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UNDERSTANDING EXTRATERRITORIALITY OF ESPIONAGE ACT: **JULIAN ASSANGE CASE NOTE**

- Sasmit Powale ¹

ABSTRACT

The Espionage Act of 1917 gives power to the U.S. Federal Government to punish anyone who participates in any act such as speaking, transmitting, obtaining, or publishing any material that the U.S. Government deems to be of paramount secrecy and therefore whose unauthorized “leak”, would harm the nation’s interests or help a foreign enemy. Recently, the people charged under the Act are Edward Snowden, a former NSA (National Security Agency) Analyst who blew a whistle on the US Government’s massive global surveillance project, and the 45th President of the United States, Donald J. Trump. However, the act took a dangerous turn in 2019 when the US Government charged Julian Assange, the Australian editor of the internet whistleblowing website Wikileaks. Julian Assange is neither a US citizen nor his operations are based out of US territory. Assange is an independent crowd-sourced publisher of government secrets and documents which help reveal the backchannel dealings of mega-corporations, politicians, and military operations. The leaks published by the site are used by journalists worldwide, and especially by post-colonial nations, to piece together a narrative of power that threatens to take away the fundamental rights of ordinary people. The essay takes a look at the constitutional validity and the implications of such a wide extra-territorial jurisdiction which dares to include in its ambit any person who is found accessing or in possession of any material that the U.S. government says is harmful to its interest.

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INTRODUCTION

On April 11th, 2019 Julian Paul Assange was arrested in London, United Kingdom after Ecuador, the country providing him political asylum in its embassy, revoked its permission after seven long years.² As Julian Assange was produced before the Westminster's magistrate's court to answer a charge of 'jumping bail'³ The United States of America unsealed an indictment a federal grand jury for the Eastern District of Virginia had issued against Assange in 2018.

Following his arrest, on May 23rd, 2019⁴, a new set of 17 new charges were brought against Assange for violating the espionage act of 1917 by his action of engaging in a wide-ranging effort to obtain and disseminate classified information about America's Iraq and Afghanistan wars.

Julian Paul Assange, an Australian citizen, is the founder and public face of "Wikileaks," a website he created with others as an "intelligence agency of the people". It has been instrumental in revealing the super-secret inner workings, corruption, and war crimes of powerful governments. These back-channel dealings that take place behind the bureaucratic curtain are also known as the 'deep state.' On April 5, 2010, Wikileaks released footage of air-to-ground attacks conducted by a team of two U.S. AH-64 Apache helicopters firing on a group of men and killing several of them. The footage also carried the audio of the pilots laughing at the casualties.⁵ It was later discovered that four of the many casualties of this strike were two Reuters journalists and two children, a girl of age four and one boy of age eight.⁶

² Addley, Esther, "The seven-year itch: Assange's awkward stay in the embassy." THE GUARDIAN, 11 April 2019, [HTTPS://WWW.THEGUARDIAN.COM/MEDIA/2019/APR/11/HOW-ECUADOR-LOST-PATIENCE-WITH-HOUSEGUEST-JULIAN-ASSANGE](https://www.theguardian.com/media/2019/apr/11/how-ecuador-lost-patience-with-houseguest-julian-assange) .

³ "Julian Assange: Wikileaks co-founder arrested in London." BBC, 12 April 2019, [HTTPS://WWW.BBC.COM/NEWS/UK-47891737](https://www.bbc.com/news/uk-47891737). Accessed 15 November 2022.

⁴ *WikiLeaks Founder Julian Assange Charged in 18-Count Superseding Indictment*. (2019, May 23). DEPARTMENT OF JUSTICE. Retrieved November 15, 2022, from [HTTPS://WWW.JUSTICE.GOV/OPA/PR/WIKILEAKS-FOUNDER-JULIAN-ASSANGE-CHARGED-18-COUNT-SUPERSEDING-INDICTMENT](https://www.justice.gov/opa/pr/wikileaks-founder-julian-assange-charged-18-count-superseding-indictment)

⁵ [HTTPS://WWW.THEGUARDIAN.COM/WORLD/2010/APR/05/WIKILEAKS-US-ARMY-IRAQ-ATTACK](https://www.theguardian.com/world/2010/apr/05/wikileaks-us-army-iraq-attack).

