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**THE EFFECT OF WIKILEAKS ON FREEDOM OF EXPRESSION GLOBALLY**

**By**

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**Dissertation Submitted in Partial fulfilment for the Degree of  
LL.M. (International Law)**

**In**

**International Law (Department of Public Law)**



**Faculty of Law**

**UNIVERSITY of JOHANNESBURG**

**Supervisor. Professor Mia Swart**

**2013**

## **DEDICATION**

To all those who stop at nothing to ensure that truth is always established in the fight to promote freedom of expression, transparency and democracy.



## ACKNOWLEDGEMENTS

This work would not have been realized without the support and encouragement from others. To begin with, I would like to express my sincere thanks to the Almighty God and the department of public law, University of Johannesburg for granting me this opportunity.

My heartfelt gratitude goes to my supervisor professor Mia Swart for her professional assistance in ensuring that this mini-dissertation reached a successful end.

I would never have been able to finish this dissertation without the guardian of my friends and family members especially my brother-in-law Ntang Elad and my husband (Dr Ikome) for his constant encouragement.



## ABBREVIATIONS

UN United Nations

US United States

UDHR Universal Declaration of Human Rights

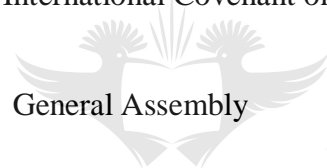
IACHR Inter-American Convention on Human Rights

ACHPR African Charter on Human and People's Rights

ECHR European Convention Human Rights

ICCPR International Covenant on Civil and Political Rights

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# THE EFFECT OF WIKILEAKS ON FREEDOM OF EXPRESSION GLOBALLY

Disclosure is not merely an action; it is a way of life. To my mind it carries both sense and sensibility: you are what you know, and no state has the right to make you less than you are. Many modern states forget that they were founded on the principles of the Enlightenment, that knowledge is a guarantor of liberty, and that no state has the right to dispense justice as if it were merely a favor of power. Justice, in fact, rightly upheld, is a check on power, and we can only look after the people by making sure that politics never controls information absolutely. - Julian Assange<sup>1</sup>

## CHAPTER 1: INTRODUCTION

### Background

Before 2006, there had been some movement to expose conspiracy and injustices in government and corporate life<sup>2</sup> but the emergence of Julian Assange and wikileaks would set a new standard in this kind of investigative probe into what the political leaders and heads of major corporations did behind the scenes. Assange's initial revelations and release of incriminating documents was about to launch his debut as an 'international man of mystery'<sup>3</sup> as people who are globally and politically curious will forever wonder what else he would reveal to the world. The first target of his disclosures was Africa then the United States but his actions would unleash a wave of leaks with corporate and government conspiracy at a volume that the world as we know it was previously unaccustomed to. Although some doubted the authenticity of his disclosures, and others criticized his methods, none doubted his right to freedom of expression as enshrined in national, regional and international instruments. Assange's organization proposes that governments and corporations should be

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<sup>1</sup> Spencer Zifcak "The emergence of wikileaks: openness secrecy and democracy" (2013) p.123 published in *More or Less Democracy and New Media in by Future Leaders* [www.futureleaders.com.au](http://www.futureleaders.com.au)

<sup>2</sup> The disclosures of Daniel Ellsberg of (1971) known as the 'Pentagon Papers'

<sup>3</sup> Wikileaks founder Julian Assange (2010) 'International man of mystery'. p.1 [www.abovetopsecret.com/forum/thread560001/pg1](http://www.abovetopsecret.com/forum/thread560001/pg1) (1-4-2013)

transparent in their dealings, and policies<sup>4</sup>. Although tumultuous at first, leaks from Assange have helped expose some corrupt practices that would not otherwise have come to light. The impact of Wikileaks on freedom of expression in the world has been massive and far reaching, the viral way in which the leaks spread are evidence to the fact that people have always been curious about this kind of conspiracy theories and are eager for transparency. It shows also that it is unwise to underestimate the impact that an event in one country could trigger globally. But what does it really mean to global stability and freedom of expression when one man chooses to go against conventional methods and probe into the powers that be? How will this change how the world does business in the area of what people are allowed to freely say or disclose without persecution and how this disclosure affect the laws that govern this kind of freedom of expression?

In another time, the actions of Assange and its effect on freedom of expression would not have been felt globally but because of the interconnected nature of the world, the story was a different one. Geography, economic means or language have not been factors in the emergence of the leaks that have ended up at Wikileaks' door step. This new world where students in South Africa can share experiences with their counterpart in New York has revolutionized the way people communicate and broadened the reach of the publications that Wikileaks leaked. One definition of globalization reads "a process which generates flows and connections, not simply across nations and states, and national territorial boundaries, but between global regions, continents and civilizations"<sup>5</sup>. Yet another says 'a historical process which engenders a significant shift to in spatial reach of networks and systems of social relations to transcontinental or interregional patterns of human organization, activity and the exercise of power.'<sup>6</sup>

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<sup>4</sup> In an exclusive interview given by Julian Assange to 'The Real News.com titled *Afghan Leak: Wikileaks' Julian Assange Tells All* Assange said the purpose for the leaks 'Afghan Leaks' was to expose injustices in governments and to try to rectify these injustices thereby promoting transparency. By implication this is the purpose of the other disclosures (2010) [http://therealnews.com/t2/index.php?itmid=74&id=31&jumival=5424&option=com\\_content&task=view](http://therealnews.com/t2/index.php?itmid=74&id=31&jumival=5424&option=com_content&task=view) (2-4-2013).

<sup>5</sup> Dr. Nayef R. F. Al-Rodhan "Definition of globalisation: a comprehensive overview and a proposed definition" (2006) p.7

<sup>6</sup> McGrew G. Anthony "Global legal interaction and present-day patterns of globalization emerging legal certainty: empirical studies on the globalization of law" Gessner V and Budak A (eds) Ashgate: Dartmouth publishing company (1998) p. 327 as cited in Kumar Vidya S. A (2003) "Critical methodology of globalization: politics of 21<sup>st</sup> century?" *Indiana Journal of Global Legal Studies Vol. 10 Issue 2 Article 4* p.98.



