

**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 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 2010¹³.

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 permissible 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

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.

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 30m². The Embassy is approximately 200m².
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’ than it would be accurate to claim that a prisoner is free to attempt to escape from prison.

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

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.alexaoobrien.com/secondsite/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

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

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."

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.

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 any 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 any territory 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 any 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

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 Bethlehem, “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 narrow⁶⁷ 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."

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

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 was 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

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 respect *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

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

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.

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 of 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

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

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 2010¹¹². 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. Although 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.

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

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?7342cecb1aff29fb302ca9eeb175808a67a8af; 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 24¹⁴² 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.

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.”