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Subject: Briefing note regarding the extradition case of Julian Paul Assange

Paris, February 19 2020.

Dear Commissioner,

We, hereby, « Maison des Lanceurs d'alerte » (France), Ligue des droits de l'Homme (France), Syndicat National des Journalistes (France), La Quadrature du Net (France), Association européenne pour la défense des droits de l'Homme (Europe), The International Federation for Human Rights (Global), The Signals Network (United States/Global), Whistleblower Netzwerk (Germany), Fundacion Baltasar Garzon (Spain), Xnet (Spain), EuroMed Rights (Europe), Ligue des droits de l'Homme Suisse (Switzerland), CETIM (Switzerland), Solidarité Bosnie (Suisse), ADETRA (Suisse), Liga voor de Rechten van de Mens (Netherlands), Ligue des droits humains (Belgique), are honoured to submit a memorandum on legal considerations related to the situation of Julian Paul Assange, founder of the website « Wikileaks ».

In August 2012, Julian Paul Assange was granted asylum by Ecuador on the basis of fears of political persecution and possible extradition to the United States. In January 2018, he was granted Ecuadorian

citizenship; however this status was suspended in April 2019. Assange remained in the Embassy of Ecuador in London for almost seven years. In April 2019, Ecuador's president Lenin Moreno stated that Assange had violated the terms of his asylum and the latter was subsequently withdrawn.

On 11 April 2019, the Metropolitan Police were invited into the Ecuadorian embassy and arrested Julian Paul Assange. The arrest was in connection with Assange's failure to surrender to the court in June 2012, in view of his extradition to Sweden. Since his arrest at the embassy, Assange has been incarcerated in HM Prison Belmarsh in London. He is currently waiting a hearing on his extradition to the United States. His extradition trial will start on February 24 for a week, with the remaining three weeks taking place from May 18.

On Thursday, May 23, 2019, a grand jury in the Eastern District of Virginia returned a superseding indictment charging WikiLeaks founder Julian Assange with 17-counts of violating the Espionage Act and one count of conspiring to violate the Computer Fraud and Abuse Act. The counts carry a maximum sentence of **175 years in prison**. His extradition trial will start on February 24 for a week, with the remaining three weeks taking place from May 18.

In this briefing note, the petitioners will draw your attention on several salient human rights issues at stake in the situation of Mr. Assange. this case.

First of all, the petitioners will develop that the extradition of Julian Assange to the United States would amount to a violation of article 3 prohibiting ill-treatment, in light of the current case-law of the European Court of Human Rights. Given the current health condition of Mr Assange and his subsequent vulnerability, , in view of the impossibility to formulate a public interest defence under the Espionage act 1917 as well as the disproportionate character of the maximum penalty incurred, an extradition to the United States would likely expose him to ill-treatment within the meaning of article 3 of the Convention.

The petitioners will then stress that the 24/7 surveillance of Assange during his stay at the Ecuadorian embassy in London blatantly violated the principle of attorney-client confidentiality, as meetings between Assange and his lawyers were systematically monitored. In light of this violation, it appears that the respect of Mr. Assange's right to fair trial and to a defense would be seriously compromised if he were to be extradited to the United States.

Finally, the third category of counts against Assange—counts 15 through 17— is merely based on the posting the documents on the internet, and did not consider other actions, such as encouraging leaks or receiving information. The counts represent the first time a US grand jury has issued an indictment based on acts of pure publication. This far-reaching scope of the count amounts to a significant threat to news reporting, an activity that is afforded the highest level of protection under article 10 of the European Convention of Human Rights. Thus, the extradition of Mr. Assange carries the potential of setting a dangerous precedent that would undermine and threaten Council of Europe standards on the protection of whistleblowers as well as press freedom all around Europe.

## **I. An extradition of Julian Paul Assange to the US would likely amount to a violation of article 3 of the Convention prohibiting ill-treatment**

As an overarching perspective to the following legal considerations, the petitioners would like to submit to the Commissioner's attention the positive obligations for Member States created by the European Convention of Human Rights. Indeed, while the Convention creates the classical duty for States to abstain from violating the rights and freedoms it enshrines, it is today established doctrine and case law<sup>1</sup> under the European Court of Human Rights that Member States carry a **positive** obligation to ensure the respect of

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<sup>1</sup>The concept of positive obligations appeared in the Court's case-law as early as 1968 in the Belgian language case (ECHR, 23 July 1986 Series A, No. 6), and was reiterated in the Marckx v. Belgium (ECHR, 13 June 1979, Series A, No. 31) and Airey v. Ireland (ECHR, 9 October 1979, Series A, No. 32) judgments. It has since become widespread, cf. infra.

such rights. This evolution of the conception of States' duties in relation to human rights has evolved with its time and found roots in several international or regional human rights conventions, such as the Inter-american Convention on Human Rights (art. 22) or the European Convention of Human Rights (art.1). These positive obligations are based on the article 1 of the Convention, which considers that States have the obligation to "*guarantee to everyone within its jurisdiction the rights and freedoms defined ... [in the] Convention*". As such, the effective respect of fundamental rights under the auspices of the Court necessarily considers that States must **prevent**, investigate and punish all violations of the rights recognized by the Convention. While article 1 of the Convention was initially referred to by the Court as the basis for positive obligations regarding Article 2 and 3, but was later generalized to the whole Convention in the *Ilascu* judgment. In this case, the European Court specified that "it follows from this provision that States Parties shall be responsible for any violation of the rights and freedoms protected by the Convention committed against individuals under their 'jurisdiction'<sup>3</sup>

The UK is therefore, as a member State of the Convention, bound by an obligation of due diligence aimed at preventing the occurrence of violations of the rights protected by the Convention.

