

Precedent dispensation
In accordance with Chapter 54, Section 10, paragraph 1 of the Code of Judicial Procedure, leave to appeal may be granted only if it is of importance for the guidance of the application of law that the Supreme Court considers the appeal (precedent dispensation). To grant examination in accordance with this paragraph, it is therefore required that a decision by the Supreme Court is of general importance to the assessment of future cases containing similar questions. The interests of the individual to achieve an examination in the Supreme Court can therefore not constitute grounds for leave to appeal on this basis (Fitger, Code of Judicial Procedure, p. 54:26).

As is evident above, the Supreme Court has set out certain general guidelines in cases NJA 2007 p. 337 and NJA 2011 p. 518 for the assessment of how to apply the principle of proportionality respectively to detentions that have lasted a very long time, and to decisions regarding detention have been taken in absentia of the suspect.

In my opinion it would be of value for the application of law if the Supreme Court further develops what considerations should be taken into account at the proportionality assessment that shall always be conducted when a decision for detention is made. The Supreme Court has not previously examined the application of the principle of proportionality in cases of detention in absentia that has lasted a very long time. In this case it would be of importance to examine whether, and if so to what extent, Julian Assange's undoubtedly strenuous stay at the embassy should be taken into consideration in the proportionality assessment. It would also be valuable to get clarity into what extent the encroaching measures Julian Assange has been subject to in the

United Kingdom, in the form of duty to report and curfew etc., shall be taken into consideration in the proportionality assessment. Finally, the question as to whether the prosecutors have moved the preliminary investigation forward to the requisite extent can be of general importance for future questions in relation to detention in absentia. When it comes to this question, the City Court and the Court of Appeal seem to have made different assessments on the same basis.

Against this background, I am of the opinion that it would be of importance for the guidance of the application of law that the Supreme Court examines the matter of detention. I therefore recommend that the Supreme Court grants leave to appeal in the matter of detention.

I cannot find any other questions regarding precedence in the case.

Extraordinary dispensation
In accordance with Chapter 54, Section 10, paragraph 1, point 2 of the Code of Judicial Procedure leave to appeal may also be granted if there are extraordinary reasons for such a determination, such as that grounds exist for relief for substantive defects or that a grave procedural error has occurred or that the result in the court of appeal is obviously due to gross oversight or to gross mistake.

When going through the material of this case I cannot find any prevalent cause for the Supreme Court to grant extraordinary dispensation.

[Signature]
Anders Perklev

[Signature]
Hedvig Trost

CC:
Director of Public Prosecution Marianne Ny, Prosecution Development Centre Gothenburg (AM-131226-10)
Chief Public Prosecutor Ingrid Isgren, Västerås Local Public Prosecution Office
Prosecution Development Centre Malmö

Aktbil 26-31

Till
Högsta domstolen

Övers. för kännedom
Stockholm i Högsta domstolens kansli 2015-04-16
I tjänsten:
B. Wikström

Ang mål nr Ö 5880-14, Julian Assange ./. Åklagaren

I tillägg till vad Julian Assange anfört i sitt överklagande får han anföra följande.

Av ändamåls- och behovsprincipen anses följa att ett frihetsberövande inte får leda till att någon frihetsberövas under längre tid än vad som motsvarar den påföljd som kan komma att ådömas (se G Lindberg, Straffprocessuella tvångsmedel, 2:a uppl, s. 26 not 26 med där angivna rättsfall).

I 19 a § lagen (1974:202) om beräkning av strafftid m.m. föreskrivs att den tid någon varit frihetsberövad som anhållen eller häktad med anledning av brott för vilket ådömts fängelse ska anses som tid under vilken den ådömda påföljden verkställts. Av 33 kap, 6 § brottsbalken följer att domstolen kan förordna om att påföljden verkställts genom frihetsberövandet i fall där den tid som den utdömda påföljden överstiger frihetsberövandet med är ringa.

När andra former av personella tvångsmedel, till exempel reseförbud, kommit till användning under förundersökningen kan det beaktas vid straffmätningen enligt de så kallade billighetsskälen enligt 29 kap, 5 § brottsbalken (se t.ex. NJA 2003 s. 414).

Som tidigare framhållits har Julian Assange varit föremål för tvångsmedel i anledning av att åklagaren utfärdade en europeisk arresteringsorder. Julian Assange frihetsberövades den 7 december 2010 och frigavs mot borgen om GBP 350 000 den 16 december 2010 med särskilda villkor om elektronisk övervakning med fotboja och daglig anmälningsplikt hos polismyndighet och förbud mot att vistas utanför bostaden mellan kl. 22-08. Vidare fråntogs Julian Assange sitt pass och förbjöds att ansöka om nya resedokument. De särskilda villkoren gällde fram till den 19 juni 2012.

Elektronisk övervakning är inte ett tvångsmedel som förekommer under förundersökningen enligt svensk straffprocessrätt, utan endast som en form för verkställighet av fängelsestraff enligt lagen (1994:451) om intensivövervakning med elektronisk kontroll. Som framgår av departementspromemorian Ds 2004:7 har intensivövervakning med elektronisk kontroll visat sig vara en verkställighetsform som i princip upplevs lika ingripande som fängelse (se prop. 2004/05:34 s. 48).

I artikel 26.1 i rådets rambeslut av den 13 juni 2002 om en europeisk arresteringsorder och överlämnande mellan medlemsstaterna föreskrivs att avräkning ska ske för tid som någon varit frihetsberövad på grund av verkställigheten av en arresteringsorder. Någon definition av vad som avses med frihetsberövande ges inte.

Enligt 33 kap, 7 § brottsbalken ska frihetsberövande utom riket tillgodoräknas som verkställighet av påföljd, om inte särskilda skäl talar emot det. I bestämmelsen hänvisas till bland annat 33 kap, 6 § brottsbalken och 19 a § lagen (1974:202) om beräkning av strafftid m.m. Av regleringen synes följa att endast anhållanden och häktning räknas som sådana frihetsberövanden som åsyftas i rambeslutets artikel 26.1.

Motsvarande bedömningen skedde även i Kammarrättens i Stockholm dom 2014-03-21 i mål nr 45-14. Sedan Förvaltningsrätten bedömt att den tid som en person varit underkastad borgen med villkor om bland annat elektronisk övervakning i Storbritannien med anledning av att Sverige utfärdat en europeisk arresteringsorder skulle avräknas från verkställigheten av hans fängelsestraff (dom 2013-12-20 i mål nr 6584-13), upphävde kammarrätten domen med motiveringen att personen inte har haft sådana inskränkningar i sin rörelsefrihet att han kan anses ha varit frihetsberövad under den aktuella perioden, bilaga 1-2.

Kammarrättens avgörande avsåg tillämpningen av 19 b § lagen (1974:202) om beräkning av strafftid m.m. som, till skillnad från 19 a §, avser överföring för verkställighet och endast talar om frihetsberövande utomlands, utan att närmare ange vilka former av frihetsberövanden som avses.

Enligt Julian Assanges uppfattning måste frågan om hur tid som misstänkt varit underkastad borgen med villkor om elektronisk övervakningen ska beaktas vid verkställighet av påföljden prövas, i första hand, med beaktande av hur rekvisitet "frihetsberövande" i rambeslutets artikel 26.1 ska tolkas.

Utgångspunkten bör vara att den europeiska arresteringsordern är ett uttryck för principen om ömsesidigt erkännande av medlemsstaternas rättsordningar som grundas på ett förtroende för att de lever upp till grundläggande fri- och rättigheter. Detta gäller inte endast lagföring och verkställighet efter överlämnandet, utan måste även anses innefatta åtgärder som vidtas när en utfärdad arresteringsorder ska verkställas i den anmodade staten.

33 kap, 6 § brottsbalken tar sikte på frihetsberövanden utom riket, utan att närmare ange vad som utgör ett frihetsberövande. Hänvisningen till bl.a. 19 a § lagen (1974:202) om beräkning av strafftid m.m. kan uppfattas som att de frihetsberövanden som avses i tiden före och under lagföring begränsas till anhållande och häktning så som dessa institut definieras enligt inhemsk nationell straffprocessuell rätt. Enligt Julian Assanges uppfattning strider emellertid en sådan tolkning av bestämmelsen mot rambeslutets artikel 26.1.

För det fall en anmodad stat i avsikt att verkställa en arresteringsorder vidtar åtgärder mot en enskild som enligt den inhemska rätten anses så ingripande att de är att likställa med ett frihetsberövande ger artikel 26.1 skäl för att den utfärdande staten ska beakta

åtgärderna vid bestämmandet av påföljden för det fall så skulle skett om lagföring genomförts i den anmodade staten.

Av Europarådets ministerkommittés rekommendation CM/Rec(2014)4 om elektronisk övervakning, bilaga 3, framgår i artikel III.1 att elektronisk övervakning ska regleras i lag och i artikel IV.3 att nationell lag ska reglera hur den tid som den elektroniska övervakningen pågått ska kunna avräknas från verkställigheten av påföljden. I kommentaren till rekommendationen har uttalats att avräkningen ska ske *on the agreed sense of equivalence between time spent on monitoring and time spent in custody as well as on the specific modalities of execution in each individual case*, bilaga 4 (s. 8, rule 17).

Rekommendationen ska givetvis inte ses som en anmodan till medlemsstaterna att införa elektronisk övervakning som ett tvångsmedel under förundersökningen, men den visar att tvångsmedlet som sådant är accepterat och att det endast får användas under i lag reglerade former. Rekommendationen kan ses som ett uttryck för principen om att rätten till frihet endast får begränsas genom lag (jfr artikel 5 i Europakonventionen och 2 kap, 8 och 20 §§ regeringsformen).

I anslutning till verkställigheten av en europeisk arresteringsorder kan åtgärder av tvångsmedelkaraktär i den verkställande staten till sin natur vara så ingripande att de utgör ett allvarligt ingrepp i den enskildes rätt till frihet och de kan formellt sett vara att likställa med anhållande och häktning, även om de inte direkt svarar mot de svenska instituten. Således finns olika möjligheter att begränsa en enskilds rörelsefrihet genom till exempel husarrest eller elektronisk övervakning., vilka inte nödvändigtvis förutsätter inlåsning i en cell.

Av principen om ömsesidigt erkännande och förtroende följer att den verkställande staten måste ha rätt att utgå från att den enskilde inte hamnar i ett sämre läge vad gäller sina grundläggande rättigheter till följd av ett överlämnande enligt en europeisk arresteringsorder än om han lagförts i den verkställande staten. Ingrepp i den enskildes rättigheter som vidtas med anledning av en utfärdad arresteringsorder måste därför behandlas på ett likvärdigt sätt i såväl den verkställande som den utfärdande staten.

Av brittisk lag framgår att den tid som någon varit fri mot borgen med villkor om elektronisk övervakning ska avräknas mot påföljden enligt relationen 2:1, det vill säga att hälften av de dagar som övervakningen pågått ska anses som verkställighet av påföljden, se bifogade rättsutlåtande, bilaga 5. För det fall lagföring skett i Storbritannien skulle Julian Assange således haft rätt att avräkna halva den tid han varit ålagd elektronisk övervakning från verkställigheten av en eventuell påföljd, vilket svarar mot ca 280 dagar av de 560 dagar som övervakningen pågått.

I Julian Assange fall ska även beaktas att åtgärderna vidtogs i en annan stat än hans hemland. För hans del förelåg därför inte de fördelar som elektronisk övervakning kan medföra i form av möjligheter att vistas i sin bostad, umgås med sin familj och sköta sitt arbete. I verkligheten förhöll det sig tvärtom så, att de belastande villkoren för borgen hindrade honom från att åtnjuta dessa förmåner, vilket utvecklats i tidigare inlagor.

Enligt Julian Assange följer av det sagda att domstolen vid bestämmande av en eventuell påföljd är skyldig att beakta den tid som han varit underkastad borgen med villkor om

elektronisk övervakning m.m. på så sätt att det sker en avräkning enligt 33 kap, 7 § brottsbalken eller att omständigheterna beaktas vid straffmätningen enligt 29 kap, 5 § brottsbalken. Till det kommer givetvis att Julian Assange under denna tid varit underkastad ett reseförbud och att han efter den 19 juni 2012 levt under förhållanden som är att jämställa med en husarrest på den Ecuadorianska ambassaden.

Med hänsyn till att straffvärdet för de gärningar som ligger till grund för brottsmisstanken kan anses svara mot klart mindre än tolv månaders fängelse (se t.ex. NJA 2008 s. 482 och RH 2008:41, 2010:6 och 2010:37) medför en avräkning av den tid som Julian Assange varit frihetsberövad eller eljest underkastad elektronisk övervakning m.m. att det föreligger en uppenbar risk för att ett verkställande av häktningsbeslutet kommer att medföra ett längre frihetsberövande än längden av den förväntade påföljden. Detta förhållande talar starkt emot ett upprätthållande av häktningsbeslutet.

Julian Assange menar att även frågorna kring hur den tid som han varit underkastad borgen med elektronisk övervakning m.m. ska behandlas vid fastställandet av en eventuell påföljd och vilken betydelse det får för prövningen av häktningens ändamålsenlighet är av betydelse för den framtida rättstillämpningen.

Stockholm den

Per E Samuelsson

Thomas Olsson

Bil 1-2

KAMMARRÄTTEN I STOCKHOLM
Avdelning 6

DOM

2014-03-21
Meddelad i Stockholm

Mål nr 45-14

KLAGANDE
Kriminalvården
Slottsgatan 78
601 80 Norrköping

MOTPART
Basim Fadil Yasser, 620311-8770

Ombud: Advokat Clea Sangborn
Försvarsadvokaterna Stockholm HB
Box 12107
102 23 Stockholm

ÖVERKLAGAT AVGÖRANDE
Förvaltningsrätten i Uppsalas dom den 20 december 2013 i mål nr 6584-13, se bilaga A

SAKEN
Beräkning av strafftid

KAMMARRÄTTENS AVGÖRANDE

Med bifall till överklagandet upphäver kammarrätten förvaltningsrättens dom och fastställer Kriminalvårdens beslut den 28 november 2013.

Postadress Box 2302, 103 17 Stockholm
Besöksadress Birger Jarls Torg 5
Telefon 08-561 690 00
Telefax 08-14 98 89
E-post: kammarrattenistockholm@dom.se
www.kammarrattenistockholm.domstol.se
Expeditionstid måndag – fredag 08:00-16:00

YRKANDEN M.M.

Kriminalvården yrkar att kammarrätten upphäver förvaltningsrättens dom och fastställer Kriminalvårdens beslut. Kriminalvården anför bl.a. följande. Begreppet frihetsberövande har inte definierats i lagen (1974:202) om beräkning av strafftid m.m. (strafftidslagen) och det framgår inte heller i förarbetena vad som avses. Ett frisläppande mot borgen som har förenats med vissa villkor kan inte innebära ett frihetsberövande enligt 19 b § strafftidslagen. De villkor som varit förenade med Basim Fadil Yassers frigivande mot borgen är till stor del sådana som redan kan meddelas i Sverige genom reseförbud och anmälningsskyldighet. Dessa icke frihetsberövande straffprocessuella tvångsmedel kan användas när det inte finns tillräckliga skäl för anhållande och häktning. Villkor får i dessa fall uppställas för övervakningen, exempelvis att den misstänkte på vissa tider ska vara tillgänglig i sin bostad eller på sin arbetsplats. Avräkning medges dock inte för tid då reseförbud eller anmälningsskyldighet har gällt. Den tid Basim Fadil Yasser har varit skyldig att vistas i sin bostad motsvarar i princip tiden för nattvila. I Sverige är det inte möjligt att följa upp villkoren genom elektronisk övervakning. En sådan övervakning är ett sätt att kunna kontrollera att villkoren följs och begränsar i sig inte rörelsefriheten.

Basim Fadil Yasser bestrider bifall till överklagandet och anför bl.a. följande. Obligatorisk avräkning gäller som huvudregel med undantag för de fall det finns särskilda skäl som talar mot avräkning. Avgörande för om det finns särskilda skäl som talar mot avräkning är arten av frihetsberövandet och formerna för dess verkställighet. Frihetsberövanden som anhållande, häktning och intagning för rättspsykiatrisk vård ska regelmässigt avräknas. Detsamma gäller motsvarande frihetsberövanden i någon av EU:s medlemsstater. Även om reglerna vid en första anblick påminner om det svenska systemets reseförbud och anmälningsplikt är villkorten betydligt mer ingripande. I Sverige anses fotboja vara ett substitut för fängelse varför den tid han hade fotboja måste anses vara av sådan art att den ska avräknas från det utdömda straffet. I många europeiska länder anses

exempelvis borgen och där medföljande villkor vara ett fullgott substitut för häktning. Om ett europeiskt land finner, i enlighet med sin rättsordning, att en person ska beviljas borgen med villkor istället för att vara häktad bör Sverige erkänna landets rättsordning och bevilja avräkning för den tid det europeiska landet genom sina förfaranden haft den tilltalade under sådan uppsikt att det motsvarar häktning.

SKÄLEN FÖR KAMMARRÄTTENS AVGÖRANDE

Frågan i målet är om Basim Fadil Yasser ska anses ha varit frihetsberövad under den period han varit frisläppt mot borgen med villkor.

Av handlingarna i målet framgår att de villkor som ställdes upp för Basim Fadil Yassers frisläppande mot borgen i huvudsak bestod i att han inte fick tillbaka sitt pass eller ansöka om nytt pass. Han var vidare ålagd att anmäla sig hos polisen varje dag inklusive helger, bo i sitt hem och sova där varje natt samt befinna sig i hemmet mellan klockan 21.00–06.00 varje dag. För att säkerställa att villkoren följdes övervakades han med en elektronisk fotboja.

Kammarrätten anser inte att Basim Fadil Yasser har haft sådana inskränkningar i sin rörelsefrihet att han kan anses ha varit frihetsberövad under den aktuella perioden. Kriminalvårdens överklagande ska därför bifallas.

