IN THE CITY OF WESTMINSTER MAGISTRATES' COURT

DIRECTOR OF PUBLIC PROSECUTION MARIANNE NY, SWEDISH PROSECUTION AUTHORITY, SWEDEN (A SWEDISH JUDICIAL AUTHORITY)

-v-

JULIAN PAUL ASSANGE

SKELETON ARGUMENT

ON BEHALF OF MR. ASSANGE

Resumption of extradition hearing: 7-8 February 2011

PROCEDURAL BACKGROUND

1. Ms. Marianne Ny, described in the EAW as Director of Public Prosecutions, has requested the surrender of Julian Assange to Sweden pursuant to a second European arrest warrant (EAW) issued on 2nd December 2010 and certified by the Serious Organised Crime Agency (SOCA) on 6th December. Her first attempt at an EAW, on 26th November, was rejected by SOCA.

2. Mr. Assange surrendered himself for arrest on the EAW by appointment with police officers on 7 December 2010. The extradition hearing was opened and adjourned to 14 December 2010, and subsequently adjourned again to 7-8 February 2011, with a review hearing on 11 January 2011.

3. Mr. Assange will raise the following issues in opposition to his extradition to Sweden. (There is obviously an overlap between issues 3 and 4, and to some extent issue 5):

(1) Ms. Ny was not eligible to issue the EAW.

(2) Ms. Ny is not "a judicial authority".

(3) These proceedings are an abuse of process because the warrant is being sought for a collateral purpose, namely so as forcibly to bring Mr. Assange to Sweden for questioning, without any fixed intention at the time of its issue to charge or arrest or prosecute him.

(4) The EAW is not a Part 1 warrant for the purposes of section 2(3)(b) of the Act, because it is not issued "with a view to his arrest … for the purpose of being prosecuted for the offence" and/or because it fails to provide sufficient particulars under s2(4)(c) of the Act because the offences are not described with sufficient particularity.

(5) The application for the EAW is disproportionate given the prosecutor's refusal to resort to mutual legal assistance or to question Mr. Assange by telephone, videolink, Skype, on affidavit or during his proffered attendance at the Swedish Embassy or New Scotland Yard.

(6) Offences 1-3 do not constitute extradition offences because the conduct alleged would not amount to an offence under English law.

(7) Offence 4 is not an extradition offence because the conduct does not fall within the European Framework offence of rape.

(8) The extradition of Mr. Assange to Sweden would involve the real risk of a flagrant denial of his human rights, especially because the trial would be held in secret. Sending him abroad to face a trial where justice would not be seen to be done would blatantly offend the UK's due process and open justice traditions, and breach Article

47 of the Charter of Fundamental Rights of the European Union (2000/C 364/01) (Charter) and Article 6 of the European Convention on Human Rights.

INTRODUCTION

4. The prosecution opening note (served 10th January 2011) contains a short section, "Spirit of the 2003 Act", which by selective quotation from the authorities gives the impression that the swift surrender of "accused" persons should be virtually automatic to category 1 states whose good faith and human rights excellence may be presumed. The note gives the impression that this court is bound to defer to the request of the issuing "judicial authority", once satisfied that the warrant is in order on its face. But that is not the true "spirit" in which the Extradition Act of 2003 should be applied.

5. It is of course accepted that the primary mischief which the 2003 Act was designed to cure was delay (*Osman*, for example, had taken seven years) and that the category 1 arrangements did evince a high degree of confidence that the justice systems of category 1 states would work fairly and effectively. But given the number of times all such states have been found at fault by the European Court of Human Rights (ECtHR), this was certainly not an automatic assumption. Neither the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) (Framework Decision) nor the 2003 Act embodied any "spirit" that requires justice to be sacrificed to expediency, or that UK courts must defer to laws or procedures in other European states that are either disproportionate or are antipathetic to our own principles of fair trial. Quite the contrary.

6. The Framework Decision itself makes clear that a European Arrest Warrant (EAW) is not to be rubber-stamped. Control by a "judicial authority" (i.e. this court) is mandatory (Preamble: 8) and "judicial co-operation" (not co-operation with police or prosecuting authorities) is its cornerstone (Preamble: 6). The principle of proportionality must be inherent in achieving the purpose of the Framework Decision (Preamble: 7) and fundamental rights under the European Convention on Human Rights (ECHR) must be protected (Preamble: 12). Very importantly, the addendum to 12 states: "*This Framework Decision does not prevent a member state from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media*."

7. The Framework Decision as an EU instrument is now subject to the provisions of the Charter of Fundamental Rights, introduced by the Lisbon treaty. The Court of Appeal recently noted that the Charter is binding on UK courts whenever they are interpreting or applying EU law, as this court must do at this hearing: *see On the Application of NS* [2010] EWCA Civ 990. The Lisbon treaty came into force in December 2009, supplements the ECHR in certain respects and supplants it as the cornerstone of EU law. It is fully incorporated into the Framework Decision and necessitates a reading of that Decision which is consonant with human dignity and other rights which cannot be sacrificed on the altar of expediency or to considerations of European comity, and it makes all EU law decisions subject to the proportionality principle.

8. The 2003 Act, as has been widely noted, did not faithfully adopt the language of the Framework Decision. There were civil liberty concerns raised in both Houses of

Parliament (see Lord Scott in *Dabas,*[1] para 66) which adopted different wording because they intended to make better provision for liberty. As Lord Hope points out in *Cando Armas*,[2] paras 23-24: "*The system has, of course, been designed to protect rights. Trust in its ability to provide that protection will be earned by a careful observance of the procedures that have been laid down … the liberty of the subject is at stake here, and generosity must be balanced against the rights of the persons who are sought to be removed under these procedures. They are entitled to expect the courts to see that the procedures are adhered to according to the requirements laid down in the statute*."

9. So the "spirit" of the 2003 Act is to preserve fundamental liberties and cherished constitutional principles, within a system that promptly decides whether to extradite (not promptly decides to extradite) and which in making that decision gives credit to judicial decisions of category 1 countries. This spirit calls first for intense focus on the wording of the warrant – here, the prosecution is put to strict "beyond reasonable doubt" proof that it has been issued by the correct entity and has complied with the statutory requirements. More broadly, the spirit requires the court to be satisfied that its process is not being abused for any collateral purpose (e.g. to seek a suspect for questioning rather than prosecution) and that the prosecuting authority's request is proportionate, made in good faith and will not, if implemented, entail the consequence of breaching Charter or ECHR rights or abandoning the UK's constitutional traditions of protecting due process and freedom of expression.

10. The spirit of a law is influenced by its history. Here, as that history shows, there was by 2002-3 not only a desire for greater expedition in extradition cases and greater confidence

[1] *Dabas v High Court of Justice in Madrid, Spain* [2007] UKHL 6.
[2] *Office of the King's Prosecutor, Brussels v Cando Armas* [2004] EWHC 2019 (Admin).

in the criminal justice systems of category 1 countries, but a demand for a process that would ensure that persons credibly accused of serious crime would face justice somewhere. As the government's 2001 consultation document sets out: "The law should provide a quick and effective framework to extradite a person to the country where he is accused or has been convicted of a serious crime, *provided that this does not breach his fundamental human rights*" (Explanatory Note to the Extradition Act 2003, para 7 (emphasis added)).

11. This was the theme when the government ushered the 2003 Act through parliament, with impetus from the 9/11 terrorist attacks on New York, i.e. that the main objective of the Act was to make it easier and quicker to surrender persons accused or convicted of serious international crime. That does not mean, of course, that EAWs cannot be used for less serious offences, but what it should mean is that when surrender is sought for lesser offences, without an international element, the court should insist that their description in the warrant is fair and accurate and that the double criminality test is fully satisfied, with a burden of proof on the prosecutor to the criminal standard.

OVERVIEW

12. Julian Assange (JA), the head of Wikileaks, arrived in Sweden in August and stayed by invitation at the flat of the first complainant for a week, save for the night of 16th-17th August in which he stayed by invitation at the flat of the second complainant. On 20th August these complainants, who had the previous day discovered that he had slept with each of them, went to the police and a prosecutor formulated an offence of rape (in the case of the second complainant) and lesser offences of sexual assault (in the case of the first complainant). An acting prosecutor unlawfully disclosed to the press that Mr.

Assange was suspected of rape, and that was a front page news story in Sweden and throughout the world. The rape allegation was dismissed by Stockholm's senior prosecutor Eva Finne on 25th August and Mr. Assange voluntarily attended a police station on 30th August to answer questions about these lesser charges. The dismissal of the rape allegation was appealed to Ms. Ny, a prosecutor for gender crimes in Gothenberg, and Ms. Ny upheld the appeal and reinstated it on the 1st September, appointing her the new prosecutor. There were offers by JA, through his lawyer Mr. Hurtig, to attend for interviews prior to his leaving Sweden on 27th September, and he offered to return on 10th October but that was not acceptable. In the event, he offered to answer questions by telephone, Skype, videolink etc from London, to attend at the Swedish Embassy or Scotland Yard's interview suite or pursuant to a request for mutual legal assistance. These offers were all rejected by Ms. Ny who on November 18th applied for an EAW. In so far as this conflicts with Ms. Ny's statement, or she disputes the chronology, these matters await cross-examination of Ms. Ny and Mr. Hurtig.

EVIDENCE

13. The correspondence with SOCA has been copied to the prosecution. Some defence evidence is in MS/1 (served for the bail hearing on 14th December), and MS/2 (served at the review stage on 11th January together with a provisional skeleton). By the "long letter" of 24th January, the CPS was apprised of the eleven propositions for which the Swedish law experts would contend and two experts – Britta Sundberg-Weitman and Sven Erick Ahlem – were served on 27th January with further evidence on the 28th (such as MS/3, containing correspondence and media interviews by the prosecutor proving that she is seeking to question rather than prosecute Mr. Assange).

Britta Sundberg-Weitman is a retired appeal judge from the Svea Court of Appeals, which issued this warrant. Her qualifications as an expert cannot be doubted. Since matters of foreign law and procedure are questions of fact, to be proved by an expert, her evidence on law and procedure is obviously admissible. She confirms that rape and sex offence trials are heard in secret (para 18). She sets out sections of the Code of Judicial Procedure (paras 10 and 11), and produces statutory references to refute the suggestion that there is any legal prohibition which would prevent Swedish prosecutors from interviewing witnesses or suspects abroad (paras 12-13). Her opinion, based on her experience and on the facts set out in the warrant and facts described by Mr. Hurtig, is that the application for an EAW was manifestly disproportionate and her opinion is that the application was an attempt to bring Mr. Assange to Sweden for questioning rather than prosecution. Her identification of prosecutorial misconduct goes to the issue of abuse (issue 3) and of flagrant injustice (issue 8).

14. **Sven-Erik Ahlem**, a highly experienced former prosecutor, is again obviously qualified as an expert on Swedish criminal law and prosecutorial practice. He gives evidence as to Swedish law and procedure, namely that rape and sex offence trials are heard in secret; persons accused of rape can be kept in prison without bail for months before their trial; the duty is on prosecutors to take suspects' statements promptly. He gives his expert opinion that applying for an EAW rather than taking advantage of mutual assistance mechanisms was disproportionate.

15. Marianne Ny. Her statement was not served until 12:30 p.m. today and this skeleton has been adjusted to make some reference to the points at which she disputes our factual and expert evidence but there has been no time to deal with her arguments in any detail. Her

statement is clearly directed to dispute some of the factual assertions made by the above experts, especially Mr. Hurtig, and to provide evidence of her own opinion. The prosecution, if it wishes to rely on her statement, is required to call her in order that she can be cross-examined, particularly as they have requested the attendance of our Swedish witnesses for that purpose and have asked the court to suspend judgment until hearing their cross-examination (see para 47 of their skeleton). This position is manifestly unfair and a breach of the principle of equality of arms. Ms. Ny is put forward as a witness of truth in relation to both fact and opinion and the court cannot receive her evidence unless she is called.

ISSUE 1: MS. NY WAS NOT ELIGIBLE TO ISSUE THE EAW.

16. Section 2(2) of the Act defines a Part 1 warrant as one which is issued "by a judicial authority of a category 1 territory". There is no definition in the Act itself of such "judicial authority". However, Article 6 of the Framework Decision (Determination of the Competent Judicial Authorities) defines the issuing "judicial authority" as "the judicial authority of the issuing member state which is competent to issue an European arrest warrant by virtue of the law of that state". Article 6(3) requires that "*[e]ach Member State shall inform the General Secretariat of the Council of the competent judicial authority under its law*".

17. It is plainly for the prosecution to prove, beyond reasonable doubt (s 206 of the Act, *Mitoi v Govt of Romania* [2006] EWHC 1977 (Admin)), that Ms Ny is, or represents, the competent judicial authority that has been notified to the general secretariat by the state of Sweden. That is because this EAW is issued by "the Swedish prosecution authority" (no

address or telephone number) represented by Marianne Ny, described as "Director of Public Prosecutions". On 23rd December we wrote to SOCA seeking proof of a valid notification under Section 3 and received on 10th January "a copy of the Swedish Code of Statutes and an extract from the Swedish Code of Justice Procedure which supports her position that the Swedish prosecutor is eligible …" It does no such thing.