In relation article 3 of the Convention in particular, these positive obligations have been stated by the European Court of Human Rights in several cases, in which the Court emphasised that Art.3 imposes an obligation not to extradite or expel any person who, in the receiving country, would run the real risk of being subjected to inhumane treatment. <sup>4</sup>

#### A) The appreciation of a violation of article 3 in extradition situations

Article 3 of the European Convention on Human Rights states that :

#### Article 3 – Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

International and customary law have developed a well-established standard regarding the prohibition of extradition where "*substantial grounds for believing that a person would be in danger of being subjected to torture*",<sup>5</sup> due to the positive obligations of States to prevent acts of torture, cruel, inhuman, or degrading treatments.<sup>6</sup>

Indeed, the ECHR has repeatedly affirmed that "*an extradition can engage the responsibility of the State under the Convention, where there are serious grounds to believe that if the person is extradited to the requesting country he would run the real risk of being subjected to treatment contrary to article 3*".<sup>7</sup>

Despite the different threshold of severity, torture, inhuman or degrading treatment have in common that

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<sup>2</sup>« Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms. »

<sup>3</sup>CEDH, *Ilascu et autres c. Moldova et Russie*, 8 juillet 2004, req. n° 48787/99, § 311.

<sup>4</sup>*Saadi v Italy* (2008), No. 37201/06, *Chahal v UK* (1997) 23 EHRR 413, CEDH, *Assenov e c. Bulgarie*, 28 octobre 1998, req. n° 90/1997/874/1086, § 102.- *MC c. Bulgarie*, 4 décembre 2003, req. n° 39272/98, § 149

<sup>5</sup>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment entered into force 26 June 1987, Art.3.

<sup>6</sup>Universal declaration of Human Rights, 10 December 1948, Art.5 ; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, entered into force 26 June 1987, Art.3 ; The Convention for the Protection of Human Rights and Fundamental Freedoms, entered into force in 1953, Art.3 ; International Covenant on Civil and Political Rights, entered into force on 23 March 1976, Art.7.

<sup>7</sup>ECtHR, *Trabelsi v Belgium*, 21 February 1975, No 4451/70, §§116-120 ; ECtHR *Soering v. United Kingdom*, 7 July 1989, No 14038/88, §§90-91 ; ECtHR *Chahal v. The UK*, 15 November 1996, No 22414/93 ; *Saadi v Italy*, 28 February 2008, No 37201/06, §138 ; ECtHR, *Daoudi v France*, 3 December 2009, No 19576/08, §64 ; ECtHR *M.S v Belgium*, 31 January 2012, No 50012/08, §§126, 127.

they all amount to a violation of physical integrity and human dignity. They range from acts by which severe pain or suffering, physical or mental are intentionally inflicted to, *inter alia* punish or intimidate (torture),<sup>8</sup> or premeditated treatment, causing actual bodily injury or intense physical or mental suffering (inhuman),<sup>9</sup> or “treatment such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them” (degrading).<sup>10</sup> In extradition cases, the Court also considers that the receiving of a **grossly disproportionate sentence** in the State to which extradition is sought would violate article 3.<sup>11</sup>

In this legal memorandum, it will be asserted that Julian Assange, if extradited, would be submitted to inhuman or degrading treatment, due to the grossly disproportionate sentence he is facing, but also to the treatment he could receive as a prisoner, which would constitute a violation by the United Kingdom of its obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Indeed, the Court has found that there is a positive duty on national authorities, when necessary in light of the circumstances, to go beyond the evidence provided by the applicant and use diverse sources of current information in order to gain a clearer understanding of the situation and practices in the receiving country.<sup>12</sup>

In conducting such a *proprio motu* assessment, **diplomatic assurances** are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment, and the weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time. Thus, the assessment made by the extraditing State must be “sufficiently supported” by materials originating from agencies of the United Nations and reputable non-governmental Organisations.<sup>13</sup>

Notwithstanding the view of the Court that the Convention “does not purport to be a means of requiring the contracting states to impose convention standards on other states”,<sup>14</sup> the United Kingdom has the obligation to make sure that the prisoner will be detained in conditions compatible with article 3 and therefore with human dignity and physical integrity.<sup>15</sup> In this sense, the absence of any specific justification for the measure imposed,<sup>16</sup> the length of time for which the measure was imposed,<sup>17</sup> the fact that there has been a degree of distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention,<sup>18</sup> as well as the implementation of a measure in a manner which cause feelings of fear, anguish or inferiority,<sup>19</sup> are factors on which the ECHR has already declared contracting States responsible under article 3, and which can be applied to the situation of Julian Assange.

Therefore, the concerns and warnings of the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment should be taken into account by the UK government, especially in view of the current health condition of Julian Assange.

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<sup>8</sup>ECtHR *Costero v Italy*, 7 April 2015, No 6884/11, §171 ; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment entered into force 26 June 1987, Art.1.

<sup>9</sup>ECtHR *Kudla v. Poland*, 26 October 2000, No 30210/96, §92.