HUR MAN ÖVERKLAGAR, se bilaga B (formulär 1).

Magnus Ekman
lagman
ordförande

Carin Jahn
kammarrättsråd

Anna Vilgeus Huldt
tf assessor
referent

Caroline Sommar
föredragande

Bil. A ab 4

FÖRVALTNINGSRÄTTEN I UPPSALA

DOM
2013-12-20
Meddelad i Uppsala

Mål nr
6584-13
Enhet 2

KLAGANDE
Basim Fadil Yasser, 620311-8770
Anstalten Tillberga
Box 1133
721 28 Västerås

Ombud:
Advokaten Clea Sangborn
Försvarsadvokaterna Stockholm HB
Box 12107
102 23 Stockholm

MOTPART
Kriminalvården HK
Klient och säkerhetsenheten
601 80 Norrköping

ÖVERKLAGAT BESLUT
Kriminalvårdens beslut den 28 november 2013

SAKEN
Tillgodoräknande av tid enligt lagen (1974:202) om beräkning av strafftid m.m.

DOMSLUT

Förvaltningsrätten bifaller överklagandet och förordnar att de dagar som Basim Fadil Yasser varit frigiven mot borgen med villkor ska avräknas från verkställigheten av hans fängelsestraff.

Postadress	Besöksadress	Telefon	Telefax	Expeditionstid
Box 1853 751 48 Uppsala	Kungsgatan 49	018-16 73 00 E-post: forvaltningsratteniuppsala@dom.se	018-16 73 43	måndag – fredag 08:00-16:00

BAKGRUND

Kriminalvården beslutade den 28 november 2013 att inte ändra sitt strafftidsbeslutbeslut från den 5 november 2013 enligt vilket den tid som Basim Fadil Yasser varit fri mot borgen inte tillgodoräknas honom enligt 19 b § lagen om beräkning av strafftid, mm. Strafftidsbeslutet innebär att tidigaste dag för villkorlig frigivning är den 12 januari 2014.

Som skäl för besluten angav Kriminalvården bland annat följande. Basim Fadil Yasser dömdes av Svea hovrätt den 22 december 2011 till fängelse i sex månader. Han efterlystes internationellt för verkställighet av domen och greps i Storbritannien på en europeisk arristeringsorder den 31 juli 2013. Han frigavs mot borgen den 1 augusti 2013 och överfördes till Sverige den 13 september samma år. Verkställigheten har beräknats från den 13 september 2013 då Basim Fadil Yasser ankom till Sverige. Basim Fadil Yasser har tillgodoräknats en dag, från den 31 juli till och med den 1 augusti 2013, för tid han varit frihetsberövad i Storbritannien med anledning av den europeiska arresteringsorden. Kriminalvården anser inte att villkoren för frisläppande mot borgen varit av sådan art och form att tiden från den 1 augusti 2013 till och med den 13 september 2013 ska tillgodoräknas honom. Tidigaste dag för villkorlig frigivning infaller då den 12 januari 2014 och slutdag blir den 12 mars 2014.

YRKANDE

Basim Fadil Yasser överklagar Kriminalvårdens beslut och yrkar att han från sitt fängelsestraff får avräkna de dagar han satt häktad samt dagarna från den 1 augusti 2013 till och med den 13 september 2013 då han var frisläppt mot borgen. Som stöd för sin talan anför han bland annat följande. Han har suttit anhållen och därefter släppts mot borgen. Borgen förenades med villkor vilka bestod i att han inte fick tillbaka sitt pass eller ansöka om nytt pass och att han skulle anmäla sig hos polisen varje dag inklusive helger, bo i sitt hem och sova där varje natt samt vara inomhus i sitt hem mellan kl. 21.00-06.00 varje dag. För att säkerställa att villkoren uppfylldes

övervakades han med elektronisk fotboja. Även om reglerna vid en första anblick påminner om det svenska systemets reseförbud och anmälningsplikt är de ovan presenterade villkoren betydligt mer ingripande. I Sverige anses vidare fotboja vara ett substitut för fängelse varför den tid han hade fotboja måste anses vara av sådan art att den ska avräknas från det utdömda straffet. Här vill särskilt betonas att det inte enbart är svensk rätt som är tillämplig utan här ska även artikel 26.1 i rambeslutet om en europeisk arresteringsorder beaktas. Om det bara är anhållande och häktning som ska få avräknas torde de som omfattas av dessa vara få. I många europeiska länder anses nämligen exempelvis borgen och där medföljande villkor vara ett fullgott substitut för häktning. Om ett europeiskt land finner, i enlighet med sin rättsordning, att en person ska beviljas borgen med villkor istället för att vara häktad bör Sverige erkänna landets rättsordning och bevilja avräkning för den tid det europeiska landet genom sina förfaranden haft den tilltalade under sådan uppsikt att det motsvarar häktning.

DOMSKÄL

Enligt 19 b § lagen om beräkning av strafftid m.m. ska den som har överlämnats till Sverige för straffverkställighet enligt en europeisk arresteringsorder tillgodoräknas den tid som han med anledning av begäran om överlämnande har varit frihetsberövad utomlands.

Bestämmelsen gäller, till skillnad från motsvarande avräkningsregel vid överlämnande för lagföring i 33 kap. 7 § brottsbalken, utan undantag. Även om de förhållanden under vilka utländska frihetsberövande verkställs kan variera mellan olika länder är avräkningen således obligatoriskt under förutsättning att fråga varit om ett frihetsberövande. Det innebär att Kriminalvården vid strafftidsberäkningen är skyldig att avräkna all den tid som en person med anledning av begäran om överlämnade enligt en europeisk arresteringeorder har varit frihetsberövad utomlands. Begreppet frihetsberövande definieras dock inte i lagen. Inte heller av förarbetena (prop.

2010/11:158 och Ds 2010:26) eller av Rådets rambeslut av den 13 juni 2002 om en europeisk arresteringsorder och överlämnande mellan medlemsstaterna framgår vad som avses med frihetsberövande.

Frågan i målet är om Basim Fadil Yaser ska anses ha varit frihetsberövad under den period han varit frihetsberövad mot borgen med villkor.

Att ett land utövat tvångsåtgärder gentemot en enskild på grund av en europeisk arresteringsorder innebär inte per automatik att tvångsåtgärden ska ses som ett frihetsberövande. Det avgörande måste istället vara tvångsåtgärdens innebörd. Av utredningen i målet framgår att Basim Fadil Yasser under den tid som han var frigiven mot borgen övervakats elektroniskt samt varit skyldig att följa vissa villkor, bland annat att anmäla sig hos polisen varje dag och att befinna sig i hemmet mellan kl. 21.00 och 06.00. Han har därmed haft sådana inskränkningar i sin rörelsefrihet att han enligt förvaltningsrättens bedömning måste anses ha varit frihetsberövad under den ifrågavarande perioden. Mot denna bakgrund finner förvaltningsrätten att överklagandet ska bifallas på så sätt att de dagar som Basim Fadil Yasser varit frigiven mot borgen med villkor ska avräknas från verkställigheten av hans fängelsestraff.

HUR MAN ÖVERKLAGAR, se bilaga (DV 3109/1A)

Annika Lowén
Rådman

I avgörandet har även nämndemännen Håkan Welin, Felemez Akad och Sofia Andersson deltagit.

Målet har handlagts av Maria Romelin

Bilaga

Bilaga B

HUR MAN ÖVERKLAGAR

Den som vill överklaga kammarrättens avgörande ska skriva till Högsta förvaltningsdomstolen. Skrivelsen ställs alltså till Högsta förvaltningsdomstolen *men ska skickas eller lämnas till kammarrätten.*

Överklagandet ska ha kommit in till kammarrätten *inom tre veckor* från den dag då klaganden fick del av beslutet. Om beslutet har meddelats vid en muntlig förhandling, eller det vid en sådan förhandling har angetts när beslutet kommer att meddelas, ska dock överklagandet ha kommit in inom tre veckor från den dag domstolens beslut meddelades. Tiden för överklagande för det allmänna räknas dock från den dag beslutet meddelades.

Om sista dagen för överklagande infaller på en lördag, söndag eller helgdag, midsommar-, jul- eller nyårsafton, räcker det att skrivelsen kommer in nästa vardag.

För att ett överklagande ska kunna tas upp i Högsta förvaltningsdomstolen krävs att *prövningstillstånd* meddelas. Högsta förvaltningsdomstolen lämnar prövningstillstånd om det är av vikt för ledning av rättstillämpningen att överklagandet prövas eller om det finns synnerliga skäl till sådan prövning, såsom att det finns grund för resning eller att målets utgång i kammarrätten uppenbarligen beror på grovt förbiseende eller grovt misstag.

Om prövningstillstånd inte meddelas står kammarrättens beslut fast. Det är därför viktigt att det klart och tydligt framgår av överklagandet till Högsta förvaltningsdomstolen varför man anser att prövningstillstånd bör meddelas.

Skrivelsen med överklagande ska innehålla följande uppgifter;

1. den klagandes namn, person-/organisationsnummer, postadress, e-postadress och telefonnummer till bostaden och mobiltelefon. Dessutom ska adress och telefonnummer till arbetsplatsen och eventuell annan plats där klaganden kan nås för delgivning lämnas om dessa uppgifter inte tidigare uppgetts i målet. Om klaganden anlitar ombud, ska ombudets namn, postadress, e-postadress, telefonnummer till arbetsplatsen och mobiltelefonnummer anges. Om någon person- eller adressuppgift ändras är det viktigt att anmälan snarast görs till Högsta förvaltningsdomstolen
2. det beslut som överklagas med uppgift om kammarrättens namn, målnummer samt dagen för beslutet
3. de skäl som klaganden vill åberopa för sin begäran om att få prövningstillstånd
4. den ändring av kammarrättens beslut som klaganden vill få till stånd och skälen för detta
5. de bevis som klaganden vill åberopa och vad han/hon vill styrka med varje särskilt bevis.

R1 3

Recommendation CM/Rec(2014)4
of the Committee of Ministers to member States
on electronic monitoring

(Adopted by the Committee of Ministers on 19 February 2014,

at the 1192nd meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve greater unity among its members;

Agreeing that it is necessary to further develop international co-operation in the field of enforcement of penal sentences;

Considering that such co-operation should contribute to improving justice, to executing sanctions effectively and in full respect of human rights and dignity of offenders and to reducing the incidence of offending;

Agreeing that deprivation of liberty should be used as a measure of last resort and that the majority of suspects and offenders can be efficiently and cost-effectively dealt with in the community;

Considering that the continuing growth of prison populations can lead to detention conditions which are not in conformity with Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedom (ETS No. 5), as highlighted by the relevant case law of the European Court of Human Rights;

Reiterating that prison overcrowding and prison population growth are a major challenge to prison administrations and the criminal justice system as a whole, both in terms of human rights and of the efficient management of penal institutions;

Recognising that electronic monitoring used in the framework of the criminal justice process can help reduce resorting to deprivation of liberty, while ensuring effective supervision of suspects and offenders in the community, and thus helping prevent crime;

Recognising at the same time that electronic monitoring technologies should be used in a well-regulated and proportionate manner in order to reduce their potential negative effects on the private and family life of a person under electronic monitoring and of concerned third parties;

Agreeing therefore that rules about limits, types and modalities of provision of electronic monitoring technologies need to be defined in order to guide the governments of the members States in their legislation, policies and practice in this area;

Agreeing further that ethical and professional standards need to be developed regarding the effective use of electronic monitoring in order to guide the national authorities, including judges, prosecutors, prison administrations, probation agencies, police and agencies providing equipment or supervising suspects and offenders;

Taking into account:

- the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5);

- the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (ETS No. 51);

- Recommendation Rec(92)16 on the European rules on community sanctions and measures;

- Recommendation Rec(92)17 concerning consistency in sentencing;

- Recommendation Rec(97)12 on staff concerned with the implementation of sanctions and measures;

- Recommendation Rec(99)22 concerning prison overcrowding and prison population inflation;

- Recommendation Rec(2000)22 on improving the implementation of the European rules on

community sanctions and measures;

- Recommendation Rec(2003)22 on conditional release (parole);

- Recommendation Rec(2006)2 on the European Prison Rules;

- Recommendation CM/Rec(2008)11 on the European Rules for juvenile offenders subject to sanctions or measures;

- Recommendation CM/Rec(2010)1 on the Council of Europe Probation Rules;

- Recommendation CM/Rec(2012)5 on the European Code of Ethics for Prison Staff;

Bearing in mind:

- the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) (Resolution 45/110);

- the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) (Resolution 2010/16);

- the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) (Resolution 40/33);

- the European Union Council Framework Decision 2008/947/JHA on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions;

- the European Union Council Framework Decision 2009/829/JHA on the application, between member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention,

Recommends that the governments of member States:

- take all appropriate measures, when reviewing their relevant legislation and practice, to apply the principles set out in the appendix to this recommendation;

- ensure the dissemination of this recommendation and its commentary among the relevant authorities and agencies, above all among the relevant ministries, the prison administration, probation agencies, the police and other relevant law enforcement agencies, as well as among any other agency providing electronic monitoring equipment or supervising persons under electronic monitoring in the framework of the criminal justice process.

Appendix to Recommendation CM/Rec(2014)4

I. Scope

The aim of this recommendation is to define a set of basic principles related to ethical issues and professional standards enabling national authorities to provide just, proportionate and effective use of different forms of electronic monitoring in the framework of the criminal justice process in full respect of the rights of the persons concerned.

It is also intended to bring to the attention of national authorities that particular care needs to be taken when using electronic monitoring not to undermine or replace the building of constructive professional relationships with suspects and offenders by competent staff dealing with them in the community. It should be underlined that the imposition of technological control can be a useful addition to existing socially and psychologically positive ways of dealing with any suspect or offender as defined by the relevant Committee of Ministers' recommendations and particularly by Recommendation Rec(92)16 on the European rules on community sanctions and measures; Recommendation Rec(97)12 on staff concerned with the implementation of sanctions and measures; Recommendation Rec(2006)2 on the European Prison Rules; Recommendation CM/Rec(2010)1 on the Council of Europe Probation Rules and Recommendation CM/Rec(2012)5 on the European Code of Ethics for Prison Staff.

II. Definitions

"Electronic monitoring" is a general term referring to forms of surveillance with which to monitor the location, movement and specific behaviour of persons in the framework of the criminal justice process. The current forms of electronic monitoring are based on radio wave, biometric or satellite tracking technology. They usually comprise a device attached to a person and are monitored remotely.

Depending on the national jurisdictions, electronic monitoring may be used in one or more of the following ways:

- during the pre-trial phase of criminal proceedings;
- as a condition for suspending or of executing a prison sentence;
- as a stand-alone means of supervising the execution of a criminal sanction or measure in the community;
- in combination with other probation interventions;
- as a pre-release measure for those in prison;
- in the framework of conditional release from prison;
- as an intensive guidance and supervision measure for certain types of offenders after release from prison;
- as a means of monitoring the internal movements of offenders in prison and/or within the perimeters of open prisons;
- as a means for protecting specific crime victims from individual suspects or offenders.

In some jurisdictions, where electronic monitoring is used as a modality of execution of a prison sentence, those under electronic monitoring are considered by the authorities to be prisoners.

In some jurisdictions, electronic monitoring is directly managed by the prison, probation agencies, police services or other competent public agency, while in others it is implemented by private companies under a service-providing contract with a State agency.

In some jurisdictions, the suspect or offender carrying the device is required to contribute to the costs of its use, while in others the State alone covers the costs of electronic monitoring.

In some jurisdictions electronic monitoring may be used in the case of juvenile suspects and offenders, while in others the measure is not applicable to juveniles.

"Suspect" means any person who is alleged to have committed or who has been charged with having committed a criminal offence but who has not been convicted of it.

"Offender" means any person who has been convicted of a criminal offence.

"Agency providing electronic monitoring equipment": usually a private company which produces, markets, sells, rents and maintains such equipment.

"Agency responsible for supervising persons under electronic monitoring": a public agency or a private company which is entrusted by the competent authorities to supervise the location, movement or specific behaviour of a suspect or an offender for a specified period of time.

"Probation agency": a body responsible for the execution in the community of sanctions and measures defined by law and imposed on an offender. Its tasks include a range of activities and interventions, which involve supervision, guidance and assistance aiming at the social inclusion of offenders, as well as at contributing to community safety. It may also, depending on the national legal system, implement one or more of the following functions: providing information and advice to judicial and other deciding authorities to help them reach informed and just decisions; providing guidance and support to offenders while in custody in order to prepare their release and resettlement; monitoring and assistance to persons subject to early release; restorative justice interventions; and offering assistance to victims of crime.

A probation agency may also be, depending on the national legal system, the "agency responsible for supervising persons under electronic monitoring".

III. Basic principles

1. The use, as well as the types, duration and modalities of execution of electronic monitoring in the framework of the criminal justice shall be regulated by law.

2. Decisions to impose or revoke electronic monitoring shall be taken by the judiciary or allow for a judicial review.

3. Where electronic monitoring is used at the pre-trial phase special care needs to be taken not to net-widen its use.

4. The type and modalities of execution of electronic monitoring shall be proportionate in terms of duration and intrusiveness to the seriousness of the offence alleged or committed, shall take into account the individual circumstances of the suspect or offender and shall be regularly reviewed.

5. Electronic monitoring shall not be executed in a manner restricting the rights and freedoms of a suspect or an offender to a greater extent than provided for by the decision imposing it.

6. When imposing electronic monitoring and fixing its type, duration and modalities of execution account should be taken of its impact on the rights and interests of families and third parties in the place to which the suspect or offender is confined.

7. There shall be no discrimination in the imposition or execution of electronic monitoring on the grounds of gender, race, colour, nationality, language, religion, sexual orientation, political or other opinion, national or social origin, property, association with a national minority or physical or mental condition.

