

INTERVENTION OF STATE SOVEREIGNTY THROUGH RELEASING STATE SECRECY BY WIKILEAKS

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ABSTRACT

The increasing number of disclosure of state secrecy in this age create by Wikileaks make the impact for state sovereignty such as stability of state, disturb the relationship between the state, dysfunction of government and political and economic instance. This number happened because of some factors:1) insufficiency of sophisticated technological support provided by related state, advancement and introducing new technology, collision between staff members. corruptions, and international criminal syndicated:2)the inconstancy law regulated the criminal act about secrecy state;3)technological advances while the human resources that are not reliable. But in other hand, people have right to know and it remarkable in Declaration of Human Right article 19 But there is no regulation at national and international level for Wikileaks. In this research, the study will investigate two problems: 1) what the impact for state sovereignty because of disclosure state secrecy; and 2) what is the legal action to protect state secrecy and study will find the problem of this research and create some offered solution and use the ultimate value in of all part the research with use the existence of legal theory, legal practice, norm or regulations, legal fact and indicated the conflict either. So this research will use normative type of research. In fact, in this research, study has analyze the case of Wikileaks and found that wikileaks already disclosure the data that very important for state sovereignty. Most of their documents are from the people who steal from diplomatic cable of state. This act teaches the people to not appreciate with state secrecy which has related with state sovereignty So, from this fact study has some conclusion that for some documents, they already do state secrecy intervention and should be banned for this site and gives punishment as international law or national law and at national level they should raise the protection their state secrecy by create new regulation

Keyword : Intervention, Sovereignty, State Secrecy

CHAPTER 1

INTRODUCTION

A. BACKGROUND

Phenomenally, the disclosure of state secrecy has been increasing to public⁶ from time by time. The impact of that is people do not care with documents classify as state secrecy and try to know all and disturb stables of state in the world to perform their sovereignty⁷ One of the cases is robbing case of Indonesian agent's personal computer in South Korea. Furthermore, in the personal computer there is the strategy document of Indonesian intelligent about the purchase of fighter aircraft Another example is the case which happened in cold war between USA and Soviet Nation, CIA stolen many documents from Soviet Nation consist of nuclear and strategy of war⁹.

Several years since 2007 new cases about state secrecy grow up ¹⁰Wikileaks which the media use internet for published their document and make it everyone can access wherever and whenever they are. Wikileaks for the first time published the video the killing of Iraq civilian and journalists by US army¹¹ and Wikileaks also published confidential documents about state secrecy. The act of Wikileaks deviated of their purpose when they published for the first time in December 2006 that is to expose unethical companies in the world¹² But in fact since 2007, their added new subject and object that is state as subject and policy of the government as the object and the source is from diplomatic cable from Wikileaks volunteers¹³ in one side on Declaration of Human Right article 19 which said that people has right to know about information and also several documents which published by Wikileaks are associated with them as people of the state but in other side this has brought some impacts to disturb the relationship between the countries¹⁴ political and economic

⁶ Budiarto Shambazy and Hendri F Isnaeni, *Indonesia, Wikileaks dan Julian Assange*, 2011, Jakarta page xi In 2007, the book " Surrenderings 10 Symbol US Policy Toward Indonesia" by Stig Aanstad from Oslo, Norwegian come out The primer Source of this book is from diplomatic cable

⁷ Budiarto Shambazy and Henri F Israeli.Ibid. page 280

⁸ K. Rudi www.vivanews.com, *Simpang Siur Isu Pencurian data Rahasia RI* accessed on 16 January 2012 ⁹ Karšasi, Jan Story of Secret State : *My Report to the World* Written as 10 help Nazi occupied Poland, Jan Karski wartime now tragically reads like a fifties espionage thriller

¹⁰ Apriadi, T. Bocoran Dokumen Dokumen Rahasia Intelijen Tingkat Tinggi 2011. Jakarta Page 18

¹¹ Apriadi T., Op.Cit page 20

¹² Apriadi T., Op.Cit page 19

¹³ Aprindi T Op.cit page 25

¹⁴ Agnes magdalena Hendri tyo, Mildha rachma and Putri uyu mumpuni *Ada Apa Dengan Wikileaks*, present in <http://kamicintapikachu.blogspot.com> , accessed in 2 November 2011.