<sup>10</sup>*Ibidem*

<sup>11</sup>ECtHR *cases of Harkins and Edwards v. UK*, 17 January 2012, Nos 9146/07 and 32650/07, §134.

<sup>12</sup>See for example: ECtHR *Fatgan Katani and Others v. Germany*, 31 May 2001, No. 67679/01.

<sup>13</sup>ECtHR *Garabayev v Russia*, 7 June 2007, No 38411/02, §74; ECtHR *Salah Sheek v Netherlands*, 11 January 2007, §136.

<sup>14</sup>ECtHR *cases of Harkins and Edwards v. UK*, 17 January 2012, Nos 9146/07 and 32650/07, §129.

<sup>15</sup>ECtHR *Mamatkulov and Askarov v. Turkey*, 4 February 2005, Nos. 46827/99 and 46951/99, § 67.

<sup>16</sup>ECtHR *cases of Harkins and Edwards v. UK*, 17 January 2012, Nos 9146/07 and 32650/07, §130 ; ECtHR *Van der ven v. The Netherlands*, 04 February 2003, No 50901/99, §§61-62; ECtHR *Iwanczuk v. Poland*, 15 November 2001, No 25196/94.

<sup>17</sup>ECtHR *Ireland v. the United Kingdom*, 20 March 2018, No 5310/71, §92 ; ECtHR *cases of Harkins and Edwards v. UK*, 17 January 2012, Nos 9146/07 and 32650/07, §130.

<sup>18</sup>ECtHR *Mathew v. the Netherlands* 29 September 2005, No 24919/03, §§197-205 ; ECtHR *cases of Harkins and Edwards v. UK*, 17 January 2012, Nos 9146/07 and 32650/07, §130.

<sup>19</sup>ECtHR *cases of Harkins and Edwards v. UK*, 17 January 2012, Nos 9146/07 and 32650/07, §130; ECtHR *Jalloh v. Germany*, 11 July 2006, No 54810/00, §68 ; ECtHR *Peers v Greece*, 19 April 2001, No 28524/95.

## B)The health condition of Julian Assange makes him more vulnerable to ill-treatment

The above-mentioned obligation to carry out a risk assessment *proprio motu* is all the more important in cases where persons are detained and in a situation of vulnerability that requires **more thorough care and attention**, given the difficulty they may face in substantiating their claim. The length of the applicant's detention period is a key factor in determining vulnerability.<sup>20</sup> Moreover, an individual can be very vulnerable because of his experience in detention and traumas or distress he is likely to have endured previously.<sup>21</sup> It is thus frequently necessary to give them the benefit of the doubt when assessing the credibility of their statements and the documents submitted in support thereof.<sup>22</sup>

The physical and mental condition of the person is also a key factor in assessing whether a treatment can be considered « inhumane or degrading » within the meaning of article 3. In cases where the person is ill and thus vulnerable, the threshold of severity required by Article 3 **can be attained more easily** than in cases where the person is in a good physical and mental condition. In such cases and even in cases of short detentions, the Court has found that the severity of the harm outweighed its short duration.<sup>23</sup>

In the case of Julian Assange, it is important to note that, according to the United Nations Working Group on Arbitrary Detention report of 2016, he has been subjected to an arbitrary deprivation of liberty ever since 7 December 2010, 24 for having been detained first in isolation, then in the form of house arrest and finally during his stay at the Ecuadorian Embassy. In its opinion, the Working Group on arbitrary detention declared that after these five years of deprivation of liberty, "it is valid to assume, Mr. Assange's health could have been deteriorated to a level that anything more than a superficial illness would put his health at a serious risk and he was denied his access to a medical institution for a proper diagnosis".<sup>25</sup> Therefore, in 2016, the state of health of Julian Assange was already warned.

**More recently, Julian Assange has been exposed to degrading and inhumane treatment**, thus worsening his health condition. In a press release already dating back to May 2019, the United Nations Rapporteur on torture Nils Melzer declared that during a visit, Julian Assange showed all "symptoms typical for prolonged exposure to psychological torture, including extreme stress, chronic anxiety and intense psychological trauma". He added that the health of Julian Assange was "seriously affected", and that he would be exposed to a real risk of torture and other cruel, inhuman or degrading treatment or punishment.<sup>26</sup>

His detention conditions have not changed since. On 14 November 2019, UN Special Rapporteur on Torture Nils Melzer and Former Foreign Minister of Australia Bob Carr spoke at a European Parliament event: **Journalism is Not a Crime: The Assange Extradition Case**. He stressed again on the harsh conditions of his detention in the UK, and his deteriorating health situation :

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<sup>20</sup>ECtHR *Kalashnikov v. Russia*, 15 July 2002, No 47095/99, §102; ECtHR *Kehayov v. Bulgaria*, 18 January 2005, No 41035/98, §64; ECtHR *Alver v. Estonia*, 8 November 2005, No 64812/01, §50; ECtHR, *Ananyev and Others v. Russia*, 8 November 2005, Nos 42525/07 and 60800/08, §142.

<sup>21</sup>ECtHR *Dougoz v. Greece*, 6 March 2001, No 40907/98; ECtHR *Peers v. Greece*, 10 April 2001, No 28524/95; ECtHR *S.D. v. Greece*, 1 June 2009, No 53541/07.