By these definitions, we get tuned in to the fact that the world is inter-related and one action in any part, depending on what kind, can have a ripple effect that can spread across continents and have a major impact on the socio-economic and political structures.

The balance of power in the world represents where countries stand in terms of having a sphere of influence that exceeds their own borders. The United States for example officially or unofficially can be considered to hold the position of the watchdog or police of the world as it intervenes most often than not in internal affairs of other countries. In this pursuit their image internationally is fashioned to uphold this role. In the July 2013 trial of Bradley Manning this national image took a major blow. “Private Manning was an army intelligence analyst deployed in Iraq when, in 2010 he amassed 90,000 field logs from the Afghanistan war and 392,000 from Iraq, files on Guantanamo prisoners and 250,000 State department diplomatic cables Manning passed them all to WikiLeaks which published them through well-established newspapers and magazines”<sup>7</sup>

These releases had implications for international politics and diplomacy and no matter what view you subscribe to; “What cannot be doubted, however, is that taken as a whole, the Cable gate disclosures have given citizens in different parts of the world an unparalleled opportunity to learn about and evaluate the work that their governments undertake on their constituents’ behalf in the pursuit of international diplomacy.”<sup>8</sup> Whether it was the groundbreaking release of the fact that the US administration was spying on top UN officials contrary to international law; the revelation that Russian top officials were working with organized criminals to traffic arms, and stash their big payoffs in offshore accounts, Assange and his crew continued to dismantle secrets and unfair practices around the globe.

In *Handyside v United Kingdom*, the European Court of Human Rights stated clearly that “Freedom of Expression constitutes an essential foundation of a democratic society, one of the basic conditions for its progress and for the development of everyman.”<sup>9</sup> Section 16 (1) of the South African Constitution protects freedom of expression while 16 (2) indicates instances that free expression can be limited. Article 19 of the Universal Declaration of Human Rights defines freedom of expression as “the rights of every individual without interference to seek, receive and impart information and ideas through any media regardless

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<sup>7</sup> Madar Chase “The trial of Bradley Manning” *The Nation* (2013) Vol.297 Issue 7/8 p.13

<sup>8</sup> n1

<sup>9</sup> European court of human rights’ decision in *Handyside v United Kingdom* app 5493/72 (1976).

of frontiers<sup>10</sup>.” It is on this article that journalists and volunteers of wikileaks derive their inspiration.<sup>11</sup> Freedom of Expression provides citizens with rights to participate in the decision making process in their countries.<sup>12</sup>

From the above definitions there is no doubt that freedom of expression is one of the essential foundations of democracy and that it is important for the development and protection of other human rights, but because it has the potential to be harmful to the interest of others or public benefits, there is need to issue restrictions to this rights which is why Article 10(2) of the European Convention of Human Rights states that the exercise of this right carries with it duties and responsibilities, and may be subject to such formalities, conditions, restrictions or penalties,<sup>13</sup> so while exercising one’s right to freedom of expression, we should be careful not to infringe on others’ right to privacy.

The American Bill of Rights in its Fourth Amendment states that people have the right to secure their persons, houses, papers and effects against unreasonable searches and seizures.<sup>14</sup> This right shall not be violated and no warrants shall be issued except upon probable cause, supported by oath and describing the place to be searched and the persons or things to be seized.<sup>15</sup> The South African Bill of Rights also advocates for the right to privacy in section 14 stating in similar terms to that of the American Fourth Amendment mentioned above that, everyone has the right to privacy which shall include the right not to have: (a) their person or home searched; (b) their property searched; (c) their possessions seized; or (d) the privacy of their communications infringed.<sup>16</sup> Common-Law describes the right to privacy as a right which depicts independent personality right that the court considers as part of the conception of ‘dignitas’. It was this same position of the Common-Law that was maintained in *Bernstein v Bester*.<sup>17</sup> Invasion of someone’s privacy occurs according to common law when there is an unlawful intrusion of a person’s privacy or an illegal disclosure of private information about a person. If people, government, corporations are honest in their dealings

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<sup>10</sup> Article 19 of the Universal Declaration of Human Rights

<sup>11</sup> Wikileaks.org/About.html. (31-3- 2013).

<sup>12</sup> Allan T. R. S. “Common law constitutionalism and freedom of speech in J. Beatson and Y. Cripps freedom of expression and freedom of information: essays in Honor of Sir David William” *Oxford Clarendon Press Oxford (2000) p.15.*

<sup>13</sup> Article 10(2) of the European convention on human rights.

<sup>14</sup> The American bill of rights fourth amendment

<sup>15</sup> n16

<sup>16</sup> Iain Currie & Johan de Waal “The bill of rights handbook” (5th ed) p.315.

<sup>17</sup> *Bernstein v Bester* 1996 2 SA 751 (cc) para. 68.

and policies, as wikileaks propagates, there will be no need for invasion of their privacy. Privacy rights are meant to protect individuals from the meddling eyes and ears of governments.<sup>18</sup>

Transparency in terms of the government is when majority of the information about its activities and policies are available for the public's appreciation<sup>19</sup>. Government entities are statutorily required to conduct their business through open, transparent processes to ensure they are accountable to the citizens as it is believed that open government is key for a democratic state.<sup>20</sup> Defining transparency is a difficult task as the term is used in many contexts.<sup>21</sup> For the purpose of wikileaks, we will define transparency as a state of doing things that allows other people to know exactly what you are doing<sup>22</sup> characterized by visibility and accessibility of information, honesty and openness. Section 32 of the 1997 South African Constitution makes allusion to transparency by stating in 1(a) (b) that everyone has the right of access to any information held by the state and any information that is held by another person that is required for the exercise or protection of any right. In South Africa, after the Apartheid regime, it was believed that the only way to achieve democracy was through the notion of accountability, responsiveness and openness at all levels of the government.<sup>23</sup>

In fact transparency is so important for any democratic society that an international organization, well respected in the world today was created to foster transparency. This organization is called Transparency International (TI). It is a non-profit non-governmental organization with a mission to stop corruption and promote transparency, accountability and

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<sup>18</sup> Moore A. Adam "Privacy security and government surveillance: wikileaks and the new accountability" *Public Affairs Quarterly* Vol.25 No.2 p.141.

