

Joint Submission for the United Kingdom's Universal Periodic Review in 2017

United Kingdom

Universal Periodic Review – 22nd session 2017-2021

Submitted by a coalition of the following international human rights, fair trial and jurist organisations:

Center for Constitutional Rights
Eva Joly Institute
National Lawyers Guild
International Association of Democratic Lawyers
Liberty Victoria
Courage Foundation
Centro de Estudios Legales y Sociales (CELS)
Derechos Humanos en Acción
Australian Lawyers for Human Rights
Australian Lawyers Alliance
Swedish Professors & Doctors for Human Rights (SWEDHR)
Digital Rights Watch
Sydney Peace Prize Foundation

I: SUMMARY

1. This joint submission highlights issues about respect for and implementation of United Nations' Human Rights Council special mechanisms, domestic human rights protection, ratification of individual complaint mechanisms under international treaties to which the United Kingdom (UK) is a party, as well as specific human rights concerns regarding the right to liberty, due process, equal treatment, freedom from arbitrary detention and inhuman and degrading treatment, freedom of movement, fair trial, privacy and family life, health and mutual recognition of asylum.
2. We call upon the UK to commit to the following recommendations:
 - A. Respect and take all necessary measures to ensure the implementation of UN special mechanism findings and recommendations;
 - B. Continuing existing domestic law protections for human rights in the UK, including the Human Rights Act and European Convention on Human Rights;
 - C. Ending all cases of arbitrary detention in the territory of the UK, including under state detention and other forms of detention, as recognised by the UN;

- D. Ensuring all persons in detention, whether by state or by default, are afforded the basic protections under UN Minimum Standard on the Treatment of Detainees and against inhuman and degrading treatment;
- E. Giving effect to the important due process protections in the implementation of the EAW scheme introduced in 2014 for the benefit of all affected by the previous unjust regime;
- F. Ensuring better protections for privacy, judicial oversight and transparency in surveillance operations;
- G. Ratifying international treaties which provide individuals the right to petition UN committees, including CAT and ICCPR, to ensure better human rights protection for all individuals in the UK.

II: HUMAN RIGHTS CONCERNS

1. In this joint submission we have highlighted the case of Mr Julian Assange because it is a serious case which is emblematic of the general concerns we wish to raise in this submission. Mr Assange, an Australian citizen, is the founder and editor-in-chief of WikiLeaks, a publishing organisation specialising in the publication of information that is of historical, political, diplomatic or ethical significance, with the objective of ensuring the right to information of all citizens. He has been deprived of liberty in the UK since December 2010 in circumstances the UN Working Group on Arbitrary Detention (WGAD) have determined amount to arbitrary detention, an unlawful status under international law, in breach of Articles 9 and 10 of the Universal Declaration of Human Rights (UDHR) and Articles 7, 9(1), 9(3), 9(4), 10 and 14 of the International Covenant on Civil and Political Rights (ICCPR).
2. Mr Assange's deprivation in the UK has been marked as the longest running pre-trial (and indeed, pre-charge) deprivation of liberty in both Sweden and the UK, and raises serious concerns regarding the UK's ability to guarantee equal treatment and the right to a fair trial, protection against inhuman and degrading treatment and arbitrary detention, the right to privacy and family life and the right to health. In addition, Mr Assange's case is emblematic of the trajectory of human rights protection in the UK, with the UK's apparent efforts to cut off access to human rights appeal mechanisms, and demonstrates the importance of access to UN complaint mechanisms for UK citizens and residents.

Failure to respect and implement findings and recommendations of UN special mechanisms

3. The UK has committed to complying with the recommendations of the Special Procedures mechanisms at the UN Human Rights Council. The UK has been a member of the Human Rights Council since it was created in 2006 (except for the period when its renewal was prohibited by regulation). The UK is signatory to the “pledges and commitments” before the General Assembly, which includes commitments to respect the decisions issued by the Special Procedures of the Human Rights Council.

4. It is worth recalling that in its recent bid for membership of the UN Human Rights Council for 2017-2019, the UK emphasised its support for a “strong and independent UN human rights system”:

We will work to ensure the Human Rights Council remains at the forefront of the UN’s work on human rights. We will support the independence and the work of the High Commissioner for Human Rights and his Office. We will work in a spirit of openness, consultation and respect for all, on a foundation of cooperation across regional groups. We will encourage dialogue with parliaments and civil society. We will promote the vital role of the independent UN human rights Treaty Monitoring Body system in the protection of human rights globally. We will encourage ratification of UN human rights instruments and their successful implementation by governments. We will maintain a standing invitation to and co-operation with the UN Special Rapporteurs who wish to visit and will encourage other countries to do the same. We remain committed to the success of the Universal Periodic Review process and pledge to assist others by sharing our experiences and offering advice and support.¹

5. In its 2012 Universal Periodic Review, several recommendations related to the improvement of the UK’s response to and compliance with UN human rights mechanisms decisions and recommendations. Recommendation 46 called upon the UK to adopt and implement a concrete plan of action realizing recommendations of treaty bodies and UN human rights mechanisms, and international human rights obligations. Further, Recommendation 47 called upon the UK to improve its response rate to communications from the Human Rights Council mechanisms. Both of these recommendations were accepted by the UK. In its 2014 Universal Periodic Review Mid Term Report, the UK said:

The UK cooperates fully with Special Procedures of the Human Rights Council, and encourages others to do likewise. Our response rate to

¹ See Foreign and Commonwealth Office, ‘UN Human Rights Council: United Kingdom 2017-2019 candidate’, Gov.UK, 9 December 2015 <<https://www.gov.uk/government/publications/un-human-rights-council-united-kingdom-2017-2019-candidate/un-human-rights-council-united-kingdom-2017-2019-candidate>>.

*communications is already positive, but we are always looking for ways to improve.*²

6. The UK government's response to the UN Working Group on Arbitrary Detention (WGAD) ruling in relation to Julian Assange in 2016 raises serious concerns about the UK's commitment to the implementation of United Nations human rights findings. This follows the UK's failure to adequately comply with WGAD's ruling in *Abdi v United Kingdom*, the resolution of which continued into this UPR period.³
7. In Opinion 54/2015, WGAD Found that Mr Assange was arbitrarily deprived of liberty by the Governments of Great Britain and Northern Ireland and Sweden in contravention of Articles 9 and 10 of the UDHR and Articles 7, 9(1), 9(3), 9(4), 10 and 14 of the ICCPR. WGAD concluded that Mr Assange's detention falls within Category III of the applicable categories for cases submitted to WGAD.⁴
8. WGAD determined that the situation of Mr Assange constituted arbitrary detention, that both States had disregarded the asylum afforded by Ecuador, compelling Mr Assange to choose between deprivation of liberty or the risk of losing the protection granted by Ecuador. WGAD also found that there have been grave due process violations resulting from the disproportionate action by the UK and Swedish authorities by failing to progress the preliminary investigation through alternative means, which would have allowed Mr Assange to be interviewed in a manner that was consistent with his asylum. WGAD found that, over the past four years, Mr Assange's circumstances have effectively been of an increasingly serious incarceration amounting to prolonged solitary confinement, and amounts to an arbitrary detention that is indefinite and sustained, thereby seriously compromising his health and family life. WGAD instructed the Governments of the UK and Sweden to assess the situation of Mr Assange to ensure his safety and physical integrity, to facilitate the exercise of his right to freedom of movement in an expedient manner, and to ensure the full enjoyment of rights guaranteed by the international norms on deprivations of liberty as well as to accord him an enforceable right to compensation.⁵

² United Nations Universal Periodic Review Mid Term Report of the United Kingdom of Great Britain and Northern Ireland, and the British Overseas Territories, and Crown Dependencies (2014), <<https://www.justice.gov.uk/downloads/human-rights/uk-upr-mid-term-report-2014.pdf>>.

