The United Nations Working Group on Arbitrary Detention decision on Assange: 'ridiculous' or 'justifiable'?

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The UN WGAD Assange decision has been met with general ridicule from British officials, legal academics and the press. This piece seeks to bring some balance to the coverage on this decision, which consistently fails to outline the arguments which persuaded the Working Group.

The central argument of Assange's lawyers' proceed on the basis that his confinement in the Ecuadorian embassy 'cannot … be characterized as volitional' (para 13). He is not free to leave, because he is protecting himself from the violation of other human rights: 'the only way for Mr. Assange to enjoy his right to asylum was to be in detention' (para 11). If Assange were to leave he would be arrested in the UK and extradited pursuant to a European Arrest Warrant (EAW) issued by Sweden. Consequently, he would expose himself to the risk of a 'well founded fear of persecution' were he to be extradited to the US from Sweden (para 12). In the words of Assange's lawyers:

> The source submits that Mr. Assange was deprived of his liberty against his will and his liberty had been severely restricted, against his volition. An individual cannot be compelled to renounce an inalienable right, nor can they be required to expose themselves to the risk of significant harm. Mr. Assange's exit from the Ecuadorian Embassy would require him to renounce his right to asylum and expose himself to the very persecution and risk of physical and mental mistreatment that his grant of asylum was intended to address. His continued presence in the Embassy cannot, therefore, be characterised as 'volitional' (para 13).

Assange's lawyers move on to the failure of the Swedish authorities to pursue their investigation through less restrictive means. Simply put, the Swedish authorities have 'not established a prima facie case' and have refused 'unreasonably and disproportionately' to 'question him through alternative means offered under the process of mutual assistance' (para 13). Furthermore, they argue that Assange has

been deprived of the opportunity to know the case against him, to provide a statement regarding the charges against him, and thus to defend himself against the charges. This combination of factors thus also bears upon the principle of *audi alterum partem* and the presumption of innocence. The cumulative result of all of these conditions, and the failure to guarantee non-refoulement to the US, have resulted in a situation in which, on Assange's argument, he has in effect been arbitrarily detained. The argument on arbitrariness rests on a claim of disproportionality: 'any hypothetical investigative inconveniences regarding the interview of Mr. Assange by video link or in the Embassy pale into insignificance when compared to the grave risk that *refoulement* poses to Mr. Assange's physical and mental integrity' (para 18).

In essence, the UN WGAD had to decide two questions. Firstly, whether there was a 'deprivation of liberty' as opposed to a 'restriction of liberty'. Secondly, assuming the answer to the first question is in the affirmative, whether that deprivation of liberty was 'arbitrary'.

In response to the first question, the UN WGAD clearly accepted the argument that Assange's conditions are not volitional, or self-imposed. The weakness of the UN WGAD decision is that it fails to address this point directly and clearly. Its justification was based instead on 'substantial failure' of the authorities 'to exercise due diligence' in the 'performance of criminal administration' (para 98). Inter alia, it castigated the authorities for failing to weigh up Assange's rights to non-refoulment and asylum which should be been 'given fuller consideration … instead of being subjected to a sweeping judgment as either merely hypothetical or irrelevant' (para 98). The discussion doesn't however either explicitly endorse the argument that Assange's residence in the Embassy 'cannot be characterized as volitional', or directly refute the dissenting argument that Assange's position is one of 'self-confinement'. This is the weakness in the report which all critics have exploited. On this, there are a few points worth making.

The line between a 'restriction of liberty' and 'deprivation of liberty' is finely drawn in human rights jurisprudence 'as a matter of degree or intensity, but not one of nature or substance' *(Guzzardi*). As counterintuitive as it may seem, liberty deprivation doesn't consist only in the easily recognizable conditions of state detention, where

individuals are detained through the direct actions of the State against their will. The conceptual grounds for describing Assange's conditions as a form of deprivation of liberty are arguable. This doesn't only relate to the length of time that Assange has remained in the Ecuadorian embassy. Simply put, liberty must be capable of being realized in actuality. Where the exercise of such liberty would have coercive results, such as further deprivations of liberty or putting other rights at risk, this cannot be described as liberty in practice.

There is precedent for such an approach in previous UN WGAD decisions. These demonstrate that the UN WGAD subjects states to a test of higher scrutiny where the negation of other rights would follow from the exercise of the subject's liberty. To argue that Assange has been 'self-confined', as is the case in the dissent, is to argue that he has chosen his conditions of residence in the Ecuadorian Embassy by his free will without any coercive factors leading to this decision. But such an assertion would be to ignore the conditions which resulted in his decision to seek asylum in the Ecuadorian Embassy in the first place, and in his decision to remain there. He is not free to leave of his own will. Assange fears ultimate extradition from Sweden to the USA on the grounds of his involvement in Wikileaks. This is arguably a 'well founded' fear, given the sentencing and treatment of Chelsea Manning in the USA, and the decision of Edward Snowden to take up asylum in Russia.

On the second question, the UN WGAD was persuaded that the confinement is disproportionate and thus arbitrary. In other words, it agrees that there could have been another way. Before issuing a EAW, the Swedish authorities could have followed the normal practice of interviewing Assange in a British police interview room. After Assange took residence in the Ecuadorian embassy they could have relied on 'mutual assistance' protocols and questioned Assange by video link (which he offered). He could have been provided the chance to respond to the allegations against him, or been provided with an assurance related to his refoulment to the US.

The UK and Sweden currently justify their position on the basis of the EAW procedure. Two UK Supreme Court justices considered this EAW invalid under UK law because they were issued by a prosecutor and not a judge, and one dissenting Swedish Supreme Court judge considered it disproportionate in the circumstances.

Moreover, due to general political concern in the UK and pursuant to parliamentary debate, the EAW conditions have been tightened since the initial Assange decision. Despite the impact these safeguards might have to his confinement, the UK government argues that they do not apply retrospectively to Assange. There is still no charge against Mr. Assange, and he does not have the full case against him. He has, under international, European, and domestic law, the right to be presumed innocent until proven guilty. He has offered to respond to the process in other ways, and has offered to co-operate fully if he had a further guarantee of non-refoulment.

Whether or not you believe Mr. Assange is guilty of a sexual offence, whether or not you think he is a self-publicist deliberately resisting arrest, the fact remains that the authorities could use less restrictive means without compromising the initial investigation into the allegations regarding his sexual conduct in Sweden. Were the current UK safeguards on the EAW to be applied to Mr. Assange retrospectively, in particular the question of 'judicial authority' and 'proportionality', it is arguable that the existing EAW would be invalidated and the conditions resulting in Mr. Assange's continued confinement would shift. Moreover, it is arguable that 10 months on, the Swedish Supreme Court view may well move closer to the dissenting judgment of Justice Svante Johansson, that the conditions of the investigation are now disproportionate. According to the Guardian, '"the split decision suggests that the supreme court's position on proportionality is not set in stone, according to Anne Ramberg, the head of Sweden's Bar Association. "The reasoning of the court indicates that it may take a different view with the passing of further time…". Certainly, the Former Legal Counsel to the United Nations and Legal Adviser to the Swedish Ministry of Foreign Affairs, Hans Corell, has stated that he "does not understand why the prosecutor had not questioned Julian Assange during all the years he has been at the Ecuadorian Embassy".

Reasonable minds may differ on many of these issues, and may be coloured by our particular position on the integrity of Assange himself. But human rights are not meant to favour the popular amongst us; they are meant to favour us all.