<sup>19</sup> Chawki Mohamed "Wikileaks: transparency vs. national security" (2012) *International Journal of Intellectual Property Management* Vol.5 No.1 p.39-60.

<sup>20</sup> Dilann Diane "The legal framework of transparency and accountability within the context of privatization" (2011) [www.lwv.org/content/legal-framework-transparency-and-accountability-within-context-of-privatization](http://www.lwv.org/content/legal-framework-transparency-and-accountability-within-context-of-privatization) (3-4-2013).

<sup>21</sup> Googling the word transparency results in so many web hits without giving any precise definition.

<sup>22</sup> Macmillan dictionary

<sup>23</sup> Corder Hugh "Administrative justice in the final constitution" (1997) No.13 *South African Journal of Human Right* 28 p 43.

integrity at all levels and across all sectors of society.<sup>24</sup> Its headquarters is in Berlin Germany. Wikileaks just like Transparency International, aims at exposing anyone abusing the power entrusted in them by the people. Their goal is to ensure that people in high positions operate with utmost honesty and transparency. But unlike wikileaks, after exposing the corruption, Transparency International goes a step further to advice the said government on policy review to curb corruption.<sup>25</sup> At this point, it is imperative to look at the wikileaks organization.

Wikileaks is an organization that accepts classified, censored and restricted material that has ethical, diplomatic and political significance. It is a non-profitable international organization working for transparency<sup>26</sup>. It published documents, videos as well as sensitive military information that raised a lot of controversy around the globe. Its founder Julian Assange is considered to be a hero by one school of thought while another takes him to be a villain,<sup>27</sup> this is because the value that wikileaks has had by indicating violations of human rights creates an agreement amongst many organizations meanwhile it led to an invasion of personal privacy according to some organizations such as 'Reporters Without Borders'<sup>28</sup>. The organization defines itself as "an organization that publishes on the internet information from secret documents, emails and recording from government, companies, and political parties."<sup>29</sup> Wikileaks garnered a lot of international attention in 2010 when it published thousands of United States' military cables relating to the war in Afghanistan.<sup>30</sup> Through wikileaks disclosures, the public was able to get knowledge on the realities of the war.

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<sup>24</sup> Transparency International: global coalition against corruption.

[www.transparency.org/whoweare/organisation/mission\\_vision\\_and\\_values](http://www.transparency.org/whoweare/organisation/mission_vision_and_values) (4-4- 2013).

<sup>25</sup> n 11

<sup>26</sup> n11

<sup>27</sup> P.C.magazine.com. encyclopaedia. [www.pcmag.com/encyclopedia/term/62221/wikileaks](http://www.pcmag.com/encyclopedia/term/62221/wikileaks) (4-4- 2013).

<sup>28</sup> Paivikki Karhular "What is the effect of wikileaks for freedom of expression" (2011) p.3

<sup>29</sup> n 11

Wikileaks' advocates base their argument about the legitimacy of its activities on Article 19 of the UDHR which protects freedom of expression therefore guaranteeing the lawful right to share information with the public.<sup>31</sup> But for this law to protect whistle-blowers, they must respect confidentiality of sensitive information. Wikileaks' rise to global attention has been outstanding and relatively fast and unforeseen that it even took the all-powerful United States by surprise. After the Pentagon Papers case<sup>32</sup> in which Daniel Ellsberg released documents pertaining to US's involvement in the Vietnam War, which was similar to some disclosures of wikileaks,<sup>33</sup> the US and other governments in general never thought that another whistleblower could come up with so much information which the government had classified as secret and confidential. Under normal circumstances, such disclosures as that of the pentagon papers should have led to the tightening of security around government and corporate confidential documents.



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<sup>30</sup> n 18

<sup>31</sup> n 12 (The relevance of article 19 of UDHR protecting freedom of expression guarantees the lawful right of wikileaks to share information with the public provided such information is for the public's interest.); n85, p.2 and n31 p.1

<sup>32</sup> The Pentagon Papers case is relevant to this study because it was the first attempts through which whistle blowers tried to foster freedom of expression by getting the government to be more accountable for their actions. The case left the door ajar to whistle blowing especially after the prosecution failed to find Daniel Ellsberg guilty of his actions.

<sup>33</sup> The following articles attest to the similarity between pentagon papers and wikileaks: Mark Fenster "Disclosure's effect: wikileaks and transparency" (2012) *Vol.97 No.3 Iowa Law Review* p.753-807; Alasdair Roberts "The wikileaks illusion" (2011) *The Wilson Quarterly* Vol.35 p.17; Adam Liptak and Veronica Majerol "1971: Pentagon Papers." *The New York Times Upfront*, Vol.143 (February 21 2011).

## 1.2 PURPOSE OF THE STUDY

Although much has been written about the credibility and controversy of wikileaks, a number of misinterpretations and uncertainties remain regarding its effects on transparency. Some have argued that states have a right to keep secrets as, in so doing; they ensure the protection of citizens. In the Manning trial the US government tried to use Wikileaks publications as an infringement on their intellectual property right, though they ended up going for the proverbial “low hanging fruit” in the prosecution of Private Manning. Schools of thought differ when it comes to whether it is correct to publish these kinds of sensitive material, the questions “Is sunshine truly the best disinfectant? Is Wikileaks even a threat to national security, or a beneficial counter to excessive government secrecy?”<sup>34</sup>

This study will analyze the legality of wikileaks’ disclosures within the framework of international law with regard to the right to privacy and transparency. This will enable us to answer the question; do wikileaks disclosures violate the international law right to privacy? In order to achieve the objective aimed at, it will be best to explore the relevant legal instruments that guarantee the right to freedom of expression as well as evaluate the limitations of freedom of expression. An analysis of some of wikileaks’ disclosures will be made so as to determine if wikileaks violated the right to privacy in its commitment to protect the human right to free expression. Materials used in this study will be obtained from primary sources like international and regional treaties, secondary sources such as books, journals, articles and electronic sources (internet). This research is divided into three chapters with the introductory chapter inclusive. Chapter 2 and 3 will be focused on the legal issues raised by wikileaks’ disclosures.