³ *Abdi v United Kingdom*, Working Group on Arbitrary Detention, Opinion No. 45/2006, U.N. Doc. A/HRC/7/4/Add.1 at 40 (2007). This was ultimately successful appealed to the European Court of Human Rights in 2013: *Hode and Abdi v. the United Kingdom*, Application No. 22341/09.

⁴ Human Rights Council, 'Opinions adopted by the Working Group on Arbitrary Detention at its seventy-fourth session: Opinion No. 54/2015 concerning Julian Assange (Sweden and the United Kingdom of Great Britain and Northern Ireland)', *Working Group on Arbitrary Detention*, 22 January 2016, UN Doc A/HRC/WGAD/2015, p. 17

⁵ Human Rights Council, 'Opinions adopted by the Working Group on Arbitrary Detention at its seventy-fourth session: Opinion No. 54/2015 concerning Julian Assange (Sweden and the United

9. The UK has stated it has no intention of enforcing WGAD's findings and has taken no steps towards complying with its decision, including refusing to address what WGAD described as a "serious risk" to Mr Assange's health. The UK has continually made clear that if Mr Assange leaves the embassy he will be arrested and has refused all requests for safe passage to hospital to receive medical treatment. The UK is ignoring the WGAD ruling and has placed Mr Assange in the unacceptable position of having to choose between his right to asylum and his right to health. Not only has the UK refused to assess Mr Assange's protection and to ensure his physical protection, but there was a recent security breach by an intruder at the embassy: the UK has failed (despite spending millions in preventing him from leaving the embassy) to ensure his protection, being unable or unwilling to take effective steps to prevent persons from entering the embassy.⁶
10. In addition to this non-compliance with the WGAD decision, the reaction of UK public officials was unprecedented: numerous public officials, including the Prime Minister, publicly attacking WGAD as an institution, with some also including *ad hominem* attacks on individual WGAD members and their expertise. Oxford University Professor of Law Liora Lazarus commented that the Assange ruling, despite being correct in law, 'has been met with almost universal ridicule from a line of British officials'.⁷ For example:
- Phillip Hammond, the Foreign Secretary of the United Kingdom attacked the UN expert panel as a group "made up of lay people and not lawyers"⁸ and described the ruling as "ridiculous".⁹
 - Prime Minister, David Cameron, described it as a "ridiculous decision".¹⁰
 - Foreign and Commonwealth Office Minister Hugo Swire called the WGAD findings 'inaccurate'.¹¹ On the day the WGAD ruling was

Kingdom of Great Britain and Northern Ireland', *Working Group on Arbitrary Detention*, 22 January 2016, UN Doc A/HRC/WGAD/2015, para. 100 and 101.

⁶ Zoie O'Brien, "Assassination attempt? Panic for Julian Assange as intruder scales Ecuadorian embassy wall", *Express*, 22 August 2016, <<http://www.express.co.uk/news/uk/702542/Panic-intruder-Ecuadorian-Embassy-Julian-Assange>>.

⁷ L. Lazarus, 'Is the United Nations Working Group on Arbitrary Detention Decision on Assange 'So Wrong'?' *U.K. Const. L. Blog*, 9th Feb 2016, available at <<https://ukconstitutionallaw.org/>>.

⁸ 'Julian Assange case: Who is on the UN's expert panel?', *ITV News*, 5 February 2016, <<http://www.itv.com/news/2016-02-05/julian-assange-case-who-is-on-the-uns-expert-panel/>>.

⁹ 'Julian Assange decision by UN panel ridiculous, says Hammond', *BBC*, 5 February 2016, available at <<http://www.bbc.com/news/uk-35504237>>.

¹⁰ 'David Cameron urges Julian Assange to leave embassy, end 'sorry saga'', *RTNews*, 10 February 2016, <<https://www.rt.com/uk/332041-assange-cameron-pmqs-yougov/>>.

¹¹ Foreign and Commonwealth Office and the Rt Hon Hugo Swire MP, 'UK submits response to UN Working Group on Assange case', *Gov.UK*, 24 March 2016, <<https://www.gov.uk/government/news/uk-submits-response-to-un-working-group-on-assange-case--2>>.

made public, Mr Swire went further and tweeted a picture of himself, holding his dog with the hashtag #arbitrarilydetained, clearly aimed at mocking and denigrating the WGAD decision.¹²

- Former Director of Public Prosecutions Ken MacDonald described the decision as 'ludicrous'.¹³

11. Journalists and media went further: describing the committee as 'academics seemingly devoid of judicial expertise'.¹⁴

12. These comments must be seen as an objective attempt to undermine the authority of WGAD. Former WGAD Chair and UN Special Rapporteur on arbitrary detention Professor Mads Andenaes outlined the unusual nature of such a response:

*'Rulings by the UN WGAD are not always followed by states, but rarely do they result in such personal attacks as made by UK politicians after the Assange opinion...The UK politicians aimed at weakening the authority of the UN body for short-term opportunistic gain. The UK may lobby for some support when the matter is reported to the UN Human Rights Council, but the UK will certainly be criticised by other states for its response, and clearly deserve that. The damage done to the UK in the UN and its moral authority in human rights issues is another matter, but there is no doubt about the damage done to the authority of the UK.'*¹⁵

13. General Counsel for Human Rights Watch, Dinah PoKempner described the response as "deplorable":

*"rhetorical parries from the UK and Swedish governments, who both stated not just disagreement, but that the UNWGAD opinion would have absolutely no effect on their actions. This is not what one expects from democratic governments who usually support the UN mechanisms and international law."*¹⁶

14. In the past, the UK has welcomed WGAD rulings in relation to other states, regularly calling upon other states to comply with WGAD decisions. In one

¹² See tweet from Foreign and Commonwealth Office Minister Hugo Swire on the day the WGAD decision was made public, 5 February 2016, captured here:

<<https://twitter.com/wikileaks/status/696128960195911680>>.

¹³ L. Lazarus, 'Is the United Nations Working Group on Arbitrary Detention Decision on Assange 'So Wrong'?' *U.K. Const. L. Blog*, 9th Feb 2016, available at <<https://ukconstitutionallaw.org/>>.

¹⁴ L. Lazarus, 'Is the United Nations Working Group on Arbitrary Detention Decision on Assange 'So Wrong'?' *U.K. Const. L. Blog*, 9th Feb 2016, available at <<https://ukconstitutionallaw.org/>>.

¹⁵ Owen Bowcott, 'Britain 'sets dangerous precedent' by defying UN report on Assange', *Guardian*, 24 February 2016, <<https://www.theguardian.com/media/2016/feb/24/britain-precedent-defy-un-report-julian-assange-politicians>>.

¹⁶ Owen Bowcott, 'Britain 'sets dangerous precedent' by defying UN report on Assange', *Guardian*, 24 February 2016, <<https://www.theguardian.com/media/2016/feb/24/britain-precedent-defy-un-report-julian-assange-politicians>>.

prominent example, Hammond's predecessor, former Foreign Secretary William Hague called upon Myanmar to comply with the WGAD ruling in relation to Aung San Suu Kyi:

"I urge the Government of Myanmar to heed the call of an independent United Nations human rights body to immediately release Daw Aung San Suu Kyi. The United Nations Working Group on Arbitrary Detention recently adopted its sixth 'Opinion' on Daw Aung San Suu Kyi, which has been made public.