Instance¹⁵, and could be also dysfunction of government¹⁶. For example the document which released in 10 July 2009, the title is Bahrain plans \$1billion for extended security plan¹⁷ this subject will make the public pro and contra and disturb activity of government,

This is not authorization publishing caused by several influencing factors: 1) insufficiency of sophisticated technological support provided by related state, advancement and introducing new technology coalition between staff members, corruptions, international criminal syndicates: 2) The inconsistency law regulated the criminal act about secrecy state: 3) technological advances while the human resources that are not reliable.¹⁸

The caused is break international law¹⁹ based on positivism theory by Austinian in international relationship need international comity and also morality code²⁰ So that, Although in international level there has no international rules regarding to the subject matter but this theory affirmed that necessary approvals from the state is very important and it will contribute to development of international law. Wikileaks case although treaty already regulated about sovereignty of state which purpose to keep the right of state and also keep the secrecy of state²¹ Wikileaks burglarized of the territory and it form of intervention and there is possibility the violation of international law.

On this page the writers said that the action of Wikileaks which opened the secrecy state of United State made different gesture the other countries when they've international relationship with United State

¹⁵ Agnes magdalena. Hendri tyo, Mildha rachma and Putri ayu mumpuni. *Ibid.* page 2

¹⁶ Defense Minister Of The Republic Of Indonesia Number 09 Year 2010 Concerning The State Of Defense Policy Planning 2011. On chapter IV about *principle of policy planning* point g which said to keep save the state information to support the effectiveness and efficient of government

¹⁷wikileaks.org, accessed on 27 January 2012

¹⁸ Onno W Purbo, " *Data Wikileaks Belum Jelas Kebenarannya*" Investor Daily Indonesia, 23

December 2010. He said that the government needs to create the reliable human resources if they want to keep save their secrecy state.

¹⁹ Jawahir Thontowi and Pranoto Iskandar *Hukum International Komtemporer Bandung*, 2006, page 14.

²⁰ Jawahir Thontowi and Pranoto Iskandar *Ibid*, page 15

²¹ Mochtar Kusumaatmadja and Etty R. Agoes, *Pengantr Hukum Internasional Bandung* 2002. Page 120. The Ratification international treaty with the act classified by the treaty material and not by the form or nomenclature of treaty This purpose to give legal certainly and uniformity for the ratification form of international treaty with the law present

²² Eael-Conteh Morgan, " *International Intervention Convention Conflict Economic and the Hegemonic Role of Dominant Actors* And [http: www.deptan.go.id](http://www.deptan.go.id), *Buku Putih*, accessed on 1 December 2011. General several state intervention consisting of a) Territorial Intervention, b) Human Right Intervention, c) State Secrecy Intervention, d) Military

The core problem is found on the incompleteness²³ of regulations, at national level. In general some states has enacted national rules on protection of secrecy state for example Indonesia²⁴ USA²⁵, Australia ²⁶ However, the only one rules regarding to this subject is article 8 of Montevideo Convention "No state²⁷ has the right to intervene in the internal or external affairs of another". This article do not provide international protection of state secrecy. including appropriate meassures taken by states both bilateral and multilaterally to prevent any offences against state secrecy This also means there is no effective collaboration or cooperation among states courts adjudicate

Furthermore, root cause of this problem can be seen at the absence of international institution (special court)²⁸ promoting justice (global justice)²⁹ in the matter of state secrecy protection. Even though, there are several international courts such as ICC ICJ, Ad Hoc, International Court, but they do not have competency to judge and solve in added cases match to state secrecy. In International Criminal Court (ICC), there is uncertain regulation for this cases because based on Article 5 of the Rome Statute said the Court jurisdiction over four groups of crimes.³⁰ which it refers to as the most serious crimes of concern to the international community as a whole": the crime of genocide, crimes, war crimes, and the crime of aggression