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<sup>34</sup> Freedman James “Protecting state secret as intellectual property: a strategy for prosecuting wikileaks”(2012) *Stanford Journal of International law Vol.48 Issue 1 p.187 para.1*

## CHAPTER 2: EMERGENCE OF WIKILEAKS

Wikileaks became famous through its mega-releases of secret documents in 2010 – including the *Collateral Murder* video, protocol in Guantanamo Bay, and e-mails from Sarah Palin’s personal account and Iraq war diaries. The recent disclosure of 250,000 US diplomatic cables were published in collaboration with major newspapers, such as Le Monde, El Pais, Der Spiegel, The Guardian and the New York Times.<sup>35</sup> Many Wikileaks releases have uncovered secret information in areas such as finance, security, and international conflict. These disclosures have generated fierce international debates such as legality of free speech on the internet, the right to privacy, whether wikileaks is a threat to national security, if it indeed fosters free speech and transparency as intended and relationship between the government and the media. The wikileaks phenomenon also ‘highlights the difficulty of defending Governments against insider threats as well as the irreversibility of information leakage’<sup>36</sup>This chapter will examine legal issues raised by wikileaks such as the applicable law in the wikileaks case, government’s right to secrecy, national security, free speech on the internet and the role of wikileaks as watchdogs of the society.

### 2.1 Creation of wikileaks



Wikileaks is an international non-profitable non-governmental organization which promotes free speech and transparency by publishing leaks based on ethical, historical and political significance.<sup>37</sup> It is a protector of democracy and a journalistic media with objective to reduce corruption and strengthen democracy by providing transparency to the public.<sup>38</sup>This is done through collaborating with conventional media<sup>39</sup> so as to receive maximum credibility and

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<sup>35</sup> Sedona Chinn “Wikileaks state secrets and trust in government” (2010) <http://designpublic.in/blog/wikileaks-state-secrets-and-trust-in-government/> (15-7- 2013)

<sup>36</sup> Statement on wikileaks events by the European network and information security agency (2010) <http://www.enisa.europa.eu/media/news-items/enisa-statement-on-wikileaks-events> (1-8- 2013).

<sup>37</sup> n 11.

<sup>38</sup> n 11; n 1.

<sup>39</sup> n 60.

publicity for the leaked information.<sup>40</sup> Wikileaks was founded in 2006 by Chinese activists, mathematicians, journalists from several countries who came together with the aim of providing a platform for transparency to the public. It is spearheaded by the Australian internet activist Julian Assange. This organization was created based on Article 19 of the Universal Declaration of Human Rights which makes freedom of expression and impact of information basic rights for all human beings. Upon receipt of information from anonymous sources, the information is analyzed and its authenticity verified by journalist that work for the organization. If satisfied, a news piece is then written about the information gotten for public consumption after removing all information that could lead to the identification of a source. This is done so as to protect the life of informants.<sup>41</sup> The organization sought to suppress corruption, deceit, abuse and malpractices in public and private sectors by equalizing power between the government and the citizenry, by making available to the public all information needed in order to make their governments or employers as the case maybe, accountable for their actions.<sup>42</sup>

Wikileaks' founder Julian Assange pinpointed two similar but distinct aspirations for the leaks. He propagates the reformist idea of disclosure of government information as understood by transparency promoters such as Transparency International who believe that transparency leads to a knowledgeable public and accountable governance.<sup>43</sup> Secondly, he proposes that wikileaks performs a more radical, revolutionary function by disabling authoritarian and illegitimate governments.<sup>44</sup> These two theories suggest that wikileaks intended to use conventional means to further its goal of liberal democratic governance, thereby fostering the relationship between the governing and the governed. In the first theory which considers disclosure as a liberal reform, some members of open-government community see wikileaks' success as a necessary answer to the excessiveness of government

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<sup>40</sup> Mitjo Vaulasvirta "Wikileaks: a new media facilitating democracy and democratization?" (2012)

<sup>41</sup> n11

<sup>42</sup> n11

<sup>43</sup> Fenster Mark "Disclosure's effect: wikileaks and transparency" (2012) *Iowa Law Review* Vol.97 No.3 p.772

<sup>44</sup> Moore F. John "Wikileaks is a blow to open government" (2010) <http://govinthelab.com/wikileaks-is-a-blow-to-open-government/>; Whimsley "Wikileaks shines a light on the limits of techno-politics" (2010) and Anthony D. Williams "Could wikileaks set back open government?" (2010).

<http://anthonydwilliams.com/3010/11/29/could-wikileaks-set-back-open-government/> (12-8- 2013).



secrecy.<sup>45</sup> Thomas Blanton Director of National Security Archives of George Washington University said “the only remedy that will genuinely curb leaks is one that forces the governments to disclose most of the information it holds rather than hold more information tightly.”<sup>46</sup>

Whether they are criticizing or defending wikileaks, transparency promoters sees wikileaks’ organization as unconventional and different from their own reformist efforts but apparently Bradley Manning the person being prosecuted for handing the diplomatic cables to wikileaks, disagrees with them on this issue, as perceived from his actions.<sup>47</sup> Julian Assange also expressed his disapproval of the opinion of these transparency promoters when he said during an interview that, the wikileaks site is a conventional and journalistic site which pushes public institutions to be accountable to their subjects.<sup>48</sup> True to its aim, wikileaks has indeed resulted in some changes in government as the legislation was forced to fasten control on classified confidential information and enacting laws to transform the Whistle-blower Protection Act (1989) which makes leakers more accountable for their actions under the Espionage Act (1917).<sup>49</sup> Julian Assange said, with regard to the publishing and controversy over the diplomatic cables that wikileaks work with other media outlet to bring news to people and also proof that the news is true by giving people the opportunity to go to the internet and verify the facts provided. Thereafter, it is left for the individual to judge for himself.<sup>50</sup> Wikileaks yearns to play the role of “Fourth Estate<sup>51</sup>” within a liberal democracy.