As in its previous five 'Opinions', the Working Group has found that the continuous deprivation of Daw Aung San Suu Kyi's liberty is arbitrary, and has requested the Government of Myanmar to implement its previous recommendations and to remedy the situation in order for Myanmar to be in conformity with the norms and principles set forth in the Universal Declaration of Human Rights."¹⁷

15. The UK reaction to the WGAD ruling on Mr Assange raises serious concern about the UK's commitment to the implementation of United Nations human rights findings and the international rule of law. It raises questions as to whether the UK – a permanent member of the Security Council and a member of the Human Rights Council – should be permitted to exempt itself from complying with UN findings and recommendations, undermining the UK's ability to call upon other states to comply with WGAD rulings and recommendations of other UN special mechanisms. The UK's refusal to comply with the WGAD decision in circumstances when it is found to have been in breach and its disrespectful statements about WGAD undermines respect for UN human rights mechanisms and gives license to other states to do the same. For example, the UK government response to the WGAD Assange ruling has been cited by Maldives and Sri Lanka to justify non-compliance with WGAD decisions and UN commitments to investigate war crimes.¹⁸

16. Although the UK indicated in 2012 that it would establish a working group to resolve Mr. Assange's situation, it has failed to do so (which coincided with Mr Assange providing assistance to Edward Snowden), 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.¹⁹ The

¹⁷ Foreign and Commonwealth Office and The Rt Hon William Hague, 'Foreign Secretary William Hague welcomes UN statement on detention of Aung San Suu Kyi', 17 June 2010, <<https://www.gov.uk/government/news/foreign-secretary-welcomes-un-statement-on-aung-san-suu-kyi>>.

¹⁸ Owen Bowcott and David Crouch, 'Assange supporters condemn UK and Sweden in open letter', *Guardian*, 1 March 2016, <<https://www.theguardian.com/media/2016/mar/01/julian-assange-wikileaks-supporters-ai-weiwei-uk-sweden-open-letter>>.

¹⁹ 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>>.

UK continues to refuse to acknowledge its role in Mr Assange's deprivation of liberty, thereby denying him the right of judicial review in respect of the human rights violations found by WGAD and set out further below.

Specific, ongoing human rights concerns in the UK

17. The prohibition against arbitrary detention, the right to liberty and security of person, right to equal treatment and a speedy trial and the prohibition against inhuman and degrading treatment, the right to privacy and family life, and the right to health are fundamental human rights are protected by international human rights treaties to which the United Kingdom is a party, including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention Against Torture (CAT) and the European Convention of Human Rights (ECHR).
18. Both the UK and Sweden have refused to recognise Mr. Assange's confinement as a form of detention over which they have effective control, and as such he has had no means to seek judicial review as concerns the length and necessity of such confinement in the Embassy.²⁰ The UK's refusal to comply with WGAD's ruling to relieve this situation compounds the breaches listed below.

Right to equal treatment and a speedy trial – Article 14 ICCPR, Article 6 ECHR

19. Article 14 of the ICCPR, ratified by the United Kingdom, requires that "all persons shall be equal before the courts and tribunals," that all persons have the right to be "tried without undue delay," and to "examine, or have examined, the witnesses against him." These guarantees place on the UK affirmative obligations to fulfil rights, rather than just obligations of non-interference. Article 6 of the ECHR guarantees the right to "fair and public hearing within a reasonable time."
20. The Human Rights Committee, monitoring implementation of the ICCPR, has found that delays of years between arrest and trial are typically enough to satisfy the definition of "undue delay" under the ICCPR.²¹
21. Discrimination can occur not only by law, but also by the actions of public officials. Article 14, General Comment 32 of the ICCPR, an authoritative interpretation of customary international law, observes that "a situation in

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²⁰ See 'Submission to the Working Group on Arbitrary Detention by Mr Julian Assange', available at <<https://justice4assange.com/IMG/pdf/assange-wgad.pdf>>.

²¹ See *J. Leslie v Jamaica*, Communication No. 564/1993, UN doc. GAOR, A/53/40 (vol.II), p. 28, para. 9.3 (29 month delay violated Article 14); *C. Smart v Trinidad and Tobago*, Communication No. 672/199, UN doc. GAOR, A/53/40 (vol. II), p. 149, para. 10.2 (two year delay found to violate).

which an individual's attempts to access the competent courts or tribunals are systematically frustrated de jure or de facto runs counter to the guarantee of article 14."

22. As stated above, Mr Assange has no judicial remedy available to him to challenge his arbitrary detention within the UK. The normal remedy, of habeas corpus, does not apply because the UK executive claims Mr. Assange is not deprived of liberty notwithstanding the encirclement of the his embassy by a multi-million pound policing operation seeking to arrest him should he attempt to exercise even minimal freedom of movement. This rhetorical stance, which winds back the accepted human rights norm of "deprivation of liberty" to a narrow definition of "detention" (i.e inside a state prison) is being used to deny him an effective remedy. Such a legal vacuum is incompatible with the rule of law.
23. Further, the Swedish European Arrest Warrant (EAW) is the reason for his continued deprivation of liberty. This harsh penalty dealt upon Assange is 'one of the reasons Parliament reformed the Extradition Act to prevent the misuse of the EAW... the draconian catch-all used against him could not happen now'.²² Instead, 'these changes in the law mean that the UK now recognises as correct everything that was argued in his case. Yet he does not benefit.'²³ In fact, Julian Assange is now the only person in the UK denied the benefit from this change.
24. We welcome the changes made to the UK's extradition laws since the UPR in 2012, which have gone some way towards redressing the grave injustices caused in the implementation of EAW cases,²⁴ including those experienced by Mr Assange. As set out by Fair Trials International in 2011, change was needed to incorporate vital safeguards into the EAW system, including "a proportionality test in the issuing and executing State [and] a provision allowing executing States alerted to a real risk of rights infringements to seek further information and guarantees (and refuse surrender if not provided)".²⁵
25. The corrective UK legislation, introduced in this UPR period in 2014, addressed courts' inability to conduct a proportionality assessment of EAWs (corrected by s. 157 of the Anti-Social Behaviour, Crime and Policing Act

²² John Pilger, 'Julian Assange: The Untold Story of an Epic Struggle for Justice', *New Matilda*, 31 July 2015 <<https://newmatilda.com/2015/07/31/julian-assange-untold-story-epic-struggle-justice/>>.

²³ John Pilger, 'Julian Assange: The Untold Story of an Epic Struggle for Justice', *New Matilda*, 31 July 2015 <<https://newmatilda.com/2015/07/31/julian-assange-untold-story-epic-struggle-justice/>>.

²⁴ Cases of injustices in extradition cases from the UK listed by Fair Trials International included the cases of Patrick O'Connor, Edmund Arapi, Gary Mann, Mikolaj Kowalski, Deborah Dark, Andrew Symeou, Michael Turner, Jason McGoldrick and cited cases *Symeou v Public Prosecutor's Office at Court of Appeals, Patras, Greece* [2009] EWHC 897 (Admin), *Herdman and ors v City of Westminster Magistrates Court* [2010] EWHC 1533 (Admin): see Fair Trials International, 'The European Arrest Warrant seven years on – the case for reform', May 2011, <https://www.fairtrials.org/documents/FTI_Report_EAW_May_2011.pdf>, pp 15-23.

²⁵ Fair Trials International, 'The European Arrest Warrant seven years on – the case for reform', May 2011, <https://www.fairtrials.org/documents/FTI_Report_EAW_May_2011.pdf>, pp 22-23.

2014). The corrective legislation also barred extradition where no decision to bring a person to trial had been made (s. 156).