<sup>22</sup>see, among other landmark cases: ECtHR *N. v. Sweden*, 20 July 2010, No 25035/09; ECtHR *Hakizimana v. Sweden*, 27 March 2008, No 37913/05; ECtHR *Collins and Akaziebie v. Sweden*, 8 March 2007, No 23944/05.

<sup>23</sup>see ECtHR *Brega v. Moldova*, 20 April 2010, No 52100/08, § 42-43, and ECtHR *Parascineti v. Romania*, 13 March 2012, No 32060/05, § 53-55.

<sup>24</sup>Human Rights Council, Opinions adopted by the Working Group on Arbitrary Detention at its seventy-fourth session, [17] [17] 30 November – 4 December 2015, Opinion No. 54/2015 concerning Julian Assange (Sweden and the United Kingdom of Great Britain and Northern Ireland), A/HRC/WGAD/2015.

<sup>25</sup>Idem, §98.

<sup>26</sup>Office of the High Commissioner for Human Rights, UN expert says "collective persecution" of Julian Assange must end now », 31 may 2019.

« (...) Both experts told me that if the pressure is not alleviated soon his state of health will deteriorate rapidly and to a dangerous level. Ten days later he had to be transferred to the medical care division of the Belmarsh prison. So our predictions were correct.

(...) Mr Assange has been **detained in almost isolation**, it's not solitary confinement in a strict term but he's isolated from the population of the prison, he is in a single cell reportedly, what I've been told is that whenever he passes the prison corridors they are cleared. He has no contact whatsoever with other detainees. I think that is extremely difficult for months on end, he is apparently surveilled in **obviously very stressful conditions** and now we come to due process. It's only in October, after being arrested in April, that he has received access to his legal documents

(...)

I have also received from various reliable sources information that **the health condition of Mr Assange is deteriorating**, as is to be expected in these conditions of this constant arbitrariness and isolation he's exposed to. I waited to see what will happen once his sentence was served, for the bail violation, now obviously he's being kept indefinitely in relation to the extradition request to the US and **under condition that are profoundly inhumane**.

(...)

Both medical experts have explained to me that psychological torture is not 'torture light', and I know that from experience from my own profession from talking to torture victims for 20 years. Psychological torture aims directly at the person's personality and their emotional identity, and **it has physical consequences and he can very quickly go into a downward spiral where these consequences will be irreversible**, on the nervous system, on the cardio-vascular system. »

These concerns have been supported by more than 60 doctors. In an open letter to the UK Home Secretary,<sup>27</sup> doctors expressed the fear that Julian Assange's health was so concerning that he was running to risk to decease inside the top-security prison he is currently imprisoned. The doctors based their assessment on "harrowing eyewitness accounts" of his 21 October court appearance in London and a 1 November report by Nils Melzer, the United Nations special rapporteur on torture.

The present legal memorandum submit that Assange's current state of health would increase the suffering during its detention in the US – regardless its duration – causing him a suffering amounting to a treatment prohibited by article 3.

Moreover, Mr. Assange's state of health is all the more likely to deteriorate in the US that faces a sentence far exceeding international norms.

**C) Julian Assange could possibly face life incarceration under the Espionage Act 1917, which far exceeds international standards**

As already mentioned before, the superseding indictment against Julian Assange includes 18 counts on violating various provisions of the Espionage Act and the Computer Fraud Act. On paper, according to the Department of Justice himself,<sup>28</sup> Julian Assange might thus, if convicted, face a maximum penalty of 10 years in prison on each count except for conspiracy to commit computer intrusion, for which he faces a maximum

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● <sup>27</sup>Doctors4Assange: Open Letter to UK Home Secretary Priti Patel and Shadow Home Secretary Diane Abbott 25 November 2019.

<sup>28</sup>US DOJ, WikiLeaks Founder Julian Assange Charged in 18-Count Superseding Indictment, May 23, 2019. Url : <https://www.justice.gov/opa/pr/wikileaks-founder-julian-assange-charged-18-count-superseding-indictment>.

penalty of five years in prison.

This means that he faces a maximum sentence of **175 years in prison** in the US if convicted of all the charges against him.

	Count	Penalty
Count 1	Conspiracy to Obtain, Receive, and Disclose National Defense information <b>18.U.S.C. § 793(g)</b>	10 years
Count 2	Conspiracy to Obtain, Receive, and Disclose National Defense information (Detainee Assessment Brief) <b>18.U.S.C. § 793(b) and 2</b>	10 years
Count 3	Unauthorized Obtaining of National Defense information (State Department Cables) <b>18.U.S.C. § 793(b) and 2</b>	10 years
Count 4	Unauthorized Obtaining of National Defense information (Iraq Rules of Engagement Files) <b>18.U.S.C. § 793(b) and 2</b>	10 years
Count 5	Unauthorized Obtaining and Receiving of National Defense information <b>18.U.S.C. § 793(b) and 2</b>	10 years
Count 6	Unauthorized Obtaining and Receiving of National Defense information (Detainee Assessment Briefs) <b>18.U.S.C. § 793(c) and 2</b>	10 years
Count 7	Unauthorized Obtaining and Receiving of National Defense information (State Department Cables) <b>18.U.S.C. § 793(c) and 2</b>	10 years
Count 8	Unauthorized Obtaining and Receiving of National Defense information (Iraq Rules of Engagement Files) <b>18.U.S.C. § 793(c) and 2</b>	10 years
Count 9	Unauthorized disclosure of National Defense information (Detainee Assessment Briefs)	10 years