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<sup>45</sup> Stephen Collins “open government in a wikileaks world” (2010)

<sup>46</sup> Thomas Blanton’s statement before the high commission on the judiciary, 111<sup>th</sup> congress (2010) on the topic: Espionage act legal and constitutional issues raised by wikileaks.

<sup>47</sup> Bradley Manning’s motives for Disclosure found in David Leigh and Luke David’s “Wikileaks: inside Julian Assange’s war on secrecy” (2011) *Public Affairs* p.84-87.

<sup>48</sup> Flew Terry and Liu Bonnie Rui “Globally networked public spheres? The Australian Media Reaction to Wikileaks” *Global Media Journal: Australian Edition* (2011) Vol.5 Issue 1 p.5.

<sup>49</sup> Glenn Greenwald “Wikileaks reveal more than just government secrets” (2010)  
<http://www.salon.com/2010/11/30/wikileaks-10/singleton> (30-7-2013)

<sup>50</sup> Julian Assange “Don’t shoot the messenger for revealing uncomfortable truths” (2010)  
<http://www.theaustralian.com.au/in-depth/wikileaks/don-t-shoot-messenger-for-revealing-uncomfortable-truths/story-fn775xiq-1225967241332> (10-9-2013).

<sup>51</sup> Fourth estate is a term that refers to the press positioning itself as a fourth branch of the government and it is very important in a functioning democracy. Gill Kathy “What is the fourth estate and why should I care”  
[http://uspolitics.about.com/od/politicaljunkies/a/fourth\\_estate.htm](http://uspolitics.about.com/od/politicaljunkies/a/fourth_estate.htm) (13-8- 2013).

In fact, the lesson to be learned from Assange's assertions is that Wikileaks enforces the human rights to know, to free speech and above all the right to communicate information.<sup>52</sup>

According to the second theory for which disclosure is considered as a radical resistance, Assange extensively explains concepts of political theories propagated by transparency promoters and conservative journalism by posting articles which give basic understanding of transparency and its political consequences.<sup>53</sup> Regarding radical resistance theory, Julian Assange said in an article in Zunguzungu that:

To radically shift regimes' behavior, we must think clearly and boldly; for if we have learnt anything, it is that regimes do not want to be changed. We must think beyond those who have gone before us, and discover technological changes and embolden us with ways to act which our forebears could not. Firstly, we must understand what aspect of government and neo-corporatist behavior we wish to change or remove. Secondly, we must develop a way of thinking about this behavior that is strong enough to carry us through the mire of politically distorted language, and into a position of clarity. Finally, we must use these insights to inspire within us and others a course of ennobling an effective action.<sup>54</sup> As it will be argued in the next chapter, this way of thinking impacts on freedom of expression and the way leaders govern.

Assange describes the US government as an authoritarian conspiracy and proposes that to fight this conspiracy; its ability to conspire must be tainted, while its ability to think as a conspiratorial mind must be hindered<sup>55</sup>. To Assange, authoritarianism and conspiracy go together as the former creates resistance which is generally known and continues to function only by hiding its aim from the knowledge of the general public. Assange says when authoritarianism behaves this way, it definitely becomes conspiracy.<sup>56</sup> The conspiratorial interaction among political elite is what allows these governments to communicate ways to

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<sup>52</sup> Fenster Mark "The transparency fix: advocating legal rights and their alternatives in the Pursuit of a visible state" (2012) *University of Pittsburgh Law Review* Vol.73 No.3 p. 21.

<sup>53</sup> n 47; n60.

<sup>54</sup> n 60; also available in an essay by Assange Julian titled "State and terrorist conspiracies" Cited in an article by Lagerkvist Johan "Wikileaks ravage" *part II Yale Global* (2010) Available at; <http://yaleglobal.yale.edu/content/internet-ravage-part-ii> (11-9-2013).

<sup>55</sup> Zunguzungu "Julian Assange and the computer conspiracy: to destroy this invisible government" Available at <http://zunguzungu.wordpress.com/2010/11/> (13-6- 2013).

<sup>56</sup> n 47.

maintain their authoritarian power. If there is a breach in communication or their plans are disclosed as wikileaks did, it will lead to the downfall of such governments.

Authoritarian regimes rely on the concealment of information for their success but ironically, this concealment happens to be their greatest weakness as well. So for them to succeed, their modus operandi must be effective and safe from the eyes of the public. Disclosing what these authorities fight so hard to keep secret is the best way to bring these regimes down.<sup>57</sup> Assange proposes that conspiracy between institutions should be destroyed by attacking the most important link that connects the conspirators either by distorting or using unstructured attacks like disclosures on the link. When the regimes' ability to communicate with other conspirators is destroyed, the regime will be unable to govern efficiently. In essence, what Assange meant is that disclosure is both a method to reform and a weapon which should be used to resist authoritative institutions.<sup>58</sup>

## 2.2 Applicable law in the wikileaks' case

Identifying the precise international law that wikileaks breaches is difficult since it is a new phenomenon but while examining the different documents disclosed by Wikileaks, it is difficult not to notice that the country most targeted by the disclosures is America. This provides an explanation as to why the United States are so willing to pursue the organization and its representatives. As it has been reported in the media,<sup>59</sup> the United States have started investigating Wikileaks and services of experts have been employed to identify the law that would be appropriate to prosecute the organization and its founder Assange. However, as far as we know, the experts face difficulties in finding any legal provision likely to apply effectively to wikileaks.<sup>60</sup>

This notwithstanding, many scholars think that the suitable law to use in prosecuting wikileaks is the 1917 United States' Espionage Act. Finding the laws that Wikileaks is guilty

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<sup>57</sup> n 44; BBC NEWS-TODAY "Transcript: the Assange interview" (2010)  
[http://news.bbc.co.uk/today/hi/newsid\\_9309000/9309320/](http://news.bbc.co.uk/today/hi/newsid_9309000/9309320/) (2-5-2013).

