

**JA Swed. Litigation - LEGAL NOTE 8 – February 2015 – Schaus, Marchand and
Chihaoui- Brussels**

Refoulement to the USA of JA would violate article 3 ECHR – Serious fear

To be inserted in the submission at the Swedish Supreme Court

ANNEMIE SCHAU
as@juscogens.be

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

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

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

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

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

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

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

On 28 January 2015 the US officials confirmed that the attempts to bring a national security investigation against M. Assange continues for his WikiLeaks work.

JA is in unlawful and arbitrary detention in the Ecuadorian Embassy, not by choice but because he doesn't want to be sent to the United States (here after US) where he would inevitably be submitted to inhumane and degrading treatment and to an unfair trial. To this stage the UK and Sweden has refused to confirm or deny the existence of an American arrest warrant.

His direct or indirect refoulement to the USA, by the United Kingdom or Sweden would infringe article 3 ECHR. There are many reasonable grounds to believe that it would be the case.

JA can invoke the protection of article 3 ECHR as developed in the case VINTER, at the ECtHR : the Great Chamber of the ECtHR has decided that no clear evidence is necessary to demonstrate the risk of violation of article 3 but reasonable ground to believe is sufficient.

JA is subject of a criminal investigation and is wanted by the US for publishing on the internet embarrassing information for this State, showing its implication, in war crimes. The Department of Justice, National Security/Criminal Division are seeking to construct a prosecution against JA for conspiracy, espionage, theft/conversion of government property, and the Computer Fraud and Abuse Act. Some media and public opinion consider he should be wanted for treason, conspiracy, and terrorism.

Homeland Security Today (main information magazine on the national security of the US), has written a column in April/May 2014 on WikiLeaks. It considers that WikiLeaks is the greatest threat for the US national security.

The activity of JA and WikiLeaks constitutes the substance of "whistleblowing": a person or an organization disclose information on a gross unlawful action in the past or at present, committed by a public or private person (UBB (P.)), "Whistleblowing: A restrictive definition and interpretation.", *Journal of Business Ethics* 21.1 pp. 77-94).

The Whistleblower has the moral conviction that he cannot do something else than to go in the media to alert the public opinion, knowing the risks he is taking. It is a difficult dilemma (J. JENSEN, « Ethical tension points in whistleblowing. » *Journal of Business Ethics*, 1987, vol. 6, no 4, p. 321-328).

This is the paradox of the whistleblower, and JA is the more important

representative of these, admired for the honesty of their word and courage, but at the same time marginalized and harshly under repressive pressure for the negative consequences for the State involved.

There is then a necessity to build a specific protective legal system to protect the whistleblowers. As underlined by the Council of Europe High Commissioner Hammarberg, the whistle blower must be encouraged to alert inside companies and state agencies as it is in the interest of democracy to permit revelations that would otherwise be impossible.

The legal protection has to meet this challenge between the necessity of the revelation of the information and the risks taken by the whistleblower.

Finally the necessity of whistleblowing lies in the heart of the freedom of expression focused on public interest (A. Katz, "Government information leaks and the First Amendment", *California Law Review*, 1976, p. 108-145. ; M. Opper, "WikiLeaks: Balancing First Amendment Rights with National Security.", *Loy. LA Ent. L. Rev.*, 2010, vol. 31, p. 237 ; POZEN (D.), "The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information" *Harv. L. Rev.*, 2013, vol. 127, p. 512).

ECTHR has developed a specific whistleblower legal protection based on a large concept of the freedom of speech (article 10) through a pilot case law (V. JUNOD, « Lancer l'alerte : quoi de neuf depuis *Guja* ? », *RTDH*, 2014, p. 459 ; V. JUNOD, « La liberté d'expression du whistleblower », *RTDH*, 2009).

The Unites States, despite the call by many States to protect whistleblowers, submit JA and his partners at WikiLeaks, or Edward Snowden, to harsh criminal investigations and prosecutions for important crimes such as conspiracy, espionage, theft/conversion of government property, and the Computer Fraud, infringement of national security or even terrorism with a specific treatment contrary to article 3, 6 and 10 of the ECHR.