8. Electronic monitoring may be used as a stand-alone measure in order to ensure supervision and reduce crime over the specific period of its execution. In order to seek longer term desistance from crime it should be combined with other professional interventions and supportive measures aimed at the social reintegration of offenders.

9. Where private sector organisations are involved in the implementation of decisions imposing electronic monitoring, the responsibility for the effective treatment of the persons concerned in conformity with the relevant international ethical and professional standards shall remain with public authorities.

10. Public authorities shall ensure that all relevant information regarding private sector involvement in the delivery of electronic monitoring is transparent and shall regulate the access to it by the public.

11. Where suspects and offenders are contributing to the costs for the use of electronic monitoring, the amount of their contribution shall be proportionate to their financial situation and shall be regulated by law.

12. The handling and shared availability and use of data collected in relation to the imposition and implementation of electronic monitoring by the relevant agencies shall be specifically regulated by law.

13. Staff responsible for the implementation of decisions related to electronic monitoring shall be sufficient in number and adequately and regularly trained to carry out their duties efficiently, professionally and in accordance with the highest ethical standards. Their training shall cover data protection issues.

14. There shall be regular government inspection and avenues for independent monitoring of the agencies responsible for the execution of electronic monitoring in a manner consistent with national law.

IV. Conditions of execution of electronic monitoring at the different stages of the criminal process

1. In order to ensure compliance, different measures can be implemented in accordance with national law. In particular, the suspect's or offender's consent and co-operation may be sought, or dissuasive sanctions may be established.

2. The modalities of execution and level of intrusiveness of electronic monitoring at the pre-trial stage shall be proportionate to the alleged offence and shall be based on the properly assessed risk of the

person absconding, interfering with the course of justice, posing a serious threat to public order or committing a new crime.

3. National law shall regulate the manner in which time spent under electronic monitoring supervision at pre-trial stage may be deducted by the court when defining the overall duration of any final sanction or measure to be served.

4. Where there is a victim protection scheme using electronic monitoring to supervise the movements of a suspect or an offender, it is essential to obtain the victim's prior consent and every effort shall be made to ensure that the victim understands the capacities and limitations of the technology.

5. In cases where electronic monitoring relates to exclusion from, or limitation to, specific zones, efforts shall be made to ensure that such conditions of execution are not so restrictive as to prevent a reasonable quality of everyday life in the community.

6. Where substance abuse needs to be monitored, consideration shall be given to the respective intrusiveness and therapeutic and educative potential of electronic and traditional approaches when deciding which approach is to be used.

7. Electronic monitoring confining offenders to a place of residence without the right to leave it should be avoided as far as possible in order to prevent the negative effects of isolation, in case the person lives alone, and to protect the rights of third parties who may reside at the same place.

8. In order to prepare offenders for release, and depending on the type of offence and offender management programme, electronic monitoring may be used to increase the number of individual cases of short-term prison leave that are granted, or to give offenders the possibility to work outside prison or be given a placement in an open prison.

9. Electronic monitoring may be used as an alternative execution of a prison sentence, in which case its duration shall be regulated by law.

10. Electronic monitoring may be used, if needed, in case of early release from prison. In such a case, its duration shall be proportionate to the remainder of the sentence to be served.

11. If electronic monitoring is used, if needed, after the prison sentence has been served, as a post-release measure, its duration and intrusiveness shall be carefully defined, in full consideration of its overall impact on former prisoners, their families and third parties.

I. Ethical issues

1. Age, disability and other relevant specific conditions or personal circumstances of each suspect or offender shall be taken into account in deciding whether and under what modalities of execution electronic monitoring may be imposed.

2. Under no circumstances may electronic monitoring equipment be used to cause intentional physical or mental harm or suffering to a suspect or an offender.

3. Rules regarding the use of electronic monitoring shall be periodically reviewed in order to take into account the technological developments in the area so as to avoid undue intrusiveness into the private and family life of suspects, offenders and other persons affected.

I. Data protection

1. Data collected in the course of the use of electronic monitoring shall be subject to specific regulations based on the relevant international standards regarding storage, use and sharing of data.

2. Particular attention shall be paid to regulating strictly the use and sharing of such data in the framework of criminal investigations and proceedings.

3. A system of effective sanctions shall be put in place in case of careless or intentional misuse or handling of such data.

4. Private agencies providing electronic monitoring equipment or responsible for supervising persons under electronic monitoring shall be subjected to the same rules and regulations regarding handling

of the data in their possession.

I. Staff

1. All relevant rules of Recommendation Rec(92)16 on the European rules on community sanctions and measures, of Recommendation Rec(97)12 on staff concerned with the implementation of sanctions and measures, of Recommendation CM/Rec(2010)1 on the Council of Europe Probation Rules and of Recommendation CM/Rec(2012)5 on the European Code of Ethics for Prison Staff, which relate to staff, shall be applicable.

2. Staff shall be trained to communicate sensitively with suspects and offenders, to inform them in a manner and language they understand of the use of the technology, of its impact on their private and family lives and on the consequences of its misuse.

3. Staff shall be trained to deal with victims in cases where victim support schemes are used in the framework of electronic monitoring.

4. In establishing electronic monitoring systems, consideration shall be given to the respective merits of both human and automated responses to the data gathered by the monitoring centre, bearing in mind the advantages of each.

5. Staff entrusted with the imposition or execution of electronic monitoring shall be regularly updated and trained on the handling, use and impact of the equipment on the persons concerned.

6. Staff shall be trained to install and uninstall technology and provide technical assistance and support in order to ensure the efficient and accurate functioning of the equipment.

I. Work with the public, research and evaluation

1. The general public shall be informed of the ethical and technological aspects of the use of electronic monitoring, its effectiveness, its purpose and its value as a means of restricting the liberty of suspects or offenders. Awareness shall also be raised regarding the fact that electronic monitoring cannot replace professional human intervention and support for suspects and offenders.

2. Research and independent evaluation and monitoring shall be carried out in order to help national authorities take informed decisions regarding the ethical and professional aspects of the use of electronic monitoring in the criminal process.

Related Documents

Meetings

- 1192nd meeting of the Ministers' Deputies (CM Room) / 19 February 2014

Other documents

- CM(2014)14add2E / 21 January 2014
- CM/Del/Dec(2014)1192/10.1E / 24 February 2014

Bil 4

Ministers' Deputies
CM Documents

CM(2014)14 add2 21 January 2014[1]

1192 Meeting, 19-21 February 2014

10 Legal questions

10.1 European Committee on Crime Problems (CDPC) –

c. Draft Recommendation CM/Rec(2014)... of the Committee of Ministers to member States on electronic monitoring
Draft commentary
Item to be prepared by the GR-J at its meeting on 11 February 2014

I. Scope

Electronic monitoring has been used in Europe since the 1990s and continues to expand. It is predominantly been used to enforce curfews and home detention but newer technologies are emerging (e.g. GPS) which can monitor the behaviour and movements of suspects and offenders as well as help create and monitor exclusion zones. Different countries have developed their own legislation and policy on electronic monitoring and the European Organisation for Probation (CEP) has sustained a significant dialogue about electronic monitoring with European probation services promoting the development of European rules in this area.

Many understandable fears have been expressed in relation to this surveillance technology and many European probation services have been concerned of the need to emphasize that the technology should never be used as a replacement for constructive professional relationships with suspects and offenders by competent staff dealing with them in the community. It is important to stress in this respect that probation helps develop a person's internal control, i.e. helps a person develop resistance to aggression, violence and crime, while electronic monitoring is used to help the external control on a person by the competent authorities. As such electronic monitoring can also be an efficient dissuasive tool for the period for which it is used.

Electronic monitoring is specifically referred to in Recommendation Rec (2000)22 on improving the implementation of the European rules on community sanctions and measures as a means of enforcement of community sanctions and measures and more specifically curfew orders. The Council of Europe Probation Rules also contain rules related to electronic monitoring (Rules 58 and 59). Nevertheless the 16th Conference of Directors of Prison Administration.(CDAP) (Strasbourg, 2011) specifically requested the Council of Europe to develop more detailed ethical and professional standards regulating the use of electronic monitoring in the criminal justice process. The present Recommendation contains basic standards but the Council of Europe member States are encouraged to go beyond the recommended principles in order to ensure efficient and human rights based use of electronic monitoring.

II. Definitions

The definition of electronic monitoring is broad and general as this is not a single technology. In Appendix Ito the commentary you can find a descriptive list of the currently used forms of electronic monitoring. As the technologies are rapidly developing this list cannot be considered to be exhaustive. The definition also reflects in general terms the stages of the criminal process during which electronic monitoring can be used. Following the specific instruction of the European Committee on Crime Problems (CDPC) the recommendation does not prescribe what national legislation should be in this respect, it only emphasizes the
basic principles which should underpin such legislation. In addition it does not deal with the use of electronic monitoring inside prisons.

As stated, electronic monitoring may be used at all stages of the criminal process. It can be used as a tool to ensure home arrest, implementation of a community sanction or measure, or it can be used as a stand-alone measure (for example it is used in the United Kingdom as a tool to keep certain violently behaving persons away from public gatherings and demonstrations , for example away from

football matches).

Electronic monitoring may be used to prepare prisoners for release while they are still in prison, for example when they are on a prison leave or are working outside the prison perimeter or are requested to attend meetings with their social worker, future employer or probation officer outside prison.

Electronic monitoring may also be used as a tool for controlling the whereabouts or behaviour of offenders released from prison earlier under certain conditions (for example to participate in training or undergo treatment for specific addictions, etc.)

Electronic monitoring may also be used to control the whereabouts of certain types of offenders who have served their prison sentence (for example serious sex offenders).

In some jurisdictions (like Belgium and France) electronic monitoring is considered by the legislation to be a modality of the execution of a prison sentence and those under electronic monitoring are considered to be prisoners and are dealt with accordingly.

In the United Kingdom there is currently a tendency to allow the same private companies (working under tender procedures) to run private prisons, to supervise persons under electronic monitoring, to provide prison escort services and also (only recently) to run interrogations. It should be noted that important ethical issues arise as a result of this which should be carefully considered.

In some jurisdictions, such as in France and Belgium, electronic monitoring is considered to be a modality of execution of a prison sentence and therefore specific provisions regarding its execution are contained in the court judgment. Hence those under electronic monitoring are considered to be prisoners and their number is included in the overall prison population. The reality of their experience may be more like that of an offender under supervision in the community but the regulations to which they are subject are those pertaining to prisoners in general. This means for example that non-compliance with the requirements of electronic monitoring can mean that they will be recalled to prison without any judicial involvement.

In some countries electronic monitoring is managed by the penitentiary services (France and Catalonia), in others by the probation services (Belgium, Denmark, the Netherlands, Switzerland, Turkey), or jointly by the probation and police services (England and Wales and Sweden). In other countries other competent state agencies deal with electronic monitoring, like the Ministry of the Interior (Italy) and in the case of juveniles by youth justice services (England and Wales, Sweden). In some countries while overall management is reserved for public services electronic monitoring is implemented by private companies under a service-providing contract (Italy, United Kingdom). In Austria, in Baden-Wurttemberg (Germany) and in the Netherlands the electronic monitoring is implemented by the probation service which is run by an NGO under a contract with the Ministry of Justice. In the Russian Federation electronic monitoring is implemented by institutions executing penal sentences.

It should be underlined that the rules contained in this Recommendation are addressed to the national authorities as well as to all competent public agencies, associations, private companies and persons involved in the execution of electronic monitoring.

In the majority of the Council of Europe member States it is the state which covers the cost of the use of electronic monitoring. In some countries the suspect or offender contributes to the costs for its use (Sweden, United Kingdom). The original rationale for this latter case was simply to cover equipment costs but from the outset Sweden used the contribution to support a victim-compensation fund which helped to win public legitimacy for electronic monitoring. Whatever the rationale behind such a financial requirement it has to take into account theoffender's capacity to cover costs and in order to respect the principle of equality of treatment it has to provide for situations when a suspect or an offender is exempt from paying costs.[2]

Few countries use electronic monitoring for juveniles, the rest consider that this tool is not applicable to juveniles. It should be noted in this respect that the Council of Europe has consistently reminded the national authorities of its member States that juveniles in conflict with the law are vulnerable and should be treated differently from adults because their personality and maturity are still developing. Therefore intervention methods based on education, training and increasing motivation should be used systematically. Where electronic monitoring is used for this group careful impact assessment of

this tool should be done before and during its use in order to better adapt its length and intrusiveness on the juveniles and their families and third parties. Efforts must be made to combine this measure with other interventions aimed at developing the juvenile's personality and capacity to resist involvement in crime.

III. Basic principles:

Rule 1

As in the case of the European Prison Rules and the Council of Europe Probation Rules the term "law" is used here as a general term which refers to any national legal text regulating questions related to electronic monitoring (laws passed by national parliaments, governmental legislation, by-laws, regional and internal rules, etc.). This includes policy documents which expand upon the legal provisions, and in respect of electronic monitoring, partly because of its technical and, in some instances its procedural complexity, these texts can themselves become complex documents of which the meaning may not be transparent to all relevant stakeholders. Effort must be made to properly explain the technical aspects and practical implications of electronic monitoring to sentencing authorities which may be otherwise unfamiliar with its technical capacities and its social impact, and may therefore underestimate or, more rarely, overestimate its potential as a judicial or administrative intervention. It is equally important that prison, probation and police staff involved in the execution of electronic monitoring understand what it entails and that suspects and offenders understand what compliance with electronic monitoring requires, and what would constitute non-compliance. It is left to the national jurisdictions to decide in which way specific regulations should be constructed. What is of primary importance is the legal clarity and the need to provide the persons affected with legal guarantees and means for appeal against decisions which may infringe their rights.

Rule 2

It is left to the national jurisdictions to regulate in which ways decisions imposing or revoking electronic monitoring are taken. The imposition may be integrated into a court judgment, may be decided by a prosecutor, by a judge entrusted with the execution of sanctions or measures, by a prison or a probation agency. What is important here is that in cases where a decision is taken by an administrative body, including prison and probation services, effective judicial review is available to the persons concerned. Judicial review may be undertaken by a specific judicial body, a parole board or an ombudsman - where parole boards themselves make or revoke an order involving electronic monitoring, their decisions should in turn be reviewable by a judicial authority. It should be noted that in most European countries electronic monitoring is combined with other probation sanctions or measures which are imposed by the judiciary at the pre-trial or sentencing stage while in a number of electronically monitored early release schemes both the decision to grant it and the decision to order recall is administrative in the first instance rather than judicial.

Rule 3

Due to the effect electronic monitoring has on the restriction of personal liberty, it is usually used as an alternative to cases when a suspect should be in pre-trial detention. In some jurisdictions, at the pre-trial stage, it may also be used as a way of executing home arrest, a curfew order or a prohibition to leave a certain place or country. There is always a risk of net-widening[3] with electronic monitoring, particularly when it is used as a stand-alone measure, partly because there is no consensus across, or even within jurisdictions, as to the risk-level of suspects on whom it should be most appropriately targeted. Although research shows clearly that the experience of electronically monitored curfew or home detention can be an onerous experience for suspects and their families[4], practice shows that it has been used on people who pose only low risk, merely because it is perceived as a useful additional form of control. In particular, in some pre-trial cases, the judiciary has prescribed electronic monitoring to suspects who would not normally be remanded in custody because they do not present a risk of flight or of interfering with the course of justice. This is not to be encouraged, either at the pre-trial (or indeed sentencing) stage, particularly in view of its cost and intrusiveness.

On the other hand in some countries where suspects may have some difficulty coping with the onerous nature of the electronic monitoring experience, "bail support projects" have been used to provide help and assistance to suspects and their families, and this practice may increase the use of electronic monitoring at the pre-trial stage on suspects who may otherwise be considered more appropriate for remand in custody.

Rule 4

The meaning of proportionality in a sanction involving electronic monitoring is complex, because the technology can be used in very flexible and variable ways, in different legal frameworks and in conjunction with a range of measures. All of these affect the way an individual offender experiences this sanction or measure. The overall duration of the sanction is clearly important to proportionality, (and the maximum needs to be specified in law), but the intensity, onerousness and punitiveness of the experience can vary considerably depending not only on how long it lasts, but as crucially, on how electronic monitoring is deployed on a day to day basis. The radio frequency electronic monitoring which is used to enforce curfews and home confinement need not be applied for a full 24 hours; a full day and night on electronic monitoring is arguably more punitive than an overnight curfew which is restricted by law to a 12 hour maximum, and may in practice be even less. It is technically and therefore legally possible to vary the hours of a curfew on different days of the week, fitting them around a person's hours of employment during the week, or making them longer on a weekend, for example. The longer and more intensive the daily burden of electronically monitored confinement is the harder a sanction of long duration may be; it may be that a short period of complete confinement (up to three months) is more bearable than a long one (for 12 or more months), and that the longer a sanction of electronic monitoring lasts the more desirable it is, if continued compliance is to be expected, for the daily hours to be flexible. Which of these is more proportionate to a particular offence - a short intensive sanction or a longer, less intensive one - is a matter for consideration in different jurisdictions.

With different modalities of execution of electronic monitoring, the question of proportionality becomes more complex. Is continuous GPS tracking of an offender's movements for several months more or less onerous than the same period under electronically monitored home confinement? Is the imposition and monitoring of exclusion zones but without continuous monitoring of one's general whereabouts a less intrusive use of GPS tracking - or a greater one, because of the restriction it imposes on a citizen's use of public space? Decisions to impose electronic monitoring - particularly GPS tracking - may not in the first instance be governed by considerations of proportionality. Public protection and the practical effect that different modalities of electronic monitoring may have on reducing offending are also to be considered by the sentencing authorities. The determining of the legitimate limits of these interventions - their proportionality in relation to particular offences and offenders - an understanding of their actual restrictiveness, and the degree of onerousness that it would impose on them, bearing in mind their family and employment circumstances is essential.