<sup>58</sup> Julian Assange's "Conspiracy as governance" (2006) p.1-6  
[web.archive.org/web/20071020051936/http://iq.org/conspiracies.pdf](http://web.archive.org/web/20071020051936/http://iq.org/conspiracies.pdf) (2-5-2013).

<sup>59</sup> Michael Ratner "Julian Assange is right to fear US prosecution" (2012)  
<http://www.theguardian.com/commentisfree/2012/aug/02/julian-assange-right-fear-prosecution> (30-7 2013).

<sup>60</sup> Baruch Weiss "Why prosecuting wikileaks' Julian Assange won't be easy" (2010)  
<http://www.washingtonpost.com/wp-dyn/content/article/2010/12/03/AR2010120303267.html> (8-4-2013).

of violating is very difficult because of its global outreach. Firstly, the organization uses ‘neutral server space’<sup>61</sup>(that is, there is no specific server that can be identified with wikileaks) and channels its publications through several countries so the legal issue of pinpointing the jurisdiction under which to hold the organization accountable is an uphill task. Also Assange, an Australian national who is always travelling through different countries “having no place of establishment” is himself difficult to narrow down, brings to mind the analogy of “hitting a moving target”. Indeed, the organization is based in a company settled in Sweden and documents sent to the website transit through Belgian and Icelandic servers. The aim of this geographical dispersion is to enable Wikileaks to benefit from the legislation of those countries which provides protection to whistleblowers and to investigative journalism and protection of sources. The Espionage Act seems to be the only act that could be used in prosecuting wikileaks for now.

Under the Espionage Act, anyone in possession of information related to national defense without authorization and has reason to believe it could harm the United States can be prosecuted if he/she publishes it or willfully retains it when the government has demanded its return.<sup>62</sup>

### **2.3 Wikileaks’ Impact on Freedom of Expression on the Internet**

The internet has been considered for long as a free space<sup>63</sup> where divergent opinions can be expressed without any restrictions. Individuals participate in public sphere with radically stronger means of imparting information when they express themselves using the internet than if they were to go to the streets to express their opinions.<sup>64</sup>This is because they are guaranteed anonymity on the internet. By proposing anonymity to sources, the wikileaks organization promoted freedom of expression through the internet giving people confidence to express their opinions about governments and corporations leadership. In fact, internet fosters the public’s right to know as implied by article 19 Of UDHR. Researchers assert to the fact that open communication on the internet has particular importance for the development

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<sup>61</sup> Lisa Lynch “That’s not leaking its pure editorial: wikileaks scientific journalism and journalistic expertise. CJMC special issue fall” (2012) RCEM p.40-67.

<sup>62</sup> Comments made by Jeffrey Smitt former CIA general counsel. Washington Post “Wikileaks founder could be charged under Espionage Act” (2010) <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/29/AR201011290573.html> (5-7-2013).

<sup>63</sup> Zizi Papacharissi “The virtual sphere: the internet as a public sphere” (2002) *New Media Society Vol.4 Issue 1* p.9-27

<sup>64</sup> Sachs H “Computer networks and the formation of public opinion: an ethnographic study” *Media Culture and Society Vol. 17 No. 1 (1995) p.81-99.*

of democracies as it promotes “a more enlightened exchange of ideas,”<sup>65</sup> provides a forum for democratic discourse, as well as help expose the wrong-doings of both governments and corporations. Though the ability of the internet to promote free expression has been praised, concerns have also been raised as to the productivity of this method of expression especially within national governments, concerns such as national security breaches,<sup>66</sup> spread of cyber-crimes, child pornography and mobilization of anti-government forces.<sup>67</sup>

When it comes to wikileaks, the first and the last concerns are of essence. These concerns have been the result of internet censorship in many countries.<sup>68</sup> It is common knowledge that one of the main tenets of a democratic nation is freedom of expression, so how these democracies are negotiating contradictory positions regarding freedom of expression and internet control is an area worthy of research exploration. This subsection attempts to answer this, by examining how the advent of wikileaks contributed to making the profession of whistle –blowing a more secure and private affair offering anonymity to the whistleblower.

Mr Abid Hussain, special rapporteur on the promotion and protection of the right to freedom of opinion and expression stressed the importance of the internet in the free flow of information, ideas and opinions in his annual report to the UN. According to him, the internet plays an important role in shaping political and cultural debates as well as bringing out dissenting voices. He goes on to emphasize that internet is inherently democratic and online expression should be protected by international standards and guaranteed the same protection given to other forms of expression.<sup>69</sup>

In follow up of the special rapporteur’s report, meetings have been held to examine wikileaks’ impact on free speech on the internet. One of such meetings was held in 2012 by International Communication Association on the theme *wikileaks and freedom of expression: perspectives voiced via the International Press*. The outcome of this meeting will be our focus in this subsection. As mentioned above, wikileaks’ main goal was to expose the wrongful activities of governments and corporations. It achieved notoriety in 2010 with the releases of both the collateral murder video that showed a U.S. air strike attack on civilians in

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<sup>65</sup> Zizi Papacharissi “Democracy online: civility politeness and the democratic potential of online political discussions groups” *New Media and Society Vol.6 Issue 2 p.256*.

<sup>66</sup> n 80.

<sup>67</sup> n 50.

<sup>68</sup> Reporters Without Borders warns against internet censorship (2010).

<sup>69</sup> Mr Abid Hussain’s annual report to the commission on human rights. (E/CN.4/2000/63).

Afghanistan and classified U.S. diplomatic cables.<sup>70</sup> Through disclosing classified intelligence reports and confidential diplomatic cables, the wikileaks organization provoked both controversies over U.S. foreign policies as well as controversies over the future of free speech on the internet. Democratic governments such as the U.S. which have always promoted the cause of internet freedom, condemned wikileaks and are looking for a suitable charge to prosecute Assange.<sup>71</sup> These reactions have raised concerns that it might thwart future distribution of truthful political information online as well as affect internet freedom adversely,<sup>72</sup> but so far, these concerns have not yet been accredited as recently, the world witnessed yet another disclosure of confidential NSA documents that has come to be known as the Snowden disclosures.