JA can be subjected to cumulative criminal offences that would de facto submit him to an life long sentence without decent hope for parole.

The Special Rapporteur on Torture has confirmed that the « first » informant of WikiLeaks, Chelsea Manning had been submitted to inhumane and degrading treatment and was condemned to a 35 year jail sentence. JA was constantly and expressly mentioned during the court hearings (See Legal Note 6 Submission by JA at UNWGAD).

In January 2015 CIA leaker Jeffrey Sterling was convicted of 9 counts of espionage carrying 90 years imprisonment. In the US Senate CIA report we can read: "General situation in US for whistleblowers/ "terrorists"/ "persons who harmed the national interests": pleading guilty 97 % + solitary confinement + prosecutions overcharge to aggregate to come to a prison sentence of 150 years" (CIA Senate Report, <http://www.intelligence.senate.gov/study2014/sscistudy2.pdf>)

The direct refoulement by the United Kingdom or indirect refoulement by Sweden to the US would lead to a serious problem concerning the respect of article 3 ECHR and would engage the responsibility of Sweden as there is a real risk that JA would be submitted to a treatment contrary to article 3 ECHR (*Soering c. Royaume-Uni*, 7 juillet 1989).

The circumstance that the illegal treatment would be done by a third party to the ECHR convention is irrelevant (*Saadi c. Italie*, § 138). Article 3 ECHR implies that it is forbidden, to send JA to the US (*Soering*, précité, § 91, *Mamatkoulou et Askarov c. Turquie* [GC], § 67, CEDH 2005-I, et *Saadi*, précité, § 126).

There is no distinction between extradition and refoulement (*Harkins et Edwards c. Royaume Uni*, § 120, et *Babar Ahmad et autres c. Royaume Uni*, § 168).

This risk concerns the prison condition and the disproportionate character of the condemnation (*Vinter et autres c. Royaume Uni*).

It is not doubtful that the ECtHR protection of whistleblowers based on article 10 ECHR is not in line with prison condemnations of 35 to 95 years that are clearly disproportionate.

The ECtHR has considered that a prison condemnation of 2 years was disproportionate (*Bucur et Toma c. Roumanie*).

If someone is condemned to 90 years prison, it is a de facto life long sentence.

Finally, as decided in Great Chamber by ECtHR in the case *Vinter*, it is not necessary that the condemnation is already in force, but a real risk of condemnation is sufficient.

The reality of the investigation against JA has been recently confirmed: Google revealed in December 2014 that it turned over all e-mail content, subscriber information, and metadata of three WikiLeaks staff to the United States government in response to search warrants. The crimes investigated by the warrants include espionage and conspiracy. The warrants were issued in March 2012, and according to Google, it was prevented by court order from disclosing them sooner because the US government fought to ensure Google was muzzled (http://www.washingtonpost.com/world/national-security/google-says-it-fought-gag-orders-in-wikileaks-investigation/2015/01/28/e62bfd04-a5c9-11e4-a06b-9df2002b86a0_story.html)

Attached to the present Legal Note, we summarize some facts that demonstrate that it is for JA not unreasonable to believe on the basis of objective grounds, that he would be submitted to an inhumane and degrading treatment or unfair trial contrary to article 3, 6 and 10 ECHR if sent to the US.

Annemie SCHAUS

Christophe MARCHAND

Zouhaier CHIHAOUI¹



¹ Member of the Law firm "Just Rights".

Annex to Legal Note 8 - Fear of JA about unfair trial and inhumane and degrading treatment in the US.