Until now there is a doubt about Wikileaks, it should be banned or Wikileaks has right to publish its. Therefore, to answer the problem mentioned above, the writer make some offer solution: 1) Consider

Intervention e) Transnational Criminal,) Economic and Social Culture Intervention For this research the focus only about state secrecy intervention

²³For example in Indonesia when the government built the Bill of Secret State, some people had been rejected it because of their right to know This fact had impact for state secret wish has low protection See Anti Arcana Mempersemynt Precing Lingkup Pethuri Negara Third editin/23 January 2011,page 1

²⁴The new regulation of Intelligent was bom in 2011 in Indonesia This Regulation had a pro and contra since this subject know by public in Indonesia related with human right People has right to know

²⁵ Diane Firsten, Prosecute Assange Under the Espionage Act December 2010

²⁶ T, Apriadi op.cil page 45

²⁷ For wikileaks study investigate that the condition to build sovereign state is consider of citizen, region, government and the ability to have relationship between the state. The creator of wikileaks is a citizen of state, so that's the reason why this convention can use as based

²⁸ Jawahir Thontowi.Op Cit page 233 International court nd also special court is a court that has jurisdiction for many problems in international level. For example. International Court Justice (ICJ) has the authority to decision for cases by agreement from the parties who have a legal dispute. Usually, in one year ICJ only has about four or five cases to give the decision

²⁹ Jawahir, Thontowi. Op.Cit,page 25 Global justice is distribution and separation effort of power, free and fair general election, and independent judiciary, freedom of press, speech and expression, an administration tribunal and the protection of human right

³⁰-----, www.icc-epi.int, accessed on 1 december 2011

restriction for the subject which can be published by Wikileaks³¹. 2) raise the security state to protect the secrecy state³² Sensitivity of state who feels their secrecy state leaked out caused their activity which present in secret document is illegal also. So, this writing try to analyze the illegal acts that protested from the legal power which valid leaked out by the accused illegal media

b. Research Question

From the offered solution, this study will be guided by at least two following research questions:

1. What the impact of disclosure state secrecy against state sovereignty protection?
2. What is an appropriate measure to protect state secrecy from intervention?

A. Definition of State Sovereignty

Generally, sovereignty definition explained in United Nation charter in article 2 (7) which said :

“Nothing containing in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the member to submit such matters to settlement under the present of charter, but this principle shall not prejudice the application of enforcement measure under Chapter VII”

From this article, there is "domestic jurisdiction which explain sovereignty in 5 points³³

1. It contain of Human Right
2. It contain the right of all nation about self determination and on this article considered colonialism is not legal
3. Sovereignty is correlation of government in a state
4. Non-self governing territories
5. The boundaries dispute

This summary is, the domestic jurisdiction is hiv related to the meaning of state sovereignty because state sovereignty also can explained as supreme authority of state to do the activity in interest of state which not contradicted with international law. Kofi Annan highlighted the changing nature of sovereignty when he said that sovereignty implies responsibility not just power" This concept is very different from the classical international approach which emphasized the authority of the state to intervene coercively in activities in its territory without interference from external actors. The

³¹Because not all the documents that disclose of Wikileaks is classified as top secret and confidentially

³² Wikileaks use the internet as the media to leak the state secrecy for this reason state need to adding their capability to protect state secrecy

³³ Jawahir thantowi and Pranoto Iskandar, *Op.Cit.* page to 103

major difference in this concept of sovereignty is the emphasis on sovereignty as responsibility, not authority. Thinking of sovereignty as responsibility, in a way that is being increasingly recognized in state practice, has three folds significance³⁴ First, it implies that the state authorities are responsible for the functions of protecting the safety and lives of citizens and promotion of their welfare. Secondly, it suggests that the national political authorities are responsible to the citizens internally and to the international community through the UN. And thirdly, it means that the agents of state are responsible for their actions; that is to say, they are accountable for their acts of commission and omission. The case for thinking of sovereignty in these terms is strengthened by the ever-increasing impact of international human rights norms, and the increasing impact in international discourse of the concept of human security.