Rule 5

The decision which prescribes electronic monitoring needs to define the purpose of its use, and to tailor the restrictions it imposes, including its duration, to this purpose. If - as it should be - the general purpose of electronic monitoring when used in a sentence or as an element in a prison release programme is to help with reintegration and desistance, it should not be executed in such a way that restricts the possibility of the offender having access to appropriate and relevant services or benefitting from those aspects of community life that can act as incentives to good citizenship and law-abidingness. The agency which executes electronic monitoring must connect the overall duration of electronic monitoring, the daily time a person needs to spend at home, and/or the size of any imposed exclusion zones to broader reintegration purposes, and this connection must be made apparent to the offender. Electronic monitoring is not an inherently reintegrating measure in its own right, but it can afford opportunities to an offender to participate in and benefit from such measures.

Where electronic monitoring is used at the pre-trial stage with unconvicted persons, reintegrating considerations may be wholly absent, and there may be less incentive to give offenders access to opportunities and resources in the community which may be helpful to them. Some European schemes do impose electronically monitored home confinement for twenty-four hour periods at the pre-trial stage and it may well be that that the judiciary would not use them as an alternative to a remand in custody unless the measure was so restrictive. Such schemes permit "authorised absences" (usually at the discretion of an administrative authority) in specified circumstances (for example, medical emergencies or family funerals) but these may not necessarily be enough to enable a suspect to maintain the kind of ties to the community that his/her long-term well-being and desistance may require. Electronic monitoring can be used merely to create an experience of confinement, replicating that of imprisonment but in more congenial surroundings, and alongside one's family, and at lower cost to the state, but this is not the best use of it, given its much greater potential to add an element of oversight an controlling to suspects (and offenders) who might

otherwise be leading constructive lives in the community.

Rule 6

More so than any other form of community supervision, electronically monitored home confinement affects the other people in the household with whom offenders are confined. This may be their parents, partners or children, and sometimes grandparents or other relatives. It is essential in making decisions to use electronic monitoring that appropriate risk assessments are made of the suspect/offenders likely impact on these other householders, particularly in relation to the potential for domestic violence, or the likelihood of increased tension occasioned by enforced proximity. It is also essential that the adult householders should be asked by the relevant authorities to give their consent to the presence of the monitored person, and to the installation of the monitoring equipment - and also that they should be able to withdraw that consent if their views or circumstances change (which means the monitored person can no longer reside there, and that alternative arrangements, possibly monitoring at another address, have to be made). Extensive research shows clearly that other family members do become involved in the suspect/offenders confinement[5] - taking on additional burdens outside the home (shopping, collecting children from school, etc.) which the offender is prohibited from doing, making special efforts to make sure that the monitored person is at home in time for their curfew. Monitored parents may find that they cannot participate in their children's activities outside the home, even in some instances, that they cannot play with their children in their gardens (if this is beyond the range of the monitoring unit). Other family members may curtail their own social lives, and stay indoors, just because the offenders are not allowed out and they do not wish them to feel isolated, or resentful of their freedom of movement. The size of a home can affect the quality of the monitoring experience, and in smaller homes people may not be able to avoid each other even when tensions arise; the onus is always on the other householders to step outside and go elsewhere to cool down, because the offender will be in violation if he or she does it. These are all further reasons why electronic monitoring should not, ideally, be used to confine persons to their home for 24 hours a day - this is a burden on families and third parties as much, and maybe more, than it is on offenders, and as such may be considered unfair on the former. In recognition of the domestic tensions which may be caused or intensified by the confining modalities of electronic monitoring, many jurisdictions do provide support to families to help them through the experience, and it is in the interests of judicial and penal authorities to prevent, as far as possible, these living arrangements from breaking down.

Rule 7

This rule is a general non-discrimination rule following Art 14 of the European Convention on Human Rights (ECHR) and a number of other relevant international legal texts. Its aim is to underline the need to prohibit any discrimination based on the listed grounds. In addition to this rule there may be a need for positive discrimination in some cases (see Rule 27 below). Regarding non-discrimination on the basis of mental condition the Rule recommends that persons with mental disorders should not be automatically excluded from being eligible for electronic monitoring.

Rule 8

There is adequate if not definitive research evidence to suggest that electronic monitoring suppresses criminal behaviour during the period people are subjected to it but not beyond it.[6] This is consistent with an understanding of deterrence - electronic monitoring increases the risk of detection when violations occur, and also the risk of further punishment. If deterrence and immediate, short term prevention is all that is desired - for example keeping convicted football hooligans away from matches on evenings and weekends - then stand-alone electronically monitored curfews could be used, but if it is desired to reduce hooligans' general propensity to violence, then an intervention designed to change behaviour is also needed. There is evidence too that it is better suited to medium and higher risk offenders than to those of a lower risk[7]. Location monitoring technology cannot in itself bring about a change of attitude or behaviour in the way that a number of probation initiatives and programmes dealing with offending behaviour are designed to do. Some evidence suggests that wearing a monitoring device can have a "shaming effect" but by itself this is insufficient to bring about long-term change. If reintegration and desistance are to be achieved electronic monitoring must be used in conjunction with measures which can accomplish this, tailored to individual offenders' circumstances (drug treatment, alcohol treatment, anger management, employment skills training, helping with finding jobs and shelter, etc.[8]). It is not ideal to regard electronic monitoring merely as "the punishment part" of a multi-component sentence which also has reintegration elements, but in

some jurisdictions this is how it is understood, and it serves to make community supervision legitimate with the public in ways that may otherwise be harder to achieve. It is better if electronic monitoring is itself tailored to support reintegration initiatives - confining people to home at specific times when they have been known to offend. Canadian research, albeit with a small sample of people, showed in the early days of electronic monitoring that it could help stabilise the lives of offenders who would otherwise not have completed rehabilitative programmes, and who thereby get benefit from them[9].

Rule 9

Commercial organisations in the private sector are involved in the provision of electronic monitoring to a greater extent than in other forms of community supervision, at the very least as technology manufacturers, and sometimes as full service deliverers (fitting monitoring devices, running a monitoring centre). They are usually procured by a process of competitive tendering and invariably contracted to state agencies, not necessarily central government. It must be understood that public authorities remain fully responsible for protecting the rights and freedoms of offenders and for public safety whoever is entrusted with the execution of penal sanctions or measures, and however the contract is constituted (see also Rule 9 of the Council of Europe Probation Rules and Rule 71 of the European Prison Rules (EPR)). This is a question of democratic accountability, of quality of service to the public, and of ultimate responsibility for the respect of human rights. If, for whatever reason, a commercial organisation defaults on the service it has been contracted to provide, the public authorities must take action to remedy the situation.

Rule 10

Transparency of operation, and the regular publication of accurate penal and judicial statistics in which the use of electronic monitoring both as an alternative to imprisonment and as part of community sanctions or measures can clearly be seen is essential for effective governance. It is also important to be transparent about the costs (and cost-effectiveness) of electronic monitoring, both regarding equipment and service provision, in order to make valid comparisons with the cost-effectiveness of other penal measures, and to ascertain what cost savings, if any, electronic monitoring has delivered. Financial auditing and auditing of the quality of interventions are necessary to achieve this transparency. Commercial confidentiality, often claimed as a consequence of competitive tendering arrangements, cannot be regarded as a valid ground for a lack of transparency. The public has the right of access to all such information in a manner regulated by law.

Rule 11

Where a suspect or offender is required to make a contribution to the costs of his or her being monitored the maximum daily amount should be set by law, and the offender's capacity to pay should be income-tested and related to his or her domestic circumstances, and the impact that such costs may have on these. There should also be an absolute limit to the overall amount paid, in order to limit the liability of offenders who are on electronic monitoring for long periods. An inability to pay a contribution should not be considered a reason to deny a suspect or an offender the opportunity to be given electronic monitoring. There should be schemes allowing indigenous suspects or offenders to also be granted electronic monitoring.

In addition the rationale for the payment should be transparent to the public and to offenders themselves in order to be understood and accepted. For example Sweden requires a financial contribution of 5 euros per day in its Intensive Supervision with Electronic Monitoring (ISEM) scheme, but this is not to cover partially the costs of the equipment or the service. The money is paid into a victim compensation scheme. This has helped win and sustain legitimacy in the eyes of the public for electronic monitoring as a sanction supporting crime victims[10].

Rule 12

It is in the nature of electronic monitoring systems, particularly GPS tracking systems, to generate a great deal of computerised information, more so than other forms of community supervision. As such, legal and professional choices need to be made as to which agencies (including technology manufacturers) need to have which information and in what form, and also which information is to be used for routine monitoring purposes, and which can be used in exceptional circumstances. Data on offender's names, addresses and offences can be encrypted into number strings in such a way as to

ensure that operative staff in monitoring centres do not know the identity of the person subjected to monitoring, even though they can make precise records of their movements and pass them on, in decryptable form, to criminal justice agencies, which can use this information in their face-to-face work with offenders. It may however, be decided in law that not all information about an offender's movements should be made available, for example, to probation staff - rather than having access to all whereabouts, in real-time or retrospectively, the only information they need to have

should concern the violation of exclusion zone perimeters. Data on whereabouts remain stored in the computer, however, and the police may find such data useful, as a means of situating a tracked offender at a newly-committed crime scene or incriminating or exonerating him or her. Law must specify the circumstances and procedures in and through which the police can access such data. Law should also specify strictly after what time period records of a suspect's or an offender's movements shall be destroyed.

Rule 13

This Rule carries a similar message to Rule 10 of the Council of Europe Probation Rules and Rule 8 of the European Prison Rules. See also Rules 33-38 below. In view of the great availability and easy access to data in the case of electronic monitoring it is important to underline that staff need also to be trained to respect data protection rules and privacy as violation of the rules may be detrimental for the rights and freedoms of the persons concerned.

Rule 14

This Rule mirrors Rule 15 of the Council of Europe Probation Rules and Rule 9 of the European Prison Rules. It is important to have government inspection and independent monitoring of the agencies responsible for the execution of electronic monitoring at regular intervals. It is essential for the reports of these agencies to be publicly available. In some cases inspection may be internal, i.e. carried out by the ministry responsible for electronic monitoring, in other cases it may be undertaken by a separate governmental body (e.g. an Inspectorate) but this should not preclude the possibility of allowing fully independent monitoring from approved non-governmental agencies. This is important for reasons of both financial propriety and best professional practice, as well as from a human rights perspective.

IV. Conditions of execution of electronic monitoring at the different stages of the criminal process

Rule 15

Most jurisdictions require a suspect or an offender to formally consent to the imposition of community-based sanctions or measures, including those in which electronic monitoring is used. Other jurisdictions have established dissuasive sanctions for ensuring compliance. Some jurisdictions have different rules for different community-based intervention programmes. In England and Wales, for example, formal consent is not required where electronic monitoring is imposed as part of a community sentence, but is required to be given by short-term prisoners who are eligible for early release on electronic monitoring (in fact not all do consent to or "volunteer" for it, preferring to remain in prison). In many countries the suspect's or the offender's willingness to co-operate in practice is considered to be an important element for the success of the measure. The giving of consent to supervision in the community by an offender has traditionally been understood by courts and probation services as a preliminary sign of commitment and willingness to accept the terms of such supervision, and a likely indicator of future compliance. Such signs and indicators do matter in respect of electronic monitoring, but there is, in addition, a simple practical sense in which the technology will not work to ensure compliance unless the offender/suspect agrees to abide by regulations which make monitoring possible, and co-operates with its imposition. There is little value in engaging the expenses (staff time, travel time) of fitting a tag to a person - even if he or she allows this - if he or she has declared from the outset that they have no intention of remaining indoors during required periods of curfew or home detention, or that they will cut the tag off at the earliest opportunity. In the case of GPS tracking an offender/suspect is required to return home and remain indoors in order to charge the battery which powers the monitoring equipment, without which it would not function; this requires a degree of active co-operation on the part of the monitored person that simpler radio frequency electronic monitoring does not require. Charging may be required on a daily basis, but as the quality of batteries in electronic monitoring devices improves (and battery strength increases) it may become less frequent than this. In recognition of this aspect of electronic

monitoring, some of the companies which manufacture this technology aptly refer to it as "participant dependent".

Rule 16

There should be no presumption that electronic monitoring needs to be used routinely at the pre-trial stage. It is important to avoid its net-widening as many suspects - unconvicted and technically innocent - can safely be released into the community pending trial (into their homes or sometimes into specially designated hostel accommodation) without intrusive and controlling forms of surveillance. If necessary, some can be monitored by means of reporting to police stations at specified intervals and times. Some can be monitored at night by police-enforced curfews - random visits to the suspect's home to check whether they are indoors as required. In some jurisdictions social work support is offered to pre-trial suspects in the community despite them not being convicted, purely on humanitarian grounds, to meet their or their families' manifest needs at a stressful time of their lives. Electronic monitoring may, in some jurisdictions, be perceived as a more cost-efficient, less labour-intensive means of enforcing curfews or house arrest than police-based monitoring, especially for suspects living in remote geographical areas. Equally, it may simply be regarded as a practical equivalent of police-based monitoring, and co-exist alongside it. However a jurisdiction decides to monitor suspects at the pre-trial stage - particularly if electronic monitoring is being considered - the execution of the measure should be proportionate to the risks (absconding, re-offending, and interference with the course of justice or threatening public order) that it seeks to prevent. If there are less intrusive and more socially inclusive means of preventing such risks, or if in individual cases no such risks are perceived, then electronic monitoring should not be used at the pre-trial stage.

Rule 17

The usual reason for introducing electronic monitoring at the pre-trial stage is to reduce the costly use of remand in custody for offences for which it is required or for suspects who pose serious and well-founded risks, thus enabling more of them to remain in the community than would otherwise have been the case. While many suspects will appreciate the opportunity to avoid custodial remand, and to remain with their families pending trial, those who anticipate a subsequent custodial sentence have less of an incentive to accept a pre-trial period of electronic monitoring if the time spent on it is not to be discounted against that subsequent sentence. Some suspects prefer to be remanded in custody for this reason. It should be acknowledged that electronic monitoring is limiting one's freedom although not completely preventing the suspect from it. Some forms and modalities of execution of electronic monitoring are rather demanding and constraining for those subjected to the measure. Therefore some jurisdictions consider electronic monitoring as a modality of execution of a prison sentence and therefore deduct time spent under electronic monitoring from the overall time [to be] spent in detention. How much of the time spent on pre-trial electronic monitoring is to be deducted from the final time to be spent in prison or is to be otherwise taken into account will depend, in any jurisdiction, on the agreed sense of equivalence between time spent on monitoring and time spent in custody as well as on the specific modalities of execution in each individual case. The procedure and way of calculation should be specified in law.

Rule 18

Individual victims of specific crimes (such as victims of domestic violence, stalking or sexual assault) can in principle be protected (in the framework of victim-protection schemes) by particular configurations of electronic monitoring technology, all of which entail giving the victims an alarm which they carry on themselves and which simultaneously informs them and the police if a particular tagged offender comes within defined radius of proximity. Experiments with radio frequency electronic monitoring used in this way, at the pre-trial stage, were undertaken in the USA, judged to be of limited efficiency , and for the foreseeable future all such schemes, including those that have already been developed in Europe, (Spain, Portugal and - imminently - Sweden) are likely to be based on GPS tracking. There are several different ways in which tracking can be used to protect victims, both when they are in their homes and also when they are mobile, but whatever system is chosen in a particular jurisdiction, its nature (size of exclusion zones, range of alarm-devices, likely speed of police response, etc.), capacities and limitations must be described and explained in advance to the victims so that they can appraise the benefits and risks of being protected in this way, for the victim and sometimes the children, and give their informed consent to the arrangement. Effectively protecting the victim also requires agreed protocols among the agencies involved to ensure that the

suspects/perpetrators is not inadvertently notified of his former victim's whereabouts, by being warned to stay away from an area where they would not otherwise know the victim is now living. Current evidence from the USA suggests that former women victims of domestic violence, notwithstanding a degree of anxiety at the

outset, derive benefit from well-run GPS tracking schemes used to protect them at the pre-trial stage[11]. It should never be understood that electronic monitoring is the only or best means for supporting or protecting victims of domestic violence: there are other ways of keeping perpetrators and victims apart and of discouraging aggressive behaviour that should also be used in this context.

Rule 19

Where exclusion zones are imposed on the offender in the context of GPS tracking, their size and number warrants ethical consideration. A presumption should be made in respect of offenders under supervision in the community (as opposed to those who have been removed from it, and imprisoned) that they are entitled as citizens to the use of shared public space; indeed, it is the trust placed in them by judicial and penal authorities to be of law-abiding behaviour, and their everyday participation in ordinary social life, which is held to facilitate their reintegration and desistance. Temporary exclusion from particular places can, nonetheless, be a useful means of crime reduction and victim protection. In urban areas with routinely dense traffic the police may claim that only large exclusion zones, of several kilometres diameter, are feasible as a means of protecting specific victims, because once alerted to an offender/suspect's proximity to an exclusion zone perimeter they still need sufficient time to travel to the victim's location and/or the offender's last known whereabouts. This may be true, but is hardly desirable, given the amount of urban space, its facilities, and possible access to significant friends and relatives from which an offender would be prohibited. In the case of convicted child sex offenders, consideration should be given to the reasonableness or otherwise of placing (at present, technically costly) exclusion zones around every school or park in a town or city that the offender might potentially visit; over and above the undertaking of appropriate risk assessments, the offenders' own view of what they would find helpful to resist temptation and sustain desistance can be considered.