	<b>18.U.S.C. § 793(d) and 2</b>	
Count 10	Unauthorized disclosure of National Defense information (State Department Cables) <b>18.U.S.C. § 793(d) and 2</b>	10 years
Count 11	Unauthorized disclosure of National Defense information (Iraq Rules of Engagement Files) <b>18.U.S.C. § 793(d) and 2</b>	10 years
Count 12	Unauthorized disclosure of National Defense information (Detainee Assessment Brief) <b>18.U.S.C. § 793(e) and 2</b>	10 years
Count 13	Unauthorized disclosure of National Defense information (State Department Cables) <b>18.U.S.C. § 793(e) and 2</b>	10 years
Count 14	Unauthorized disclosure of National Defense information (Iraq Rules of Engagement Files) <b>18.U.S.C. § 793(e) and 2</b>	10 years
Count 15	Unauthorized disclosure of National Defense information <b>18.U.S.C. § 793(e)</b>	10 years
Count 16	Unauthorized disclosure of National Defense information <b>18.U.S.C. § 793(e)</b>	10 years
Count 17	Unauthorized disclosure of National Defense information <b>18.U.S.C. § 793(e)</b>	10 years
Count 18	Conspiracy to Commit Computer Intrusion <b>18.U.S.C. §§ 371 and 1030</b>	5 years

Even though the Department of Justice rightly points out that « *actual sentences for federal crimes are typically less than the maximum penalties* », <sup>29</sup> the Manning precedent shows that sentences handed down to National Security Whistleblowers in similar cases **far exceed international standards**.

Indeed, even though Manning was sentenced by the US Army Court of Appeals and not by a federal judge, she was found guilty of 6 espionage charges and was thus sentenced to 35 years in prison. The guilty verdicts included seven out of the eight counts brought under the Espionage Act. On these counts, Manning was accused of leaking the Afghan and Iraq war logs, embassy cables and Guantánamo files.

The comparison between both cases is all the more relevant that most of the counts against Julian Paul

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<sup>29</sup>Idem.



Assange are based on information given by Chelsea Manning to Wikileaks. Indeed, the superseding indictment alleges that Assange was complicit with Chelsea Manning, a former intelligence analyst in the U.S. Army, in unlawfully obtaining and disclosing classified documents related to the national defense.

Given that Chelsea Manning has been convicted to 35 years in prison based on the same espionage counts, and based on her complicity with Assange, it is extremely likely that Assange will be handed down a sentence **at least as harsh** as the sentence handed down to Manning.

Again, such sentence far exceeds international standards. In an *amicus curiae* brief submitted to the U.S. Army Court of Criminal Appeals, Virginia, the Open Justice Initiative notes that a survey of 30 countries shows the sentence to be far higher than the penalties that US closest allies would consider proportionate<sup>30</sup>.

In 13 of these countries, penalties for the unauthorized public disclosure of national security secrets are limited to five or fewer years' imprisonment where there is no espionage, treason, disclosure to a foreign state, or intent to cause harm: Brazil (one year, and only applicable to public servants); Australia, Sweden and United Kingdom (2 years), Slovenia (3 years), Panama and Spain (4 years), Colombia and Norway (4 1/2 years), and Belgium, Mexico, Paraguay and Poland (5 years). Another six countries have maximum penalties of less than 10 years: Netherlands (6 years); France and Russia (7 years); Bolivia and Guatemala (8 years); and Ecuador (9 years). Four countries have penalties of up to 10 years: Argentina, Germany, Serbia, US. Denmark allows penalties of up to 12 years, but highest penalty in past 20 years was 4 months

#### **D) Julian Assange would not be allowed to raise a public interest defense before U.S federal courts, in contradiction with ECHR's standards**

The European Court of Human Rights has repeatedly affirmed that penalties for disclosure of classified or otherwise sensitive information were unnecessary and therefore violated the right to impart information where the information was of public interest. In 2008, in *Guja v. Moldova*, the Grand Chamber of the European Court of Human Rights noted that *"the public has a right to expect that they will help and not hinder the democratically elected government. As a consequence, "the interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence."*<sup>31</sup>

Still more significantly, in the *Bucur v. Romania* case,<sup>32</sup> which concerned the disclosure by a telecommunications analyst in one of Romania's military intelligence units of "top secret" information about "irregular" surveillance, the Court found that the general interest in the disclosure of information revealing irregular surveillance authorized by high-ranking officials was so important in a democratic society that it prevailed over the interest in maintaining public confidence in the intelligence agency. In doing so, it took into account – among 6 other factors – the reasonableness of the applicant's belief in the accuracy and importance of the information. It further stated that protecting national security cannot come at the price of destroying democracy and proceeded to criticise the domestic courts for not taking into account the applicant's arguments relating to the public interest of the information disclosed.

Even though this defence applies, strictly speaking, to public servants, and require that they through internal channels first, it also applies to journalists or persons acting as journalists, like Assange.

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<sup>30</sup>Open Society Justice Initiative, Chelsea Manning Appeal Brief: 35-year Prison Sentence Far Exceeds Norms, May 19, 2016. Url : <https://www.opensocietyfoundations.org/newsroom/chelsea-manning-appeal-brief-35-year-prison-sentence-far-exceeds-norms>

<sup>31</sup>ECtHR *Guja v. Moldova*, 12 February 2008, No 14277/04.