` In this age there is two types sovereignty: internal and external Internal sovereignty means the suspicion that the state has supreme authority in its territorial authority External sovereignty means the ability of states to do international relationship. It means there is a suspicion that states has equal law to do international relationship. So, it means³⁵ :

1. States has same sovereignty
2. States not allow to intervene of another state
- 3 States has exclusive jurisdiction for their territory
4. In assumption states competency
5. States has the duty to give ratified
6. States has absolute authority to wage war has
7. The positive international law is only binding a state if that state as explicit and voluntary allow to be binding

In Wikileaks case, there is a low number of state responsibilities to protect their state secrecy, so make opportunity for them to disclosure the state secrecy. If it is accepted that the concept of state responsibility can be the basis for assessing the success or failure of states, then it is necessary to recognize that the current conceptions of sovereignty need to be re-evaluated Sovereignty These include international order among states, membership and participation in the society of states, co-existence of political systems, legal equality of states, political freedom of states, and pluralism or respect for the diversity of ways of life of different groups of people around the world Sovereignty acknowledges the value of international legal equality, the equal status between independent states³⁶.

³⁴ Hans Kelsen, *General theory of law and state, united State of America* 2005.page 383

³⁵ Kurt Mills, *Human Right in the emerging Global Order: A new Sovereignty?*, London MacMillan Press, 1999 Page 13

³⁶ Donald W Potter. *State responsibility. Sovereignty, and failed states*, this paper presented to the Australian Political Studies Association Conference in University of Adelaide 29 september-4 October 2006)

Commonly, to attain sovereignty a state must demonstrate internal supremacy and external independence. That is a sovereign state must be able to show political supremacy in its own territory over all other political authorities and demonstrate actual independence of outside authority, not the supremacy of one state over others but the independence of one state from its peers.³⁷ Sovereignty, therefore, is the assumption that a government of a state is both supreme and independent.³⁸ Internal sovereignty is a fundamental authority relationship within states between rulers and ruled which is usually defined by a state's constitution, and external authority is a fundamental authority relationship between states which is defined by international law³⁹. The notion concept of sovereignty refers to the three-fold capacity of a state, which is the "absolute supremacy over internal affairs within its territory, absolute right to govern its people, and freedom from any external interference in the above matters". So a state is sovereign if it has the ability to make and implement laws within its territory, and can function without any external power and assistance, and doesn't acknowledge any higher authority above itself in the world of independent states. From the above definition one can draw the conclusion that either a state can be sovereign or not, since sovereignty is defined as the absolute supremacy and right of the government in a given state.

In practice, the term sovereignty has been used in many different ways. Krasner⁴⁰ has identified four different meanings of sovereignty in contemporary usage; interdependence sovereignty, domestic sovereignty, Westphalian sovereignty and international legal sovereignty. These are defined as:

1. Interdependence Sovereignty is the ability of states to control movement across their borders
2. Domestic sovereignty refers to the authority structures within states and the ability of these structures to effectively regulate behavior. The acceptance or recognition of a given authority structure is one aspect of domestic sovereignty the other is the level of control that officials can actually exercise. Well ordered domestic policies have both legitimate and effective authority structures Failed states have neither
3. Westphalian sovereignty refers to the exclusion of external sources of authority both *de jure* and *de facto*

³⁷ Michael Ross Fowler and Julie Marie Bunck, *Law, Power, and the Sovereign State: The Evolution and Application of the Concept of Sovereignty* (University Park: Pennsylvania State University Press, 1995)

³⁸ Jackson, "Sovereignty in World Politics: A Chance on the Conceptual and Historical Landscape " page 2

³⁹ Donald W Pote, *State responsibility. Sovereignty, and failed states* (this paper presented to the Australian Political Studies Association Conference in University of Adelaide 29 september-4 October 2006)

⁴⁰ Stephen D. Krasner, *Sovereignty Organised Hypocrisy* (Electronic Book) (Princeton University Press, 1999 [cited 25 April 2003), available from <http://www.amazon.com> and Krasner, "Rethinking the Sovereign State Model."