The duration as well as the degree of exclusion from prohibited zones should also be considered, with maximum periods regulated by law. In some countries the duration as well as the degree of exclusion from prohibited zones is fixed by the court in its judgment and may be reviewed upon proposal from the body executing electronic monitoring. In the Russian Federation the court passes the sentence of limitation of liberty and imposes certain prohibitions and restrictions, in accordance with which the penitentiary institutions apply electronic monitoring, defining prohibited and exclusion zones for each sentenced person. The time span and prohibited zones may be altered by the court upon request from the penitentiary institution administering electronic monitoring. Whatever the legal system, consideration should be given, taking due account of the interests of victims and the society, to authorising graduated re-entry into exclusion zones, in order to motivate the offender's compliance with the principle of exclusion, to ameliorate its pains and inconvenience and for the offender to demonstrate his or her reliability and trustworthiness as a period of supervision comes to an end. Where offenders abide by exclusionary prohibitions, in the sense of not deliberately violating the perimeter, but must nonetheless travel across it by car or public transport in order to get to work (or indeed to any area from which they is not excluded) they should forewarn the authorities by phone of their intention to pass through it, so as to avoid false alerts being sent to protected victims, and wasteful mobilisation of police resources.

Rule 20

The remote electronic monitoring of prohibited substance use is at present largely focussed on alcohol, although it is possible that illegal drugs may be encompassed by it in the near future. This represents a move away from mere location monitoring in the community - although a great deal of control over a person can be achieved by doing that - towards the direct monitoring of behaviour, specifically in this case the prohibition of alcohol use in cases of alcohol-related criminal behaviour. Some jurisdictions have had such a prohibition for a long time, and have used other, non-electronic means of enforcing them, e.g. urine testing. In deciding when and whether to adopt electronic means of monitoring alcohol use - whether in the context of home confinement or tracking movement, or as a stand-alone measure - the question of intrusiveness to offenders, and the dignity of supervisory staff, is sharply posed - what is more intrusive, the periodic downloading of digitised data on alcohol intake to a monitoring centre, or the periodic giving of a urine sample in a probation office. In settling

such questions, the views and preferences of offenders and staff can legitimately be taken into consideration - and it may well be reasoned that urine testing is the more intrusive, less dignified measure when compared to electronic monitoring. It may also be the case that offenders, as part of their involvement in a wider treatment programme, find therapeutic and educative value in having their alcohol intake continually monitored, whether their aim is abstinence or merely reduced intake (moderate drinking). For some offenders, committed to desistance, the wearing of an ankle bracelet may act as valuable incentive to stay sober, and can thereby be integrated into a rehabilitative programme without the ethical anxieties that often accompany the discussion on electronic monitoring.

Rule 21

It is preferable to think of electronic monitoring not as a means of creating "jail space" in the offender's home but as something akin to the partially restrictive nature of all forms of supervision in the community which require attendance at particular locations at particular times and intervals (e.g. probation offices, employment centres, community service sites) and which leave scope, where necessary, for an offender/suspect to engage in gainful employment or in treatment or educative programmes. This has psychological benefits for the offender - confining offenders to their home for 24 hours per day, for several weeks or months, requiring nothing more than passive compliance with their confinement, is hardly conducive to stimulating responsible attitudes in them (perhaps even less so than in a well-resourced prison). Even more importantly, however, the offenders' accepted absence from home at least for part of a day relieves pressure on the other people with whom they share that home - otherwise the onus is always on the latter (the innocent) to leave the home if and when pressure and discord arises, simply because offenders are not allowed to do so. In England and Wales, where, at both the sentencing and early release stages, electronically monitored curfews have, since their inception, lasted for a maximum of 12 hours per day (soon to be increased to 16 hours), offenders do have "free time", as well as the possibility of "authorised absences" (for medical emergencies and family funerals etc.) during curfew hours. Other countries - Portugal's pre-trial scheme and Sweden's "Intensive Supervision with Electronic Monitoring (ISEM)" demand longer hours of confinement, and allow only "authorised absences". Regular employment (or training and education), and weekly participation in specified rehabilitative activities are required features of ISEM; the rest of the time the offender is under curfew, and electronically monitored. In some jurisdictions, it is only on the basis of extensive periods of daily confinement, with discretionary "authorised absences" that sentencing authorities are prepared to give electronically monitored measures and sanctions serious consideration. The principle remains, however, the more electronic monitoring is used purely to enforce long confinement the less re-integrative this confinement is likely to be, and the more difficult and demanding the experience becomes for the third parties who share the offender's home, even if they willingly choose to bear it for the sake of keeping the offender out of prison.

Rule 22

This Rule enumerates in a non-exhaustive manner ways of using electronic monitoring in the case of imprisoned offenders. The merit of such measures in the context of graduated release programmes is two-fold. Firstly, they give a degree of reassurance and legitimacy to temporary release schemes about which the public may otherwise have been more sceptical, making them difficult to sustain or implement. Secondly, they may make it possible to grant temporary leave to higher risk prisoners who would not otherwise have been considered eligible for it. Catalonia uses an electronic monitoring programme to support overnight stays at home of inmates on a daily work release scheme (from what they consider an "open prison", in so far as prisoners usually sleep there, nothing more); Sweden uses electronic monitoring in four open prisons to facilitate a relaxed regime for inmates prior to release, and has recently started a separate temporary release scheme, using GPS tracking, for serious young offenders in residential care.

Rule 23

This is manifestly a way of using electronic monitoring to reduce the use of imprisonment; to allow offenders sentenced to custody to serve their sentence, conditionally, for an equivalent or proportionately long period of time, in the community. Sweden's Intensive Supervision with Electronic Monitoring (ISEM), which can last for a specified maximum of six months, is a viable example of this.

Rule 24

This Rule does not intend to promote the use of electronic monitoring for all offenders who are released from prison earlier than their term of imprisonment as many of them would not require such use. For some prisoners though (especially those who have remained a longer time in a closed prison) there is demonstrable merit in graduating the process of release from prison, rather than expecting them to make an abrupt transition from it to the community. The immediate period after release holds a high risk for re-offending, and electronic monitoring - together with the prospect of recall for violations - can be a means of retaining, but simultaneously reducing, control. In many countries early release is discretionary, something which can be used by the prison authorities to motivate compliance in prisoners, something to be earned by good behaviour - and a period of supervision on electronic monitoring (radio frequency or GPS) can be a way of encouraging this. The degree of control imposed by electronic monitoring may also reassure the public that early release can be permitted without detriment to public safety: England and Wales, which has a longstanding electronically-monitored early release scheme for short sentence prisoners, for a maximum of 135 days, is satisfied that early release on electronic monitoring does not make the risk of reoffending any greater compared to equivalent offenders who are not released early. It is in the nature of early release schemes, whether they are electronically monitored or not, that they will be intended less to graduate an individual prisoner's release process, and more to relieve aggregate pressure on a rising prison population - although the two purposes need not be contradictory. The savings in cost of such early release schemes may be considerable[12], and these may act as an incentive in their own right to use electronic monitoring to accomplish them.

Rule 25

The risk posed by some serious sexual and violent offenders, who may still be considered dangerous when their period in custody comes to an end has led a number of jurisdictions to develop new forms of preventive detention or protective control in the community. The various modalities of electronic monitoring have become part of these considerations, and electronically monitored curfews have been used in respect of them, as, for example, one among several conditions in a post-release Sex Offender Protection Order (SOPO) in Scotland. As a result of an ECHR ruling against the continued preventive imprisonment of sex offenders in Germany, GPS tracking has been used since 1 January 2011 by the Federal Government in the case of serious sexual and violent offenders released from prison (also retroactively). Such offenders undeniably pose difficult ethical challenges; in Germany, their consent to GPS was not required, and all movement data collected by tracking can be given to the police for up to two months, for use in other investigations, and only thereafter deleted. While recognising legitimate concerns with public protection, the impact of these measures on offenders and their families remains important.

V. Ethical issues

Rule 26

Notwithstanding a general presumption against non-discrimination in the application of electronic monitoring at any stage of the judicial process (see Rule 7), there may be occasions when age or disability, including psychiatric condition, warrants a more tailored, individual approach. The first person to be subject to GPS tracking in the Netherlands was an 83-year old convicted sex offender, whom the judge was reluctant to imprison even though the seriousness of the offence, and the degree of assessed risk, warranted it. Electronic monitoring may not be a suitable tool for all old or mentally ill people, even if, on face value, it seems like an appropriate alternative to prison. If neither prison nor electronic monitoring is appropriate for an offender or suspect, other alternatives should be considered. In respect of electronically monitoring juveniles, existing research is equivocal about its effect on recidivism, but in view of the importance attached to keeping young people out of prison and secure residential homes it seems unwise to rule out its use with them on the grounds of age alone, as some European countries have done. Electronic monitoring need not be used in a purely punitive fashion, and, as with adults, it can be combined with re-integrative and supportive

interventions and as such may be of use in keeping young people with their families and out of institutions. Some parents would find this desirable. Sweden, which was once opposed to using electronic monitoring on juveniles, had recently begun using GPS tracking on young offenders convicted of serious crime, when they leave residential care to go on temporary leave.

Rule 27

Periodically, it is suggested in the media, and sometimes by technologists, that electronic monitoring would be enhanced if, along with location-finding functions, it was able to immobilise offenders by giving them a Taser-like electric shock - for example, if they approach the perimeter of an exclusion zone. It is technologically feasible to do this, using a powerful battery in the ankle bracelet which can be remotely discharged, but no such device has ever been used anywhere in the world, although it was at one time under consideration in South Africa. Such use causes physical harm amounting to inhuman treatment or punishment which is prohibited by the ECHR.

Similarly, it is sometimes suggested that the location monitoring of offenders would be more efficiently accomplished by sub-dermally implanted chips, rather than wearable devices. Implanting chips in the human body is also feasible, not necessarily or solely for location-finding purposes, and may have merit as a medical rather than a judicial intervention (for example for patients suffering from dementia). In general terms, the dangers that implants represent have already been considered by the European Group on Ethics and Science in New Technologies.[13] At present, chips have a limited range as tracking devices, and have shown no obvious or compelling advantages over small wearable devices. These potentially harmful forms of electronic monitoring, which impinge on bodily integrity in a way that wearable devices do not, cannot be legitimated by a person's consent to them - as something subjectively preferable to imprisonment - and must be prohibited.

Rule 28

Electronic monitoring technologies, like all forms of modern digital technology, are susceptible to "upgrades", which are easily marketed by their manufacturers as indispensable improvements, and sometimes sought by government agencies that are keen to be thought as "modern". It may well be that innovations in electronic monitoring technology - whether of infrastructure (e.g. mobile phone networks), hardware (e.g. GPS chipsets), or software (e.g. data processing programmes, encryption techniques) - do improve the quality and cost of the service available to criminal justice agencies, and also the experience of offenders, suspects and their families - but care should be taken to ascertain in full, and in advance, what the implications of new technological permutations in electronic monitoring actually are. Some may be good and useful, others not. Technological improvement in electronic monitoring - which may not necessarily mean social or ethical improvement - should not be pursued for its own sake.

VI. Data Protection

Rule 29

There are a number of detailed and binding international standards related to data protection. For example the first such instrument is the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108). In addition Article 8 paragraph 1 of the ECHR states that "Everyone has the right to respect for his private and family life, his home and his correspondence". The European Court of Human Rights has defined in its relevant case law the limits to the exercise of each of these rights and, in particular, the extent to which, public authorities have the right to interfere.

The development of modern technologies, including electronic monitoring, make it increasingly possible to intrude into an offender's private and family life and to collect, store, process and share large amount of personal data. It is indispensable in criminal justice as in all other spheres of social life to establish a sound framework of specific principles and standards protecting the rights of the concerned individuals.

Rule 30

Probation, prison and particularly the police have access to massive quantities of information collected and stored in the framework of the criminal justice process. They have the authority and the possibility of using such data and therefore strict rules should be introduced which reflect on the one hand the broader mandate of work of such agencies and the higher level of their responsibility in using personal data which may interfere with one's rights to respect for private and family life. These rules should specify the legitimate purposes of collection and should regulate the automatic processing, storage and sharing of such data, as well as the procedures pertaining to its deletion after a specified period of time.

It should also be noted that the present Recommendation does not deal with the transborder aspects

of electronic monitoring but it should at the same time be kept in mind that with the rapid development of the technology it is possible to track electronically monitored suspects and offenders beyond the national borders and to share information and data in the framework of transborder police and judicial co-operation.

Rule 31

Rule 31 draws the attention to the fact that rules are not only needed to regulate the collection, storage and sharing of data but also that effective sanctions and measures need to be provided for the intentional or careless breach of such rules. No standards and prohibitions can be efficiently or effectively respected without the provision of sanctions and measures against non-compliance.

Rule 32

In jurisdictions where private companies are entrusted with the supervision of persons under electronic monitoring it is necessary to provide for effective sanctions and measures against the unlawful or careless collecting, handling or sharing of data in the same way as for public agencies.

It should also be noted that it may be necessary and legally permissible in some jurisdictions for private companies involved in providing monitoring technology or in supervising offenders to withhold data from criminal justice agencies - e.g. in some systems probation services may not be allowed details of a GPS tracked offender's general whereabouts, only his or her violation of exclusion zone perimeters - but this data can and should be retained for a legally specified period so that it can be accessed on request by authorised agencies, e.g. the police, in respect of any criminal investigations to which it may be relevant. Sanctions may need to be provided also in this respect to prevent private agencies from withholding data which may be needed to prevent or sanction criminal behaviour or protect victims.

VII. Staff

Rule 33

This Rule recalls that all relevant Council of Europe standards which apply to prison and probation staff shall also apply to staff entrusted with the execution of sanctions and measures involving electronic monitoring.

Rule 34

It is assumed in some countries that staff entrusted with the execution of electronic monitoring do not, for the majority of time, enter into prolonged contact with suspects and offenders (especially at the pre-trial stage). It is assumed that their tasks are more related to installing and handling equipment, monitoring computer screens and collecting and processing data. This is particularly true where staff are employed by the private sector. Even in those jurisdictions where probation or prison services are responsible for electronic monitoring there may be an internal division of labour between professional staff and ancillary (less qualified) staff who merely install equipment and monitor screens. This type of staff, whether in private or statutory organisations, needs to receive training which enables them to deal sensitively with suspects, offenders, their families and third persons. They need to be trained to understand and acknowledge differences in the personal circumstances among those subjected to electronic monitoring, to be trained to take (in conjunction with more senior professional colleagues) balanced decisions in cases of domestic difficulty and non-

compliance. Where responsibility for individual offenders who are subject to both electronic monitoring and supportive and re-integrative services is divided between private and public sector organisations, staff on both sides must be trained to collaborate with each other.

Rule 35

It should not be assumed that an ability to work sensitively and constructively with offenders necessarily carries over into work with crime victims, and specific staff training should be provided to ensure competence in understanding their likely needs and anxieties. Particular emphasis should be placed on communicating the nature, capacities and limitations of the monitoring technologies involved.

Rule 36

It is in the nature of electronic monitoring systems that many aspects of them are automated, notably the precise registering of presence at or absence from home, or (in GPS tracking programmes) one's continual location in a public space, the violation of an exclusion zone perimeter, or texted instructions in respect of signal loss or low battery. The immediate response to violations - in terms of warning letters or texts, or phone calls - can also either be automated or personal. While automated systems, by removing the human factor in transactions between authorities and offenders may have the advantage of impartiality and consistency, there is a concomitant danger of impersonality. The balance of personal and automated communication should always be given careful consideration, and as far as possible offenders should not be encouraged or allowed to feel, subjectively, that they are being monitored by a machine, divorced from professionals whose personalised approach to them can help them towards desistance and law-abiding lives.

Rule 37

The Rule also underlines the importance of sufficient and regular training of staff in order to ensure professionalism of the highest possible quality. Technical training regarding installing, maintaining and repairing the equipment is essential but over and above technical competence, staff involved in monitoring - whether as field or monitoring centre staff - need to be able to explain to the suspects/offenders and their families the nature of the regime that different modalities of electronic monitoring require, the patterns of time-keeping required, the procedures followed when a violation occurs and the protocols governing authorised absences - as well as to be able to engage sensitively and constructively with people who may be anxious or angry about the prospect or impact of being monitored.

Rule 38

It is important to regularly update the knowledge and competencies of staff in procuring electronic monitoring equipment as technologies in this field can change quickly. It is important to find the technology that best assists with reintegration and desistance. Upgrades may sometimes be warranted, but also sometimes not. The particular impact that new technical developments may have on the private life of suspects/offenders (and their propensity to offend), and on their families and third persons needs regular assessment in respect of potentially harmful effects.

VIII. Work with the public, research and evaluation

Rule 39

Electronic monitoring technology is rapidly developing and it is therefore important to update the public opinion on a regular basis in order to have the necessary support for its use. The perceived legitimacy or otherwise of penal interventions can depend on the general public having a reasonably informed understanding - based on publicly accessible information and responsible media coverage - of the range of measures and sanctions used to deal with suspects and offenders. Misconceptions about community supervision are commonplace - typically, either their worth is underestimated in comparison to imprisonment, or exaggerated claims are made for their capacity to control offenders - but some evidence suggests that when the public are properly informed about how measures and sanctions are applied to particular individuals they become more supportive of judicial decision-making, and more capable of constructive criticism. Exaggerated claims can and have been made for the various modalities of electronic monitoring, sometimes leading to inflated expectations of what it can or could, or should achieve, and which diminish the value of simple human supervision. Dashed expectations of electronic monitoring - relating perhaps to a handful of well publicised failures (usually serious reoffending while under supervision) - can then lead to an unwarranted lack of public confidence it in, and make sentencing authorities and administrators more averse to using it constructively. At the same time, electronic monitoring does raise important issues in respect of surveillance and privacy, to a degree that other forms of community supervision do not, and it is important that these are openly debated. In some countries the introduction of electronic monitoring has been publicly controversial, in others less so, reflecting both different traditions of media reporting on criminal justice and the care and attention given specifically to the way in which government agencies wanted electronic monitoring portrayed in the media. For example the Netherlands probation service considered a media strategy essential when they introduced GPS tracking, while Sweden took several steps to ensure that electronic monitoring was perceived as an acceptable and legitimate sanction among crime victims.