In April 2011 Wikileaks along with the New York Times, NPR and The Guardian and other independent organizations began publishing the Guantanamo Files. Guantanamo, or as colloquially known as Gitmo, is the U.S. military detention center at Guantanamo Bay, Cuba which was created in the wake of the 9/11 terrorist attacks to give the US unprecedented power in investigating the attack as well as avoiding future acts of terrorism on the American soil. This detention center has generated intense debate about human rights, international conventions, and justice and is dubbed as a legal blackhole for its opaqueness concerning the procedures used to bring, detain and interrogate detainees. The Gitmo files revealed nearly 100 detainees at Gitmo were diagnosed with depressive or psychotic illnesses and they tortured many foreign nationals. The documents also revealed that some of the prison's youngest detainees included 14-year-old boy Naqib Ullah who suffered from fragile mental and physical conditions.

Over the course of the next decade, Wikileaks published various classified information, emails, and diplomatic cables such as the ones exposing surveillance by the Central Investigation Agency, National Security Agency, and private corporations. Diplomatic cables from Saudi Arabia, emails from the government of Turkey and Syria as well as corruption in Turkey. The emails detailing the corruption of the Tunisian government were instrumental in the Arab Spring.⁷

The United States responded by arresting and charging Chelsea Manning, the 22-year-old American Army Intelligence analyst who leaked the Afghan and Iraq war logs, for espionage, and later Julian Assange.

The importance of the publications by Wikileaks can be gauged by going through the

⁶ Alexander, David, et al. "Leaked U.S. video shows deaths of Reuters' Iraqi staffers." REUTERS, 5 April 2010, [HTTPS://WWW.REUTERS.COM/ARTICLE/IDUSTRE6344FW20100406](https://www.reuters.com/article/IDUSTRE6344FW20100406) .

⁷ Walker, Peter, "Amnesty International hails WikiLeaks and Guardian as Arab spring 'catalysts.'" THE GUARDIAN, 12 May 2011, [HTTPS://WWW.THEGUARDIAN.COM/WORLD/2011/MAY/13/AMNESTY-INTERNATIONAL-WIKILEAKS-ARAB-SPRING](https://www.theguardian.com/world/2011/MAY/13/AMNESTY-INTERNATIONAL-WIKILEAKS-ARAB-SPRING) .

recognition it has received for its journalistic work. Wikileaks has been awarded The Economist's New Media Award in 2008 at the index censorship awards, and Amnesty International's UK Media Award in 2009. Julian Assange received the 2010 Sam Adams Award for integrity in Intelligence for releasing secret US Military reports on the Iraq and Afghan wars. Was named reader's choice for TIME's Person of the Year in 2010 and also has been nominated for the Nobel Peace Prize in 2021. Yochai Benkler, the Bekerman professor of entrepreneurial legal studies at Harvard law school praised Wikileaks for serving a particular journalistic function when he testified before the court in the trial of Chelsea Manning. The information published by Wikileaks is used by citizens and journalists worldwide and especially by the people of post-colonial nations to piece together a narrative of power and abuse which threatens to take away the fundamental rights of the ordinary people.

For the reasons aforementioned the arrest of Julian Assange, as a publisher of classified information, has ignited a debate over whether pursuing Assange for publishing classified information could lead to other cases against journalists who receive government secrets, publishers who publish them, and readers who obtain them when they are not citizens of the United States of America. Such a prosecution of a foreign national outside the territory of a nation under the said nation's domestic law has a chilling effect on freedom of speech, right to information, and journalism.