18. The Code of Statutes merely provides for the issue of a Swedish arrest warrant and, by Section 3, that "the Prosecutor General decides which prosecutors are competent to issue a Swedish arrest warrant". The extract from the Swedish Code of Judicial Procedure shows that "the Prosecutor General is chief prosecutor under the government" and responsible for the prosecution service in the realm: he is "the public prosecutor" at courts of appeal and the Supreme Court. There is no reference to any "director of public prosecutions", an office that does not appear to exist in Sweden, despite Ms Ny describing herself as such in the EAW and in her statement.

19. The formal notification by Sweden to the Council of the European Union on 29th May 2009 in respect of Article 6(3) states in terms that the only "issuing judicial authority" for an EAW is "the public prosecutor". This is, deliberately, singular, and must refer to one particular entity or individual. The address given is "the office of the prosecutor general". It is plain from Chapter 7 of the Swedish Code of Judicial Procedure that the prosecutor general must be "the public prosecutor" who, or whose position, was officially notified to the Council.

20. It follows that the warrant is invalid on its face, should not have been certified by SOCA and should not be accepted by this court. Ms. Ny, described as Director of Public

Prosecutions, does not hold that non-existent office and has not been notified as an issuing authority under Article 6(3). She is not "the public prosecutor". Moreover, "Director of Public Prosecutions" is not even an accurate translation of the Swedish word *overaklagare*. Translations have apparently been arranged by the Swedish police board and are misleading by representing that Ms. Ny is the director of public prosecutions – the Swedish equivalent of Mr Keir Starmer. At any event she is not the notified issuing authority, who is the prosecutor general, an office currently occupied by a Mr. Perkov who has had nothing to do with the Assange case.

21. SOCA has, on Friday 4 February, finally rejected the request to withdraw the warrant, claiming that it has no power to do so. Its decision is open to challenge on judicial review, outside these proceedings.

ISSUE 2: MS NY IS NOT "A JUDICIAL AUTHORITY".

22. To describe a prosecutor as a "judicial authority" is a contradiction in terms. The latter must, as an essential feature, be independent and impartial. Prosecutors are partisan. This is clearly the case in Sweden, where there is no rule (as in the UK) that the prosecutor must act as a minister of justice and is bound by DPP's guidelines. There is nothing in the Act or the Framework Decision which requires trust in prosecutorial fairness, as distinct from trust in the fairness of the decision of category 1 courts and tribunals, which comprise the "vertical institutions" whose integrity and fairness can be trusted.

23. The argument that neither Ms. Ny nor the Swedish prosecuting authority constitutes a "judicial authority" for the purpose of Section 2.2 of the Act collides at first blush with the Divisional Court decision in *Enander* (Tab 8) where it was decided that the Swedish Police Board was a "judicial authority" for the purposes of issuing a conviction warrant (a) because it had been appointed as a "judicial authority" by Sweden under Article 6(3) of the Framework Decision, and (b) because there would be practical difficulties if it were not.

24. We reserve our position on whether *Enander* was decided *per incuriam*, but it can be distinguished on the following grounds:

    24.1. Neither the Swedish prosecution authority nor Ms Ny have been appointed under section 6(3) – see issue 1.

    24.2. *Enander* was a conviction case, where the issuing authority is in effect reporting the outcome of a judicial proceeding and where any inquiry into the nature of the authority itself would be irrelevant. This is not the case with an arrest warrant, which requires a decision to initiate a draconian process which could impact severely on the liberty of the subject, and where an inquiry to check that the decision has been made by an independent and impartial entity is appropriate and by no means impractical.

    24.3. Importantly, the court was not referred to *Skoogstrom v Sweden*, where the European Commission ruled that a Swedish public prosecutor would not be "an officer authorised by law to exercise judicial power" because she was not independent of the executive or of the parties – "she was one of the parties" (paras 74 and 78). As the "issuing judicial authority" must be competent to issue an EAW "by

virtue of the law of that state", it would appear that Convention law applicable to Sweden excludes the government from nominating a prosecutor as a "judicial authority" for the purpose of issuing an EAW (Framework Decision, Article 1), a decision which must be a "judicial decision" (Framework Decision, 1.1).

25. The evidence of Ms. Brita Sundberg-Weitman (tab 9) is that the EAW was in fact issued "for the purposes of enforcing the order for detention in absentia referred to at box (b) of the EAW" and therefore "the Swedish National Police Board was the only authority which could issue the EAW" (para 15). If so then, again, Ms. Ny was not eligible to issue the EAW.

ISSUE 3: ABUSE OF PROCESS: THE EAW HAS BEEN ISSUED FOR A "COLLATERAL PURPOSE", NAMELY FOR QUESTIONING RATHER THAN PROSECUTION.

26. The law and procedure for deciding whether extradition proceedings should be stayed as an abuse of process are well-established.

27. In *Bermingham and Others* [2006] EWHC 200 (Admin), the Administrative Court held that, under the 2003 Act, the magistrates' court has jurisdiction to ensure that "the regime's integrity" was not usurped by abuse of process, although the question whether abuse is demonstrated has to be "asked and answered in light of the specifics of the statutory scheme". It cited, as an example of an abuse of process, "pressing the extradition request for some collateral motive" (para 100, emphasis added).

28. In *Tollman* [2006] EWHC 2256 (Admin), the Administrative Court, at paragraph 82, endorsed the conclusion that the judge conducting extradition proceedings has jurisdiction

to consider an allegation of abuse of process. Rose LJ went on to apply to extradition proceedings the statement made by Bingham LJ, in relation to conventional criminal proceedings in *R v Liverpool Stipendiary Magistrate, ex part Ellison* [1990] RTR 220:

> "If any criminal court at any time has cause to suspect that a prosecutor may be manipulating or using the procedures of the court in order to oppress or unfairly to prejudice a defendant before the court, I have no doubt that it is the duty of the court to inquire into the situation and ensure that its procedure is not being abused. Usually no doubt such inquiry will be prompted by a complaint on the part of the defendant. But the duty of the court in my view exists even in the absence of a complaint."

29. The Court in *Tollman* then went on, at paragraph 84, to set out the proper procedure for dealing with an allegation of abuse of process:

> "Where an allegation of abuse of process is made, the first step must be to insist on the conduct alleged to constitute the abuse being identified with particularity. The judge must then consider whether the conduct, if established, is capable of amounting to an abuse of process. If it is, he must next consider whether there are reasonable grounds for believing that such conduct may have occurred. If there are, then the judge should not accede to the request for extradition unless he has satisfied himself that such abuse has not occurred."

30. More recent cases such as *Lopetas v. Minister of Justice for Lithuania* [2007] EWHC 2407(Admin) and *Central Examining Court of the National Court of Madrid v. City of Westminster Magistrates' Court & Malkit Singh* [2007] EWJC 2059 (Admin) have applied the above authorities.

31. It is submitted that the request for Mr. Assange's extradition is an abuse of process because the EAW has been issued by Ms. Ny for the collateral motive or purpose of securing an interview with him, at a time (2 December – the date of issue) and in circumstances when she has taken no decision as to whether to prosecute him.

32. There are two elements to this collateral motive:

(1) Ms. Ny has not yet decided whether or not to prosecute Mr. Assange;

(2) Ms. Ny has sought Mr. Assange's arrest and extradition in order to question him.

These two elements will be explored in turn.

33. As a preliminary matter, it should be noted that the case of *Aszataslos*, upon which the prosecution relies, deals with the issue of whether an EAW is deficient in respect of section 2 of the Act, and does not apply to the question of whether the proceedings constitute an abuse of process by virtue of a misuse of the EAW. Plainly evidence from outside the EAW itself ("extrinsic factual and expert evidence") is always admissible if relevant to a potential abuse of process.

(1) Ms. Ny has not yet decided whether or not to prosecute Mr. Assange

34. Ms. Ny has herself made plain that she has not yet decided whether or not to prosecute Mr. Assange.

35. This is clear, first, from her communications with the Australian Embassy in Stockholm in December 2010, and thus subsequent to the issuing of the EAW. She wrote to the Australian ambassador in Stockholm:

> "Your request to obtain copies of the investigation against Julian Assange has been denied. This is mostly due to the confidentiality of the bulk of the requested documents which are only available in Swedish. Assange's lawyer Bjorn Hurtig received a copy of the majority of the investigation documents during his detention hearing in the Stockholm District Court on November 18. The same documents were also filed in court.[3] The Stockholm District Court

[3] This is the prosecution dossier or case file which includes the complainants' statements.

> and defendant [sic] were verbally given a detailed explanation of the contents of the small number of documents not included in the written material that was submitted.[4] The defence has asked for copies of all materials. Under Chapter 23, paragraph 18 of the Code of Judicial Procedure, I have decided to reject the defence's request to obtain copies of the documents not surrendered before the detention hearing. I consider it would be detrimental to the ongoing investigation into the matter.
>
> I want to emphasise that before a decision to prosecute the defendant has been made, he will be given the right to examine all documents relating to the case. If the prosecution goes ahead, the suspect will have the right to receive a copy of the investigation".
>
> On 16 December the Australian Ambassador spoke directly to Ms Ny and confirmed that the key points she wished to convey were:
>
> - our request for access to the documents requested has been denied;
> - the defence has already been granted access to the majority of the investigation documents (in Swedish) and has been briefed verbally on those documents not included in the written material already provided;
> - if a decision is made to charge Mr. Assange, he and his lawyers will be granted access to all documents related to the case (no such decision has been made at this stage);
> - third parties ('including the Australian Embassy) do not have the right to access information about the case.[5]

36. It is, therefore, clear from the foregoing, official diplomatic communications between Ms. Ny and the Australian High Commission (Mr. Assange's consular representatives), in December 2010 (after the issuance of the EAW on 2 December 2010), with reference to the underlined passages above, that:

    - "a decision to prosecute the defendant" has not been made yet. In other words, the Swedish Prosecutor has not yet decided whether or not to prosecute Mr. Assange;

[4] These are the text messages shown to Mr. Hurtig.
[5] Emphasis added.

- "a decision to charge Mr. Assange" has not yet been made. "No such decision has been made at this stage";

- no such decision will be made until Assange and his lawyers are given an opportunity to examine all the documents (an opportunity that has not yet been given and had not been given at 2 December).

37. The position is further confirmed by Mr. Hurtig, to whom the prosecutor and her deputy have regularly spoken and emphasised that they have not come to any decision: "I have been asked about the likely outcome of the proceedings if Mr. Assange is extradited to Sweden. In my opinion, it is highly unlikely whether Mr. Assange will be prosecuted at all, if extradited" (MS-4, emphasis added). That there is considerable doubt as to whether Mr. Assange would be prosecuted at all, if extradited, only underlines the point that a decision as to whether he will be prosecuted at all remains to be taken by Ms. Ny. Yet the EAW should only have been issued for the purposes of prosecution.

38. That Ms. Ny has not yet decided whether or not to prosecute Mr. Assange is conclusively demonstrated by her failure to provide him with full disclosure of the case-file against him. Her sole excuse for failing to do so under Swedish law is, both as she admits and witnesses testify, that a decision has not yet been taken to prosecute Mr. Assange. Once that decision has been taken, she is obliged under Swedish law to provide full disclosure.

39. The horns of the Swedish Prosecutor's dilemma are these: either (1) Mr. Assange's extradition is sought for purposes of prosecution, and thus a decision has been taken as to his prosecution and he is then entitled under Swedish law to disclosure of the entire investigation file, including the SMS messages and blog evidence – and yet these crucial items of evidence have not been disclosed to him, representing a serious violation of

Swedish criminal procedure law thus an abuse of process, or (2) Mr. Assange's extradition is not being sought for the purposes of prosecution, in which case it should not have been sought at all. Either way, it is an abuse of process for Ms. Ny to proceed in the way in which she is doing. Indeed, it bears emphasising that Mr. Assange has never been informed by the Swedish Prosecutor, in a language he understands, of the charges against him, if indeed there are any formal charges – until he was arrested on the EAW. If he was indeed a formal suspect, then this would have had to happen.

(2) Ms. Ny has sought Mr. Assange's arrest and extradition in order to question him

40. Ms. Ny has repeatedly and publicly stated that she has sought an EAW in respect of Mr. Assange simply in order to facilitate his questioning and without having yet reached a decision as to whether or not to prosecute him. Her position must be judged as at 2 December, and not at the time of her statement (4 February). That statement's assertions are not accepted since they conflict with her statement in October or November 2010.

41. On 18 November 2010, Ms. Ny explained her reasons for seeking an arrest warrant in these terms:

> "Ny … told AFP: 'I requested his arrest so we could carry out an interrogation with Assange'
>
> […]
>
> Ny reopened the rape investigation on September 1 but did not request his [Assange's] detention, making it possible for him to leave Sweden.

> ‘We have exhausted all the normal procedures for getting an interrogation (and) this investigation has gotten to a point where it is not possible to go further without interrogating Assange himself,’ Ny said.”
>
> (Exhibit to the Witness Statement of Mark Stephens, Exhibit MS-7, 14 December 2010, emphasis added)

42. In fact, Ms. Ny’s claim that all the “normal procedures for getting an interrogation” had been “exhausted” is highly inaccurate. As is clear from the letter from Mr. Assange’s Swedish lawyer, Mr. Hurtig (MS-4), the latter repeatedly sought to make Mr. Assange available to Ms. Ny for questioning, but all these efforts were rebuffed: “I can confirm that on behalf of Mr. Assange I have been trying for many weeks to arrange for him to be questioned by Ms. Ny, including by Mr. Assange returning to Sweden for questioning. All these attempts have been rebuffed by her. It is here useful to set out a brief chronology…” (Letter of Mr. Hurtig, Exhibit MS-4 to the witness statement of Mark Stephens, emphasis added). Ms. Ny’s claims to the contrary can only be assessed after cross-examination.