Rule 40

The early adopters of electronic monitoring in Europe tended to undertake evaluations of their pilot programmes, the results of which were sufficient to justify modest use if it, with certain offenders in certain circumstances, and to justify the belief that it probably could make a small contribution to reducing the use and costs of custody.[14] Effectiveness evaluation of penal initiatives is always good in principle - initiatives should not be capriciously imposed on offenders (or victims) for whom there is no reasonable hope of success in achieving specified goals. If intervention programmes are misconceived, and their purposes unquestioned (for whatever reason), evaluation of their methods will be of little use in redirecting penal efforts - and electronic monitoring has been criticised for being more ideologically than empirically driven and for being pursued on a scale that evaluative research alone cannot justify[15]. Since the early days of electronic monitoring in Europe, a range of process-oriented and evaluative research has been undertaken, unevenly in different countries, and of varying methodological type and sophistication - but practice still reflects the diversity of national cultures and priorities. Taken in conjunction with American research there is some consensus that electronic monitoring has a crime suppression effect for the duration of the period that people are subject to it, but no evidence that it can effect a longer-term change of attitudes or behaviour (as say, probation can) - although Swiss research which compared the longer term impacts of electronic monitoring and community service on comparable groups of offenders found greater reductions in recidivism among the former than the latter.[16]. There is clear evidence that suspects, offenders and their families find the experience of electronically-monitored home confinement onerous, if still largely preferable to imprisonment[17]. There is some evidence that even stand-alone electronically monitored curfews can stimulate some offenders to contemplate desistance[18], but to the extent that it can have this effect it may still seem preferable to capitalise on it by providing professional support to offenders, to help them sustain the decision to give up crime. There is no clear consensus on how best to combine and integrate electronic monitoring with other supportive measures, although programmes in Sweden and Hessen, Germany, seem to offer models of good practice in this respect.[19]. There is no clear view as to the optimum duration of electronically monitored measures and sanctions - do protracted periods of home confinement become progressively more unbearable; is this offset, and can the duration be extended by daily restrictions on hours under curfew, allowing the offender "free time"?. There is as yet no central access point in which European research on electronic monitoring can be collated, co-ordinated and accessed, but it is possible that the soon-to-be-published Campbell Consortium[20] meta-evaluation of electronic monitoring research worldwide will provide a definitive view of the state of current knowledge.

Appendix I

Types of Electronic Monitoring

Different electronic monitoring technologies have different practical and ethical implications for the supervision of offenders. For example satellite tracking is not in fact a single system. It has a number of capacities, types of use and permutations, some of which might be regarded as less ethically acceptable than others. Data protection issues can also arise in relation to the use of modern electronic monitoring technologies. New technologies are continuing to emerge and are constantly improving and the ethical implications should be considered in advance as far as possible.

Radio frequency (rf) electronic monitoring entails the wearing of an ankle bracelet (or tag), the signal from which can be picked up by a transceiver installed in the offender's home. So long as he or she remains in proximity to the transceiver his or her presence in the home will be registered in the monitoring centre, via either the landline or mobile telephone system. Radio frequency technology can be used to monitor house arrest or night-time curfews. Most straps are made of toughened plastic with optic fibres running through them, and cease to work if this fibre is cut. Straps can be made of leather with steel bands running through them: these can only be cut with powerful bolt cutters and are much harder for a wearer to remove. Wrist tags are available where health considerations require using these instead of ankle tags. Worldwide, radio frequency technology has been understood as the "first generation" of electronic monitoring, and is still the commonest form of it: the technology has been constantly upgraded to improve performance, reliability and ease of use. Internationally, however, a professional/commercial debate has begun which suggests that this "first generation" technology should be supplemented and perhaps superseded by more versatile "second generation" technology (satellite tracking), and in the past five years at least two countries adopted this without ever having used "first generation" technology.

Satellite tracking - combined with mobile phone location technology - monitors the location or

movement of a person on the earth's surface, outdoors and indoors, but not necessarily underground. It entails the wearing of an ankle bracelet (sometimes accompanied by a belt-worn computer) which can both pick up and triangulate signals from orbiting satellites (currently the American Global Positioning System (GPS)) and cell phone towers, and transmit/upload an offender's location through the mobile phone system to a monitoring centre. It can do this in "real-time", so that an offender's whereabouts are always known immediately to the monitoring centre, or retrospectively, in which a record of an offender's movements is compiled (and analysed) some hours later. Some systems combine both immediate and retrospective monitoring, and some have in-built texting facilities for giving instructions to the offender. A person being satellite tracked is required to spend part of the day recharging the battery which powers the equipment he or she wears or carries. In case of a one-piece tracking tag the person has in the past been required to remain attached to the plug-in system for recharging, but technology is emerging which can charge the tag from a short distance away. Tracking technology can be used to monitor house arrest (by creating small "inclusion zones"), to follow all of a person's movements and to create exclusion zones (areas of past offending, neighbourhoods of former victims) which the offender is forbidden to enter. Satellite tracking technology can also be used as part of a victim protection scheme which requires a victim to carry a device which warns him or her of the offender's proximity. Some satellite tracking systems can be combined with mapping software which shows the location of recent crime scenes, making it possible to see if the offender was in the vicinity of the crime at the time. This can be presented to the offender as a tangible means of demonstrating that he or she is desisting from crime, and the data may be used in legal proceedings incriminating or exonerating him/her. The cost of satellite tracking has been steadily decreasing, making it more attractive to penal and judicial authorities than it has been in the past. The availability of other satellite systems apart for the American one may make offender tracking even more feasible in the future, and rival systems of terrestrial tracking may be customised for the same purpose.

Voice verification is a form of electronic monitoring which uses a person's unique biometric voiceprint, recorded at the point of conviction. Each time the monitoring centre phones the offender his or her voice is matched to the voiceprint stored on the computer, while the location of the phone being used by the offender is simultaneously registered. Voice verification can be used to monitor the presence of a person at a single location, or to track his or her movements between a number of specified locations, e.g. a community service placement, or a job centre. Because it does not entail the use of a wearable device there is no risk of stigma or of using the tag as a trophy and for this reason some experts believe that this makes voice verification a more acceptable form of electronic monitoring for juveniles and young offenders.

Remote Alcohol Monitoring (RAM) exists in two forms. The first links a breathalyser to radio frequency electronic monitoring - specifically to the transceiver - in the offender's home. The offender is randomly phoned by the monitoring centre and asked to use breathalyser, whose result can immediately be transmitted by landline. The offender using the breathalyser is identified either by voice verification technology, or by photograph, or by (biometric) facial recognition technology.

The second form of RAM is mobile, and does not require the offender to be in a single location. It entails the offender wearing an ankle bracelet which picks up the presence of alcohol in the offenders system "transdermally" - through his or her skin - and periodically uploads that data to the monitoring centre via the mobile phone system. RAM can be used with offenders whose crimes have been alcohol-related, where the court has either forbidden them to use alcohol over the period of supervision, or required supervisors to help offenders reduce its intake. Some offenders value the technology because it helps them to self-manage their intake of alcohol.

Kiosk reporting is a form of electronic monitoring installed at the office of the probation agency and ostensibly designed to help probation officers manage large caseloads, focused specifically on low-risk offenders at some point in the supervision process, although not (at present) all of it. When offenders report to a probation office, instead of meeting a real probation officer face-to-face, they are required to interact with a kiosk-based computer (similar to a cashpoint machine). The machine requires them to answer certain questions about their recent activities, and may contain instructions from their probation officer. The offender identifies himself or herself to the machine – undergoes verification that it is him or her who is reporting and not a substitute - by means of a fingerprint, although a voiceprint could also be used.

It is clear from the above that different types of surveillance technology are now being combined in electronic monitoring, for example biometrics and location monitoring, and while we intend to explore

the ethical implications of these for offenders our comments on biometrics in general will not be exhaustive.

A Note on Commercial Organisations Involved in Electronic Monitoring.
There are essentially two kinds of private company involved in the delivery of electronic monitoring. Firstly, technology manufacturers (who produce equipment - hardware and software - train public sector staff to install it, provide technical support services and manage monitoring centres). Secondly, full service providers (who employ field and centre-based monitoring officers, install equipment, manage monitoring centres and may sometimes be involved in the legal aspects of revocation, supplying technical evidence of non-compliance in respect of offenders who are not on any other kind of supervision apart from electronic monitoring). All countries require some degree of partnership between their electronic monitoring providers and national telecommunication companies (e.g. in terms of access to landline and cell phone networks), and in some countries these companies may be contracted to provide monitoring services themselves, buying or renting equipment from technology manufacturers and working in conjunction with state agencies. There is a sense in which the effective operation of electronic monitoring is dependent on, and constrained by the technical quality and administrative efficiency of existing telecommunication infrastructures. Some of the larger global corporations involved in full service provision may also manufacture their own technology. These larger companies may also be involved in wider security and surveillance activities (guarding and CCTV management), in the provision of private prisons, in the provision of back-office functions for police forces and a range of what have hitherto been understood as statutory probation services - hostel accommodation and community service. Both technology manufacturers and service providers may also be involved in the provision of electronic monitoring in the tele-care and tele-health fields (monitoring the locations and "life signs" of old people, or people with dementia): research and technical development in electronic monitoring overlaps in the health and criminal justice fields.

[1] This document has been classified restricted until examination by the Committee of Ministers.

[2] See, Rule 69 (Recommendation Rec(92)16) which states: "In principle, the costs of implementation shall not be borne by the offender."

[3] The term "net-widening is usually taken to mean the use of a penal measure for offences below the threshold above which such a measure is used, or on lower risk offenders, than the measure was originally intended for by legislators, policymakers or penal reformers. Where a measure that was intended in law or policy as an alternative to custody (at the sentencing or remand stage) is used on offenders or suspects who would not otherwise have been at risk of a custodial decision, net-widening can be said to have occurred. It is usually understood as something unintended and undesirable; the term is invariably used pejoratively. However, there is quite often a degree of professional or philosophical disagreement between penal reformers, legislators, policymakers and sentencers as to where a measure or sanction is appropriately pitched on the threshold - and some sentencers may well use a putative alternative to custody lower than the threshold, because they think it is appropriate for that particular offender (or category of offenders) - even if they would never have considered sending the person to prison. Typically, such sentencers will not think of themselves as "net-widening" - they will simply argue that electronically monitored curfews (whether integrated with other measures or not) is too versatile or useful a measure or sanction to be reserved only for offenders who would otherwise have warranted imprisonment. Some countries do indeed use electronic monitoring, even in it is integrated forms, as a useful form of supervision in the community for offenders who may never been at risk of custody. Outside observers may well judge them to be net-widening, but this would not be their own understanding. The chances are that in any given country there may always be contesting views among different groups in criminal justice as to how electronic monitoring should be properly used; net-widening is rarely an objective fact: it is a judgement based on a particular preconception of how a measure or sanction should be used.

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[20] The Campbell Consortium undertakes meta-evaluations of research on different penal measures and is generally regarded as setting the gold standard in understanding state of the art knowledge about effectiveness. Its meta-evaluation of electronic monitoring should by published in 2013

Related Documents

Other documents

- CM(2014)14add1E / 21 January 2014
- CM(2014)14E / 21 January 2014
- CM/Del/Dec(2014)1192/10.1E / 24 February 2014
- CM/Rec(2014)4E / 19 February 2014
- CM/Notes/1192/10.1E / 12 February 2014

External links

- European Committee on Crime Problems (CDPC) - Website

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doughty street chambers

53-54 Doughty Street, London WC1N 2LS
Telephone 020 7404 1313
Fax 020 7404 2283/84
DX 223 Chancery Lane
Email enquiries@doughtystreet.co.uk
Website www.doughtystreet.co.uk

Legal Opinion

In relation to the case of Mr. Julian Assange

1. Scope of the Opinion

I have been requested by Mr. Thomas Olsson, who represents Mr. Assange in proceedings before the Supreme Court in Sweden, to provide him with a formal Legal Opinion concerning relevant domestic legislation in the United Kingdom pertaining to the credit afforded in sentencing to any time spent under a regime of electronic monitoring, during the pre-trial stage of the proceedings.

I confirm that insofar as the facts stated in this Opinion are within my own knowledge I have made clear which they are and I believe them to be true, and that the opinions I have expressed represent my true and complete professional opinion.

2. Background Information

I am a practicing Barrister who was called to the Bar of England and Wales in 1992. I was appointed Queen's Counsel in 2013. I am a specialist extradition practitioner and author. In particular, I am the General Editor of the Extradition and Mutual Legal Assistance Handbook (Oxford University Press, 2010 (second edition)) and publish the Extradition Law Reports (Southside Legal Publishing, 2007). I have appeared on behalf of requested persons, foreign governments and judicial authorities in a large number of extradition proceedings.

As part of my extradition practice, I represented Mr. Assange in the proceedings in the magistrates' court, in relation to Sweden's request for his extradition.

Relevant legislation

In the United Kingdom, any person who is subjected to a 'curfew condition' and 'electronic monitoring condition' as part of the conditions of their pre-trial release ('bail') is entitled to receive credit for that time period in connection with any future sentence that might be imposed in the case.

The relevant provisions are as follows,

Section 21 of the Criminal Justice and Immigration Act 2008, amended Section 240 of the Criminal Justice Act, 2003, by incorporating the following section (240A) into the Criminal Justice Act:

240 A Crediting periods of remand on bail: terms of imprisonment and detention

(1)This section applies where—

(a)a court sentences an offender to imprisonment for a term in respect of an offence committed on or after 4th April 2005,

(b)the offender was remanded on bail by a court in course of or in connection with proceedings for the offence, or any related offence, after the coming into force of section 21 of the Criminal Justice and Immigration Act 2008, and

(c)the offender's bail was subject to a qualifying curfew condition and an electronic monitoring condition ("the relevant conditions").

(2)Subject to subsection (4), the court must direct that the credit period is to count as time served by the offender as part of the sentence.

(3)The "credit period" is the number of days represented by half of the sum of—

(a)the day on which the offender's bail was first subject to conditions that, had they applied throughout the day in question, would have been relevant conditions, and

(b)the number of other days on which the offender's bail was subject to those conditions (excluding the last day on which it was so subject), rounded up to the nearest whole number.

[....]

(12)In this section—

"electronic monitoring condition" means any electronic monitoring requirements imposed under section 3(6ZAA) of the Bail Act 1976 for the purpose of securing the electronic monitoring of a person's compliance with a qualifying curfew condition;

"qualifying curfew condition" means a condition of bail which requires the person granted bail to remain at one or more specified places for a total of not less than 9 hours in any given day; and

"related offence" means an offence, other than the offence for which the sentence is imposed ("offence A"), with which the offender was charged and the charge for which was founded on the same facts or evidence as offence A

It should also be noted that other domestic legislation provides for greater credit to be provided in connection with the use of electronic monitoring. In particular, any prisoners who are released pursuant to the Home Detention Curfew scheme are entitled to be credited with time served, at a ratio of 1:1, when they are subject to electronic monitoring and a curfew of at least 9 hours.[1]

Home Detention Curfews apply to prisoners who are serving a sentence of between 6 weeks (as per section 246 of the Criminal Justice Act 2003) and 4 years. [2]

3. Relevant facts

In connection with the domestic proceedings in the United Kindgom concerning the execution of the European Arrest Warrant against Mr. Assange, Mr. Assange was released on bail on 16 December 2010.

The conditions imposed on Mr. Assange were the following. Mr. Assange was required to wear an ankle bracelet, as a means of electronic monitoring, and to report to the police daily (initially between 14:00-17:00, then this was modified to between 08:00-11:00). He was also subject to a curfew, in that he was prohibited from going outside of the building he was staying in between 22:00 at night and 08:00 in the morning (10 hours in total). He was required to submit securities in the sum of GBP 350, 000. His passport was also confiscated. These bail conditions were maintained until 19 June 2012.

Mr. Assange's liberty was therefore restricted as a result of these measures for 551 days.

1 See https://www.justice.gov.uk/offenders/before-after-release/home-detention-curfew ; See also Prison Service Order 6700 of 2013, http://www.justice.gov.uk/downloads/offenders/psipso/pso/pso-6700.doc

2 https://www.justice.gov.uk/offenders/before-after-release/home-detention-curfew

4. Application of UK legislation to Mr. Assange

Mr. Assange falls within the scope of Section 240A of the Criminal Justice Act. [3] He was remanded on bail after section 21 of the Criminal Justice and Immigration Act 2008 came into effect. [4] He was subjected to both electronic monitoring, and a curfew of more than 9 hours in any given day in a specified place. Under the terms of this legislation, he would, therefore, ordinarily have been entitled to a sentencing credit of half the total period – i.e. **275.5 days.**[5]

Since Mr. Assange has not yet been charged or convicted, he did not fall under the scope of the Home Detention Curfew. The allegations which are the subject of the European Arrest Warrant are nonetheless the type of allegations that would attract the application of the Home Detention Curfew scheme, if Mr. Assange were to be sentenced in the United Kingdom.

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3 For completeness, note that section 240A has now been amended with the coming into force of section 109 LASPO 2012: the calculation of the credit period as set out in sections 240(3)- (7) has been repealed and replaced by sections 240A(3), 3(A) and 3(B), which will provide a five step calculation of the credit period. However does not apply to this case.

4The relevant date is 3 November 2008. Section 240(a) does not apply to a period spent on bail subject to qualifying conditions prior to that date. *R. v. Monaghan [2010] 2 Cr.App.R.(S.) 50, CA*

5If the court is of the opinion that it would be 'just in all the circumstances' not to give any credit for days spent on bail under these conditions, the court should explain what the circumstances are which led to that conclusion (section 240A(4) and (10) CJA 2003). Alternatively, the court may direct a period of days which is less than the credit period is to count as time served (section 240.A(5) CJA 2003).