This essay explores the extraterritorial jurisdiction of the USA concerning the Espionage Act, its validity, counter-arguments, and its ramifications in four parts. Part I takes a look at the indictment and law. The board and tedious wording of the act offers immense insight into the minds of the lawmakers. Part II looks at the laws, logic, and philosophy of extraterritorial criminal jurisdiction and its proponents and validity concerning the impugned act. Part III makes a strong argument against such use of extraterritorial jurisdiction generally and specifically relating to the case of Julian Assange a foreign journalist. Finally, in Part IV, the essay captures the broad ramifications of such action by the United States of America on international law, journalists, and the free press

THE LAW

The Espionage Act was brought in June 1917 shortly after the United States entered World War I to prohibit interference with military operations or recruitment, prevent insubordination in the military, and prevent the support of United States enemies during wartime.

The provisions of the act which pertain to the discussion of this essay are section 1 (a) which helps identify the person fit to be prosecuted under this act, “to obtain information respecting the national defense with intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or the advantage of any foreign nation...” It also provides a list of documents that are considered important for national security. Section 1 (b) criminalizes the acts of making copies, obtaining originals, or copies of the aforementioned documents which are in any way connected to national defense. Section 2 and 4 criminalizes the conspiracy of more than one person engaged in any acts of espionage as defined in the aforementioned provisions.

The act was able to successfully prosecute many including Eugene V. Debs, a four-time presidential candidate from the socialist party⁸. However, since the end of World War two and especially after the Vietnam War, the act’s provisions have come under criticism especially after Daniel Ellsberg and Anthony Russo were charged with a felony under the Espionage Act for publishing classified documents which later began to be known as Pentagon Papers⁹. The Pentagon papers (officially titled Report of the Office of the Secretary of Defense Vietnam task for, exposed the secret and enlarged scope of its Vietnam war which included but was not limited to, coastal raids of North Vietnam and

⁸ *'Harding Frees Debs and 23 Others Held for War Violations: Socialist Leader Among Those Pardoned by President on Eve of Christmas'*, NEW YORK TIMES, (1921) December 24 [HTTPS://WWW.NYTIMES.COM/1921/12/24/ARCHIVES/HARDING-FREES-DEBS-AND-23-OTHERS-HELD- FOR-WAR-VIOLATIONS-SOCIALIST.HTML](https://www.nytimes.com/1921/12/24/archives/harding-frees-debs-and-23-others-held-for-war-violations-socialist.html).

⁹ *'The Nixon Tapes: 1971-1972'*, NATIONAL SECURITY ARCHIVE, THE GEORGE WASHINGTON UNIVERSITY, accessed on 15 February 2023, [HTTP://WWW.GWU.EDU/~NSARCHIV/NSAEBB/NSAEBB48/NIXON.HTML](http://www.gwu.edu/~NSARCHIV/NSAEBB/NSAEBB48/NIXON.HTML).

lying to the public and the Congress about the objectives of war. Ellsberg and Russo passed on the report to the media and claimed defense of public interest, the United States swiftly moved into action and asked for an injunction against the press from releasing the papers. While the Supreme Court in *New York Times Co. V. United States* denied granting a prior injunction against the publishing of the papers, they all concurred that if the action was brought under the Espionage Act they would have ruled in favor of the government. Ellsberg and Russo were not acquitted of violating the Espionage Act. However, they were freed due to a mistrial based on irregularities in the government's case.¹⁰

This case invoked a discussion around the law concerning the vagueness and overbreadth of the legislation. The Act criminalizes a range of activities related to espionage and national security, including the disclosure of information that could harm U.S. national security. However, the Act does not clearly define what constitutes "national security" or what kinds of information may be considered harmful. This lack of clarity leads to the Act being applied in an overly broad or arbitrary manner¹¹.

But despite such criticisms, the question comes: what is the standing of an act that dares prosecute a foreign national residing outside the territory of the United States?

EXTRA TERRITORIALITY: LOGIC AND LAWS

The terms 'extraterritoriality' and 'extraterritorial jurisdiction' refer to the competence of a State to make, apply and enforce rules of conduct in respect of persons, property, or events beyond its territory. Such competence may be exercised by way of prescription, adjudication, or enforcement¹².