The Internet has brought new challenges to democratic governments especially in the interpretation of freedom of expression. Although scholars such as Balkin Jack and Nunziato Dawn are of the opinion that continued protection of freedom of expression is necessary in this technology driven information age,<sup>73</sup> the availability via the internet of sexually explicit content, hate speech and anti-governmental rhetoric has prompted governments to evade the principle of free expression and implement regulatory measures.<sup>74</sup> Thanks to websites like wikileaks, governments have increased its usage of filtering systems that use internet nodes as gate ways for filtering out certain information. They have often either engaged in

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<sup>70</sup> McGreal C “Hacker turns in U.S. soldier over wikileaks Iraq video” *The Guardian* <http://www-guardian.co.uk/world/2010/jun/07/hacker-wikileaks-iraq-video-manning/print> (12-6-2013).

<sup>71</sup> Washington D.C. department of state’s remarks on internet freedom (2010) <http://www.state.gov/secretary/rm/2010/01/135519.htm> (12-6- 2013).

<sup>72</sup> Bligh K. “Journalists companies wrestle with consequences of wikileaks” *EContent*. <http://www.highbeam.com/doc/1G1-256071015.htm>

<sup>73</sup> Balkin Jack M. “Digital Speech and Democratic Culture: A theory of freedom of expression for the information society” (2009) *New York University Law Review Vol.79 Issue 1 p.1-55* <http://www.yale.edu/lawweb/jbalkin/telecom/digitalspeechanddemocraticculture.pdf> ; Nunziato Dawn. C. “Virtual freedom: net neutrality and free speech in the internet age (2009) *Stanford University Press*.

<sup>74</sup> Akendeniz Y. “To block or not to block: European approaches to content regulation and implications for freedom of expression” *Computer Law and Security Review (2010) Vol.26 Issue 3 p. 260-272*.

exclusion filtering, that is authorizing access only to those websites deemed 'safe.'<sup>75</sup> British government for instance has asked the Internet Service Providers (ISPs) to broaden the range of information they collect, such as people's internet contacts, sites they visit, to assist the government in curbing internet crimes and terrorism investigations.<sup>76</sup> This is done in an attempt to control freedom of expression on the internet. France guaranteed freedom of speech and press in its *Declaration des Droits de l'Homme et du Citoyen* (Declaration of the Rights of Man and of the Citizen) of 1789, but with regard to internet regulations, France is amongst the countries that favors internet censorship.<sup>77</sup> The above examples illustrates the fact governments are not willing yet to have the public nosing into its affairs because it could be detrimental to the administration of the country and probably affect external relations with other countries but in doing so, they must also ensure that not everything is kept secret except it is absolutely necessary. It is the only way to ensure transparency and democracy.

#### **2.4 Disclosures versus State Secrecy**

Wikileaks disclosures highlights conflict between two important principles; freedom of expression which leads to an informative transparency on government and corporate activities on the one hand and the need to keep some State documents confidential in order to guarantee smooth functioning of State institutions as well as corporations on the other hand. Accepted freedom of expression is a basic human right that must be respected by the government but the state also has the right to keep certain information secret from public eyes if it deems it necessary for the protection of its citizenry<sup>78</sup>. Despite what conspiracy theorists may think, secrecy is not an inherently bad thing; in fact, it usually keeps us safe. We keep our bank accounts, ATM and Social Security numbers secret because revealing them could put our finances at risk. We may choose to keep information from other people, not to be deceptive but simply because it's none of their business. Similarly, revealing state secrets

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<sup>75</sup> Imre Iveta Radovic Ivanka and Luther Catherine "Wikileaks and freedom of expression: perspective voiced via the international press" Paper presented at the annual meeting of the international communication association Sharon Phoenix Downtown Phoenix (2012) p1-36.

<sup>76</sup> Casciani D. "Plan to monitor all internet use" *BBE News*. (2009) <http://newsbbc.co.uk/2/hi/8020039.stm> (29-9-2013).

<sup>77</sup> Deibert Ronald Palfred John Rohozinski Rafal and Zittrain Jonathan "France Accessed Controlled: The shaping of power, rights and rules in cyberspace" (eds) (2010) Cambridge, MA: The MIT Press. P 297-305.

<sup>78</sup> n75

could put national security at risk or may fall into the category of "too much information."<sup>79</sup> This subsection will examine those reasons in favor of government secrecy as oppose in disclosures. States' right to secrecy is vital for the nation's survival. Revealing internal discussions of policies, projects and actions domestically and abroad as wikileaks did can jeopardize interests related to national security and international relations.<sup>80</sup> States secrets are privileged to the executive branch of governments to protect against subpoenas or other judicial requests for information.<sup>81</sup>

In November of 2010, wikileaks released approximately 250,000 United States government diplomatic cables many of which were classified as state secrets on the internet.<sup>82</sup> Warning that the cables' release could put the lives of diplomatic sources at risk and profoundly affect not only U.S. foreign policy interests but also that of other governments collaborating with the U.S government; the White House strongly condemned this "unauthorized disclosure of classified documents and sensitive national security information."<sup>83</sup>

The wikileaks case shows that there is a problem of over-classification policies used by States in their daily functioning. Democracy supposes that citizens are aware of the actions taken by the government on their behalf in order to be held accountable in case of any misconduct from these governments<sup>84</sup>. If the right of access to official documents is not sufficiently and effectively controlled, it may lead to a legal responsibility for the State, disguise of doubtful action by officials and even lack of trust amongst citizens. It is for this reason that Julian Assange explains the retaliations of some governments against his organization with this assumption: 'The more secretive or unjust an organization is, the more leaks induce fear and paranoia in its leadership and planning coterie'<sup>85</sup>

Over-classification is a known fact in the United States. Joan Dempsey, former deputy director of central intelligence, recognizes that U.S. officials are too 'lazy when it comes to

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<sup>79</sup> Benjamin Radford "Wikileaks: the ethics of revealing secrets" (2010)  
<http://news.discovery.com/human/wikileaks-the-ethics-of-revealing-secrets.htm>. (10-9-2013)

<sup>80</sup> Ezequiel Jimenez "Diplomatic scandals leaks and secrets: balancing freedom of expression and state right to secrets" p.1-17

<sup>81</sup> Weaver William G and Pallitto Robert M "State secrets and the executive power" *Political Science Quarterly* (2005) Vol.120, Issue 1, p.88

<sup>82</sup> n35

<sup>83</sup> n 65

<sup>84</sup> Dykstra A. Clarence "The quest for responsibility" *American Political Science Review* (1939) Vol.33 No.1 p1-25.