26. The original cause for Mr Assange's detention was Sweden's EAW. The legality of that EAW was ruled upon by the UK Supreme Court in 2011, which was prior to the legislative changes implemented to address the complaints made by the Court in Mr Assange's case. The new legislative framework now enables UK courts to consider proportionality in extradition cases and the ability to refuse extradition where no decision to bring a person to trial had been made. It was the injustices that occurred in Mr. Assange's case, and those like his, that led to corrective legislation that came into force in 2014.
27. As found by WGAD, the prosecutor in Sweden does not dispute that she had not yet made a decision to bring the case to trial, let alone charge Mr. Assange.²⁶ The legal basis for Mr. Assange's extradition has also since been further eroded in a more recent Supreme Court case, *Bucnys*: the Court revisited its split decision in *Assange vs. Swedish Prosecution Authority* and explained that the single argument which had become the decisive point in *Assange* had been reached incorrectly.²⁷
28. As set out in the WGAD ruling:

...the corrective legislation in domestic UK law excluded any individual whose case had been already decided by the UK courts. Thus Mr. Assange was frozen out of a remedy, further contributing to his legally uncertain and precarious situation, without a willingness on the part of the United Kingdom to review the case given the subsequent circumstances (the granting of asylum), and with it, the principle of the retroactive application of the law which was favourable to the accused, in accordance with the jurisprudence of the ECtHR. The corrective legislation was passed to prevent arbitrary detention – to prevent people languishing in prison awaiting trial – but now the United Kingdom is not remedying the very case that led to it. The passage of the new legislation is an admission of previous unfairness and the very person abused by it is not getting its benefit.²⁸

29. As a result, Mr Assange has been denied the benefit of legislation that was designed to remedy the injustice in his case. The UK maintains the position in which Mr Assange's deprivation of liberty is likely to continue indefinitely and

²⁶ See discussion in Human Rights Council, 'Opinions adopted by the Working Group on Arbitrary Detention at its seventy-fourth session: Opinion No. 54/2015 concerning Julian Assange (Sweden and the United Kingdom of Great Britain and Northern Ireland)', *Working Group on Arbitrary Detention*, 22 January 2016, UN Doc A/HRC/WGAD/2015, at p.13, para [78].

²⁷ *Bucnys v Ministry of Justice, Lithuania* [2013] UKSC 71.

²⁸ Human Rights Council, 'Opinions adopted by the Working Group on Arbitrary Detention at its seventy-fourth session: Opinion No. 54/2015 concerning Julian Assange (Sweden and the United Kingdom of Great Britain and Northern Ireland)', *Working Group on Arbitrary Detention*, 22 January 2016, UN Doc A/HRC/WGAD/2015, para 80.

“[n]either Sweden nor the United Kingdom had seen it as their duty to proffer any other remedy than to allow the demand for extradition to continue unchanged.”²⁹ This injustice can and must be addressed by the UK.

30. In addition to being denied the opportunity for judicial review of his current situation inside the embassy, Mr Assange has been the subject of prejudicial treatment by senior members of the judiciary of the UK, which raises questions about his ability to receive fair treatment before the courts should he leave the embassy. In 2015, Mr Assange was invited by the Commonwealth Lawyers Association to address (by video-link) the Commonwealth Law Conference in Glasgow, UK, on the subject matter of the implications for legal professional privilege as a result of the UK mass surveillance regime and the decision of the Investigatory Powers Tribunal in *Belhaj*.³⁰ Despite the session being well-attended by senior judiciary from around the Commonwealth, the judiciary of England, Wales and Scotland boycotted the conference as a result of Mr Assange’s video-link attendance. The following statement was made on behalf of the judiciary:

*Mr Assange is, as a matter of law, currently a fugitive from justice, and it would therefore not be appropriate for judges to be addressed by him. Under these circumstances, the lord president, Lord Gill, and the other Scottish judicial officeholders in attendance have withdrawn from the conference.*³¹

31. Spokespeople for the UK Supreme Court and for the Judiciary of England and Wales issued statements saying that they “share the concerns expressed by Lord Gill and his fellow senior Scottish judges regarding the late addition of Mr Assange to the conference programme.”³²
32. This definitive statement about Mr Assange’s current status – that he is a “fugitive from justice” – was therefore shared and publicized by the entire judiciary of the England and Wales and Scotland. Yet, Mr Assange’s status since seeking asylum in Ecuador’s embassy has yet to be determined by the courts of England and Wales. The only judgment issued since Mr Assange entered the embassy in 2012 related to the bail monies of his sureties. In that case, the magistrate explicitly noted that Mr Assange “may have a defence of reasonable excuse” to breach of bail given the “undoubtedly unique”

²⁹ Human Rights Council, ‘Opinions adopted by the Working Group on Arbitrary Detention at its seventy-fourth session: Opinion No. 54/2015 concerning Julian Assange (Sweden and the United Kingdom of Great Britain and Northern Ireland)’, *Working Group on Arbitrary Detention*, 22 January 2016, UN Doc A/HRC/WGAD/2015, para 69.

³⁰ See Joshua Rozenberg, “Legal privilege and the conflicting interests of GCHQ and the IPT”, *Guardian*, 17 March 2015 <https://www.theguardian.com/law/2015/mar/16/legal-privilege-conflicting-interests-gchq-ipt-investigatory-powers-tribunal>

³¹ *Ibid*

³² *Ibid*

circumstances in which he entered the embassy³³ – to seek asylum, which is his right under international law.

33. The question of Mr Assange's status as a result of seeking asylum in the embassy of Ecuador therefore may well come before the courts of England and Wales. Yet, the entire judiciary has already made a definitive and prejudicial statement about his status before the matter has come before them. In these circumstances, he cannot expect to receive a fair trial.

Right to liberty and security of person – Article 9 ICCPR, Article 5 ECHR

34. Article 5 of the ECHR and Article 9 of the ICCPR guarantee the right to be free from unlawful detention. It is well-settled that holding individuals in uncertain conditions is a deprivation of their liberty.³⁴ The deprivation of liberty is one of the most intrusive measures the state can impose on an individual. International law contains an absolute prohibition on arbitrary detention and all states have an obligation to take positive steps to end a situation of unlawful and arbitrary detention.
35. Concerns about pre-trial detention have been repeatedly raised against the UK in its UPRs in 2008 and 2012. Ecuador raised specific concerns about the participation of British authorities in arbitrary detention.³⁵ As set out in the UK's 2012 UPR report, in 2008, the UK accepted recommendation 19 that pre-trial detention should never be excessive and the UK committed to continue to ensure that this is the case. As set out by the UK in its Mid Term Report in 2014, the limits on pre-trial detention are as follows: which is 56 (or in certain cases 70) days for cases being tried summarily, and to a total of 182 days for cases tried on indictment. The limits may be extended by the court on application, provided there is a good and sufficient cause for so doing and that the prosecution has shown all due diligence and expedition. When the custody time limit expires, the defendant must be released on bail.³⁶ These limits were deemed insufficient in numerous civil society UPR submissions.
36. Despite alleged progress reported by the UK in its 2014 Mid Term Report, independent reports on pre-trial detention raise serious ongoing concerns. A

³³ See *Professor Tricia Davies and other sureties for Julian Assange* (2012)

<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/sureties-julian-assange-08102012.pdf>. P 5.

³⁴ ICCPR Article 14's General Comment 32 recognises the relationship between the guarantee of a speedy trial and deprivation of liberty, requiring a speedy trial "to avoid keeping persons too long in a state of uncertainty about their fate and to ensure that such deprivation of liberty does not last longer than necessary in the circumstances of the specific case, but also to serve the interests of justice."

³⁵ Human Rights Council, UN Doc A/HRC/WG.6/13/GBR/1 (8 March 2012) Working Group on the Universal Periodic Review, Thirteenth session, Geneva, 21 May–4 June 2012, <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/116/92/PDF/G1211692.pdf?OpenElement>>, [65].

³⁶ Human Rights Council, UN Doc A/HRC/WG.6/13/GBR/1 (8 March 2012) Working Group on the Universal Periodic Review, Thirteenth session, Geneva, 21 May–4 June 2012, <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/116/92/PDF/G1211692.pdf?OpenElement>>, [46]-[47].