<sup>32</sup>ECtHR *Bucur and Toma v. Romania*, 8 January 2013, No 40238/02.

In the case of *Matúz v. Hungary*<sup>33</sup>, the Court unanimously found a violation of Article 10 after the Hungarian courts upheld the dismissal of a whistleblowing journalist employed by the Hungarian state television company. The applicant had, in breach of the confidentiality clause in his employment contract, published a book criticising his employer for alleged censorship by a director of the company. The Court found that the dismissal was prompted only by the publication of his book, without taking into account the journalist's professional ability, and thus constituted an interference with the exercise of his freedom of expression. That interference had not been "necessary in a democratic society", because the applicant's conduct had been in the public interest, i.e. to draw public attention to censorship within the state television. It also noted that the domestic courts had found against the applicant solely on the ground that publication of the book breached his contractual obligations, without considering his argument that he was exercising his freedom of expression in the public interest.

Similarly, Council of Europe's elected bodies have repeatedly affirmed that whistleblowers facing charges for breaching official secrecy should be entitled a public interest defence. It means that whistleblowers and journalists should not face retaliation if the public interest in the information disclosed outweighs the public interest in secrecy. Very significantly, the Parliamentary Assembly of the Council of Europe passed a resolution in 2015 that calls on "*the United States of America to allow Mr. Snowden to return without fear of criminal prosecution under conditions that would not allow him to raise the public interest defense.*". In doing so, Mr Omzigt's report stressed that :

*« The 1917 Espionage Act does not allow for any form of public interest defence. This means that Mr. Snowden, if he were to return to the United States, would face very serious punishment. In line with the recommendation made above, I would therefore strongly plead for granting Mr. Snowden asylum in any of the European states which have benefited from the disclosure of NSA surveillance targeting their citizens, their businesses and even their elected political leaders »<sup>34</sup>*

It follows that, according to Council of Europe standards, persons prosecuted for breaching official secrecy should at least: 1. Be able to raise a public interest defence 2. Be able to challenge classification of information on national security grounds.

Yet, in the United State of America (USA), disclosing classified information without authorization is a crime even if the whistleblower had good intentions and was motivated by a larger public interest. Indeed, Section 793(e) of the Espionage Act, forbids any person with "*unauthorized possession of, access to, or control over information relating to the national defense*" to "*wilfully communicate, deliver, transmit the same to any person not entitled to receive it.*" 18 U.S.C. § 793(e) »

The Espionage Act is extremely vague when applied to whistleblowers and leakers because it allows for discriminatory enforcement against only disfavoured speakers and provides no fair notice of which disclosures of information will be punished or not.

Without judicial consideration of whether the disclosure of information is of critical public concern, the government is free to use the Espionage Act, aided by a regime of secrecy and over classification, to restrict the flow of information that is embarrassing to it or that exposes unlawful government acts a pervasive activity: the sharing of information broadly defined as "relating to the national defense" with the public or press(18 U.S.C. §793(e)).

In view of the above, it shall be reminded that the U.S government repeatedly asserted that any mention of

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<sup>33</sup>ECtHR, *Matuz v. Hungary*, 21 october 2014, No 73571/10.

<sup>34</sup>PACE, 23 June 2015, Resolution 2060 on « Improving the protection of whistle-blowers ».

the purpose of the disclosure should be ruled out of bounds in trial.

For example, in pre-trial motions in the case of USA v. Daniel Everette Hale in 2019,<sup>35</sup> the government has argued that :

*“Evidence of the defendant’s views of military and intelligence procedures would needlessly distract the jury from the question of whether he had illegally retained and transmitted classified documents, and instead convert the trial into an inquest of U.S. military and intelligence procedures. (...) **The defendant may wish for his criminal trial to become a forum on something other than his guilt, but those debates cannot and do not inform the core questions in this case: whether the defendant illegally retained and transferred the documents he stole,**” said. »*

In such a situation, Julian Assange will not be in a position in which he will be able to defend himself accurately against the charges pressed against him, in violation of most fundamental rights standards and developed case-law of the European Court of Human Rights and Council of Europe. As a result of this lack of public interest defense – which lies at the very heart of free press, freedom of public debates and transparent democracies – Assange is very likely to be handed down a disproportionate sentence.

## II. The monitoring of meetings between Assange and his lawyers has violated attorney-client confidentiality, a core principle in ECHR's case-law

During Julian Assange’s stay in the Ecuadorian Embassy, between 19th June 2012 and 11th April 2019, he was spied on by the Spanish company UC Global on behalf of the CIA. Indeed, as part of the Spanish prosecution of David Morales, the founder of the security firm, 3 former employees of the company have admitted having spied on Julian Assange. Starting from December 2017, the spying consisted in the fitting of cameras also able to record audio, the placement of microphones into the building’s toilet where Julian Assange had conversations with his legal team to avoid surveillance, and into a fire extinguisher in the embassy’s meeting room, in order to record and film all the meetings and conversations between Julian Assange and his lawyers or journalists, but also to have access to the medical examinations, as well as diplomatic meetings with the Ecuadorian Ambassador and its staff.<sup>36</sup>

As a result, all of the discussions between Julian Assange and his lawyers has been recorded without their knowledge. These practices cause **serious violation of the right to respect for private and family life** enshrined in article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and, more precisely, to the principle of attorney-client confidentiality.