43. As Mr. Justice Ouseley found, when rejecting the prosecution’s bail appeal with costs, granting bail to Mr. Assange, Mr Assange “has expressed, and I see no reason to doubt it, a willingness to answer questions, either over the telephone or some other suitable form of communication if the prosecutors in Sweden wish to put them to him” (para 22, Judgement).

44. This is confirmed by Mr. Hurtig’s witness statement as well as by letter:

> “I can confirm that the Swedish Prosecutor has made several remarks in the media to the effect that she is just seeking Mr. Assange’s extradition to

Sweden in order to hear his side of the story. …" (see paragraph 7 of Mr. Hurtig's letter (MS-4) (emphasis added)).

45. The Court is referred to the bundle of media clippings at MS/1 (exhibits to the 3rd statement of Mark Stephens) which further confirm Ms. Ny's repeated position that she is merely seeking extradition to conduct an interview with Mr. Assange, with no decision having been taken whether to charge or to prosecute him:

    - "I requested his arrest so we could carry out an interrogation with Assange. That is the reason";
    - "Director of Public Prosecution Marianne Ny said Thursday the reason for the request is that investigators have not been able to bring Assange in for an interrogation".

46. It is clear from the context of these remarks that in stating that she wishes to hear Mr. Assange's "side of the story", Ms. Ny is not merely stating a general fact of Swedish criminal procedural law, but making a specific remark in relation to the facts of this case. This is further demonstrated by Mr. Hurtig's evidence that her deputy assured him that if Mr. Assange came to Sweden and denied guilt, the matter would probably be dropped (Hurtig Statement, para 18). The significance of Ms. Ny's statements to the media is that Ms. Ny's purpose in requesting an arrest warrant, and subsequently an EAW, against Mr. Assange, was not in order to prosecute him, but in order to facilitate his "interrogation", i.e. to facilitate his questioning. This is an improper use of extradition, and of the EAW scheme.

47. In its Opening Note, the prosecution relies on *Paschayan v. Switzerland* [2008] EWHC 388 (Admin) and *McCormack v. Tribunal de Grande Instance, Quimper, France* [2008]

as examples where the Court has found that the person is accused notwithstanding that it remained necessary under the law of the requesting State to interrogate the person before closing the investigations. In *Paschayan*, however (a category 2 case), the facts were altogether different. In that case, the arrest warrant stated that the requested person had been "charged with" the offences (*Paschayan*, para 8). Mr. Assange has not been charged with any offences in Sweden. The formal request for his extradition, moreover, explicitly stated that Paschayan "… shall be arrested and transferred to the … office of the Investigating Magistrate for the purpose of pursuing a criminal procedure for [the offences]" (*Paschayan*, para 9).

48. The Court in Paschayan plainly considered it relevant that the requesting State provided with their request for Paschayan's extradition a detailed, 13-page statement of the facts, in which Paschayan was referred to as "the alleged offender". There is no such detailed statement of facts, beyond the bare bones of the EAW, and no reference to Mr. Assange as an "accused", "offender", "defendant" or any other comparable term (because he does not have this status). He is always referred to in the EAW simply by his name.

49. Finally, in Paschayan, the Court was satisfied, in light of all the material and detailed particulars, that the only reason for the case not having passed to the next stage of Swiss criminal procedure was the "self-inflicted absence" of the appellant:

> "27. Of particular importance is the character of the case against the appellant in Switzerland at the time of the hearing before the District Judge. This calls for a qualitative assessment. It is plain from the description of the alleged offences contained in the extradition request and the detailed amplification in the material of 24 May that the case against the appellant is highly particularized. Also, the assumption of the German and Lichtenstein cases is

> founded on the fact that he is "accountable for other grave offences in Switzerland" (Art 85). The Swiss Public Prosecutor is satisfied as to that. Although the case against the appellant has not finally passed from the Investigating Magistrate to the Public Prosecutor, it is a reasonable inference that the explanation is that the appellant is impeding the process by his refusal to attend for interrogation. The material of 24 May 2007 repeatedly shows that there is evidence of undischarged liabilities accompanied by an inference of mens rea but that the appellant "shall have to be interrogated accordingly". None of the material provided by the Swiss authorities casts doubt upon the correctness of the inference. What is missing is simply the self-inflicted absence of an explanation from the appellant."

50. In this case, Mr. Assange has both already been interviewed in relation to the first 3 offences, and repeatedly made himself available for interview in relation to the 4th offence. He was given permission to leave Sweden by none other than Ms. Ny herself, which she does not appear to dispute. His absence therefore cannot in any sense of the word be described as "self-inflicted". Moreover, there are other witnesses (notably Mr. Rudling) who have not yet been asked by the prosecutor to make written statements who have provided important exculpatory evidence to the prosecuting authorities. Therefore it cannot be said that the sole impediment now to the investigation moving forward to the prosecution stage is Mr. Assange's "self-inflicted absence". Mr. Rudling's evidence has not been checked (it was given over the telephone), and the case file indicates that condoms produced by the complainants were there a week after the alleged offences and are still being analysed by a laboratory which reports that it has no expertise to do the analysis. (Extraordinarily, or typically of the prosecution, the forensic evidence relating to the condom has just been leaked to the media as of 3 February 2011.)

51. The case of *McCormack* is likewise distinguishable. He was, "impeding the process by his refusal to attend for interrogation" and there was a "self-inflicted absence of an explanation from the appellant" (para 13) which is altogether different to the facts here, where Mr. Assange has given an explanation of the lesser offences and wants to give an explanation in respect of the rape charge.

52. This case falls squarely, therefore, within the *Vey-Trenk* line of cases and within the *Re Ismail* category of "mere suspicion" where Mr. Assange is no more than "wanted by the police to help them with their inquiries".[6] Mr. Assange has not reached the stage of being an "accused person" and his case is, therefore, distinguishable from that of Paschayan and McCormack.

53. In these circumstances, it is submitted that the EAW has been issued by Ms. Ny for a collateral motive, namely solely in order to question Mr. Assange, and that the three-part test for abuse set out in *Tollman* is satisfied.

i. The conduct alleged to constitute the abuse must be identified with particularity

54. First, the conduct alleged to constitute the abuse has been identified with particularity.

55. The abusive conduct consists of the fact that Ms. Ny is seeking Mr. Assange's extradition in circumstances where:

55.1. she has not yet decided whether to prosecute him;

55.2. she is seeking extradition for the purposes of questioning him in order to further her investigation;

[6] *See infra.*

55.3. arrest for the purposes of questioning would have been, and remains, unnecessary given that repeated offers have made on Mr. Assange's behalf for him to be questioned by her, which she has rebuffed (an issue to be decided after cross-examination);

55.4. the proper, proportionate and legal means of requesting a person's questioning in the UK in these circumstances is through Mutual Legal Assistance.

ii. Whether the conduct, if established, is capable of amounting to an abuse of process

56. It is submitted that it is clear that this conduct is capable of amounting to an abuse of process. The line of case-law from *re Ismail* through *Vey* and *Trenk* all confirm that it is improper to use extradition merely in order to force a person to attend for questioning, absent a clear decision to prosecute the arrested person, and that the appropriate remedy for the requested person in those circumstances is for him to be discharged. Where extradition should never have been sought in the first place, it is plainly appropriate to stay the proceedings as an abuse of process.

57. This is all the more so where the Prosecutor's stated reason for seeking Mr. Assange's arrest – that all domestic procedures for obtaining his questioning have been exhausted – is patently false, as the requested person has repeatedly, through his lawyers here and in Sweden, offered himself for questioning. It is also false for her to claim, as she has done, that Swedish law prevents her from interviewing Mr. Assange in London, either in person or by video- or telephone-link.

58. There is nothing to show that the Prosecutor ever sought to engage the usual Mutual Legal Assistance (MLA) procedures for questioning Mr. Assange. Mr. Hurtig asserts that

under Swedish law there has not even been a formal request for Mr. Assange's interview, and if the Judicial Authority asserts that there has been, then it is put to strict proof as to that request.

59. Finally, while Ms. Ny has stated that "[t]he Swedish embassy in London is not Swedish territory in the sense that we can hold interrogations there without formal approval of British authorities" (see Third Statement of Mark Stephens, MS-1, p. 13), there is no indication that such approval has been sought, much less refused by the UK authorities, which would be inconceivable. (If permission had been sought, the defence require disclosure.)

60. In short, Ms. Ny went from informal discussions about arranging an interview of Mr. Assange straight to the issuance of an EAW, without taking the reasonable and proportionate, intermediary step of formally summoning him for an interview or formally requesting his interrogation. Her claim (Witness Statement, para 9) that MLA "is not an appropriate course in Assange's case" must be subjected to cross-examination if it is to be credited.

iii. Whether there are reasonable grounds for believing that such conduct may have occurred

61. That such conduct may have occurred, and in fact did occur, is not at time of writing in any doubt.

The proper, appropriate and legal means of requesting a person's questioning in the UK in these circumstances is through Mutual Legal Assistance

62. It has always been open to Sweden to request that Mr. Assange be interviewed in the UK by virtue of the arrangements for MLA between Sweden and the UK, in particular the EU Convention on Mutual Legal Assistance in Criminal Matters (2000, C197/01) and Protocol (2001/C326/01) to which all EU member states are parties. These instruments, and the second additional protocol to the European Convention of 1959, make arrangements, for example, whereby a witness in one country may give evidence in proceedings in another by means of video or telephone link.[7]

63. Indeed, Mr. Assange – a cooperative witness, as he has shown by having already been interviewed at length about the allegations in Sweden and having stayed there awaiting an interview for over five weeks after the investigation began – could easily have been interviewed by the Swedish authorities simply through the informal assistance of the UK authorities:

> "15.23 The United Kingdom does not require that there be in place any bilateral or multilateral agreement, exchange of letters or other prior arrangement in order for it to make or entertain a request for mutual legal assistance. A wide range of assistance can be provided informally, including:
>
> - interviews of cooperative witnesses, unless their evidence needs to be taken on oath
>
> […]"

No credible explanation has been offered by or on behalf of Ms. Ny as to why she did not simply seek Mr. Assange's questioning through MLA. If, as she claims, the investigation is in a late stage, that is all the more reason for MLA to be used, and certainly to have been used in October/November.

[7] *See Extradition and Mutual Legal Assistance Handbook* (second edition) (Oxford University Press: 2010), Jones, Davidson, Sambei and Gibbins, chapter 15 ("Mutual Legal Assistance and other European Council Framework Decisions"), in particular at paragraph 15.37 ("Video and telephone conferencing"). See also the Home Office's published guidelines on Mutual Legal Assistance (8th edition).

64. For the foregoing reasons, therefore, it is submitted that the *Tollman* test for abuse is satisfied in this case, namely the conduct alleged to constitute the abuse has been identified with particularity; the conduct, if established, is capable of amounting to an abuse of process; and there are reasonable grounds for believing that such conduct may have occurred. Accordingly, it is submitted that the learned judge should not accede to the request for extradition.

65. The witnesses provide further evidence that abuse of process has taken place in Sweden in the course of this investigative process. In short:

(1) Contrary to Swedish law, an acting Prosecutor released Mr. Assange's name to the press as the suspect in a rape inquiry, thus ensuring his vilification throughout the world;

(2) After the Swedish authorities announced that Mr Assange had been cleared of rape by the Stockholm prosecutor, a secret process took place from which Mr Assange and his lawyers were excluded and by virtue of which, at the behest of a lawyer acting for the complainants, the rape allegation was revived by a new prosecutor, Marianne Ny. This secret process was a blatant breach of Article 6 of the ECHR;

(3) The repeated refusal of the new prosecutor, Ms. Ny, either to interview Mr Assange on dates offered in Sweden or to interview him by telephone, Skype, interview or at the Swedish embassy in London was disproportionate or unreasonable behaviour under the ECHR;

(4) The prosecutor's office has refused all requests – and still refuses all requests – to make the evidence against Mr. Assange available in English, which is in breach of his right under Article 6 of the ECHR;

(5) The prosecutor's office has given Mr. Assange's Swedish lawyer a 98-page evidence file in the Swedish language. It has, wrongly, made extracts of that file available to the media. This was a breach of Mr. Asssange's fair trial and privacy rights.

(6) Swedish law apparently permits and even pays for the lawyer representing complainants to attack the credibility of suspects even before they are charged. In this case, the Swedish state has paid Mr. Claes Borgstrom to give interviews to international journalists assassinating the character of Mr Assange and prejudicing his fair trial on these charges. Sweden has no law of contempt of court or of perverting the course of justice of the kind that is necessary to prevent media character assassination of a potential defendant prior to charge. This is a breach of Article 6 of the ECHR.

ISSUE 4: SECTION 2 OF THE ACT: THE EAW IS NOT A VALID EAW – IT HAS BEEN ISSUED FOR QUESTIONING, NOT FOR THE PURPOSES OF PROSECUTION AND FAILS TO PROVIDE SUFFICIENT PARTICULARS.

66. This ground has similarities with the previous ground but also important differences. In short:

(1) This ground is raised as a self-standing ground, and does not depend on any finding on abuse of process by Ms. Ny;

(2) Conversely, it may require (assuming *Azstaslos* was decided correctly) that there is either an ambiguity in the EAW regarding the purpose of the EAW, or a showing that this is an exceptional case, before "extrinsic evidence" may be introduced regarding whether this is a Part 1 warrant.