It is therefore relevant that this specific legislation contemplates that the type of conditions to which Mr. Assange was subjected for 551 days (electronic monitoring and a curfew of at least 9 hours) to be the equivalent of time served at a ratio of 1: 1 for the type of allegations, which Mr. Assange faces, if charged in Sweden. It therefore supports the conclusion that he has effectively served **551 days** of a sentence for this type of offence during his remand on bail.

John R. W. D. Jones Q.C.
Doughty Street Chambers

14th April 2015

PROTOKOLL
vid tillståndsprövning
DAG FÖR BESLUT
2015-04-28
Stockholm

Aktbilaga 32
Mål nr Ö 5880-14

NÄRVARANDE JUSTITIERÅD

Ann-Christine Lindeblad, Gudmund Toijer (referent), Ingemar Persson, Svante O. Johansson och Lars Edlund

FÖREDRAGANDE OCH PROTOKOLLFÖRARE

Charlotte Edvardsson

KLAGANDE

Julian Assange, 710703
Frihetsberövande: Häktad i sin frånvaro
Ecuadors Ambassad i London
Flat 3 B, 3 Hans Crescent
London, SW1X 0NT
Storbritannien

Ombud: Advokat Thomas Olsson
Fria Advokater KB
Box 12706
112 94 Stockholm

HÖGSTA DOMSTOLEN
Riddarhustorget 8

Postadress
Box 2066
103 12 Stockholm

Telefon 08-561 666 00
Telefax 08-561 666 86
E-post: hogsta.domstolen@dom.se
www.hogstadomstolen.se

Expeditionstid
08:45-12:00
13:15-15:00

Ombud: Advokat Per E Samuelson
Advokatfirman Samuelson, Schönmeyr & Wall HB
Box 12704
112 94 Stockholm

MOTPART
Riksåklagaren
Box 5553
114 85 Stockholm

SAKEN
Häktning m.m.

ÖVERKLAGAT AVGÖRANDE
Svea hovrätts beslut 2014-11-20 i mål Ö 8290-14

Målet föredras i fråga om prövningstillstånd.

Julian Assange har yrkat att Högsta domstolen ska hämta in ett förhandsavgörande från EU-domstolen. I målet har dock inte uppkommit någon sådan fråga som föranleder tvivel om tolkningen av unionsrätten och som gör det nödvändigt att hämta in ett förhandsavgörande för att fatta beslut i detta mål. Yrkandet avslås därför.

Högsta domstolen meddelar prövningstillstånd i frågan om häktning. Hovrättens avgörande i övrigt står därmed fast.

Charlotte Edvardsson

Charlotte Edvardsson

Föredraget 2015-04-22 och 2015-04-28

Uppvisat och lämnat för expediering 2015-04-28

Ann-Christine Lindeblad

PROTOKOLL
2015-04-28
Föredragning i
Stockholm

Aktbilaga 33
Mål nr Ö 5880-14

NÄRVARANDE JUSTITIERÅD

Ann-Christine Lindeblad, Gudmund Toijer (referent), Ingemar Persson, Svante O. Johansson och Lars Edlund

FÖREDRAGANDE OCH PROTOKOLLFÖRARE

Charlotte Edvardsson

KLAGANDE

Christina Pettersson

MOTPART

Riksåklagaren
Box 5553
114 85 Stockholm

SAKEN

Häktning

ÖVERKLAGAT AVGÖRANDE

Svea hovrätts beslut 2014-11-20 i mål Ö 8290-14

Målet föredras.

HÖGSTA DOMSTOLEN
Riddarhustorget 8

Postadress
Box 2066
103 12 Stockholm

Telefon 08-561 666 00
Telefax 08-561 666 86
E-post: hogsta.domstolen@dom.se
www.hogstadomstolen.se

Expeditionstid
08:45-12:00
13:15-15:00

Högsta domstolen fattar följande

BESLUT

Christina Petterssons överklagande avvisas.

SKÄL

Christina Pettersson har inte varit part i hovrättens mål. Hon har därför inte rätt att överklaga hovrättens avgörande.

Charlotte Edvardsson

Charlotte Edvardsson

Föredraget 2015-04-28

Uppvisat och lämnat för expediering 2015-04-28

Ann-Christine Lindeblad

PROTOKOLL
2015-04-28
Föredragning i
Stockholm

Aktbilaga 34
Mål nr Ö 5880-14

NÄRVARANDE JUSTITIERÅD

Ann-Christine Lindeblad, Gudmund Toijer (referent), Ingemar Persson, Svante O. Johansson och Lars Edlund

FÖREDRAGANDE OCH PROTOKOLLFÖRARE

Charlotte Edvardsson

KLAGANDE

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112 94 Stockholm

MOTPART
Riksåklagaren
Box 5553
114 85 Stockholm

SAKEN
Häktning

ÖVERKLAGAT AVGÖRANDE
Svea hovrätts beslut 2014-11-20 i mål Ö 8290-14

Målet föredras.

Föredraganden avger betänkande (aktbil. 35).

Högsta domstolen fattar slutligt beslut (aktbil. 36).

Justitierådet Svante O. Johansson är skiljaktig på det sätt som framgår av följande yttrande se Bilaga

Charlotte Edvardsson

Charlotte Edvardsson

Föredraget 2015-04-28

Uppvisat och lämnat för expediering 2015-05-07

Ann-Christine Lindeblad

BILAGA TILL PROTOKOLL
2015-04-28

Mål nr
Ö 5880-14

Justitierådet Svante O. Johansson är skiljaktig i sak och häver hovrättens beslut om häktning samt anser att beslutet från och med punkten 19 ska ha följande lydelse.

19. Förundersökningsledaren har nu vidtagit åtgärder för att få till stånd ett förhör med Julian Assange i London. Intresset av att utredningen kan fortsätta är, trots den långa häktningstiden, beaktansvärt. Det har emellertid under lång tid framstått som osäkert när ett överlämnande till Sverige kan ske. De åtgärder som nu har vidtagits borde ha påbörjats tidigare i syfte att ta reda på hur långt detta hade kunnat leda (jfr NJA 2007 s. 337). Mot denna bakgrund kan skälen för fortsatt häktning inte anses väga så tungt att de uppväger det intrång och men som åtgärden i praktiken skulle innebära för Julian Assange. Ett beslut om häktning står därför i nuläget i strid med proportionalitetsprincipen.

20. Överklagandet ska därför bifallas.

HÖGSTA DOMSTOLEN
Riddarhustorget 8

Postadress
Box 2066
103 12 Stockholm

Telefon 08-561 666 00
Telefax 08-561 666 86
E-post:
hogsta.domstolen@dom.se
www.hogstadomstolen.se

Expeditionstid
08:45-12:00
13:15-15:00

BETÄNKANDE
2015-04-28

Aktbilaga 35

Mål nr
Ö 5880-14
Föredragande
Charlotte Edvardsson

Jag föreslår att Högsta domstolen meddelar följande beslut.

HÖGSTA DOMSTOLENS AVGÖRANDE

Med ändring av hovrättens beslut upphäver Högsta domstolen häktningsbeslutet.

YRKANDEN I HÖGSTA DOMSTOLEN M.M.

Julian Assange har yrkat att Högsta domstolen ska upphäva beslutet om utevarohäktning. Han har också yrkat att Högsta domstolen ska förelägga åklagaren att till Julian Assange utge, alternativt till Högsta domstolen inge, kopior av målsägandenas SMS. För det fall Högsta domstolen inte anser att yrkandet om föreläggande angående målsägandenas SMS kan bifallas har han i andra hand yrkat att Högsta domstolen ska inhämta ett förhandsbesked från EU-domstolen rörande frågan om det av artikel 7 i Europaparlamentets och rådets direktiv 2012/13/EU av den 22 maj 2012 om rätten till information vid straffrättsliga förfaranden följer en skyldighet för åklagaren att överlämna kopior av det material som den misstänkte fått del av och önskar åberopa till stöd för sitt bestridande av ett beslut om frihetsberövande.

Riksåklagaren har motsatt sig ändring av hovrättens beslut.

Högsta domstolen har meddelat prövningstillstånd i frågan om häktning. Hovrättens avgörande i övrigt står därmed fast.

SKÄL

Bakgrund och frågan i Högsta domstolen

1. Julian Assange häktades den 18 november 2010 i sin utevaro av tingsrätten såsom på sannolika skäl misstänkt för olaga tvång den 13–14 augusti 2010 i Stockholm, sexuellt ofredande den 13–14 augusti 2010 i Stockholm, sexuellt ofredande den 18 augusti 2010 eller dagarna där omkring i Stockholm och våldtäkt, mindre grovt brott, den 17 augusti 2010 i Enköping. Julian Assange överklagade tingsrättens beslut till hovrätten, som avslog överklagandet. Högsta domstolen meddelade inte prövningstillstånd. Därefter utfärdades en europeisk arresteringsorder som prövades av de brittiska domstolarna, vars prövning var slutlig den 14 juni 2012. Vare sig häktningsbeslutet eller arresteringsordern har verkställts. Som en följd av häktningsbeslutet och den europeiska arresteringsordern har emellertid Julian Assange varit frihetsberövad i Storbritannien under tiden den 7–16 december 2010 samt haft ett flertal restriktioner i Storbritannien i form av elektronisk övervakning med fotboja, daglig anmälningsplikt hos polismyndigheten och förbud att vistas utanför bostaden mellan vissa klockslag. Julian Assange har sedan den 19 juni 2012 befunnit sig på Ecuadors ambassad i London.

2. I juni 2014 hemställde Julian Assange att tingsrätten skulle hålla en omhäktningsförhandling och undanröja beslutet om häktning. Tingsrätten beslutade att Julian Assange även fortsättningsvis ska vara häktad i sin utevaro. Julian Assange överklagade tingsrättens beslut. Hovrätten avslog hans överklagande.

3. Frågan är nu om Julian Assange fortfarande ska vara häktad i sin utevaro.

Tillämpliga regler

4. Häktning får enligt 24 kap. 1 § första stycket rättegångsbalken ske av den som på sannolika skäl är misstänkt för ett brott för vilket det är föreskrivet fängelse i ett år eller mer om det med hänsyn till brottets beskaffenhet, den misstänktes förhållande eller någon annan omständighet finns risk för att han avviker eller på något annat sätt undandrar sig lagföring eller straff. I tredje stycket föreskrivs att häktning får ske endast om skälen för åtgärden uppväger det intrång eller men i övrigt som åtgärden innebär för den misstänkte eller för något annat motstående intresse.

Häktningsskäl föreligger

5. Högsta domstolen instämmer i domstolarnas bedömning att Julian Assange är på sannolika skäl misstänkt för olaga tvång, två fall av sexuellt ofredande och våldtäkt, mindre grovt brott samt att det finns risk för att han avviker eller på annat sätt undandrar sig lagföring eller straff.

Finns det legala verkställighetshinder?

6. Julian Assange har beviljats asyl och vistas för närvarande på Ecuadors ambassad i London. Häktningsbeslutet kan därför inte verkställas eftersom han befinner sig i en lokal som inte får utsättas för husrannsakan. Vistelsen på ambassaden innebär därmed att det föreligger ett temporärt verkställighetshinder. Detta utgör emellertid inte skäl att upphäva beslutet om häktning.

7. Julian Assange har även gjort gällande att hans begränsade möjligheter att utnyttja sig av asylbeslutet bör föranleda att häktningsbeslutet upphävs. Asylbeslutet har emellertid grundat sig på helt andra skäl än vad som ligger

bakom häktningsbeslutet och kan inte anses hindra en eventuell lagföring för nu aktuella brott. Inte heller asylbeslutet eller Julian Assanges begränsade möjligheter att utnyttja detta utgör därmed skäl att upphäva häktningsbeslutet.

Proportionalitetsprincipen

8. Vid prövningen av om ett frihetsberövande som straffprocessuellt tvångsmedel är påkallat, ska det göras en proportionalitetsbedömning. Proportionalitetsbedömningen innebär en avvägning mellan olika hänsyn. Rent allmänt betyder det att den tilltänkta åtgärden inte får vara mer ingripande, omfattande eller varaktig än att den står i rimlig proportion till vad som kan vinnas med åtgärden (jfr prop. 1988/89:124 s. 26). Skälen för ett frihetsberövande ska ställas i relation till de olägenheter som frihetsberövandet skulle medföra för den misstänkte. Den ordningen kommer till uttryck i 24 kap. 1 § tredje stycket rättegångsbalken.

9. När fråga om fortsatt häktning uppkommer har det betydelse hur lång tid frihetsberövandet har pågått och hur lång tid behovet av häktning kan förväntas bestå. Ju längre frihetsberövandet har varat, desto starkare skäl måste det föreligga för fortsatt häktning. Utredningssvårigheter kan, särskilt vid allvarlig brottslighet, få betydelse för den bedömningen.

10. Högsta domstolen anser i likhet med hovrätten och tingsrätten att det vid bedömningen av om häktningsbeslutet är proportionerligt ska beaktas att Julian Assange som en följd av den europeiska arresteringsordern dels varit frihetsberövad under tiden 7–16 december 2010, dels haft olika restriktioner.

11. Härutöver har Julian Assange gjort gällande att hans vistelse på Ecuadors ambassad är att jämställa med ett frihetsberövande enligt Europadomstolens

praxis eller i vart fall är att se som en beaktansvärd följd av häktningsbeslutet, eftersom även om han har möjlighet att lämna sin tvångssituation skulle detta ske till priset av att han tvingas ge upp sin rätt till politisk asyl. Häktningsbeslutet innebär därmed enligt Julian Assange en kränkning av förbudet mot tortyr i artikel 3 i Europakonventionen samt av hans rätt till frihet enligt artikel 5 i Europakonventionen och artikel 2 i Protokoll nr 4 (d. 16 sept. 1963) till konventionen om skydd för de mänskliga rättigheterna och de grundläggande friheterna, avseende erkännande av vissa andra rättigheter och friheter än dem som redan finns i konventionen och dess första tilläggsprotokoll.

12. Som en följd av att Julian Assange har tagit sin tillflykt till Ecuadors ambassad i London bevakar brittisk polis ambassadens utgångar dygnet runt för att kunna verkställa brittisk domstols beslut om att Julian Assange ska utlämnas till Sverige. Julian Assanges rörelsefrihet är alltså i praktiken begränsad.

13. Europadomstolen har slagit fast att möjligheten för asylsökande att bege sig till ett annat land ofta är rent teoretisk och att en begränsning av någons rörelsefrihet då kan vara att se som ett frihetsberövande (se bl.a. avgörandet i målet mellan Amuur och Frankrike, no. 19776/92, den 25 juni 1996, §§ 48 och 49). Något rättsfall som berör en motsvarande situation som den i nu aktuellt mål, där en person har beviljats asyl i ett land men upplever att hans eller hennes rörelsefrihet begränsas av myndigheter i ett annat land, finns däremot inte.

14. Julian Assange har anfört att han befarar att han kommer att utlämnas till USA, för det fall häktningsbeslutet verkställs, och att han där riskerar att utsättas för politisk förföljelse, omänsklig och förnedrande behandling, orättvis rättegång eller en uppenbar rättsvägran. Riksåklagaren har emellertid

förklarat att någon utlämningsframställning inte gjorts från USA till Justitiedepartementet. Det har inte heller framkommit något i målet som tyder på att USA planerar att göra en sådan framställning. Eftersom asylbeslutet, som ovan angetts (p. 7), inte kan anses hindra en eventuell lagföring för de brott häktningsbeslutet avser kan mot denna bakgrund det faktum att Julian Assange själv valt att vistas på Ecuadors ambassad inte anses vara att jämställa med ett frihetsberövande eller ses som en beaktansvärd följd av häktningsbeslutet.

15. Vid en sådan bedömning föreligger inte heller någon kränkning av artikel 3 eller 5 i Europakonventionen och inte heller av artikel 2 i Protokoll nr 4 (d. 16 sept. 1963) till konventionen om skydd för de mänskliga rättigheterna och de grundläggande friheterna, avseende erkännande av vissa andra rättigheter och friheter än dem som redan finns i konventionen och dess första tilläggsprotokoll.

16. Julian Assange har vidare gjort gällande att åklagarna inte driver förundersökningen framåt, vilket för med sig att häktningsbeslutet ska anses oproportionerligt.

17. Enligt vad som framkommit hölls ett förhör med Julian Assange den 30 augusti 2010. Även övriga utredningsåtgärder i målet vidtogs under år 2010. Riksåklagaren har angående utredningen bl.a. anfört följande. Förundersökningsledaren har gjort bedömningen att det är av vikt att förhören med Julian Assange med hänsyn till brottens och utredningens karaktär äger rum i Sverige. Eftersom det är fråga om i vart fall ett relativt allvarligt sexualbrott som Julian Assange inte tidigare har hörts om är det inte lämpligt med förhör per telefon eller via videolänk. Ett förhör på begäran av Sverige med en person som befinner sig i Storbritannien genomförs vidare normalt av engelsk polis

som i förväg har fått besked om vilka frågor som ska ställas och bygger på den misstänktes samtycke och medverkan till de åtgärder som vidtas. Ett förhör med en misstänkt leder dessutom vanligtvis till att ytterligare utredningsåtgärder behöver vidtas som i sin tur ofta föranleder nya förhör med den misstänkte. Förundersökningsledaren har därför tidigare gjort bedömningen att ett förhör med Julian Assange i Storbritannien inte på ett effektivt sätt skulle leda förundersökningen framåt. Efter nya överväganden om hur förundersökningen bäst bör bedrivas och då flera av de brott Julian Assange misstänks för kan komma att preskriberas i augusti 2015 har dock förundersökningsledaren nu beslutat att försöka få till stånd ett förhör med Julian Assange i London.

18. Julian Assange har anfört att åklagarna tidigare borde ha prövat att hålla förhör med honom på ambassaden och att han upprepade gånger sagt sig ställa upp på förhör i Storbritannien.