Indeed, the Court repeatedly stated that

*« (...) while Article 8 protects the confidentiality of all “correspondence” between individuals, it affords strengthened protection to exchanges between lawyers and their clients. This is justified by the fact that lawyers are assigned **a fundamental role in a democratic society**, that of defending litigants. Yet lawyers cannot carry out this essential task **if they are unable to guarantee to those they are defending that their exchanges will remain confidential**. It is the relationship of trust between them, essential to the accomplishment of that mission, that is at stake. Indirectly but necessarily dependent thereupon is the right of everyone to a fair trial, including the right of accused persons not to incriminate themselves. This additional protection conferred by Article 8 on the confidentiality of lawyer-client relations, and the grounds on which it is based, lead the Court to find that, from this*

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<sup>35</sup>Hale is a former NSA intelligence analyst and NGA contractor who is accused of having provided classified documents concerning US military drone programs to *The Intercept*.

<sup>36</sup> « A massive scandal: how Assange, his doctors, lawyers and visitors were all spied on for the U.S. », La Repubblica, 18 November 2019.

*perspective, legal professional privilege, while primarily imposing certain obligations on lawyers, is specifically protected by that Article<sup>37</sup> »*

In the « Saunders v. United Kingdom » case of 17th December 1996<sup>38</sup>, the European Court stated that the general requirement of equity enshrined in article 8, implies that detainees and accused persons have the right not to self-incriminate. This principle applies to all criminal procedures and all types of criminal offences, from the simplest to the most complex ones. Hence, registering Assange without his knowledge during a conversation with his lawyers about his defence is a **blatant violation of the right not to self-incriminate**, as some of Assange's conversations may be **used against him** during his trial in the US.

It shall also be stressed that, on multiple occasions, the Court has found a violation of article 8 in cases where States have tapped attorney's conversations. For example, in the *Laurent v. France* case (2018),<sup>39</sup> the Court stated that the content of documents intercepted doesn't matter as long as that correspondences between a lawyer and his client should in principle remain confidential and private.

This principle of confidentiality applies to all discussions that individuals can have with their lawyer, even when the person is in detention.<sup>40</sup> Any interference into the right of persons to talk confidentially to their lawyers should thus be prescribed by law, pursue a legitimate goal, and be necessary in a democratic society.<sup>41</sup> In this context, the Court has constantly reminded that, while a certain degree of control over prisoners's correspondence can be established by states, the correspondence between a lawyer and his client deprived of his liberty should enjoin a very high level of protection.<sup>42</sup> Therefore, letters sent by a person deprived of his/her liberty should be read only where there are reasonable grounds to believe that it would help detecting illegal activities that could not be detected by other means.

Indeed, having a private conversation with a lawyer is in most cases the first and necessary condition for being able to exercise the right to an effective remedy,<sup>43</sup> and any violation of lawyer-client confidentiality principle is likely to have a detrimental impact on the person's ability to enjoy convention rights.<sup>44</sup>

These principles led the court to prohibit, on the basis of article 8, the wiretapping of lawyer's phones,<sup>45</sup> as well as searches and seizures in the lawyer's office or lawyer's home.<sup>46</sup>

In the light of the above-mentioned cases, there is no doubt that the bulk, warrantless, 24/7 surveillance of Assange violated attorney-client confidentiality and as result, is in direct violation of his right to privacy (art. 8, ECHR) and right to a fair trial (art. 6, ECHR).

### III. An extradition of Julian Assange would undermine and threaten Council of Europe

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<sup>37</sup>ECtHR *Michaud v. France*, 6 December 2012, No 12323/11.

<sup>38</sup>ECtHR *Saunders v. United Kingdom*, 17 December 1996, No 19187/91.

<sup>39</sup>ECtHR *Case of Laurent v. France*, 24 May 2018, No 28798/13, § 90.

<sup>40</sup>ECtHR *Silver & others v. United Kingdom*, 25 March 1983, 5947/72 6205/73 7052/75 7061/75 7107/75 7113/75 7136/75, § 84; ECtHR *Mehmet Nuri Özen & others v. Turkey*, § 41 ; ECtHR *Yefimenko v. Russia*, 12 February 2013, No152/04, §144.

<sup>41</sup>ECtHR *Case of Laurent v. France*, 24 May 2018, No 28798/13, §90.

<sup>42</sup>ECtHR *Case of Campbell v. United Kingdom*, 25 March 1992, No 13590/88, §45.

<sup>43</sup>ECtHR *Case of Ekinci et Akalin v. Turkey*, 30 January 2007, No 77097/01, §47.

<sup>44</sup>ECtHR *Case of Golder v. United Kingdom*, 21 February 1975, No 4451/70, §45 ; ECtHR, *S. v. Switzerland*, 28 November 1991, Nos 12629/87 and 13965/88, §48 ; ECtHR *Beuze v. Belgium*, 9 November 2018, No 71409/10, § 193.

<sup>45</sup>ECtHR *Case of Pruteanu v. Roumania*, 3 February 2015, No 30181/05 ; ECtHR *Versini-Campinchi & Crasnianski v. France*, 16 June 2016, No 49176/11.