The Law

67. As noted above, is a well-established principle of extradition law, pre-dating the introduction of the Extradition Act 2003, that mere suspicion should not found a request. A person's extradition should not be sought merely or primarily in order for him to be questioned. In the House of Lords' decision in *Re Ismail* [1999] 1 AC 320, 326-327, Lord Steyn stated in this regard:

> "*It is common ground that mere suspicion that an individual has committed offences is insufficient to place him in the category of 'accused' persons. It is also common ground that it is not enough that he is in the traditional phrase 'wanted by the police to help them with their inquiries.' Something more is required...*" (emphasis added)

68. An order for extradition should not, therefore, be made where the requested person is sought for the purpose of questioning, even if questioning is to take place in custody, and may be followed by a charge ie a prosecution. The "traditional phrase" indeed came to be used of persons who had been taken into custody and were said by the prosecution – to avoid libel problems – to be "helping police with their inquiries", however likely it was that they would be charged. The *Re Ismail* principle has been re-affirmed in several cases under the 2003 Act.

The Vey case

In *Vey v. The Office of the Public Prosecutor of the County Court of Montluçon, France* (a Category 1 territory) [2006] EWHC 760 (Admin), the issue was whether the Appellant's extradition was being sought for interrogation or prosecution in France on a murder charge. The Senior District Judge called for further information from the French authorities, since it

was not clear whether they sought V to prosecute her or merely to interview her. In light of their answers, the District Judge was satisfied that V was accused of the murder and he ordered V's extradition to France. V appealed to the Administrative Court pursuant to section 26 of the 2003 Act, and Moses LJ and Holland J allowed the appeal:

1. On the first issue, (which is relevant to issues 6 and 7 discussed below), of whether the information provided in the EAW amounted to sufficient particulars under section 2(4) of the 2003 Act, the Court held that the EAW failed to provide sufficient particulars. The section in the EAW for setting out the circumstances of the offence and the level of participation of the wanted person contained no clear statement or information of the circumstances in which V was alleged to have committed the offence nor of her conduct. Accordingly, the warrant did not comply with section 2(4) of the 2003 Act and was, therefore, invalid. Since the warrant was invalid, there was no jurisdiction to consider extradition under the 2003 Act. Nor was it appropriate to grant an adjournment to allow the Public Prosecutor in France to remedy the defects in the warrant.

2. On the second question, relevant to this issue 4, as to whether V was sought for prosecution or merely for interrogation, the Court affirmed that there was a clear principle that mere suspicion should not found a request for extradition (re Ismail [1999] AC 320). In this case there was uncertainty and ambiguity, not resolved by expert evidence, as to whether V was being sought merely for the purpose of questioning and not for the purpose of pursuing a criminal prosecution.

The Trenk case

69. The principle in re Ismail was again confirmed by the High Court in *Trenk v. District Court in Plzen-Mesto, Czech Republic* [2009] EWHC 1132 (Admin). A Czech judicial authority sought Trenk's extradition for an offence of swindling pursuant to an EAW. The High Court (Mr. Justice Davis) held that, on the basis of the materials before the Court, it was simply not established that the case had crossed the boundary from investigation into prosecution. Rather it appeared from a review of those materials that the reason why T's extradition was being sought was to enable him to be questioned further to see whether or not charges can or should be brought. Accordingly, T's discharge would be ordered.

70. These authorities were further recently considered and affirmed in *Asztaslos* [2010] EWHC 237 (Admin), where the Court (Aikens LJ, Openshaw J) stated, at para 16:

> If an EAW has been issued by a requesting state as an "accusation case" warrant, but its purpose is, in fact, the surrender of the requested person for the purpose of *conducting an investigation to see whether that person should be prosecuted*, it is not a legitimate purpose and so the warrant is not an EAW within the meaning of section 2(2) and (3). Accordingly, Part 1 of the Act will not apply to it: see the Armas case, paragraph 28 per Lord Hope of Craighead and paragraph 54 per Lord Scott of Foscote.

71. The Court summarised at paragraph 38 of Asztaslos, what it believed to be the effect of the authorities:

> "We will attempt to summarise what we believe is the effect of all these authorities. (1) The court will look at the warrant as a whole to see whether it is an "accusation case" warrant or a "conviction case" warrant. It will not confine itself to the wording on the first page of the warrant, which may well be equivocal. (2) In the case of an "accusation case" warrant, issued under Part 1 of the Act, *the court has to be satisfied, looking at the warrant as a whole, that the requested person is an "accused" within section 2(3)(a) of the Act.* (3) Similarly, the court will look at the wording of the warrant as a whole to decide whether the warrant indicates, unequivocally, that the purpose of the warrant is for the purpose of the requested person being prosecuted for the offences identified. (4) The court must construe the words in section 2(3)(a)

and (b) in a "cosmopolitan" sense and not just in terms of the stages of English criminal procedure. (5) If the warrant uses the phrases that are used in the English language version of the EAW annexed to the Framework Decision, there should be no (or very little scope) for argument on the purpose of the warrant. (6) Only if the wording of the warrant is equivocal should the court consider examining extrinsic evidence to decide on the purpose of the warrant. But it should not look at extrinsic material to introduce a possible doubt as to the purpose where it is clear on the face of the warrant itself. (7) Consideration of extrinsic factual or expert evidence to ascertain the purpose of the warrant should be a last resort and it is to be discouraged. The introduction of such evidence is clean contrary to the aspiration of the Framework Decision, which is to introduce clarity and simplicity into the surrender procedure between member states of the European Union. Therefore the introduction of extrinsic factual and expert evidence must be discouraged, except in exceptional cases."

The EAW does not unequivocally state that Mr. Assange is wanted for prosecution

72. Section 2 of the Act provides, in pertinent part, as follows:

2 Part 1 warrant and certificate

(1) This section applies if the designated authority receives a Part 1 warrant in respect of a person.

(2) A Part 1 warrant is an arrest warrant which is issued by a judicial authority of a category 1 territory and which contains—

(a) the statement referred to in subsection (3) and the information referred to in subsection (4).

(3) The statement is one that—

(a) the person in respect of whom the Part 1 warrant is issued is accused in the category 1 territory of the commission of an offence specified in the warrant, and

(b) the Part 1 warrant is issued with a view to his arrest and extradition to the category 1 territory for the purpose of being prosecuted for the offence.

[…]

73. The EAW in this case does not contain the statement referred to in section 2(3) of the Act. The EAW contains only the ambiguous phrase in the preamble, "This warrant has been issued by a competent authority. I request that the person mentioned below be arrested

and surrendered for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order", which leaves it entirely unclear as to whether the EAW is even a conviction EAW or an accusation EAW (assuming that it is one or the other, and not an interrogation EAW).

74. Nowhere in the EAW is Mr. Assange referred to as an "accused" (which distinguishes this EAW from the one in e.g. *Asztaslos*): see its second proposition. As to construing words in a "cosmopolitan" sense, a person "accused of the commission of an offence" and wanted for "arrest and extradition for the pupose of being prosecuted" hardly needs to refer to English prosecutorial stages: these words mean what they say in different languages in all category of countries. The person has been formally charged with a crime by state authorities who have decided to put him on trial, but need to arrest and extradite him first.

The meaning of "lagforing"

75. Moreover, there is a further and fatal ambiguity, arising from the translation of the word "lagföring" as "prosecution" in the preamble to the EAW ("This warrant has been issued by a competent authority. I request that the person mentioned below be arrested and surrendered for the purposes of conducting a criminal prosecution ["för lagföring"] or executing a custodial sentence or detention order"). This translation of "för lagföring" is wrong, and so in fact the EAW does not on its face state that it has been issued for the purposes of prosecution.

76. As explained in the witness statement of the qualified and experienced linguist and translator, Mr. Christophe Brunski:

> "4. I have been asked about the use of the word lagföring. The translation of the word lagföring as criminal prosecution in the EAW of 2 December 2010 is too narrow. Lagföring is a general term which relates to the entire legal process and can be used in either civil or criminal context. It is something of an umbrella term that encompasses other stages and legal procedures that are more strictly defined in and of themselves. There are more precise terms for prosecution in Swedish, namely åtala or åklaga, both meaning to prosecute or indict."

77. So the EAW itself states, in the Swedish original, that it has been issued for the purposes of legal proceedings; not that it has been issued specifically for prosecution. Thus the EAW in this case does not "indicate, unequivocally, that the purpose of the warrant is for the purpose of the requested person being prosecuted for the offences identified". (Proposition 3 as listed in *Asztaslos* above).

78. In *Aszataslos*, the Court considered that the position was made clear in box (e) of the warrant, where the requested person was referred to as an "accused". Mr. Assange is nowhere referred to in the EAW as an accused, or as having been charged with the offence, and the preamble to the EAW does not refer unequivocally to "prosecution" but rather refers generally to the entire legal process.

79. Confining oneself to the four corners of the EAW, therefore, the EAW is equivocal, entitling the Court – according to the proposition 6 in Aszataslos – to examine "extrinsic evidence". This evidence, referred to above in the context of abuse of process – namely the statements made by the Prosecutor, Ms. Ny, who issued the warrant, to the media, the Australian ambassador and to Mr. Hurtig, that no decision has been yet taken as to whether to prosecute Mr. Assange and that the EAW has been issued for the purpose merely of questioning him further and of hearing "his side of the story" - shows that the EAW has in fact been issued for the purposes of securing Mr. Assange's physical

presence in Sweden so that he may be questioned there in person, not so that he may be put on trial.

80. Accordingly, for the foregoing reasons, it is submitted that the EAW is equivocal as to the purposes for which Mr. Assange's extradition is sought and fails to comply with section 2(3) of the Act, and therefore the EAW is not a valid Part 1 warrant and the Court has no jurisdiction over him.

Exceptional case

81. In the alternative, it is submitted that this is, in any event, one of the categories of "exceptional case" contemplated in Azstaslos in which the Court is, in any event – whether the EAW is equivocal or not – entitled to have regard to the extrinsic evidence.

82. This case is entirely unlike those discussed in *Aztaslos*, where expert evidence has been obtained in order to throw doubt on an otherwise clear situation of an accusation EAW. In this case, the Prosecutor herself has made clear, unequivocal public statements to the media and to the Australian High Commission and to Mr. Hurtig to the effect that no decision has been taken yet as to whether to prosecute Mr. Assange and that the EAW has been issued for the purpose merely of questioning him further. This is a highly unusual, if not unprecedented, state of affairs, and clearly an exceptional case enabling this Court to consider that evidence. In what other case has a category 1 country prosecutor had to issue numerous statements, in a foreign language (English) to excuse unlawful disclosures and to feed information to the international media about the progress of its "investigation", a word the prosecution repeatedly uses on her English website.

83. It is not accepted that the Court's summary in *Aszataslos* of the effect of the authorities is entirely accurate. For example, in neither *Vey* nor *Trenk* did the High Court consider that factual and/or expert evidence regarding whether a person is an accused person in the requesting state should only be introduced "in exceptional cases". On the contrary, in both those cases, the Court evidently considered it perfectly proper to consider the evidence bearing on the subject. As *Vey* and *Trenk* are both decisions of the High Court, *Aszataslos* is of no greater precedential value than those authorities, and is outnumbered by them.

84. It will be submitted below that the descriptions of all of the offences in the EAW fail to meet the requirements of section 2(4)(c) of the Act, judged by these standards:

ISSUE 5: THE APPLICATION FOR THE EAW IS DISPROPORTIONATE.

85. An extradition order would be disproportionate given Mr Assange's initial cooperation, and his willingness to be interviewed by telephone, videolink, Skype or email, to put answers to questions on affidavit and to attend for interrogation at Scotland Yard or the Swedish Embassy. It is particularly disproportionate given the prosecutor's refusal to avail herself of mutual legal assistance to achieve her objective of interrogation.

86. The principle of proportionality is engaged in the extradition decision, firstly through section 21 of the 2003 Act – its equivalent, section 87, in relation to category 2 countries - "calls for a judgment as to proportionality of an order of extradition in all the

circumstances, having regard to the defendant's rights under Article 8 and any other relevant article" (*Norris*, para 110).

87. The proportionality test is now strengthened by the application of the Charter of Fundamental Rights which provides in Article 52:

> *"Scope of guaranteed rights: 1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."*

88. Proportionality has in any event been "built in" to the Framework Decision, which specifically provides in preamble 7: "in accordance with the principle of proportionality, as set out in the latter Article [i.e. Article 5 of the treaty, establishing the European Community] this Framework Decision does not go beyond what is necessary in order to achieve that objective." This is, in effect, a guarantee that the Framework Decision will not involve a disproportionate incursion on liberty in order that its objectives of surrender for arrest and trial should be achieved and that it will not be abused by prosecutors prematurely using the EAW when MLA procedures are readily available.

89. The Charter provision makes proportionality a key feature of the Framework Decision and applies to cases like this in which UK courts must apply European law: the UK has not been relieved of this duty by the protocol (see *On the Application of NS* [2010] EWCA Civ 990). The EAW is a draconian instrument which affects individual liberty,

freedom of movement and private life: it should only be resorted to if other, less invasive, measures for achieving the general interest have failed or are unavailable. If they are available, the court must decide whether the issuance of an EAW was necessary, given its impact on Mr. Assange, its occupation of the time of the court and its expense -- which must be borne by the UK (Framework Decision, article 30).