1. Concrete evidence of an ongoing Criminal Investigation of WikiLeaks and JA now in its fifth year

1.1. On 28 January 2015, a spokesman for the Eastern District of Virginia confirmed that the criminal investigation into WikiLeaks remains ongoing after four years. http://www.washingtonpost.com/world/national-security/google-says-it-fought-gag-orders-in-wikileaks-investigation/2015/01/28/e62bfd04-a5c9-11e4-a06b-9df2002b86a0_story.html

1.2. On May 19, 2014 the Justice Department stated in court that the WikiLeaks investigation was 'ongoing' http://epic.org/foia/doj/wikileaks/37_Def_Rep_Sup_Brief.pdf. On Apr. 25, 2014 the Justice Department represented that there are 'criminal/national security investigation(s) in to the unauthorized disclosure of classified information that was published on the WikiLeaks website. The investigation of the unauthorized disclosure is a multi-subject investigation and is still active and ongoing.' http://epic.org/foia/doj/wikileaks/33_Def_Sup_Brief.pdf

1.3. Google revealed in December 2014 that it turned over all e-mail content, subscriber information, and metadata of three WikiLeaks staff to the United States government in response to search warrants. The crimes investigated by the warrants include espionage and conspiracy. The warrants were issued in March 2012, and according to Google, it was prevented by court order from disclosing them sooner because the US government fought to ensure Google was muzzled. http://www.washingtonpost.com/world/national-security/google-says-it-fought-gag-orders-in-wikileaks-investigation/2015/01/28/e62bfd04-a5c9-11e4-a06b-9df2002b86a0_story.html²

1.4. WikiLeaks Investigation 'unprecedented in scale and nature' - Pentagon's 'WikiLeaks War

² More : <http://wikileaks.org/google-warrant.html>

Room':<http://www.smh.com.au/world/assange-targeted-by-fbi-probe-us-court-documents-reveal-20140520-38l1p.html>

- 1.5. Jan 2011 government order for Dynadot records related to Julian Assange, WikiLeaks:
http://www.wikileaks.org/IMG/pdf/Dynadot_2703_d_Order.pdf
- 1.6. December 2010 government orders for Twitter records of WikiLeaks, Julian Assange and individuals associated with WikiLeaks (associative rights violations) - Electronic Privacy Information Centre FOIA case:
http://epic.org/foia/epic_v_doj_fbi_wikileaks.html
- 1.7. US government serves grand jury subpoenas related to WikiLeaks investigation: http://www.salon.com/2011/04/27/wikileaks_26/
- 1.8. Search warrants and orders for Google accounts of WikiLeaks affiliates:
http://www.huffingtonpost.com/2013/06/24/google-wikileaks-smari-mccarthy-herbert-snorrason_n_3492076.html Google and Sonic accounts
<http://www.wsj.com/articles/SB10001424052970203476804576613284007315072> Additional Google and other accounts:
<http://alexaobrien.com/archives/1293>
<http://alexaobrien.com/archives/1308>
- 1.9. An agent for Army CID testified at Manning's pretrial hearing in December 2011 that seven civilians were investigated by the FBI, including the "founders, owners, or managers of WikiLeaks." The FBI file, lead military prosecutor, Major Fein said, was "42,135 pages or 3,475 documents <http://alexaobrien.com/archives/1308>
- 1.10. Prosecutors have failed to respond to a January 2015 letter from Julian's lawyers asking about the status of the investigation. Prosecutors have repeatedly declined to respond to requests from lawyers on the investigation's status.
- 1.11. NOTE: Over 50 free speech and human rights orgs (including Article 19, RSF, Human Rights Watch, EFF etc.) have condemned the ongoing investigation into WL for its chilling effects
<http://www.article19.org/resources.php/resource/37599/en/letter-to-eric-holder-in-support-of-wikileaks>

2. Declarations by US high ranking officials, politicians and other persons of political influence

2.1. Threats to harm and execute (sometimes extrajudicially) of JA by prominent American politicians and media personalities:

<https://www.youtube.com/watch?v=b-DIZvcK6Rc>

2.2. Diane Feinstein, head of US the Senate Intelligence Committee, stating that JA should be

prosecuted for Espionage:
<http://www.wsj.com/articles/SB10001424052748703989004575653280626335258>

2.3. Senator Lieberman and Congressman Peter T King attempted (but failed) to get WikiLeaks classed as 'enemy combatants' and to place WikiLeaks staff on a proscribed list (this did not succeed but the unlawful banking blockade was enforced by private companies without underlying legislation:

<http://www.thenewamerican.com/usnews/congress/item/13762-documents-show-lieberman-king-behind-financial-blockade-of-wikileaks>

3. Bradley MANNING (Wikileaks source) has been subjected to inhumane and degrading treatment and unfair trial in the US

3.1. Evidence obtained by torture in the case of Manning, prospectively to be used against JA - Manning's lawyer said in the media that the inhuman and degrading treatment of Manning was the US army attempting to pressure Manning to implicate JA:

<http://www.wired.com/2012/03/manning-treatment-inhuman/>

3.2. Search warrants in Chelsea Manning trial attempt to establish link to WikiLeaks: <http://alexaobrien.com/archives/905>

3.3. Also, 250+ law professors, including Barack Obama's professor, say

treatment of Manning was implicating JA:

<http://www.nybooks.com/articles/archives/2011/apr/28/private-mannings-humiliation/>

3.4. Chelsea Manning torture (Special Rapporteur findings):

<http://www.theguardian.com/world/2012/mar/12/bradley-manning-cruel-inhuman-treatment-un>

3.5. Targeting of Bradley Manning campaigners:

<http://www.cnet.com/news/bradley-manning-supporter-targeted-by-feds-wins-early-victory/>

4. Unlawful action by police and intelligence US and UK services

4.1. FBI attempted entrapment of JA through an Icelandic FBI informant:

http://www.slate.com/articles/technology/future_tense/2013/08/sigurdur_thordarson_icelandic_wikileaks_volunteer_turned_fbi_informant.html

4.2. FBI obtaining stolen harddrives belonging to WikiLeaks:

<http://www.wired.com/2013/06/wikileaks-mole/all/>

4.3. Evidence of spying on the whole organisation: GCHQ spying:

<https://firstlook.org/theintercept/2014/02/18/snowden-docs-reveal-covert-surveillance-and-pressure-tactics-aimed-at-wikileaks-and-its-supporters/>

4.4. Julian Assange is on a NSA 'manhunting' list:

<https://firstlook.org/theintercept/2014/02/18/snowden-docs-reveal-covert-surveillance-and-pressure-tactics-aimed-at-wikileaks-and-its-supporters/>

4.5. Theft of JA's suitcase in the protected area of Swedish airport:

<http://www.theaustralian.com.au/in-depth/wikileaks/swedish-police-seek-wikileaks-founder-julian-assanges-lost-luggage/story-fn775xjq-1226710226571>

5. Attack on JA's and Wikileaks financial means

5.1. Evidence of a plans to target supportive journalists and other associates of WikiLeaks by company HB Gary (for Bank of America):

<https://www.techdirt.com/articles/20110209/22340513034/leaked-hbgary-documents-show-plan-to-spread-wikileaks-propaganda-bofa-attack-glenn-greenwald.shtml>

5.2.- WikiLeaks, JA, placed on bank blacklists - there are articles and internal correspondence from one financial firm showing this:

<http://www.thenewamerican.com/usnews/congress/item/13762-documents-show-lieberman-king-behind-financial-blockade-of-wikileaks>

5.3.- Banking blockade against WikiLeaks by VISA, PayPal, MasterCard, Bank of America, Western Union - ruled to be unlawful in Iceland:

<http://www.bbc.co.uk/news/business-22294108>

6. Additional actions against Wikileaks, JA and associates

6.1. Placement by US authorities of JA's lawyer Jen Robinson on a restricted flying list:

<http://www.crikey.com.au/2012/04/19/australian-wikileaks-lawyer-on-inhibited-person-travel-list/>

6.2. Detention of Jake Appelbaum in airports interrogations about JA, WikiLeaks:

http://www.democracynow.org/2012/4/20/we_do_not_live_in_a

6.3. UK has launched a Snowden related terrorism investigation against

Guardian, David Miranda and WikiLeaks:

<http://www.theguardian.com/world/2013/aug/19/david-miranda-detention-terrorism-law-watchdog>

<http://www.theguardian.com/world/2013/aug/20/nsa-snowden-files-drives-destroyed-london>