¹⁰ *"New York Times Co. v. United States,"* Wikipedia contributors, Wikipedia, The Free Encyclopedia, , [HTTPS://EN.WIKIPEDIA.ORG/WIKI/NEW YORK TIMES CO. V. UNITED STATES](https://en.wikipedia.org/wiki/New_York_Times_Co._v._United_States).

¹¹ *"Amend Espionage Act: Public-interest Defenses Must Be Allowed Whistleblowers."* PITTSBURGH POST-GAZETTE (May 23, 2019), [HTTPS://WWW.POST-GAZETTE.COM/OPINION/EDITORIALS/2019/05/23/AMEND-ESPIONAGE-ACT-PUBLIC-INTEREST-DEFENSES-MUST-BE-ALLOWED-WHISTLEBLOWERS/STORIES/201905230044](https://www.post-gazette.com/opinion/editorials/2019/05/23/amend-espionage-act-public-interest-defenses-must-be-allowed-whistleblowers/stories/201905230044).

While prima facie prosecuting a foreign national under domestic laws sounds blatant violation of the territorial integrity of sovereign nations and human rights, extraterritoriality is a well-recognized principle of international law.

Under the Indian Penal Code 1860, sections 3 and 4 deal with its extraterritorial jurisdiction bringing within its ambit crimes committed on foreign soil by citizens of the nations or foreigners. Apart from the Indian Penal Code, the Information and Technology Act, of 2000, the Unlawful Activities (Prevention) Act, of 1967, the Prevention of Money Laundering Act, of 2002, the Foreign Contribution (Regulation) Act, of 2010 also make provisions for the prosecution of foreign entities. Such laws draw their strength from the concept of the protective principle.

The concept of the protective principle has its roots in the principle of jurisdiction, which is a core concept in international law. While jurisdiction refers to a state's legal authority to govern persons, events, and things within a certain geographic area, the protective principle is a concept within a jurisdiction that allows a state to exercise its legal authority over a person or entity that has committed a criminal offense outside of the state's territory but that affects the state's interests or security. The state's legal authority in this case is based on the need to protect its interests or security, rather than on the traditional idea of territoriality.

Laws such as the United Kingdom Bribery Act, 2010, and Canada Corruption of Foreign Public Official Act, 1999, also make use of this principle.

The origin of the protective principle can be traced back to ancient times; modern examples of it are to be found in the early 19th century when in 1837 the United States government seized and destroyed a British ship, the *Caroline*, that was being used by Canadian rebels

¹² Michael Bothe, *Extraterritoriality*, in MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW (Last updated May 2012), [HTTPS://OPIL.OUPLAW.COM/VIEW/10.1093/LAW:EPIL/9780199231690/LAW-9780199231690-E1040](https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1040).

to launch attacks against British forces. The British government protested the action as a violation of its sovereignty, but the United States claimed the right to use the protective principle to defend itself against attacks by Canadian rebels.¹³

The protective principle was also applied in the trial of Adolf Eichmann, a high-ranking Nazi Official who was responsible for organizing the deportation of Jews to concentration camps during World War II. He was captured from Argentina and tried in Israel (a country that did not even exist when the alleged crimes took place)¹⁴.

The concept of protective principle has been successfully used and defended in various cases in the United States such as *United States v. Yunis* (D.D.C. 1991) and *United States v. Alvarez-Machain* (1992) in which the US Supreme Court allowed the extradition of a Mexican doctor who was accused of involvement in the kidnap and murder of a US DEA agent. The doctor was abducted by US officials from Mexico and brought to the US for trial, despite objections from Mexico that the abduction was illegal.

However, the protective principle has not yet been applied to The Espionage Act and Julian Assange's case shall be the first to experiment with it. Therefore, protective principle is a well-established tenet of international law that allows nation-states to prosecute non-citizens committing crimes outside their territorial jurisdiction which threaten the security of the nations in question. However, this principle can be subjected to tests before it is allowed to be made applicable.