90. The principle of proportionality is well established and a high court in Germany has recently held, specifically in respect of EAW, that "the principle of proportionality of criminal offences and penalties … is a general principle of the Union's law" (*GPPS v C* 25th Feb 2010). The Council of the European Union in 2008 issued the "European Handbook on how to issue the EAW", chapter 3 of which ("The principle of proportionality") states:

> *"When it comes to issuing an EAW, in each case an evaluation should be made which takes into account all the various elements, including the seriousness of the offence, the measures and resources to be deployed in the executing state and, in particular, the fact that it involves depriving an individual of his or her freedom" (Council of Europe document 8216/2/08 18th June 2008).*

91. In this case, the offences carry no minimum prison term, and given Mr. Assange's good character and the fact that they are alleged to have been committed without violence, Mr. Hurtig considers a short or non-custodial sentence is likely in the event of conviction – unlike the "serious and organised crime" i.e. terrorism, organised drug-trafficking or the like, for which the EAW was designed. The Court will be aware of the ease and availability of mutual legal assistance (see above) and of the fact that Mr. Assange

showed he was willing to be interviewed in Sweden until he left by agreement on 27th September. He offered to return for interview on 10th October – this offer was rejected – but through his lawyer he has consistently offered to make himself available for interview in London or from London, and would readily have been available there through mutual legal assistance procedures. Insisting that he should come to Sweden at his own expense was in these circumstances unreasonable. Applying for the EAW without resorting first to voluntary cooperation and secondly mutual legal assistance is plainly disproportionate. Ms. Ny's explanation for not using mutual legal assistance is not accepted.

92. This analysis shows that the EAW was, at best, issued prematurely by a prosecutor who could have achieved the same result by much less draconian means. If the court permits this extradition to go ahead, prosecutors throughout Europe will be encouraged to eschew mutual assistance and issue EAWs. This will damage the development of mutual assistance arrangements and will mean the UK will be put to unnecessary expense (it is responsible, under Article 30 of the Framework Decision, for the cost of such proceedings) and for taking up the time of its courts. The courts can, by using their power to dismiss for proportionality, encourage prosecutors to make use of mutual legal assistance treaties and to follow the prescription of the European Council handbook.

ISSUE 6: OFFENCES 1-3 DO NOT CONSTITUTE EXTRADITION OFFENCES BECAUSE THE CONDUCT ALLEGED WOULD NOT AMOUNT TO AN OFFENCE AGAINST ENGLISH LAW.

93. Pursuant to section 10(2) of the Act, the District Judge must decide at the extradition hearing whether the offences specified in the EAW are extradition offences. If the offences are not extradition offences, the warrant is void and the court has no jurisdiction to order extradition. Allegations 1-3 only reflect extradition offices if the conduct alleged

"would constitute an offence under the law of [England and Wales] if it occurred in that part of the UK and is punishable with more than twelve months' imprisonment" (s 64(3)(b) and (c)).

94. It is settled law that the "conduct test" of double criminality applies, i.e. the comparison is between the actual conduct abroad which is alleged against the accused in the warrant, and an appropriate offence under English law. The underlying rationale of the rule is that "a person's liberty is not to be restrained as a consequence of offences not recognised as criminal by the requested state" (*Norris*, para 88). In the course of reconsidering "Lord Bridges' illustration", the House in *Norris* makes clear that if the evidence relied upon would, if accepted, nonetheless be insufficient to establish the mental element (in that case, dishonesty) then the "unstartling" result would be an end of the case (paras 70-71).

95. The onus of proof is on the prosecution to produce evidence which, if accepted, would prove the requisite elements of the English crime. Where dual criminality has to be proved, it must be proved beyond reasonable doubt. In the Hertel case, Laws LJ said:

> "The respondent's case is that the conduct on which it relies would, if it was perpetrated in England, constitute the common law offence of cheating the Revenue. It is required to establish this proposition to the criminal standard of proof: s.206 of the 2003 Act. So much was not contested before us. It does not of course mean that the conduct itself must be proved in the extradition proceedings, to the criminal or any other standard. What must be proved is that the conduct, if it were established, would constitute the extradition offence relied on, here, cheating the Revenue." [8]

96. In order to have the conduct described sufficiently to enable this comparative exercise, section 2(4) of the Act requires the warrant to provide "particulars of the circumstances in

[8] *Hartel v Government of Canada* [2010] EWHC 2305 (Admin), para. 25 (tab 18). *See also Hoholm v Government of Norway* [2009] EWHC 1513 (Admin) (Tab 19).

which the person is alleged to have committed the offence, including the conduct alleged to constitute the offence, the time and place at which he is alleged to have committed the offence …"

Insufficient Particulars (s2(4)(c) of the Act)

97. The case-law on section 2 is settled and set out in two recent decisions of the Divisional Court: *Ektor* and the second *Von der Pahlen* decision, which approves Ektor.

98. In the words of Lord Justice Scott Baker:

> "[…] the law is now correctly stated by Cranston J (with whom Richards LJ agreed) in Ektor v National Public Prosecutor of Holland [2007] EWHC 3106 (Admin). Cranston J … [said]:
>
> […]
>
> "*A balance must be struck between, in this case, the need on the one hand for an adequate description to inform the person, and on the other the object of simplifying extradition procedures. The person sought by the warrant needs to know what offence he is said to have committed and to have an idea of the nature and extent of the allegations against him in relation to that offence. The amount of detail may turn on the nature of the offence. Where dual criminality is involved, the detail must also be sufficient to enable the transposition exercise to take place.*"

99. There is a duty of good faith on the issuing authority to describe the circumstances fairly, properly and accurately, on the basis of information in its possession: *Luczak v Poland*

(2009) EWHC 2753. *See also Spain v Murua* [2010] EWHC 2609 (Admin) (tab 29) at para 58 ("It may … occasionally be necessary to ask, on appropriately clear facts, whether the description of the conduct alleged to constitute the offence is fair, proper and accurate") and para 64 ("The 2010 warrant does not, therefore, give particulars of conduct capable of constituting a viable extradition offence, so that it does not contain a description of the conduct alleged which is proper, fair and accurate").

100. If this duty is challenged, the relevant evidence demonstrating unfairness or inaccuracy must be admissible and may include the complaint on which the prosecution has relied for the description it has given in the warrant, especially if this material has been provided to the suspect so as to apprise him of the allegations against him. For this reason, the statements of the women complainants and other statements contained in the court dossier are admissible because they were provided by Ms. Ny to Mr. Hurtig and was provided to the Swedish district court when it issued the Swedish warrant. In the event of objection, dual criminality will be considered first in respect only of the "circumstances" set out in the warrant, and secondly from what a "fair and accurate description" of those circumstances would have been had the complaint been properly summarised.

101. The prosecution's opening note alleges that offences 1-3 describe conduct that would amount in each case to the crime of sexual assault against Section 3 of the Sexual Offences Act 2003 (see generally Archbold 22-24). This offence is committed when A intentionally touches B in a sexual manner and:

(i) B does not consent, and

(ii) A does not reasonably (having regard to all the circumstances) believe that B consents.

Section 76 provides a conclusive presumption of non-consent if A intentionally deceived B "as to the nature and purpose of the relevant act".

102. The English offence which the prosecution must show to have been committed if the conduct alleged against A in Sweden is assumed to be true, therefore depends on two crucial elements relating to consent, which must be gathered from the description of the conduct set out in the warrant, namely the fact that B did not consent, and that A knew or should reasonably have realised that B did not consent.

Offence no 1: Unlawful coercion (see warrant)

103. There is no allegation here either that B refused consent or that A did not reasonably believe she had consented. There is not even an allegation that the touching was sexual, although this can be inferred. The conduct described can be committed consensually. It cannot be the basis for proceedings under Section 3 unless there is evidence of lack of consent. This description does not permit the inference that A had a subjective intention to have sex irrespective of B's consent, and most importantly, does not permit an inference that B did in fact refuse consent.

104. The reason why these two elements are not alleged is simply that they cannot be alleged: the court dossier shows that the complainant told the police that she had consented. Her actual complaint is not fairly and accurately reflected in the warrant. The two elements necessary for the UK offence are in fact entirely absent from the plaintiff's

complaint, which shows both consent to sex and reasonable belief in consent to sex, and indeed compliance with B's wish for a condom to be used as soon as that wish was articulated. They agreed to have sex; B did not mention her wish that he should wear a condom; and he sought to penetrate her without one and she squeezed her legs together and tried to reach for one; he asked what she was doing; and she said she wanted him to wear a condom; so he put one on. There is no "violence" of the kind required by s75 deducible from this material.

Offence no 2: Sexual molestation (see warrant)

105. There is no English law that punishes conduct "designed to violate sexual integrity", a phrase far too vague to be the basis of a criminal charge in this country. The allegation that A knew that B had expressed a wish that he should use a condom during their consensual sex but did not do so, without her realising this, does not amount to an offence in consent-based English law. It may be inferred from the EAW description that B had consented to sexual intercourse, albeit having said that she required the use of a condom, and that A had consummated the act without her realising that he was not wearing one. This does not fulfil the "presumed non-consent" provision of Section 76(2)(a) because there is no allegation or available inference that he did "intentionally deceive her" by word or representation. There is no allegation or available inference that he deceived her "as to the nature and purpose of the relevant act" because the relevant act is that of sexual intercourse: B 2006 EWCA Crim 2945.

Offence no 3: Sexual molestation (see warrant)

106. This is a hopeless charge:

(1) It does not specify a date. "On 18th August or any of the days before or after that date" is not a proper description: it could mean at any time in human history.

(2) The description of conduct "designed to violate sexual integrity" is much too vague to be an element of an offence in this country.

(3) There is no allegation of the necessary *actus reus* – namely that B did not consent.

(4) There is no accusation that A did not reasonably believe that B had consented.

107. For these reasons, the dual criminality test is not satisfied. The warrant does not provide the basis from which could be inferred that B did not consent, or that A had the requisite *mens rea*.

ISSUE 7: OFFENCE 4 IS NOT AN EXTRADITION OFFENCE BECAUSE IT IS WRONGLY DESCRIBED AS RAPE AND THE CONDUCT ALLEGED DOES NOT ANSWER TO THAT DESCRIPTION IN EUROPEAN LAW

108. "Minor rape" (the description used by Ms. Ny in para 13 of her statement) is a contradiction in terms. Rape is a heinous, or at least very serious, crime which invariably deserves imprisonment (in the UK, tariff sentences begin at five years). The conduct described as "rape" in the warrant does not allege the use of force or the lack of consent as it is suggested that B was in a "helpless state … due to sleep". This is an unfair and inaccurate account of the complaint. It is of course accepted that because "rape" is a listed offence, the double criminality rule does not apply to it. What does apply, however, is (i) the rule that particulars must be fair, proper and accurate (*Murua* (tab 29)), and (ii) the rule that where boxes are ticked the offence must at least be recognisable as "rape" as that term is used in the language and law of European countries. The fact that these list

offences do not require a dual criminality check does not remove the court's responsibility to satisfy itself that the conduct described in the warrant can reasonably qualify as a list offence.

109. The description itself is short on particulars, but seems to allege that A "improperly exploited" the fact that B was asleep in a "helpless state". This is inadequate and, when the facts of the complaint are examined, seriously misleading. Those facts are set out in the complainant's statement in the police dossier submitted by the Prosecutor to the Swedish court and served on Mr. Hurtig and made available, it seems, to the media. This statement is the only basis for the charge as no other witness mentions it, although Mr Hurtig says the prosecution is in possession of text messages (it has not allowed him to take copies) in which B describes herself as "being half-asleep" (which would indicate that she was half awake).

110. It can be seen from her statement that the particulars in the warrant distort the event. The relevant circumstances are that B was captivated by A from his public image, set out to meet with him when he came to Sweden, and she succeeded. She infiltrated his meeting and his luncheon on the Saturday when they had some degree of intimacy but when he did not contact her on the Sunday, she was urged by her friends to make a play for him ("the ball is in your court"). She arranged to meet him the following night and she took him back to her home and her bed. Although he was at first uninterested, and fell asleep snoring – while she text-messaged her friends – they later woke up and had sex, then fell asleep and woke up and had sex again. Then she went out to get him breakfast and then they had sex again and she fell asleep and told the police she woke up to find him inside her and she said "you better don't have HIV" and he said "of course

not". He "was already inside her and she let him continue". Afterwards she initiated jokes about the prospect of her being pregnant.

111. This full account makes clear that no force was used in the encounter and that B, far from being in a "helpless state", could have objected but did not – "she let him continue" – and the circumstances were that the event happened during a consensual encounter in which they appear to have had sex three times in the course of an early morning, in between dropping off to sleep and waking again. There was no suggestion that A did anything to put B into a helpless state or that she was helpless when he proceeded to consummate. No reasonable person would describe this event as "rape", however unsatisfying or unpleasant it may have been at the time or in retrospect.

Framework Decision and Extradition Act

112. Typically, the ticking of a "framework list offence" box on an EAW would require very little analysis by the court. It would "rubber stamp" that the alleged conduct, if proved, would fit this offence (as defined under the requesting state's law) and, as a result, no showing of dual criminality would need to be made.

113. However, section 64(2)(b) of the Extradition Act requires that the pleaded conduct "constitutes" a Framework List offence, and here, the allegations, even if proved, are so far from comporting with any accepted definition of rape, that it raises the question of whether it was abusive to tick that box on the warrant. A Parliamentary Note issued by the House of Commons in 2009 highlights that an example of "abusing or improperly using the EAW system" is "defining the criminal offence as one of the listed ones (in

cases where it simply is not), with the purpose of avoiding a double criminality check".[9] Doctoring the evidence to allow the box to be ticked, or ticking the box in bad faith just to make it easier to have a warrant executed, would clearly amount to an abuse of the system.