4. International legal authority refers to mutual recognition. The basic rule of international legal sovereignty is that recognition is accorded to juridical independent territorial entities. States in the international system are free and equal.

B. Form of State Sovereignty Intervention

As we know, international law has concern view to state sovereignty, we can see in UN Charter in article 2(7) which said no one can intervene including the state to the another state sovereignty and the sovereignty equality of states and the correlative norm of non intervention received its most emphatic affirmation the newly independent states. Part of the controversy over "intervention" derives from the potential width of activities this term can cover, up to and including military intervention. Some would regard any application of pressure to a state as being intervention, and would include in this conditional support programmes by major international financial institutions whose recipients often feel they have no choice but to accept. Some others would regard almost any non-consensual interference in the internal affairs of another state as being intervention and also including the delivery of emergency relief assistance to a section of a country's population in need. In this research, we not talk about the military intervention but we talk about interference of external factor who disturb the sovereignty state in all part including about politic, economic, international relationship, governance and also has related with human right of people to know information. Actually, there is two kind of the intervention depend on national security ⁴¹ :

1. Internal Interference For the example including of rebel, and subversion which come from the national citizen
2. External Interference
It is including of infiltration, subversion, and intervention of colonialism power and imperialism and also invasion in land, air and sea by the enemy from another state

External interference going to crowd issue for international law when there is a disclosure of the state secrecy which has related with national security. Internal Interference is also an dangerous interference which can disturb state sovereignty, for example the case in Indonesia, there was GAM, some belligerent on this province want to this province be independent. They made the situation uncontrolled, there is a murderer at that time for belligerent and Indonesian army even sometimes it happened to civil people, they also make a new flag because they wanted to be a state. At the last

⁴¹ Indra Mahardi Putra, *Ketahanan Negara*, 2006. page2

time, to made the state sovereignty in authority of Indonesia there was a peace agreement between Indonesia and GAM in Finland.

State Sovereignty In the Form of State Secrecy Release

The definition of state secrecy is a kind of information that includes data containing a state secret in the areas of defense, economy, external relations, intelligence service, state security and protection of law and order disclosure or loss of which may inflict harm on the sovereignty, constitutional framework of political and economic interests of Georgia and which is deemed to constitute a state secret according to the rule prescribed by this Law and which is subject to the state protection⁴² Almost of state in the world already settled the regulation about state secret on their legal basis. One of the main obstacles in criminal and civil proceeding involving intelligence and executive officials in the objection to disclosure of information and evidence on the basis of national security privilege, and its known as State Secret Privilege⁴³ in the United State and "public interest community" in England, this evidentiary rule has been invoked successfully in an increasing of cases in US and England, Indeed, the privilege has been identified as one of the most serious obstacles to effective human right remedies.⁴⁴ Not only at national based, a secret state have been settled, but at international level there is also international law and norm regulate issue of state classification of information and the criminalization of leaking such informations⁴⁵. In this age, protect the national security related with protecting of human rights which is the problematic issue for national state. While not a legally binding treaty, "Johannesburg Principles on National security, Freedom of Expression and Access to Information", this principle have accepted norm and are arguably considered customary international law. This principle also regulates about proportionality and narrowly tailored requirements. Johannesburg principle also dictates that "no person may be punished on national security grounds for disclosure information if :

1. The disclosure does not actually harm and is not likely to harm a legitimate national security interest
2. The public interest in knowing the information outweigh the harm from disclosure⁴⁶

⁴² See Chapter I General Provision Article 1 on Law of Georgia On state Secrets 1996