¹³ "Caroline affair," WIKIPEDIA, last modified August 10, 2021, [HTTPS://EN.WIKIPEDIA.ORG/WIKI/CAROLINE_AFFAIR](https://en.wikipedia.org/wiki/Caroline_Affair)

¹⁴ Treves, Vanni E., "Jurisdictional Aspects of the Eichmann Case" [HTTPS://CORE.AC.UK/DOWNLOAD/PDF/217208455.PDF](https://core.ac.uk/download/pdf/217208455.pdf)

DEFENCES AGAINST EXTRA-TERRITORIAL JURISDICTION

The extraterritorial component of the Espionage Act will have to pass the following tests to apply to Julian Assange.

Test of Necessity

The exercise of jurisdiction under the protective principle must be necessary to protect the state's national security or interests. This means that the state must be able to demonstrate that there is no other reasonable or effective way to protect its interests. Since the strength of the act are that it is broadly worded and doesn't define the term national interest, the possibility of leaked papers having jeopardized the many sources and operations of the United States may be sufficient to qualify for this test.¹⁵

*Test of Proportionality*¹⁶

The exercise of jurisdiction must be proportional to the harm or threat being addressed. This means that the state must use the minimum amount of jurisdiction necessary to achieve its objective.

Test of Non-intervention

While the Australian Government has politely asked the United States to stop pursuing Assange, the United Kingdom has failed to show a keen interest in protecting the freedoms of the accused.¹⁷

¹⁵ Von Bernstorff, J. (2018), *Necessity and Proportionality in International Law*, In THE CAMBRIDGE HANDBOOK OF THE JUST WAR (PP. 259-273), CAMBRIDGE: CAMBRIDGE UNIVERSITY PRESS, [HTTPS://DOI.ORG/10.1017/9781316340978.018](https://doi.org/10.1017/9781316340978.018) (last accessed on February 16, 2023)

¹⁶ *ibid*

¹⁷ *Australian prime minister urges US government to drop Julian Assange case*, THE GUARDIAN (Nov. 30, 2022), [HTTPS://WWW.THEGUARDIAN.COM/MEDIA/2022/NOV/30/AUSTRALIAN-PRIME-MINISTER-ANTHONY-ALBANESE-US-GOVERNMENT-JULIAN-ASSANGE-WIKILEAKS](https://www.theguardian.com/media/2022/nov/30/australian-prime-minister-anthony-albanese-us-government-julian-assange-wikileaks)

Test of Due process

The exercise of jurisdiction must comply with the principles of due process and fair trial. This means that the accused must have the right to a fair trial, with legal representation and the opportunity to present a defense.

Assange could argue that the extraterritorial application of the Espionage Act violates principles of international law, such as the principle of territoriality or the doctrine of non- intervention, but at this point, the essay can only speculate. Since the ‘Journalism’ or ‘Public interest’ defense is not applicable under this act, it was only a policy of the United States not to prosecute journalists for publishing classified information in the public interest and not a limitation of law.¹⁸ Moreover, the U.S. Government has labeled Wikileaks at best a publisher (not a journalist) and at best a terrorist.

RAMIFICATIONS AND CONCLUSION

As Mark Zaid points out, the indictment of Julian Assange under the Espionage Act is a slippery slope¹⁹. Since the act does not distinguish between a spy, a journalist, and a common man, anyone in any corner of the world can be potentially hauled up for prosecution under this piece of legislation and national boundaries are not a protection. Since this law makes even the act of possessing such information critical to U.S. national defense regardless of the medium a crime, a person going on the internet and downloading a piece of information relating to the United States defense or possessing a newspaper that has published such information liable to be charged for espionage under this act.

Such a wide scope coupled with near infinite jurisdiction is a recipe for disaster of freedom

¹⁸ Zaid Mark S., <https://mobile.twitter.com/markszaid/status/1131682904713699329>

TWITTER,

¹⁹ *ibid*

of the press. Various news media publishers have come out in support of Assange and against his prosecution under the act for they can foresee the dangers if this trial goes through and the precedent it shall set.²⁰