114. Even accepting the conduct alleged at face value, it is not "rape". In *Cando Armas*, Lord Bingham stated that "[u]nderlying the [framework] list is an unstated assumption that offences of this character will feature in the criminal codes of all member states".[10]

115. This assumption is also clear from the debates that preceded adoption of the Extradition Act 2003. In the words of one MP, "[t]he generic headings listed … relate to conduct for which there are criminal sanctions in all the member states of the EU, even if the legal definitions of the offences do not precisely match".[11]

116. There must therefore be some reasonable or nominal connection between the box that is ticked and the conduct that is alleged. A country whose laws criminalised the conduct of writing an article that criticised a foreign-born person could not simply tick the "xenophobia" box in the EAW and thereby succeed in having a person extradited from the UK to face trial for such a "crime". Again, this point was made in the debates recorded in Hansard:

---

[9] The European arrest warrant in practice (T.M.C. Asser Press:2009), Ch. 14 "Abuse of the EAW System", Katja Sugman Stubbs and Primoz Gorkic, p. 246.

[10] [2005] UKHL 67, para. 5. *See also* Nicholls et al, *The Law of Extradition and Mutual Assistance* (2nd Edn, Oxford), at 15.29 ("[t]he assumption is that double criminality need not be established in relation to these offences because it can, in effect, be taken for granted").

[11] HC Deb 18 January 2002 vol 378 cc543-4W (Mr Bob Ainsworth), available at http://hansard.millbanksystems.com/written_answers/2002/jan/18/european-arrest-warrant#S6CV0378P0_20020118_CWA_332

> "[…] Article 2.2 [of the Framework Decision] refers to offences in the list as they are defined by the law of the issuing member state. That means that the actual terms of the law must be covered by legislation in the member state. But that expression surely cannot mean that the state can exclude dual criminality by creating a new criminal offence and labelling it xenophobia even if it has no real connection with xenophobia. We therefore still need to consider whether any particular offence can reasonably be regarded as falling into the category of racism and xenophobia and will therefore be excluded from the dual criminality requirement.[12]

117. A similar conclusion, it is submitted, should follow in relation to the conduct alleged in the EAW. Thus this court should consider whether the conduct alleged can reasonably be regarded as "rape" as that word is generally understood.

European Law

118. Sweden's definition of rape as sex with a person in a "helpless state", without a requirement that force was used or consent withheld, is not typical of European states' laws.[13] And thus, it does not comport with the requirement in *Koslowski* laid down by the European Court of Justice that framework list offences should be interpreted in a uniform autonomous manner. See *Case C-66/08*, 12 July 2008.

119. Sweden's Criminal Code defines three types of "rape" in Chapter 6, Section 1:

Chapter 6 On Sexual Crimes

Section 1

[12] Official Report of the Grand Committee on the Extradition Bill (Seventh Day) Tuesday, 8th July 2003 Column GC53-55 (Lord Goodhart), *available at* http://www.publications.parliament.uk/pa/ld200203/ldhansrd/vo030708/text/30708-36.htm.

[13] See eg Jo Lovett & Liz Kelly, Different systems, similar outcomes? Tracking attrition in reported rape cases across Europe, (London: CWASU, 2009, funded by the European Commission). See chart extract from this report attached as Annex A.

> A person who by assault or otherwise by violence or by threat of a criminal act forces another person to have sexual intercourse or to undertake or endure another sexual act that, having regard to the nature of the violation and the circumstances in general, is comparable to sexual intercourse, shall be sentenced for rape to imprisonment for at least two and at most six years.
>
> This shall also apply if a person engages with another person in sexual intercourse or in a sexual act which under the first paragraph is comparable to sexual intercourse by improperly exploiting that the person, due to unconsciousness, sleep, intoxication or other drug influence, illness, physical injury or mental disturbance, or otherwise in view of the circumstances in general, is in a helpless state.
>
> If, in view of the circumstances associated with the crime, a crime provided for in the first or second paragraph is considered less aggravated, a sentence to imprisonment for at most four years shall be imposed for rape.

120. None of these forms of "rape" are defined on the basis of a lack-of-consent by the victim. The word "consent" and indeed the concept of consent are not included in Swedish sexual offence law at all. Broadly speaking, the defining feature of these crimes is the escalating amount of violence, coercion, or threat that is used, except for one clause, known as "minor rape", which is the one exclusively relied on in the EAW, which defines rape as a sexual act with a person who is in a "helpless state". There appears to be no *mens rea* for this offence: once penetration and helplessness are proved it would be a factual decision for the court as to whether there had been "improper exploitation".

121. This most minor of the three forms of "rape" under Swedish law is referred to by the oxymoron "minor rape". The elements of this crime do not correspond to what is generally defined as "rape" in national laws, the jurisprudence of the European Court of Human Rights or international law, all of which rely on the use or threat of force or a lack of consent by victims to define the criminality of the conduct. Under the Swedish provision defining "minor rape", neither is required to be demonstrated by the prosecution to secure a conviction.

122. Other European countries define rape as requiring either the threat or use of force or lack of consent by the victim (or both, but not neither). The European Court of Human Rights stated in *M.C. v. Bulgaria* that in most European countries influenced by the continental legal tradition, the definition of rape contains references to the use of violence or threats of violence by the perpetrator.[14] It noted however that there is "a universal trend towards regarding lack of consent as the essential element of rape and sexual abuse" (para 163) and that investigations into rape in countries that are part of the Council of Europe, as well as the "conclusions" of such investigations, "must be centred on the issue of non-consent" (para 181). The Court held that although States that are members of the Council of Europe have a "wide margin of appreciation" in enacting rape laws, they are nonetheless limited by the requirements of the European Convention, as interpreted by the Court.

123. Some Council of Europe countries that do recognize the "helpless state" of the victim as an element of rape do so only where this is combined with either proof that force was used or threatened or that the lack of consent can be demonstrated. For instance, in Armenia, the fact that the victim was in a "helpless state" does not on its own constitute rape unless there is a lack of consent. Rape is therefore defined in Article 138 of the Criminal Code as "sexual intercourse between a man and a woman *against the woman's will*, with the use of violence or the threat of it against the woman or another person or *in connection with the helpless state of a woman*". Other European countries require that the defendant himself put the victim into the helpless state in order for criminal sanctions to attach.[15]

[14] App. No. 39272/98, para 159 (2004).
[15] *See M.C. v Bulgaria*, *supra,* paras. 74, 78-79 and 102.

International Law

124. The ECtHR also noted in M.C. v Bulgaria that international criminal law definitions of rape, like those of national or regional systems, rely on either force or lack-of-consent as the basis of criminalisation. This, in the ECtHR's view, "also reflects a universal trend towards regarding lack of consent as the essential element of rape and sexual abuse".[16] Commonwealth countries' laws, for instance, are based on lack-of-consent as a result of their common law inheritance.[17]

125. As summarised in a leading manual on international criminal law:

> "The crime of rape [under international law] has two components. The first is a physical invasion of a sexual nature. The second component is, according to some authorities, the presence of coercive circumstances, or according to other authorities, the absence of consent".[18]

126. At the International Criminal Tribunals for the former Yugoslavia and for Rwanda, early jurisprudence focused on the use of force or coercion against the complainant or a third party. Later jurisprudence "has moved away from cataloguing coercive circumstances and has adopted a simpler element, known in most or all legal systems: the lack of consent by the victim".[19] In the *Kunarac* case at the ICTY, the Trial Chamber reviewed the law of various legal systems and concluded that the correct common-denominator element was lack of consent of the victim, and that the same should be recognized under international law. In its words, "the *actus reus* of the crime of rape in international law is constituted by ... sexual penetration ... where [it] occurs without the

[16] *MC v Bulgaria*, *supra,* para. 163.
[17] *Prosecutor v Kunarac,* Case No. IT-96-23&23-1, Judgement (22 Feb 2001), para. 453.
[18] Robert Cryer et al, *An Introduction to International Criminal Law and Procedure* (2d Ed, 2010) , p. 254.
[19] Cryer, supra, p. 255.

consent of the victim ... The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim".[20]

127. Notwithstanding this position under European and international law, Swedish law does not adopt a consent-based approach, and for "helpless state minor rape", does not require the use of force either. Indeed, it has recently conducted a wide-ranging review of its laws to decide whether to adopt a consent-based approach, and decided firmly against it. The report compares the provisions of Swedish law with those of English law and explicitly rejects the latter's consent-based approach.[21]

128. The fact that conduct relating to a victim in a "helpless state", without more, is not what is commonly understood as being "rape" is also clear from the fact that a non-custodial sentence is available and the maximum sentence is four years. In other countries the crime of rape carries maximum sentences of life imprisonment and lengthy custodial sentences are commonly imposed.[22] By contrast, the Swedish "minor rape" offence carries no minimum custodial sentence at all and a maximum of four years.

129. As has recently been highlighted by the Minister of Justice of Denmark in relation to Danish law, non-consensual sex with a victim in a helpless state should not be included in the provision against rape in the Danish Penal Code. This is because, as the Minister has stated in a formally issued written statement: "It is not natural to call it 'rape', if the perpetrator has not used physical coercion or has not threatened the victim or placed the

[20] *Prosecutor v Kunarac, supra,* para. 460 (approved on appeal, *Prosecutor v. Kunarac,* Case No. IT-96-23/1, AC (12 June 2002), para. 128.

[21] See p. 125 of report available at http://www.sweden.gov.se/sb/d/12634/a/154515 and summarised at http://www.sweden.gov.se/sb/d/13420/a/157339.

[22] For example in England & Wales, The "starting point" for an offence of rape is 5 years and the maximum is life. See http://www.sentencingcouncil.org.uk/docs/web_SexualOffencesAct_2003.pdf.

victim in a state where that person is unable to resist".[23] This was the very point made by the Swedish Bar Association when it wrote to the Swedish Minister of Justice in 2004, just before the sex-offence laws reforms of 2005 introduced "helpless state" strict liability:

> The proposals … mean that crime terminology with a long tradition now come to have another meaning … More dubious is the fact that the crime terminology includes acts that do not reflect the terminology. *Rape* is one example of where acts are included which do not need to contain any aspect of assault or *sexual coercion*, acts that do not involve any force.[24]

This shows that Swedish lawyers themselves recognised that the terminology of "rape" was being misused when applied to the new crime. It left to government, and government prosecutors, in no doubt at all that it would be wrong to use the terminology of "rape" for this crime.

130. In conclusion, the conduct that is alleged constitutes a *sui generis* offence misnamed "minor rape" in Sweden that is not the equivalent of "rape" under European or international law. It was therefore at best a mistake and at worst an abuse to tick that box on the EAW in this case.

131. If the court accepts that the rape box should not have been ticked, it may nevertheless consider that the conduct can be extraditable based on dual-criminality. No such dual criminality can be established, however: there is no allegation or suggestion that the complainant did not consent nor is there a possible inference that the defendant did not

[23] http://www.amnesty.org/en/library/asset/ACT77/001/2010/en/5ba7f635-f2c3-4b50-86ea-e6c3428cf179/act770012010eng.pdf, p. 10, citing written statement by Minister, S 2341 (answered 10 June 2009).

[24] Letter from the Swedish Bar Association to the Ministry of Justice, R-2003/1308, 15 January 2004, p. 3 (emphasis in original).

reasonably believe her to have consented. As a result, the conduct would not constitute an offence under English law, whether it is analysed as rape or sexual assault.

ISSUE 8: THE EXTRADITION OF MR. ASSANGE TO SWEDEN WOULD INVOLVE THE REAL RISK OF A FLAGRANT DENIAL OF HIS RIGHT TO A FAIR TRIAL AND THE BLATANT BREACH OF UK CONSTITUTIONAL PRINCIPLES OF DUE PROCESS AND FREEDOM OF EXPRESSION.

132. The crucial basis for this submission is that rape trials in Sweden are held behind closed doors so the court is being asked to surrender a man for a secret trial – contrary to Article 47 of the Charter, Article 6 of the ECHR and to the UK's fundamental constitutional principles. The facts are short, stark and astonishing: in all rape trials (and at their preliminary hearings) the doors of the court are closed and the press and public excluded so they cannot hear or report the evidence (see Sven Anhelm, witness statement para 11; Britta Sundberg-Weitman, para 18). Ms. Ny concedes that rape trials are "often" heard in private so that "complainants are able to give the best evidence…". This concedes a "real risk" of a secret court and hence of a trial unfair to the defendant.

133. Ordinarily, criminal trials in Sweden are held in public and judgment is rendered publicly at the end of the trial. However, under Swedish law, where a defendant is charged with rape, legislation provides for secrecy in criminal proceedings concerning sexual offences to the extent information is of a personal character. According to expert witnesses Mr. Hurtig (para. 4), Mr. Alhem (para. 11) and Ms. Sunberg-Weitman (para. 18), this translates in practice into the fact that all rape trials are held entirely behind closed doors.