⁴³ The state secrets privilege is a common law privilege that allows the head of an executive department to refuse to produce evidence in a court case on the grounds that the evidence is secret information that would harm national security or foreign relation interests if disclosed

⁴⁴ Jasminka Kalajdzic, Ligating *State Secrets A Comparative Study ef National Security* Canadian, US and English Civil Cases 2011

⁴⁵ Human Rights in China, *State Secret: China's Legal Labyrinth*, New York, 2011. Page 6

⁴⁶ Human Rights In China, *op.cit*,page 6

In other hand there is a rule which regulate people has right to know about information, even in dictate in DUHAM article 19 and in Johannesburg principle either. If information already has been made generally available (lawful or unlawful) the public's right to know overrides any invoked justification for block further publication of the information. So, international law also realize this condition is dangerous for state, and then international law requires an actual finding of objective harm before an individuals or public can be imprisoned for leaking classified information. Actually, there is a classification of state document.⁴⁷

1. **Already classified** any mark as such)
2. **Subject to classification** when state secret grow up
3. **Retroactively classified** based upon harm perceived to have occurred
4. **Intelligence** (concern state secret, but not yet made public or classified)
5. **Internal secret of** a work unit or organization

In China, they has state secret law which purpose to protecting state secret, safeguarding state security and national interest and ensuring the smooth progress of reform, of opening the outside world of socialist construction. And there seventh scope in their state secret law it also same scope almost state):

1. Major policy decision on state affairs
2. Building of national defense and activities of the armed forces
3. Diplomatic activities, activities related to foreign countries, as well as commitments to foreign countries
4. National economic and social development
5. Science and technologies
6. Activities for safeguarding state security of criminal offences and investigation
7. Other matters that are classified as state secrets by the national State Secret Bureau (NAPSS).

This condition also regulated in international level or in another national state, the document especially diplomatic documents has a label for them to lawful for releasing or unlawful. For diplomatic cable there is category for declassified, it means in can disclosure for public, even some people use it to primary source for researcher, journalist and writer to do their interest.⁴⁸ But also the document which label top secret is extremely forbidden to public.

Conclusion

⁴⁷ HRIC, *op.cit.* page 9

⁴⁸ Hendri F Isnaeni, *Indonesia, Wikileaks and Julian Assange*, PT ufuk Publishing Jakarta 2011 page xi

Piecemeal tinkering with a closed one-party controlled system will not be enough to promote genuine progress towards an independent rule of law, good governance and human rights protections. Efforts to encourage police and security officers to alter interrogations methods without allowing information on interrogations methods, results and other data to be made public lack any real incentives for compliance without access to and disclosure of information no real accountability can be guaranteed. The state secrets system continues to seriously deny the right to freedom of expression and information by classifying too much information as secret and maintaining a culture of secrecy that has a chilling effect on the rule of law and independent civil society, and undermines any reform efforts towards these goals.

Wikileaks as their purpose trying to open the immorality of government of a state, there a phenomena people not believe with the government. But their action is not always true, there is sensitive information that should keep in save from disclosure for national security. The publishing or copying the information without permission or steal it is still criminal action which should be punishment. Because some document is for public, it must have authority to know. The government should work together" with citizen for state sovereignty.

Recommendations

From the fact above there is some recommendation for this case :

1. Wikileaks is one of threat for state sovereignty, Wikileaks need special handling by government by the regulation of government and banned the site which disclosure the secret state
2. Make classified for the information and documents, so people know the limit of their right has to know
3. Government should more transparency to people and increase the faith for them from people
4. Repaired and increasing the nation security especially in technology
5. Adding more international relationship to keep good relationship between the state
6. The development of technology should be balance with development of regulations.

poligami, atau mengkumulasi perkara permohonan izin poligami dengan permohonan itsbat nikahnya padahal masing-masing permohonan mempunyai kaitan hukum yang berbeda. Perkara di pengadilan agama dapat di kumulasikan apabila antara permohonan yang satu dengan yang lain ada keterkaitan dari segi hukumnya.