2016 report “The Practice of Pre-Trial Detention” commissioned by Fair Trials International, the first of its kind in 10 years, found that action should be taken to reduce the unnecessary use of pre-trial detention. Some concerns noted:

- Cross-jurisdictional comparisons of the use of pre-trial detention are commonly made by looking at the proportion of the prison population who have not been tried or sentenced. On this measure, at 14%, England and Wales have one of the lowest pre-trial detention populations in Europe and, indeed, the world. However, England and Wales has one of the highest *per capita* prison populations in the European Union (EU), which not only means that a large number of people are in pre-trial detention at any one time (nearly 12,000), but that measured by the proportion of those charged with a criminal offence who are in pre-trial detention, the picture does not look so good;
- A lot of defendants spend time remanded in custody who should not be deprived of their liberty. The report found that nearly one quarter of defendants remanded in custody were either acquitted or the case was dropped, and almost one third of defendants who were remanded in custody and subsequently sentenced received a non-custodial sentence.
- The failure to provide adequate information in early stages often led to incorrect decisions to hold accused on remand
- Despite the presumption in favour of bail, in practice it was very hard to reduce bail conditions over time.³⁷

37. Further, an earlier report published by the Chief Inspector of Prisons criticised the UK’s treatment of remand prisoners, concluding that pre-trial prisoners are treated worse than convicted inmates.³⁸

38. The pre-trial detention and deprivation of liberty of Mr Assange has stretched over almost six years in the UK. WGAD found that Mr. Assange has been in some form of deprivation of liberty since 7 December: he was initially held in isolation in the Wandsworth prison in London for 10 days (7-16 December 2010) and this has since lasted more than 5 years, which is inherently arbitrary given the lack of legal protection Mr Assange has been afforded in breach of articles 9 and 10 of the UDHR and articles 7, 9(1), 9(3), 9(4), 10 and 14 of the ICCPR.³⁹ This initial deprivation of liberty continued in house arrest for 551 days. WGAD was particularly critical of the failure of

³⁷ Ed Cape and Tom Smith, ‘Pre-trial Detention’, *Criminal Law and Justice Weekly*, 13 May 2016, <<http://www.criminallawandjustice.co.uk/features/Pre-trial-Detention>>.

³⁸ Clare Feikert, ‘UK’s Treatment of Remand Prisoners’, *Fair Trials*, 2 August 2012 <<https://www.fairtrials.org/uks-treatment-of-remand-prisoners/>>.

³⁹ Human Rights Council, ‘Opinions adopted by the Working Group on Arbitrary Detention at its seventy-fourth session: Opinion No. 54/2015 concerning Julian Assange (Sweden and the United Kingdom of Great Britain and Northern Ireland)’, *Working Group on Arbitrary Detention*, 22 January 2016, UN Doc A/HRC/WGAD/2015, para 86.

UK's judicial management of the restrictions Mr Assange was placed under during this period:

*During this prolonged period of house arrest, Mr. Assange had been subjected to various forms of harsh restrictions, including monitoring using an electric tag, an obligation to report to the police every day and a bar on being outside of his place of residence at night. In this regard, the Working Group has no choice but to query what has prohibited the unfolding of judicial management of any kind in a reasonable manner from occurring for such extended period of time.*⁴⁰

39. Despite the fact the Republic of Ecuador has granted Mr Assange asylum in August 2012, his status has not been recognized by the UK. Mr. Assange has been subjected to extensive surveillance by the British police during his stay at the Ecuadorian Embassy to this date. WGAD found a breach of articles 9 and 10, UDHR and articles 9 and 14 of ICCPR, Mr. Assange has not been guaranteed the international norms of due process and the guarantees to a fair trial during these three different moments: the detention in isolation in Wandsworth Prison, the 550 days under house arrest, and the continuation of the deprivation of liberty in the Embassy of the Republic of Ecuador in London, UK.⁴¹

40. Mr Assange's time in the Embassy of the Republic of Ecuador in London to this date has been found to be "a prolongation of the already continued deprivation of liberty that had been conducted in breach of the principles of reasonableness, necessity and proportionality".⁴²

41. Further, WGAD found Mr Assange's situation in the Ecuadorian embassy to be an arbitrary deprivation of liberty:

The factual elements and the totality of the circumstances that have led to this conclusion include the followings: (1) Mr. Assange has been denied the opportunity to provide a statement, which is a fundamental aspect of the audi alteram partem principle, the access to exculpatory evidence, and thus the opportunity to defend himself

⁴⁰ Human Rights Council, 'Opinions adopted by the Working Group on Arbitrary Detention at its seventy-fourth session: Opinion No. 54/2015 concerning Julian Assange (Sweden and the United Kingdom of Great Britain and Northern Ireland)', *Working Group on Arbitrary Detention*, 22 January 2016, UN Doc A/HRC/WGAD/2015, para 87.

⁴¹ Human Rights Council, 'Opinions adopted by the Working Group on Arbitrary Detention at its seventy-fourth session: Opinion No. 54/2015 concerning Julian Assange (Sweden and the United Kingdom of Great Britain and Northern Ireland)', *Working Group on Arbitrary Detention*, 22 January 2016, UN Doc A/HRC/WGAD/2015, paras 88-90

⁴² Human Rights Council, 'Opinions adopted by the Working Group on Arbitrary Detention at its seventy-fourth session: Opinion No. 54/2015 concerning Julian Assange (Sweden and the United Kingdom of Great Britain and Northern Ireland)', *Working Group on Arbitrary Detention*, 22 January 2016, UN Doc A/HRC/WGAD/2015, para 90.

against the allegations; (2) the duration of such detention is ipso facto incompatible with the presumption of innocence. Mr. Assange 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; (3) the indefinite nature of this detention, and the absence of an effective form of judicial review or remedy concerning the prolonged confinement and the highly intrusive surveillance, to which Mr. Assange has been subjected; (4) the Embassy of the Republic of Ecuador in London is not and far less than a house or detention centre equipped for prolonged pre-trial detention and lacks appropriate and necessary medical equipment or facilities. It is valid to assume, after 5 years of deprivation of liberty, 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, including taking a MRI test; (5) with regard to the legality of the EAW, since the final decision by the Supreme Court of the United Kingdom in Mr. Assange's case, UK domestic law on the determinative issues had been drastically changed, including as a result of perceived abuses raised by Sweden's EAW, so that if requested, Mr. Assange's extradition would not have been permitted by the UK. Nevertheless, the Government of the United Kingdom has stated in relation to Mr. Assange that these changes are "not retrospective" and so may not benefit him. A position is maintained in which his confinement within the Ecuadorian Embassy is likely to continue indefinitely. The corrective UK legislation addressed the court's inability to conduct a proportionality assessment of the Swedish prosecutor's international arrest warrant (corrected by s. 157 of the Anti-Social Behaviour, Crime and Policing Act 2014, in force since July 2014). The corrective legislation also barred extradition where no decision to bring a person to trial had been made (s. 156

Prohibition against torture and cruel, inhuman or degrading treatment or punishment – Article 7 ICCPR, Article 3 ECHR

Protection of the right to health – Article 12 ICESCR, Article 25 UDHR

42. Article 7 of the ICCPR establishes that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The prohibition is also contained in Article 3 of the ECHR and the UN Convention Against Torture (CAT). Article 12 of the ICESCR requires that states ensure people the highest attainable standard of physical and mental health.
43. WGAD found that, over the past four years Mr Assange's circumstances have been effectively of an increasingly serious incarceration amounting to prolonged solitary confinement, given that he is subjected to an arbitrary

detention that is indefinite and sustained, which seriously compromising his health and family life. The severity and indefinite nature of these deprivations constitutes a situation of torture, or at least cruel, inhuman or degrading treatment, in breach of the UK's obligations under CAT. The key elements include:

- A. Prolonged surveillance by the UK authorities, which has impeded his ability to receive visits from his family, his friends and at times even his lawyers.
 - B. The disproportionate nature of the actions taken by the Swedish Prosecutor, including demanding Mr Assange's arrest and extradition for the purpose of only one interview in a preliminary investigation into one allegation, rather than using less coercive means which respect his situation of asylum.
 - C. The indefinite nature of Mr Assange's detention and the constant risk of being expelled and extradited to the United States, where serious proceedings of a political and national security nature are under way against him, and where he risks being exposed to similar, or worse, treatment than Chelsea Manning.
 - D. The refusal on the part of the UK authorities to allow him temporary access to medical facilities required to diagnose and treat health ailments, causing a progressive deterioration of his health;
 - E. The continuing denial of such access over a period of time in which its harm to his physical and mental health has become cumulatively harsh, increasingly difficult to reverse and potentially life-threatening.
 - F. His confinement within a very small area of space (30m²) with no access to direct sunlight or an outside area, which is in breach of the UN Standard Minimum Rules for the Treatment of Prisoners of 17 December 2015, which mandates a minimum of an hour a day access to outside space for exercise, weather permitting.⁴³
44. 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.⁴⁴ The UK has refused all requests from Ecuador to allow Mr Assange to benefit from these protections and to access medical treatment.
45. Mr Assange's situation is tantamount to that of a prisoner being detained indefinitely – but without a prisoner's normal health care, daily access to fresh air, sunlight and exercise. As a result of the fact he has no viable route

⁴³ 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>.

⁴⁴ 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, <https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf>.

to access health and medical treatment, Mr Assange's situation is worse than those faced by prisoners who were held indefinitely in the United Kingdom under the Anti-Terrorism Crime and Security Act 2001. Detention under this legislation has been the subject of numerous submissions in the UK's 2012 UPR.

46. In addition to creating the conditions for inhuman and degrading treatment in the UK, the UK refuses to protect Mr Assange from such treatment from third countries. 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.⁴⁵ 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."⁴⁶ The only reasonable inference from this is that Ms. Manning was subjected to such mistreatment in order to obtain evidence against Mr. Assange. It is entirely reasonable to expect that Mr. Assange will suffer similar treatment should he be extradited to the United States.
47. From the moment Ecuador granted protection to Mr Assange it requested of the UK and Sweden an express undertaking that it would not violate the peremptory norm of *non-refoulement* by permitting his delivery to the United States. Both the UK and Sweden has refused to issue a guarantee that it will not transfer Mr Assange to the United States. The lack of a guarantee has prevented Ecuador from permitting Mr Assange, who is under its protection, to be extradited to Sweden, because this could trigger an onward extradition to the United States where he faces persecution for political reasons and risks torture and other inhuman and degrading treatment.

⁴⁵ "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 Juan E. Méndez, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment', 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>.

⁴⁶ 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>>; 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>.

48. Without this guarantee, the likelihood that Mr Assange will be transferred to the United States is very high. The reason is that Sweden has been condemned in a number of international courts and committees for failing to prevent the transfer of persons to countries that subsequently subjected them to torture. An example is the cases of Agiza and Alzery, two asylum seekers in Sweden whose asylum applications were refused, allegedly upon request of the US authorities in the context of the CIA rendition programme. Agiza and Alzery were then sent to their country of origin, Egypt, and tortured.⁴⁷ Sweden has complied with every extradition request from the US since 2000. The refusal of the UK to recognize Mr Assange's asylum and to seek the necessary assurances to protect him from inhuman and degrading treatment (assurances the UK has regularly sought in other cases – see below) breach its obligations under CAT.

49. The refusal of the UK to allow Mr Assange access to medical treatment in a safe and non-discriminatory manner without prejudice to his asylum status also breaches its obligations under the ICESCR.

Failure of the UK to take action to end a situation of prolonged arbitrary detention and inhuman and degrading treatment where there are measures specifically mandated by and required by international law

50. All states have a duty to afford mutual recognition to asylum decisions issued by other States within the Framework of the 1951 Convention. UNHCR has further confirmed that “the principle of *non-refoulement* applies not only to recognised refugees, but also to those who have not had their status formally declared”. In international law, the obligation to protect persons from persecution under the 1951 Refugee Convention prevails over extradition agreements between states.

51. As illustrated in the UK's submission to the WGAD investigation of Mr Assange's deprivation of liberty,⁴⁸ the UK has wholly failed to engage with or consider the well-founded fear and risks that keep Mr Assange effectively detained. The UK ignores these risks entirely with the cursory argument that it is not bound by the Caracas Convention. In so doing, the UK ignores the repeated communiques from Ecuador which underline their finding that they consider Mr Assange to meet the criteria for asylum under the 1951 Convention, which the UK has ratified.⁴⁹

⁴⁷ In *Agiza v. Sweden*, Communication No. 233/2003, the UN Committee against Torture found that Sweden had violated Articles 3, 16 and 22 of The Convention against Torture. The following year, in *Mohammed Alzery v. Sweden*, Communication No. 1416/2005, the UN Human Rights Committee found Sweden to have violated Articles 2 and 7 of The International Covenant on Civil and Political Rights.

⁴⁸ Foreign and Commonwealth Office, 'FOI release: response to WGAD on Julian Assange', 29 March 2016 <<https://www.gov.uk/government/publications/foi-release-response-to-wgad-on-julian-assange>>.

⁴⁹ 'Ecuador Grants Asylum to Julian Assange: Declaration by the Government of the Republic of Ecuador on the asylum application of Assange' *AustralianPolitics.com*, 16 August 2012

52. Ecuador has granted Mr Assange asylum under both general international law and the 1951 Convention. Accordingly, that the UK refuses to recognise the 'diplomatic portion' of Ecuador's asylum decision does not exempt it from either (a) recognising Ecuador's asylum assessment of Mr. Assange as a 'refugee' under the 1951 Refugee Convention or (b) its independent obligation to ensure that its domestic decisions do not ignore the evidential presumption that Mr. Assange requires protection from the risk of *refoulement* to the United States.⁵⁰ The UK's failure to recognise Mr Assange's asylum and allow safe passage – or at the least seek assurances as to his *non-refoulement* to the United States, is a wilful violation of Mr. Assange's right to 'seek, receive and enjoy' his asylum. It is also at the heart of his continuing arbitrary detention. Recognising his asylum and seeking assurances about his treatment will satisfy the UK's obligations under both the 1951 Convention and its obligation under ICCPR and CAT regarding the possible inhuman and degrading treatment of a third state.
53. The transfer of asylum seekers to third states raises a number of concerns under the ICCPR, including the need to protect them against potential inhuman and degrading treatment. As set out above, Mr Assange's asylum is based upon his fear of persecution and inhuman and degrading treatment should he be returned to the United States.
54. In response to its last UPR, the UK rejected the recommendation that it abandon the practice of using diplomatic assurances concerning torture and ill-treatment of persons as a means to avoid exposing persons to risk of human rights abuse during any time of involuntary transfer, such as deportation or extradition. In its response, the UK affirmed:
- The UK courts along with the European Court of Human Rights found the use of diplomatic assurances to be an appropriate and legal option in safeguarding the well-being of individuals we deport.*⁵¹
55. Despite this, the UK has refused to provide or request this diplomatic assurance against onward extradition to the United States in respect of Mr Assange. A diplomatic assurance of this nature could provide a possible end to his arbitrary detention.

<<http://australianpolitics.com/2012/08/16/ecuador-grants-asylum-to-julian-assange.html>>; 'Official statement by the government of Ecuador on the Asylum Approval for Julian Assange (translated)' *Hang The Bankers*, 16 August 2012 <<http://www.hangthebankers.com/official-statement-by-the-government-of-ecuador-on-the-asylum-approval-for-julian-assange-translated/>>.