134. This means that Mr. Assange, if extradited, will most likely be held in custody (as Mr. Anhelm points out, there is no system of money bail) until a trial at some time in the future which will be shrouded in secrecy. The complainants and the defendant and various witnesses will give their evidence, and will be cross-examined, no doubt, and questioned by the court. Not a word of this will be seen or heard or read about by anyone other than the lawyers and judges in the room. Yet here is a case where a prosecutor has wrongfully released the accusation against Mr. Assange; where Ms. Ny has fed the media with witness statements damaging to him; and where the complainants' lawyer has been permitted to vilify him. These unpleasant accusations have been spread throughout the world and Mr. Assange has a fundamental right to have them examined and challenged.

135. The public will not be able to judge whether the court is giving him a fair trial – whether it is permitting a fair cross examination, whether it is demeaning his witnesses, whether the lay judges have gone to sleep or whatever. The inconsistencies in the complainants' stories will not be revealed because they will be cross-examined in secret and no one will know Mr. Assange's account or that of his exculpatory witnesses. The complainants will be able to lie with impunity since friends and acquaintances who know the truth will not know that untruths are being told and will not come forward therefore to contest their evidence. Any sense of fair play – that justice must be seen to be done – revolts at this Swedish practice. It is not merely a difference between our systems, it is a fundamental breach of Europe's commitment to open justice, and it should not be countenanced.

136. Mr. Assange will be exposed to a flagrant denial of justice, for the simple reason that justice unseen is not justice at all. It is an English constitutional principle, traced back to the treason trial of "Freeborn John" Lilburne the Leveller in 1649, who demanded:

> "*the court must uphold the first fundamental liberty of an Englishman, that all courts of justice always ought to be free and open for all sorts of peaceable people to see, to behold and hear and have free access unto; and no man whatsoever ought to be tried in holes or corners or in any places where the gates are shut and barred".*

The high court judges of the time upheld his application and ruled that the court doors must remain open at all times "*that all the world may know with what candour and justice the court does proceed against you".*

137. In time, jurists like Blackstone and Bentham elevated openness into a fundamental pre-condition of justice. They acclaimed it on a number of grounds, particularly to safeguard against judicial error or misbehaviour. In Bentham's words, "publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial." This was endorsed as a binding rationale in the great constitutional case of Scott v Scott (1913) AC 417, and has been consistently endorsed by Lord Diplock (*AG v Leveller Magazine* (1979) AC 440 and *Home Office v Harman*).

138. As Lord Diplock has put it:

> "*If the way that courts behave cannot be hidden from the public ear and eye, this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice. The application of this principle of open justice has two aspects: as respects*

proceedings in the court itself, it requires that they should be held in open court to which the press and public are admitted and that, in criminal cases at any rate, all evidence communicated to the court is communicated publicly."[25]

139. Moreover, publicity deters perjury, in that witnesses are likely to come forward to confound lies when they learn that they are being told. Wigmore's argument that open justice tends to improve the quality of testimony has been endorsed by Lord Woolfe. *R v Legal Aid Board, ex p Kaim Todner* [1999] QB 966, and see the 5-judge Court of Appeal in *In re Trinity Mirror* [2008] EWCA Crim 50, para. 32 which said that it was "impossible to overestimate … the principle of open justice in a free country" not only for media reporting but for helping to secure for the defendant his "birthright" of a fair trial.

140. Thirdly, as Lord Scarman puts it in Harman's case, it enhances public knowledge of the case and thus is essential for the guarantee of freedom of expression. The media is entitled to report such excesses of state power which could lead to loss of liberty.

141. Following the Human Rights Act, the House of Lords has reaffirmed the fundamental importance of open justice. *In Re S* (2005) 1 AC 593 at para 30, Lord Steyn said:

"A criminal trial is a public event. The principle of open justice puts, as has often been said, the judge and all who participate in the trial under intense scrutiny. The glare of contemporaneous publicity ensures that trials are properly conducted. It is a valuable check on the criminal process. Moreover, public interest may be as much involved in the circumstances of a

[25] *Attorney General v Leveller Magazine Limited* [1979] AC 440 at 450A to C.

remarkable acquittal as in a surprising conviction. Informed public debate is necessary about all such matters. Full contemporaneous reporting of criminal trials in progress promotes public confidence in the administration of justice. It promotes the value of the rule of law."

142. The Supreme Court in one of its first cases reasserted the absolute importance of open justice. Whilst statute may derogate by permitting the court to withhold the name of victims of rape or permit national security witnesses to give evidence from behind screens, these are highly exceptional and as Lord Diplock points out, there must be no derogation from open justice unless it is absolutely essential (see *The Leveller*).

143. In *Fejde v. Sweden*,[26] the ECtHR recalled that "the guarantee of a fair and public hearing in Article 6 para. 1 (art. 6-1) of the Convention was one of the fundamental principles of any democratic society and that by rendering the administration of justice visible[,] publicity contributed to the maintenance of confidence in the administration of justice…". In addition, the Court held that "the public nature of the hearings, where issues of guilt and innocence were determined, ensured that the public was duly informed and that the legal process was publicly observable".[27] In that case the Court held that a trial must be oral and public at first instance, and this was also the case where an appeal was on the merits and raised serious questions as to the facts and the application of the law (although an appeal court may dismiss an unmeritorious appeal on the papers). This principle has been confirmed in other cases against Sweden so it would appear that its practice of secrecy in rape cases is a deliberate defiance of the Convention.[28]

[26] Application No 12631/87 (1991).
[27] *Fejde v, Sweden, supra,* para. 28.
[28] *Salomonsson v. Sweden,* App. No 38978/97 (2002).

144. The ECtHR has consistently upheld open justice. For instance in *Belashev v Russia*,[29] criminal proceedings against a suspected terrorist in Russia were held in camera. The ECtHR held that although there was a risk to the victims and witnesses' safety due to the gravity of the charges, this could not justify the restriction of such a fundamental tenet of judicial proceedings as their openness to the public. Neither the danger which defendants may present to other parties nor national security concerns could trump the need for publicity since it was "of ultimately greater importance to surround justice with all the requisite safeguards of which the most indispensable is publicity".

145. Similarly in a case against Croatia, the Court dismissed the justification that a trial relating to sexual offences needs to be secret in order to protect the defendant's "dignity".[30] In reaching this decision the Court found it relevant that the facts of the case against the applicant had in any event been widely discussed in the national media. It was obvious that the case aroused considerable public interest and, given that the proceedings in question concerned such a prominent public figure and that public allegations had already been made suggesting that the case against him was politically motivated, it was evident that it was in the interest of the applicant as well as that of the general public that the proceedings before the Council be susceptible to public scrutiny.

146. Similar decisions have been reached by the United Nations Human Rights Committee.[31] It may be said that the open justice principle at least on criminal trials is now a "general principle of law" in international law. The requirement of a fair and public hearing (and fairness can only be guaranteed if the hearing is public) is found in all human rights treaties and in the Universal Declaration (Article 10) and open justice is the

[29] App. No. 28617/03 (2009).
[30] *Olujic v Croatia*, App. No. 22330/05 (2009).
[31] *See, eg, Felix Kulov v Kyrgistan*, 1369/2005 (2010).

rule at international courts. The US Supreme Court has ruled that openness is a defining characteristic of the trial process and the Supreme Court of Canada (Justice Bertha Wilson) has been widely quoted.

147. Given the strength of these decisions, which proceed on the basis that justice cannot be done at all unless it is done in public, extradition to Sweden on a rape charge runs a very real risk of a flagrant denial of justice. No UK court, given the binding quality of the rulings referred to above (and there are many more) would find that a secret trial would be other than a flagrant denial – it obviously constitutes a "real" risk of such a denial since the only way that forensic fairness can be guaranteed is by openness. Whilst "flagrant" is a strong word, the "flagrant denial" test is more than satisfied in this case. As Laws LJ pointed out in *Brown*,

> *"if the defendants were brought to trial before a tribunal that was not impartial and independent, that would indeed constitute a flagrant breach of their rights under Article 6. In our judgment, nothing turns on the epithet "flagrant" in these appeals' particular context if the appellant's whole case on fair trial or the wont of it is substantially established: but if it is, a flagrant violation will be made out"*(repeated at para 63).

148. The court in *Brown* pointed out that the test is <u>not</u> that there will be a flagrant denial of justice:

> *"[T]he burden is on the defence to satisfy the court that there is a real risk of a flagrant denial of justice and fair trial …. But real risk does not mean proof on the balance of probabilities. It means a risk that is substantial and not merely fanciful*

and which can be established by something less than truth of a 51% probability" (para 34).

149. The "real risk" test is of course objective (*Brown*, para 120) and factual evidence that rape trials are heard in secret in Sweden is ample to satisfy that test: no more need be proved by the defence because justice will not be seen to be done and the trial cannot be other than unfair for that reason. Mr. Assange will not be accorded the opportunity to publicly confront his accusers and to demonstrate the lies and misunderstandings he says have led to these proceedings. He will not have the opportunity to clear his name: even if acquitted, the full reasons will not be appreciated and he will live thereafter with all the doubt that a "secret trial acquittal" induces. And if found guilty on uncompelling but secret evidence, he will have no way of persuading the public of the injustice he had suffered. To send him back to a secret trial in breach of the Charter, the Convention and the constitution would be unconscionable.

150. There can be no basis here for accepting the argument which is flagged up by the opening note, i.e. that it will be very difficult to show a "real risk" of Article 6 denial in a country which is a member of the EU and a signatory to the ECHR (Opening Note, 4.8). In this case, there is no difficulty at all. Sweden is in fundamental breach of Article 6 – a deliberate breach, in light of the European cases, including cases against Sweden which stress the importance of open justice. The argument from European comity is uncompelling: as Keane LJ in *Lisowski* (2006) EWHC 3227, "states do not always comply with their Convention obligations". Sedley LH, too, has stressed that the fact that the issuing state is a signatory to the ECHR is not a sufficient protection for the defendant's rights (*Ramda*). Mr. Assange does not argue that Sweden is a country with a

poor human rights record: nor is he required to do so. It is simply that his extradition, given his status as defendant to rape charge, would risk a flagrant breach of his human rights.

151. The cases cited by the prosecution take the matter no further than *Brown* which is directly in point. In *MT v Nigeria*, Lord Phillips noted that "a trial that is fair in part may be no more acceptable than a curate's egg" and that the deficiency should be such as "fundamentally to destroy the fairness of the prospective trial" (para 136). Secrecy does exactly that. At paragraph 139, Lord Phillips pointed out that in extradition cases "it is the prospective trial that is relied upon to justify the deportation. If there is a real risk that the trial will be flagrantly unfair, that is likely to be enough of itself to prevent extradition regardless of the consequences of the unfair trial." Lord Brown agreed that "*a different approach would be appropriate in an extradition case since the very object of extradition is to stand trial and no one should be sent abroad specifically to undergo an unfair trial process*" (para 259). That is precisely what the EAW seeks to do to Mr Assange.

152. *EM Lebanon* is significant in that Lord Hope identified the Article 6 right to a fair trial as a fundamental or unqualified right, to be distinguished from other, qualified Convention rights like Article 8. Article 6 is one of "*those guarantees which, as they are of fundamental importance, must always be rendered effective in practice*" (para 13).

153. There can therefore be no argument that Mr. Assange should challenge his secret trial in Sweden through an eventual application to the ECtHR. This would be heard several years hence: it would not stop the trial or render his right effective in practice. He has a fundamental right to a fair trial "which he is entitled to invoke and have protected on the

first occasion in which it becomes relevant for argument, and that is not a matter to be postponed so it can be ventilated at some date in the future in another country" (*see Minister of Justice v Stapleton* [2006] IEHC 43).

Other Factors

154. The secrecy over rape trials is of itself ample to meet the "real risk" test. There are other matters that additionally threaten the fairness of the trial and rather than make them separate headings on this issue (and they are also relevant to abuse), we accept that "the proper approach was to take all the various factors together and to ask whether, when looked at in the round, there was a real risk of a flagrant denial of a fair trial" (MT Algeria per Lord Hope, para 246). Other factors include:

155. **Trial by media**. Prosecutorial misconduct led to Mr Assange's identification as a rape suspect on 20th August and enabled media vilification of him followed a few days later by the appointment of Claes Borgstrom and his media campaign accusing Mr. Assange of guilt. Ms Ny then gave parts of her case file to the media and further unauthorised sections of it were obtained by the press in December and over the last few days. This has seriously damaged Mr. Assange in Sweden and created an expectation of guilt.

156. **Politically appointed lay judges**. Prejudicial publicity is likely to affect the "lay judges" in rape trials – 3 of them, sitting with a professional judge whom they can outvote. Two such lay judges sit on appeal courts with three professional judges. They have no legal training and will undoubtedly be affected by what they have read about this

case in the press. Moreover, they are appointed by the political parties and are usually members of the appointing parties, again in a case where one complainant and her lawyer are high profile members of the Social Democrat party.

157. Lay justices are elected by the communal assemblies. In practice they are nominated by the political parties, which means that normally the persons nominated are local politicians. This inevitably means that one or more jurors will be nominated from within the membership of the Social Democrat Party, the biggest party in Sweden and until recently the governing one. In this case one of the two complainants is a public and active member of the party. Any trial would likely focus on what to believe: her account, or the defendant's.

158. The ECtHR considered an analogous scenario in *Holm v Sweden*.[32] In that case the Court held that Article 6 had been violated when jurors were members of the Social Democratic Workers Party (SAP). The case concerned a libel action against a defendant author associated with the party and a publisher owned by the party. The plaintiff's request that the court reject all the jurors who were members of the SAP was refused. The Court considered that the independence and impartiality of the SAP jurors were open to doubt because they had political links to the defendants. The applicant's fears in this respect were objectively justified, and there had been a violation of Article 6-1.