<sup>46</sup>ECtHR *Case of Niemietz v. Germany*, 16 December 1992, No 13710/88 ; ECtHR *Petri Sallinen and others. v. Finland*, 27 September 2005, No 50882/99 ; ECtHR *André v. France*, 24 July 2008, No 18603/03 ; ECtHR *Vinci Construction & GTM Génie civil et Services v. France*, 2 April 2015, No 60567/10 and 63629/10.

## standards on the protection of whistleblowers as well as press freedom all around europe.

Counts 15 through 17 of the indictment are only based on Assange's having posted the documents on the internet and do not consider other action, such as the encouraging the leak or receiving the information. Thus, these counts seek to criminalize activities similar to the mere news-gathering, which should be granted a very high level of protection under the ECHR. Moreover, these counts are totally divorced from any concerted action between Assange and Manning and would as such open a wide-door for prosecution even if Assange had only received the material anonymously in the mail. Such indictment sets a therefore a very dangerous precedent for freedom of the press, as it paves the way for the prosecution of virtually any journalist disclosing confidential information, whether or not this information supports a free public debate by allowing the public to discuss matters that are in the public interest.

This adverse risk for the freedom of journalists has been widely denounced by prominent stakeholders and first amendment academics. As an example, Jameel Jaffer, Executive Director of the Knight First Amendment Institute at Columbia University, issued the following statement:

"The indictment and the Justice Department's press release treat everyday journalistic practices as part of a criminal conspiracy. Whether the government will be able to establish a violation of the hacking statute remains to be seen, but it's very troubling that the indictment sweeps in activities that are not just lawful but essential to press freedom—activities like cultivating sources, protecting sources' identities, and communicating with sources securely.<sup>47</sup>"

Such a direct attack against what constitutes regular activities of news-gathering directly threatens European standards and sets a dangerous precedent in that matter. For this reason, the recent PACE Resolution 2317 ("Threats to media freedom and journalist's security in Europe") clearly stated that *"The extradition of Julian Assange to the United States must be barred and he must be promptly released."*<sup>48</sup>

Indeed, the European Court of Human Rights has consistently considered, since the *Goodwin* case (1996),<sup>49</sup> that any restriction to the right of journalists to gather information – including information from confidential sources – would undermine the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected.

In *Stoll v. Switzerland*,<sup>50</sup> the Court further stressed that « *Press freedom assumes even greater importance in circumstances in which State activities and decisions escape democratic or judicial scrutiny on account of their confidential or secret nature* ». Hence, The conviction of a journalist for disclosing information considered to be confidential or secret « may discourage those working in the media from informing the public on matters of public interest. As a result, the press may no longer be able to play its vital role as "public watchdog" and the ability of the press to provide accurate and reliable information may be adversely affected ;

Still more significantly, in the *GÖRMÜŞ v. Turkey* case, the Court blamed Turkish courts for taking for granted the need for the executive to classify the documents, thus only focusing on the criminal liability of whistleblowers and journalists who refused to provide the documents to protect their sources of information. Instead, courts should have examined, in the context of the protection of whistleblowers, whether whistleblowers had the possibility of expressing their concerns to their superiors and whether the

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<sup>47</sup>Knight First Amendment, April 11 2019, « Knight Institute Comment on Indictment of Julian Assange » ; URL : <https://knightcolumbia.org/content/knight-institute-comment-indictment-julian-assange>

<sup>48</sup>ECtHR, *Bucur and Toma v. Romania*, 8 January 2013, No 40238/02.

<sup>49</sup>ECtHR *Goodwin v. United Kingdom*, 27 March 1996, No. 17488/90.

<sup>50</sup>ECtHR *Stoll v. Switzerland*, 10 December 2007, No 69698/01.

information that they had disclosed were likely to contribute to the public debate.

The view that alerting the media should be a viable avenue even for national security whistleblowers was further solidified in the COE's Parliamentary Resolution 1838 (2011), which provided that:

« The media play a vital role in the functioning of democratic institutions, in particular by investigating and publicly denouncing unlawful acts committed by state agents, including members of the secret services. They rely heavily on the co-operation of "whistle-blowers" within the services of the state. The Assembly reiterates its calls for adequate protection...for whistleblowers. »

Similarly, Resolution 1877 (2012) provided that in relation to secrecy laws, *'member States must not curtail the right of the public to be informed by restricting the right of individuals to disclose information of public concern, for example by applying...national security and anti-terrorist laws in an overly broad and non-proportional manner'*.

Finally, Parliamentary Assembly Resolution 1954 (2013), provided that *'[a] person who discloses wrongdoings in the public interest (whistle-blower) should be protected from any type of retaliation, provided he or she acted in good faith and followed applicable procedures. Applicable procedures would therefore refer to the use internal mechanisms when these are available and public disclosures only in cases where these mechanisms fail.*

In a highly connected world, informations imparted to journalists by whistleblowers and sources may not only deal with information relating to the state in which the journalist is working. It may also --Julian Assange's nationality being Australian -- affect other states which could, if the information made public is classified in that country, press charges against foreign journalists -- including European journalists -- and request their extradition.

Thus, extradition law might, if it does not provide itself with a high standard of protection to European journalists be the « Trojan Horse » in the well-established, high standard of protection afforded to journalists by the European Court of Human Rights.

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In view of the arguments developed in this brief, the petitioners solemnly ask you to express, within your possibilities, significant concerns about these human right violations the UK government, and ask for Julian Assange to be released from prison, and not being extradited to the United States of America.