⁵⁰ Human Rights Council, 'Opinions adopted by the Working Group on Arbitrary Detention at its seventy-fourth session: Opinion No. 54/2015 concerning Julian Assange (Sweden and the United Kingdom of Great Britain and Northern Ireland)', *Working Group on Arbitrary Detention*, 22 January 2016, UN Doc A/HRC/WGAD/2015, para 60

⁵¹ See, United Nations Universal Periodic Review Mid Term Report of the United Kingdom of Great Britain and Northern Ireland, and the British Overseas Territories, and Crown Dependencies (2014), <<https://www.justice.gov.uk/downloads/human-rights/uk-upr-mid-term-report-2014.pdf>>, pp 156-7.

56. Similarly, as set out by the Svea Court of Appeal in Sweden, onward extradition from Sweden to the US would require the consent of the UK:

A person who has been surrendered pursuant to a European arrest warrant must not be extradited to a third country without the consent of the competent authority of the Member State which decided to surrender the person (see Article 28 (4) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States). Therefore an extradition of Julian Assange from Sweden to the United States would, in the first place, require the consent of competent authorities in the United Kingdom.⁵²

57. The UK has also refused to provide assurances to Mr Assange or to Ecuador that the UK would refuse such consent to onward extradition to the US. Clearly, the UK has the ability to resolve this situation by the simple act of providing such an assurance to refuse consent to onward US extradition, but chooses not to do so, thereby wilfully continuing Mr Assange's arbitrary detention. In these circumstances, Mr Assange cannot be expected to leave the embassy, giving up his asylum, without this assurance from the UK. As the recent decision to extradite Lauri Love to the US demonstrates, the UK has a strong tradition to extraditing to the US,⁵³ and Mr Assange should therefore assume that the UK will extradite him without such an assurance.

58. Not only has the UK refused to provide the kind of assurance it readily seeks in other extradition and deportation cases in respect of Mr Assange, it has actively pressured Ecuador to surrender Mr Assange, threatening the official status of the Ecuador embassy premises in London and threatening trade ties.⁵⁴ The revocation of the diplomatic status of the embassy would have set a dangerous precedent as a matter of international law. Similarly, allowing states to engage in such diplomatic, political and trade retaliation in response to the grant of 1951 Convention status to a politically contentious person is completely contrary to the object and purposes of the 1951 Convention.

Protection of privacy against intrusive surveillance

⁵² *Julian Assange v Director of Public Prosecution Marianne Ny*, (2016) Case no Ö 7130-16, 16 September 2016 <<http://www.svea.se/Pages/173150/Order%20Ö%207130-16.pdf>>.

⁵³ Owen Bowcott, 'Computer activist Lauri Love loses appeal against US extradition', *Guardian*, 17 September 2016 <<https://www.theguardian.com/law/2016/sep/16/computer-activist-lauri-love-loses-appeal-against-us-extradition>>.

⁵⁴ Damien Pearse, 'Julian Assange can be arrested in Ecuador embassy, UK warns', *Guardian*, 16 August 2012 <<https://www.theguardian.com/media/2012/aug/16/julian-assange-ecuador-embassy-asylum>>; See also 'Julian Assange Embassy Battle: UK Threatens to Revoke Ecuadorian Diplomatic Status, Vows to Arrest' *The Huffington Post*, 16 October 2012 <http://www.huffingtonpost.com/2012/08/16/assange-embassy-uk-ecuador-asylum_n_1788508.html>.

59. During this UPR period and, as a result of the revelations by Edward Snowden, we learned that the UK has been engaged in mass surveillance, in breach of the right to privacy of its citizens – and those living elsewhere in the world.
60. The UK's current surveillance regime (provided for under the *Regulation of Investigatory Powers Act 2000* and *Data Retention and Investigatory Powers Act 2014*) allows 'bulk' and 'thematic' non-judicial warrants capturing enormous quantities of information through mass surveillance techniques.⁵⁵ Such large-scale collection of data is unprecedented; and, compounded by the lack of effective safeguards, is of major concern in protecting the right to privacy. Rather than addressing these issues, the UK's new IP Bill further 'violates the right to privacy (under UK and international human rights law); undermines the security of digital data; imposes burdensome and unreasonable requirements on companies; and erodes the trust of individuals in communication technologies.'⁵⁶ In some cases extending existing surveillance powers, the new IP Bill broadens authorized communications data collection and data retention without judicial authorization revealing highly sensitive information as well as equipment interference including hacking and real-time surveillance.⁵⁷
61. The judicial body with purported oversight of surveillance, the Investigatory Powers Tribunal has proved an 'imperfect component of the oversight regime'.⁵⁸ The right to appeal an IPT decision is relatively limited as compared with other tribunals and tribunal hearings are frequently closed on grounds of 'national security'.⁵⁹ It is recommended that the IPT should adopt a more open and fair procedural process, by presumption rather than by exception. It is, after all, impossible for UK citizens to obtain information from

⁵⁵ Privacy International, 'Privacy International's Submission to the Joint Committee on the Draft Investigatory Powers Bill in Response to the Call for Evidence on the Draft Investigatory Powers Bill' 21 December 2015, <https://www.privacyinternational.org/sites/default/files/Submission_IPB_Joint_Committee.pdf> at [7].

⁵⁶ Privacy International, 'Privacy International's Submission to the Joint Committee on the Draft Investigatory Powers Bill in Response to the Call for Evidence on the Draft Investigatory Powers Bill' 21 December 2015, <https://www.privacyinternational.org/sites/default/files/Submission_IPB_Joint_Committee.pdf>.

⁵⁷ Privacy International, 'Privacy International's Submission to the Joint Committee on the Draft Investigatory Powers Bill in Response to the Call for Evidence on the Draft Investigatory Powers Bill' 21 December 2015, <https://www.privacyinternational.org/sites/default/files/Submission_IPB_Joint_Committee.pdf>.

⁵⁸ Privacy International, 'Privacy International's Submission to the Joint Committee on the Draft Investigatory Powers Bill in Response to the Call for Evidence on the Draft Investigatory Powers Bill' 21 December 2015, <https://www.privacyinternational.org/sites/default/files/Submission_IPB_Joint_Committee.pdf> at [291].

⁵⁹ Privacy International, 'Privacy International's Submission to the Joint Committee on the Draft Investigatory Powers Bill in Response to the Call for Evidence on the Draft Investigatory Powers Bill' 21 December 2015, <https://www.privacyinternational.org/sites/default/files/Submission_IPB_Joint_Committee.pdf>.

government under freedom of information laws as to whether they are being spied upon. In line with Privacy International's Submission to the Joint Committee on the Draft Investigatory Powers Bill, we recommend that all appeals should be allowed 'where they would have a real prospect of success; or there is some other compelling reason why the appeal should be heard.'⁶⁰

62. It is in this context that the current surveillance regime of Mr Assange was recognized by WGAD as part of the ongoing campaign of surveillance, and deprivation of liberty, which commenced in 2010. Listening devices have been found inside the Ecuadorian embassy and the Metropolitan Police Service has had an immense physical presence, admitting both overt and covert surveillance tactics since 2010.
63. This campaign has targeted Mr. Assange's right to free speech and political belief, free movement, privacy, and privileged legal communications. It is a gross deprivation of privacy – impacting on his ability to receive family and legal visits – and, given it has taken place over such a prolonged period, constitutes inhuman and degrading treatment.⁶¹ It has also interfered with his right to receive legal advice in a confidential setting, rendering illusory his right to legal representation.⁶²
64. 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.
65. The last media publication of surveillance cost for the police encirclement of Julian Assange was published over 18 months ago in February 2015, where it was estimated to be costing over £10,000 a day. The government confirmed that they had spent £12.6 million pounds against Mr. Assange at the embassy from June 2012 through August 2015, but would not reveal the cost of "covert activity," or costs through October 2015, as requested. Since this point, the UK has effectively classified the budget expenses spent against Mr. Assange under the basis that they form part of a covert activity. The International Business Times quoted an estimate that if Assange stays in the embassy until 2022 - when the statute of limitations on his extradition

⁶⁰Privacy International, 'Privacy International's Submission to the Joint Committee on the Draft Investigatory Powers Bill in Response to the Call for Evidence on the Draft Investigatory Powers Bill' 21 December 2015, <https://www.privacyinternational.org/sites/default/files/Submission_IPB_Joint_Committee.pdf> at [295].