19. En häktning får aldrig fortgå längre än vad som är nödvändigt med hänsyn till syftet. I kravet på att en häktning inte får fortgå längre än vad som är nödvändigt ligger, att berörda myndigheter eller organ ska med rimlig effektivitet verka för att häktningstiden blir så kort som möjligt. Det är av betydelse hur det förfarande som den fortsatta häktningen är beroende av (t.ex. en förundersökning) har fortskridit och kan förväntas fortlöpa. Enligt 23 kap. 4 § rättegångsbalken ska en förundersökning bedrivas så skyndsamt som omständigheterna medger och på ett sätt som innebär att inte någon onödigt utsätts för misstanke eller får vidkännas kostnad eller olägenhet. En åklagares underlåtenhet att på visst sätt föra förundersökningen framåt kan under vissa förhållanden leda till att ett häktningsbeslut anses oproportionerligt och därför bör hävas (se NJA 2007 s. 337). Hänsyn ska sålunda tas till det sätt på vilket

berörda myndigheter eller organ har agerat eller inte har agerat, liksom till om de fortsättningsvis kan förväntas agera med den skyndsamhet som är påkallad med hänsyn till såväl den misstänktes intresse som intresset av att ärendet blir ordentligt utrett och avgörs på ett säkert underlag. (Se NJA 2011 s. 518.)

20. Om utredningen i ärendet inte ger stöd för bedömningen att tillräcklig skyndsamhet har iakttagits, utgör det ett skäl mot fortsatt häktning. Den misstänkte ska alltså inte bära bördan av oklarheter i detta hänseende. (Se NJA 2011 s. 518.)

21. Vid bedömningen av om ett häktningsbeslut ska hävas p.g.a. brister i hur förundersökningen har bedrivits bör bl.a. brottets art och styrkan i de särskilda häktningsskälen vara av stor betydelse. Högre krav måste vidare ställas på de skäl som åklagaren anför till stöd för sin begäran om häktning ju längre tid som går utan att åklagaren driver förundersökningen framåt.

22. Julian Assange är misstänkt för i vart fall ett relativt allvarligt brott och det finns en stor risk för att han kommer att avvika och därmed undandra sig lagföring om häktningsbeslutet hävs. Mot detta ska vägas att det fattades beslut om att han skulle häktas i sin utevaro för mer än fyra år sedan, att åklagarna under större delen av denna period inte vidtagit några åtgärder, utöver att utfärda en europeisk arresteringsorder, eller prövat några alternativa vägar för att driva förundersökningen framåt, trots att Julian Assanges vistelseort varit känd och tre av de brott han misstänks för preskriberas i augusti 2015.

23. Hur länge ett beslut om häktning av någon i dennes utevaro kan bestå beror på vad som får anses vara en godtagbar tid för en rimligt effektiv handläggning i målet. Att, trots att det under i vart fall två och ett halvt års tid

framstått som mycket osäkert när eller om ett överlämnande från Storbritannien till Sverige skulle kunna ske, inte undersöka alternativa vägar för att driva förundersökningen framåt kan inte anses som en rimligt effektiv handläggning. Åklagarna har nu visserligen beslutat att försöka få till stånd ett förhör med Julian Assange i London. Mot bakgrund av hur förundersökningen hittills bedrivits i målet framstår det emellertid som osäkert om den fortsatta handläggningen kommer att bedrivas med den skyndsamhet som är påkallad. Med hänsyn till denna osäkerhet kring den fortsatta handläggningen och bristerna i vad som hittills förevarit är det inte godtagbart att Julian Assange ska vara häktad i sin utevaro fortsättningsvis. Häktningsbeslutet ska mot bakgrund av det anförda upphävas.

Charlotte Edwardsson

HÖGSTA DOMSTOLENS
BESLUT

Mål nr
Ö 5880-14

meddelat i Stockholm den 11 maj 2015

KLAGANDE

Julian Assange, 710703

Frihetsberövande: Häktad i sin utevaro

Ecuadors Ambassad i London

Flat 3 B, 3 Hans Crescent

London, SW1X 0NT

Storbritannien

Ombud: Advokat Thomas Olsson

Fria Advokater KB

Box 12706

112 94 Stockholm

Ombud: Advokat Per E Samuelson

Advokatfirman Samuelson, Schönmeyr & Wall HB

Box 12704

112 94 Stockholm

MOTPART

Riksåklagaren

Box 5553

114 85 Stockholm

HÖGSTA DOMSTOLEN
Riddarhustorget 8

Postadress
Box 2066
103 12 Stockholm

Telefon 08-561 666 00
Telefax 08-561 666 86
E-post:
hogsta.domstolen@dom.se
www.hogstadomstolen.se

Expeditionstid
08:45-12:00
13:15-15:00

SAKEN

Häktning

ÖVERKLAGAT AVGÖRANDE

Svea hovrätts beslut 2014-11-20 i mål Ö 8290-14

Hovrättens beslut se Bilaga

HÖGSTA DOMSTOLENS AVGÖRANDE

Högsta domstolen avslår överklagandet.

YRKANDEN I HÖGSTA DOMSTOLEN

Julian Assange har yrkat att Högsta domstolen ska upphäva beslutet om häktning.

Julian Assange har yrkat också att Högsta domstolen ska förelägga åklagaren att till honom utge, alternativt till Högsta domstolen inge, kopior av målsägandenas SMS. För det fall att Högsta domstolen inte anser att yrkandet om föreläggande angående målsägandenas SMS kan bifallas har han i andra hand yrkat att Högsta domstolen ska hämta in ett förhandsavgörande från EU-domstolen i frågan om det av artikel 7 i Europaparlamentets och rådets direktiv 2012/13/EU av den 22 maj 2012 om rätten till information vid straffrättsliga förfaranden följer en skyldighet för åklagaren att överlämna kopior av det material som den misstänkte fått del av och önskar åberopa till stöd för sitt bestridande av ett beslut om frihetsberövande.

Riksåklagaren har motsatt sig att hovrättens beslut ändras.

Högsta domstolen har tidigare avslagit yrkandet om att det ska hämtas in ett förhandsavgörande från EU-domstolen. Högsta domstolen har beviljat prövningstillstånd i frågan om häktning, men inte meddelat prövningstillstånd i målet i övrigt.

SKÄL

Bakgrund och frågan i Högsta domstolen

1. Julian Assange häktades i sin utevaro den 18 november 2010, eftersom han var på sannolika skäl misstänkt för olaga tvång den 13–14 augusti 2010 i Stockholm, för sexuellt ofredande den 13–14 augusti 2010 i Stockholm, för sexuellt ofredande den 18 augusti 2010 eller dagarna där omkring i Stockholm samt för våldtäkt, mindre grovt brott, den 17 augusti 2010 i Enköping. En europeisk arresteringsorder för lagföring har utfärdats och den prövades slutligt av brittiska domstolar den 14 juni 2012.

2. Varken häktningsbeslutet eller arresteringsordern har verkställts. Som en följd av häktningsbeslutet och arresteringsordern har emellertid Julian Assange varit frihetsberövad i Storbritannien under tiden den 7–16 december 2010 och han har haft restriktioner i Storbritannien i form av elektronisk övervakning med fotboja, daglig anmälningsplikt hos polismyndigheten och förbud att vistas utanför bostaden mellan vissa klockslag. Julian Assange har sedan den 19 juni 2012 befunnit sig på Ecuadors ambassad i London.

3. I juni 2014 hemställde Julian Assange att tingsrätten skulle hålla en omhäktningsförhandling och undanröja beslutet om häktning. Tingsrätten beslutade att Julian Assange även fortsättningsvis ska vara häktad. Julian Assange överklagade tingsrättens beslut. Hovrätten avslog hans överklagande. Frågan är nu om Julian Assange fortfarande ska vara häktad.

Grundläggande förutsättningar för häktning

4. Häktning får ske av den som på sannolika skäl är misstänkt för ett brott, för vilket är föreskrivet fängelse ett år eller därutöver, om det med hänsyn till brottets beskaffenhet, den misstänktes förhållande eller någon annan omständighet finns risk för att han avviker eller på något annat sätt undandrar sig lagföring eller straff (24 kap. 1 § första stycket 1 rättegångsbalken).

5. Högsta domstolen delar hovrättens uppfattning att Julian Assange på sannolika skäl är misstänkt för olaga tvång, för två fall av sexuellt ofredande och för våldtäkt, mindre grovt brott, samt att det finns risk för att han avviker eller på något annat sätt undandrar sig lagföring eller straff. Högsta domstolen instämmer också i hovrättens slutsats att det inte finns något legalt verkställighetshinder som innebär att häktningsbeslutet bör hävas.

Proportionalitetsprincipen

6. En ytterligare förutsättning för att häktning ska få ske är att skälen för åtgärden uppväger det intrång eller men i övrigt som åtgärden innebär för den misstänkte eller för något annat motstående intresse (24 kap. 1 § tredje stycket rättegångsbalken).

7. Lagbestämmelsen uttrycker den s.k. proportionalitetsprincipen. Den innebär att en häktning måste stå i rimlig proportion till vad som står att vinna med åtgärden. Minsta möjliga tvång ska användas för att nå det avsedda syftet, och ett tvångsmedel får användas bara om syftet med åtgärden inte kan tillgodoses genom mindre ingripande åtgärder. (Se prop. 1988/89:124 s. 26 och 65 f.) Ytterst blir det fråga om att väga det allmänna intresset av att brottsmisstankar utreds på ett säkert sätt mot den enskildes intresse av att inte få sin rörelsefrihet inskränkt. Det bör då särskilt uppmärksammas att skuldfrågan inte är avgjord.

8. När det är fråga om en fortsatt häktning, får det betydelse hur lång tid som frihetsberövandet har pågått och under hur lång tid som behovet av häktning kan förväntas bestå. Ju längre frihetsberövandet har varat, desto starkare skäl måste finnas för en fortsatt häktning. Särskilt vid allvarlig brottslighet kan det få betydelse om det föreligger utredningssvårigheter. De brottsutredande myndigheterna ska också med rimlig effektivitet verka för att häktningstiden blir så kort som möjligt. Om det råder några oklarheter i detta avseende, är det inte den enskilde som ska bära bördan av detta. (Se NJA 2011 s. 518 p. 14–21, jfr 24 kap. 18 § tredje stycket rättegångsbalken.)

9. En bedömning av proportionaliteten ska göras också vid fortsatt häktning av en misstänkt som inte är närvarande vid rätten. Avvägningen mellan motstående intressen måste dock kunna ta intryck av att en häktning inte har kunnat verkställas. De intressen som står mot varandra kan därför komma att ges en annan inbördes tyngd i sådana fall. Även utevarohäktning kan i praktiken leda till inskränkningar i den enskildes rörelsefrihet, men typiskt

sett måste ett verkställt häktningsbeslut ses som väsentligt mer ingripande (jfr 24 kap. 17 § tredje och fjärde styckena rättegångsbalken).

10. Den misstänkte behöver inte medverka i utredningen. Den rent faktiska följden vid häktningar som inte verkställs kan bli att förundersökningen i vissa lägen inte kan drivas framåt på samma sätt som annars. I kraven på att förundersökningen ska bedrivas effektivt måste då anses ligga att de brotts-utredande myndigheterna överväger vilka möjligheter som finns att ändå föra saken framåt.

11. Vid framför allt mer långvariga häktningar, som inte har kunnat verkställas, finns det skäl att överväga om åtgärden framstår som verkningsfull (jfr Per Olof Ekelöf m.fl., Rättegång III, 7 uppl. 2006, s. 48). När det finns ett starkt allmänt intresse av att brottsligheten utreds och lagförs kan det dock ibland vara svårt att undvika en långvarig utevarohäktning (jfr NJA 2008 s. 868).

12. Det finns i sammanhanget skäl att peka också på bestämmelserna i 23 kap. 4 § rättegångsbalken. De innebär bl.a. att ingen i onödan bör drabbas av kostnader eller olägenheter på grund av förundersökningen och att förunder-sökningen ska bedrivas så skyndsamt som omständigheterna medger. Därmed kan det bli aktuellt att bedöma exempelvis om förhör med den misstänkte kan genomföras under andra former än vad som är brukligt och om det därigenom blir möjligt att undvika en tvångsåtgärd. Saken får bedömas mot bakgrund av bl.a. hur långt förundersökningen har kunnat föras och vilka åtgärder som återstår, förhörets betydelse och om tidigare förhör har kunnat hållas samt

under vilka förhållanden ett förhör kan genomföras (jfr NJA 2007 s. 337). Vid en tillämpning av bestämmelserna i 23 kap. 4 § måste det avgörande dock vara att förhöret genomförs under rättssäkra former och i möjligaste mån ger ett gott bedömningsunderlag.

Bedömningen i detta fall

13. Brottslighet av det slag som misstanken avser i detta fall är sådan att det finns ett starkt allmänt intresse av att den kan utredas. Misstanken avser händelser som ska ha ägt rum i Sverige, och de brittiska domstolarna har funnit att Julian Assange kan överlämnas hit enligt den europeiska arresteringsordern.

14. Det måste samtidigt konstateras att häktningen – som inte kunnat verkställas – har bestått under mycket lång tid. I juni i år kommer det att ha gått tre år sedan de brittiska domstolarna avslutade sin prövning av arresteringsordern. Julian Assange har under nästan hela den tiden befunnit sig på Ecuadors ambassad i London. Enligt Julian Assange ska detta ses som ett frihetsberövande som ska vägas in i proportionalitetsbedömningen. Han har gjort gällande att han efter ett överlämnande till Sverige kan komma att utlämnas till USA med allvarliga negativa återverkningar för honom.

15. Vid en bedömning av proportionaliteten ska det vägas in att Julian Assange som en följd av häktningsbeslutet och den europeiska arresterings-ordern har varit berövad friheten i Storbritannien den 7–16 december 2010 och att han har haft andra restriktioner där. Att Julian Assange har vistats på

Ecuadors ambassad kan däremot inte ges någon betydelse vid proportionalitetsbedömningen. Om en person har överlämnats enligt en europeisk arresteringsorder gäller att han eller hon inte får utlämnas till tredje land utan samtycke av den behöriga myndigheten i den medlemsstat som har överlämnat personen (se artikel 28.4 i rådets rambeslut 2002/584/RIF av den 13 juni 2002 om en europeisk arresteringsorder och överlämnande mellan medlemsstaterna). En utlämning från Sverige till USA förutsätter sålunda – utöver en prövning enligt svensk rätt – att Storbritannien lämnar sitt samtycke. Tilläggas kan att någon begäran från USA inte har gjorts i Sverige.

16. Julian Assanges rörelsefrihet kan inte heller anses vara i praktiken begränsad på ett sådant sätt att det strider mot Europakonventionen.

17. Frågan är då om de brottsutredande myndigheterna ändå borde ha vidtagit alternativa åtgärder för att driva förundersökningen framåt och genomföra ett förhör med Julian Assange. Enligt riksåklagaren har förundersökningsledaren övervägt om förhör skulle kunna ske med Julian Assange utan att han är i Sverige, exempelvis genom videolänk, men har funnit att detta inte är lämpligt med hänsyn till utredningens karaktär. Förundersökningsledaren har inte tidigare sett några godtagbara, alternativa utredningsmetoder under den tid som Julian Assange har vistats på ambassaden.

18. Den nu mycket långa tid som häktningen har bestått måste vägas in i bedömningen och innebär ett ökat krav på de brottsutredande myndigheterna att undersöka vilka alternativa utredningsmöjligheter som står till buds för att driva förundersökningen framåt. I annat fall skulle en häktning – även med

hänsyn till att den inte verkställts – kunna anses vara oförenlig med proportionalitetsprincipen.

19. Efter hovrättens beslut har förundersökningsledaren emellertid vidtagit åtgärder för att få till stånd ett förhör med Julian Assange i London. Det allmänna intresset av att utredningen kan fortsätta väger tungt. Med hänsyn härtill och till risken för att Julian Assange undandrar sig lagföring om häktningen hävs, kan en fortsatt häktning i nuläget anses förenlig med proportionalitetsprincipen. Det finns därför för närvarande inte skäl att häva beslutet. Vad Julian Assange har anfört i övrigt föranleder inte någon annan bedömning.

20. Julian Assanges överklagande ska alltså avslås.

Svante O. Johansson
(se prot.)

I avgörandet har deltagit: justitieråden Ann-Christine Lindeblad, Gudmund Toijer (referent), Ingemar Persson, Svante O. Johansson (skiljaktig) och Lars Edlund
Föredragande justitiesekreterare: Charlotte Edvardsson

BILAGA TILL PROTOKOLL
2015-04-28

Mål nr
Ö 5880-14

Justitierådet Svante O. Johansson är skiljaktig i sak och häver hovrättens beslut om häktning samt anser att beslutet från och med punkten 19 ska ha följande lydelse.

19. Förundersökningsledaren har nu vidtagit åtgärder för att få till stånd ett förhör med Julian Assange i London. Intresset av att utredningen kan fortsätta är, trots den långa häktningstiden, beaktansvärt. Det har emellertid under lång tid framstått som osäkert när ett överlämnande till Sverige kan ske. De åtgärder som nu har vidtagits borde ha påbörjats tidigare i syfte att ta reda på hur långt detta hade kunnat leda (jfr NJA 2007 s. 337). Mot denna bakgrund kan skälen för fortsatt häktning inte anses väga så tungt att de uppväger det intrång och men som åtgärden i praktiken skulle innebära för Julian Assange. Ett beslut om häktning står därför i nuläget i strid med proportionalitetsprincipen.

20. Överklagandet ska därför bifallas.

HÖGSTA DOMSTOLEN
Riddarhustorget 8

Postadress
Box 2066
103 12 Stockholm

Telefon 08-561 666 00
Telefax 08-561 666 86
E-post:
hogsta.domstolen@dom.se
www.hogstadomstolen.se

Expeditionstid
08:45-12:00
13:15-15:00