159. **Unlikelihood of bail**. The evidence is that on his return to Sweden, Mr. Assange would be unlikely to be given bail on the rape charge and that the trial may not be held for some time. As Mr. Anhelm says, Sweden has no money-surety system of the kind

[32] App. No. 14191/88 (1993).

which permits him to be placed on bail in the UK. It would be a matter firstly for the prosecutor to determine his bail conditions and Ms. Ny, when applying for the warrant in absentia, asked for him to be held incommunicado. She does dispute this scenario, but once again she must be subject to cross-examination.

160. There is a presumption in Sweden that suspects in rape cases shall be denied bail. This is set out in section 24.1(2) of the Code of Judicial Procedure, which provides that "[i]f a penalty less severe than imprisonment for two years is not prescribed for the offence, the suspect shall be detained unless it is clear that detention is unwarranted". In such a case, the prosecutor does not have to show any risk of flight, interference with witnesses or evidence or risk of commission of further offences. It suffices that the person is charged with rape. Mr. Assange submits that this provision breaches Article 5 of the European Convention of Human Rights by inverting the presumption of liberty and replacing it with a presumption of detention prior to any conviction.[33]

161. The ECtHR has held that there is an explicit right to release pending trial under Art.5(3) and that this can only be overcome only if, in addition to a finding of reasonable suspicion, sufficient reasons for ongoing deprivation of liberty can be established. The reasons for prolongation of detention will only be admissible if they are actually applicable to the circumstances of the person concerned: it is not acceptable to, as a rule, exclude persons who are accused of certain specified offences from being considered for release pending their trial.[34]

[33] *See, eg, Ilijkov v Bulgaria*, App. No. 33977/96 (2001).
[34] *Caballero v UK,* App. No. 32819/96 (2000).

162. Therefore the Swedish system of "automatic" detention fails to pass muster under human rights standards.

163. Swedish prosecutors have broad discretion to hold suspects charged with rape under very restrictive conditions, including in some cases absolute incommunicado detention. Moreover, there is no time-limit to pre-trial detention under these circumstances and as a result suspects are regularly held for many months in pre-trial detention.

164. This has been criticised in a 2009 report by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). In this report the Committee found that "[t]he issue of restrictions imposed on remand prisoners has been central to the dialogue between the CPT and the Swedish authorities ever since the Committee's first visit to Sweden in 1991" and that in its view Sweden "still fails to meet Committee's concerns" in this area.[35] The CPT also points out concerns in relation to conditions of detention for remand prisoners (p. 30-33) and in particular the detention on remand of foreign national prisoners (p. 40).[36] The CPT noted that "[a]t the time of the 2009 visit to Gothenburg Remand Prison, [the city where Ms. Ny is based] 62 of the 136 remand prisoners present (i.e. some 46 %) were subject to restrictions, some being subject to long periods of isolation (ranging from 6 to 18 months)" (para 36). It concluded that "[t]he findings from the 2009 visit indicate that much remains to be done to ensure that the imposition of restrictions on remand prisoners is an exceptional measure rather than the rule. A proper balance should be struck between the needs of a criminal investigation

[35] Para. 6.
[36] Report to the Swedish Government on the visit to Sweden carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 9 to 18 June 2009, CPT/Inf (2009) 34, para 35-36.

and the rights of prisoners; further, restrictions should never be applied for the purpose of bringing pressure to bear on persons remanded in custody".[37]

165. The Committee Against Torture also expressed its concern at information that between 40 to 50 per cent of remand prisoners were unable to challenge and appeal decisions to impose or maintain specific restrictions.[38]

166. The CPT also expressed concerns at the situation of prisoners held in isolation for prolonged periods. This included remand prisoners.[39]

167. Incommunicado detention is not per se prohibited by the ECHR. However, cases of incommunicado detention generally involve additional interferences by the State party which might disclose a violation of several articles including Article 3 and 5,[40] Article 6[41] and Article 8.[42]

168. **Presumption of Innocence.** If Mr. Assange goes on trial in Sweden, he would be facing a maximum of over 4 years in prison for offences that do not require the prosecutor to establish *mens rea* on his part; in other words, these are strict liability offences.

169. The European Court of Human Rights has affirmed in *Salabiaku v France* that the creation of strict liability must always prompt consideration of compatibility with the presumption of innocence in Article 6(2) of the Convention. The Court has said that strict

[37] Para 38.
[38] Committee Against Torture, Fortieth Session, 28 April -16 May 2008, Concluding Observations (*Extracts for follow-up of CAT/C/SWE/CO/5*), para. 16.
[39] CPT Report, *supra,* para. 33.
[40] See, eg, *Ocalan v Turkey (46221/99)* (2005).
[41] See, eg, *Magee v UK (28135/95)* (2000).
[42] See, eg, *Sari and Colak v Turkey (42596/98, 42603/98)* (2006).

liability offences should be confined to "within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence".[43] Guilt or *mens rea* is a fundamental concept of criminal responsibility, which is confirmed in the presumption of innocence (Article 6(2) ECHR, Article 48(1) Charter).

170. Strict liability offences are usually applied conduct on the less serious side of the criminal spectrum and are usually employed where it is necessary to ensure the integrity of a regulatory scheme. In addition, the penalty for a strict liability offence is generally limited to a monetary or minor custodial penalty.

Conclusion

171. It can be appreciated extradition to Sweden has a "real risk" of exposing Mr. Assange to breaches of his rights under Articles 3, 5, 8 or 10, as well as Article 6. These are all matters to be taken cumulatively into account. But it is the breach of the "open justice" principle, without more, that inevitably constitutes a real risk of a flagrant denial of justice.

THERE IS A REAL RISK OF ONWARD RENDITION TO THE U.S.

172. Onward rendition is something this court should take into account where there is a real risk that it may occur.[44] In CAT 88/1997, 16/11/98, the Committee Against Torture considered the case an Iraqi national living in Sweden who has been persecuted in his country of origin and entered Sweden from Jordan. The Committee held that a decision to

[43] *Salabiaku v France*, App. No. 10519/83 (1988), para 28.
[44] [deleted]

return him to Jordan would violate Art 3 due to the possibility that he might be repatriated from there to Iraq.

173. In 2005, in *Agiza v. Sweden* (Communication No. 233/2003), the United Nations Committee against Torture found that Sweden had violated the United Nations Convention against Torture ("CAT"). In its Decision dated 24 May 2005 (CAT/C/34/D/233/2003), the Committee found that Sweden's expulsion of Agiza was in breach of its obligation under Article 3 of CAT not to expel or to return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture:

> "13.4 The Committee considers at the outset that it was known, or should have been known, to the State party's authorities at the time of the complainant's removal that Egypt resorted to consistent and widespread use of torture against detainees, and that the risk of such treatment was particularly high in the case of detainees held for political and security reasons. The State party was also aware that its own security intelligence services regarded the complainant as implicated in terrorist activities and a threat to its national security, and for these reasons its ordinary tribunals referred the case to the Government for a decision at the highest executive level, from which no appeal was possible. The State party was also aware of the interest in the complainant by the intelligence services of two other States: according to the facts submitted by the State party to the Committee, the first foreign State offered through its intelligence service an aircraft to transport the complainant to the second State, Egypt, where to the State party's knowledge, he had been sentenced in absentia and was wanted for alleged involvement in terrorist activities. In the Committee's view, the natural conclusion from these combined elements, that is, that the complainant was at a real risk of torture in Egypt in the event of expulsion, was confirmed when, immediately preceding expulsion, the complainant was subjected on the State party's territory to treatment in breach of, at least, article 16 of the Convention by foreign agents but with the acquiescence of the State party's police. It follows that the State party's expulsion of the complainant was in breach of article 3 of the Convention. The procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk."[45]

[45] See also Memorandum to the Swedish Government, Assessment of the progress made in implementing the 2004 recommendations of the Council of Europe Commissioner for Human Rights, CommDH(2007)10, 16 May 2007 (Commissioner "urges the Swedish authorities to refrain from using diplomatic assurances" prior to a deportation, as they "do not provide an effective safeguard against … ill treatment".

174. Worryingly, too, the Committee against Torture further found that Sweden failed to co-operate fully with the Committee "by neither disclosing to the Committee relevant information, nor presenting its concerns to the Committee for an appropriate procedural decision" (paragraph 13.10), thereby also breaching Article 22 of the CAT.

175. The following year, in *Mohammed Alzery v Sweden* (Communication No. 1416/2005), the United Nations Human Rights Committee ("HRC"), the treaty body established to examine individual and inter-state complaints regarding breaches of the International Covenant on Civil and Political Rights ("ICCPR"), found that Sweden had violated the prohibition on torture contained in Article 7 of the ICCPR.

176. The HRC found that Sweden had committed multiple violations of the prohibition on torture by expelling Mr. Alzery to Egypt, including violations committed by foreign agents (US and Egyptian agents) on Swedish territory, at Bromma airport (para 11.6). Among other things, the HRC considered that Sweden over-relied on mere diplomatic assurances which it received regarding the risk of ill-treatment (paragraph 11.4):

> "11.4 The Committee notes that, in the present case, the State party itself has conceded that there was a risk of ill-treatment that – without more – would have prevented the expulsion of the author consistent with its international human rights obligations (see supra, at para 3.6). The State party in fact relied on the diplomatic assurances alone for its belief that the risk of proscribed ill-treatment was sufficiently reduced to avoid breaching the prohibition on refoulement."

177. These cases, and what they reveal about Sweden's naïveté in relying on diplomatic assurances that expelled persons will not be ill-treated, are significant for this case.

178. It is submitted that there is a real risk that, if extradited to Sweden, the US will seek his extradition and/or illegal rendition to the USA, where there will be a real risk of him being detained at Guantanamo Bay or elsewhere, in conditions which would breach Article 3 of the ECHR. Indeed, if Mr. Assange were rendered to the USA, without assurances that the death penalty would not be carried out, there is a real risk that he could be made subject to the death penalty, which is provided for in the Espionage Act (US). It is well-known that prominent figures have implied, if not stated outright, that Mr. Assange should be executed:

- Mick Huckabee, who was one of the favourites as Republican candidate for the 2010 Presidential election has called for those responsible for the leaking of the US Embassy cables to be executed ("US embassy cables culprit should be executed, says Mike Huckabee: Republican presidential hopeful wants the person responsible for the WikiLeaks cables to face capital punishment for treason", The Guardian on-line, 1 December 2010 (http://www.guardian.co.uk/world/2010/dec/01/us-embassy-cables-executed-mike-huckabee) ;

- "WikiLeaks: guilty parties 'should face death penalty': Leading US political figures have called for the death penalty to be imposed on the person who leaked sensitive documents to whistle-blower website WikiLeaks as anger intensified against those responsible for the international relations crisis", The Telegraph on-line, 10 January 2011, http://www.telegraph.co.uk/news/worldnews/wikileaks/8172916/WikiLeaks-guilty-parties-should-face-death-penalty.html);

- Sarah Palin, the former Republican Vice-Presidential candidate, has said that Mr. Assange "should be hunted down just like al-Qaeda and Taliban leaders" (http://www.telegraph.co.uk/news/worldnews/wikileaks/8171269/Sarah-Palin-hunt-WikiLeaks-founder-like-al-Qaeda-and-Taliban-leaders.html).

179. If the USA were to seek Mr. Assange's rendition from Sweden, e.g. by way of expelling an alien on the completion of any criminal proceedings in the USA, it is submitted that, based on its record as condemned by the United Nations Committee against Torture and the Human Rights Committee, Sweden would bow to US pressure and/or rely naively on diplomatic assurances from the USA that Mr. Assange would not be mistreated, with the consequence that he would be deported/expelled to the USA, where he would suffer serious ill-treatment, in breach of Article 3 of the ECHR, as well as in breach of Articles 6, 8 and 10 of the ECHR.

180. Mr. Assange has asked his own government to request assurances from Sweden that he would under no circumstances be physically removed – whether by deportation, expulsion, extradition or rendition – to the USA. Should such assurances be forthcoming, this point would not be available.

CONCLUSION

181. For the foregoing reasons, Mr. Assange will request the Court to order his discharge.

Geoffrey Robertson QC
John RWD Jones

Doughty Street Chambers

4th February 2011

Annex A

Table 6.1 Legal approach to rape in case tracking countries

Country	Wide/mid-range/ narrow definition	Rape defined by force / threat or consent	Section of legal code/ area of law	Gender-specific or gender-neutral
Austria	Wide, includes sexual coercion	Force/threat	Crimes against sexual freedom and bodily integrity	Gender-neutral
Belgium	Wide	Consent	Crimes against decency	Gender-neutral
England & Wales	Mid-range	Consent	Sexual crime	Gender-specific for perpetrator Gender-neutral for victim
Germany	Wide, includes sexual coercion	Force/threat	Crimes against sexual self-determination	Gender-neutral
Hungary	Narrow	Force/threat	Crimes against sexual morals	Gender-specific
Ireland	2 definitions: 1. Narrow 2. Wide	Consent	Sexual crime	1 = Gender-specific 2 = Gender-neutral
Portugal	Wide	Consent	Crimes against sexual liberty	Gender-neutral
Scotland	Narrow	Consent	Sexual crime	Gender-specific
Sweden	Wide	Force/threat, includes abuse of a helpless state	Sexual crime	Gender-neutral