⁶¹ *Aguilar v. Bolivia*, Op No. 12/2005 (2005), para 13; Op No. 13/2007 (Vietnam), para. 20.

⁶² *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.

request expires – the total cost of policing the building is estimated to cost £36.5m.⁶³

66. 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.

67. 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).⁶⁴

Concern regarding domestic human rights legal protection

68. We note with grave concern the current proposals within the UK to repeal domestic human rights protections contained in the *Human Rights Act* and to withdraw from the *European Convention of Human Rights*. Doing so would constitute retrograde steps in the protection of human rights in the UK in breach of the UK's international treaty obligations. The proposals, recently affirmed by the May government, have been described as 'the gravest threat to freedom in Britain since the Second World War'.⁶⁵

69. A British cross-party parliamentary committee has warned that the proposed bill would undermine the UK's international legal standing and "unravel" the constitution. The Committee reported: "We urge the government not to introduce domestic human rights legislation that would jeopardise the UK's participation in this important area of EU cooperation in the fight against international crime."⁶⁶

Ratification of international treaties providing individual complaint mechanisms

70. The current proposals to repeal domestic human rights protections only increases the impetus for the UK to ratify international treaties providing for individual complaint mechanisms under the treaties to which the UK is a

⁶³ Ewan Palmer, 'Julian Assange's Ecuadorian Embassy Asylum Costs Met Police £5m-plus' *International Business Times*, 26 February 2014 <<http://www.ibtimes.co.uk/julian-assanges-ecuadorian-embassy-asylum-has-cost-met-police-5-3m-1437962>>.

⁶⁴ 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>>.

⁶⁵ 'Human Rights Act will be scrapped, government confirms', *The Week*, 23 August 2016, <<http://www.theweek.co.uk/63635/human-rights-act-will-be-scrapped-government-confirms>>.

⁶⁶ Jim O'Hagan, 'UK to scrap Human Rights Act' *Euronews*, 28 August 2016 <<http://www.euronews.com/2016/08/28/uk-to-scrap-human-rights-act>>.

party. This was the subject of numerous recommendations from UPR 2012. In response, the UK stated:

The UK Government remains to be convinced of the added practical value to people in the United Kingdom of rights of individual petition to the United Nations. The United Nations committees that consider petitions are not courts, and they cannot award damages or produce legal ruling on the meaning of the law, whereas the United Kingdom has strong and effective laws under which individuals may seek remedies in the courts or in tribunals if they feel their rights have been breached.

71. The UK repeated this in its 2014 Mid Term Report, stating that the UK remains "unclear about the practical benefits of the right to individual petition to the UN".⁶⁷ In 2016, the failures of the UK to provide adequate remedy in relation to the human rights concerns listed here only emphasises the importance of international oversight and remedies. The complete lack of legal defence available to Mr Assange and his inability to challenge his current situation of arbitrary detention before the domestic courts highlighted here is just one example.
72. In particular, the UK has not made a declaration under Article 22 of UNCAT accepting the right of individual petition, nor has it ratified the First Optional Protocol of the ICCPR. These procedures provide victims with an opportunity to raise allegations of specific or systemic violations under UNCAT with the Committee Against Torture and under the ICCPR with the Human Rights Committee. Individual petitions would constitute an important additional avenue for individuals and enable the committees to monitor the UK's compliance with its UNCAT and ICCPR obligations beyond periodic reporting.
73. It is particularly important that the UK ratifies individual complaint mechanisms in order to address the void which will be created by Brexit: after Brexit European Court of Justice and European Union remedies will no longer be available and the UK is considering withdrawal from the European Convention of Human Rights and Council of Europe. In these circumstances, UN individual complaint mechanisms will afford an important residual remedy to UK citizens and residents.
74. The UK's acceptance of these individual petitions procedure would send an important message and provide an example to other states. The ratification of these individual complaints mechanisms would help to strengthen the rights of individuals in the United Kingdom and the roles of the respective committees, which are recognised as the bodies specifically created to develop international standards, whose decisions in turn can positively

⁶⁷ United Nations Universal Periodic Review Mid Term Report of the United Kingdom of Great Britain and Northern Ireland, and the British Overseas Territories, and Crown Dependencies (2014), <<https://www.justice.gov.uk/downloads/human-rights/uk-upr-mid-term-report-2014.pdf>>, pp 8-9.

impact on domestic jurisprudence and provide acknowledgment of the harm suffered by individual complainants.

III: CONCLUSION

75. The selective failure to respect and implement findings and recommendations of UN special mechanisms, particularly in relation to the Working Group on Arbitrary Detention of Julian Assange in 2016, raises serious concerns about the UK's commitment to international cooperation and implementation of United Nations human rights findings.
76. Secondly, despite alleged progress claimed by the UK in its 2014 Mid Term Report, recent reports on pre-trial detention raise continuing concerns of England and Wales' average length of pre-trial detention recorded as the highest per capita prison rate in the EU. We note Julian Assange has now been deprived of liberty for over 6 years, in breach of Article 9 and 14 ICCPR and Article 5 and 6 ECHR.
77. Over the past four years, Assange's detention increasingly amounts to solitary confinement and arbitrary detention, with no end on sight and no opportunity for judicial review. We submit that treatment of this kind constitutes a situation of torture, or at least cruel, inhuman or degrading treatment in breach of the UK's obligations under the United Nations Convention Against Torture and the International Covenant on Civil and Political Rights.
78. The UK's new IP Bill violates the right to privacy and family life; undermining the security of digital data, imposing burdensome and unreasonable requirements on companies and eroding the trust of individuals in communication technologies. The oversight provided by the IPT is insufficient and the lack of transparency around procedures remains incredibly problematic, both as a matter of principle and in regards to allowing individuals access to remedies. The disproportionate use of surveillance in Julian Assange's case presents a serious case of abuse of these powers.
79. Of final concern is the UK's failure to commit to signing international treaties with respect to individual complaint mechanisms, particularly considering the proposed repeal of the UK domestic Human Rights Act and withdraw from the European Convention on Human Rights in the wake of Brexit. The lack of remedies for Mr Assange demonstrate the importance of access to UN complaint mechanisms for UK citizens and residents, as well as those involuntarily detained in UK territory.

IV: RECOMMENDATIONS

80. Based upon the foregoing, the United Kingdom should commit to:

- H. Respect and take all necessary measures to ensure the implementation of UN special mechanism findings and recommendations;
- I. Continuing existing domestic law protections for human rights in the UK, including the Human Rights Act and European Convention on Human Rights;
- J. Ending all cases of arbitrary detention in the territory of the UK, including under state detention and other forms of detention, as recognised by the UN;
- K. Ensuring all persons in detention, whether by state or by default, are afforded the basic protections under UN Minimum Standard on the Treatment of Detainees and against inhuman and degrading treatment;
- L. Giving effect to the important due process protections in the implementation of the EAW scheme introduced in 2014 for the benefit of all affected by the previous unjust regime;
- M. Ensuring better protections for privacy, judicial oversight and transparency in surveillance operations;
- N. Ratifying international treaties which provide individuals the right to petition UN committees, including CAT and ICCPR, to ensure better human rights protection for all individuals in the UK.