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Detention Conditions / art. 3 ECHR

To be inserted in the submission at the Swedish Supreme Court

1. Facts

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

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

2. Applicable norms

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

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

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

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

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

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

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

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

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

³CPT Standards, page 5.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6. Conclusion

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

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

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