<sup>85</sup> n 11



classification' and so, classify too many documents<sup>86</sup> as confidential which might not necessarily be so if they took out time to go through the content of the document before classification. This notwithstanding, stating that the United States keep too much information secret does not mean that the secrets are not justified; as some disclosures of information are likely to harm civilians, diplomatic relations or security of the government and corporate relations. This accession is true not only for the U.S government but for governments around the globe. Even the Wikileaks organization acknowledges this fact, reasons why it hid some information especially names of civilians through its "harm minimization" policy, on the ground that it could cause serious harm if mentioned.<sup>87</sup>

The above clearly indicates a conflict between the legitimate necessity of the State and the democratic morals of openness because some releases are likely to lead to disaster and tragedy for the country. An instance of disclosure ending in a tragedy for a country is disclosing the position of troops during wartime. Another illustration of harm that can be caused by the disclosure of confidential information is; when it exposes a State's negotiation strategy in advance, giving that state a potential disadvantage against the other negotiating parties.

In these state of affairs, it is obvious that Governments and corporations have to evaluate their classification mechanisms and management of information as well as computer data as excess classification would increase the amount of data to be protected. Less classification could mean, more efficient protection of the documents, thereby limiting the opportunities of having wrong hands falling on information which the government or corporation intend to keep secret.

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<sup>86</sup> Ellington C. Thomas "Thin skinned on democratic values? the wikileaks case and the role of secrecy in the democratic state sixth general conference of the European consortium for political research Reykjavik Iceland" (2011) p.21. [http://www.ecprnet.eu/MY ECPR/proposals/reykjavik/uploads/papers/3725.pdf](http://www.ecprnet.eu/MY%20ECPR/proposals/reykjavik/uploads/papers/3725.pdf) (3-8-2013).

<sup>87</sup> n 11

## 2.5 Wikileaks' role as watchdogs of the society and how it fosters democracy

The wikileaks phenomenon brings about serious questions of journalistic ethics. It is a known fact that the journalism professional is there to enlighten people on the happenings in the communities, it's important to know whether in fostering freedom of expression, wikileaks was acting under the umbrella of journalism; that is watching out for the society's interest. This subsection will focus on whether wikileaks is journalism or not in order to determine whether it is covered by the freedom of expression laws which it propagates. To attempt an answer to this question, we will examine the relationship between law and the media so as to determine if wikileaks respected this relation in disclosing government's confidential information. A democratic system of government is dedicated to openness and accountability, and for it to succeed, the important role of the media must be recognized, as the success of most governments venture depend on the robust criticisms from the media on the way and manner in which power is exercised. In fact, the media has a very important role in nurturing and strengthening democracy. This role has been recognized very clearly in section 15(1) of the South African Constitution and was reiterated in the *Holomisa case*.<sup>88</sup>

Freedom of the media is indeed a vital part of freedom of expression and an essential requisite of democracy. The media is obligated to respect the rights of individual, (protected by international covenants such as the ICCPR) and work within the framework of legal principles and statutes. The media is a vital arm of a democratic society.<sup>89</sup> The legislature prepares the law for the society and the executive takes the necessary steps for implementing them, the judiciary ensures legality of all actions and decisions<sup>90</sup>. The press in its Fourth Estate role has to operate within the confines of the law while acting in the interest of the public and the nation. This goes to indicate the fact that no one is above law. When Constitutions of countries guarantee freedom of expression and speech to their citizens, they ensured that the freedom is not an absolute right and any expression does not violate any

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<sup>88</sup> *Holomisa v Argus Newspaper Ltd* 1996 2 SA 588 (W) 608G-609D. (in this case, it was established that a defamatory statement that relates to free and fair political activity was constitutionally protected even if it was false unless the plaintiff could show that the publisher acted unreasonably. Given the important role of freedom of expression of expression and the media in fostering democracy any limitation on these rights should be reasonable justifiable and necessary.)

<sup>89</sup> Shawn Powers "Weaponized media legitimacy and the fourth estate: a comment" (2010) *Ethnopolitics Vol.9 Issue 2* p.255-258

<sup>90</sup> Salter Diane "Three branches of government" <http://www.decisionmaker.co.nz/guide2003/tbp/3branches.html> (18-10 2013).

statutory provisions enacted by legislature and executed by the executive. If the media, in carrying out its duty, surpasses its jurisdiction, the judiciary comes forward to ensure that the violation does not go unpunished.

The aim of the media include: disseminating information; editing; act as watchdogs on people in power; advocate for reforms of certain causes; educate; empower the public and guide public opinion.<sup>91</sup> They are permitted to do coverage about individuals, public institutions, but in doing so, they are obligated to report only accurate and reliable information as well as respect privacy. They must carry out proper research as well as edit the piece before publishing.<sup>92</sup> Relating this information to the wikileaks case, the wikileaks organization describes itself as a media outlet whose objectives are to promote transparency and accountability in governments and corporations. From the knowledge we have of wikileaks, it can be said that it is journalism as it verifies the authenticity of the information and edits it before publishing it.<sup>93</sup> But we should not lose sight of the fact that wikileaks violated privacy as well.

The media also has an obligation to provide a forum for public debate and discussion, through which people can express their opinions about the government on any topic which could be beneficial to both the state and the citizens. It can be argued that wikileaks did just that, provide a forum where people actually express themselves on issues concerning the government thereby promoting freedom of expression. The information provided through media is vital for democracy because the public needs to be informed about decisions that the government is taking on their behalf. Information is necessary so that people in representative democracy can alter their voting patterns and direct pressure on their representatives to maximize the fulfillment of kratos (power) and demos (citizen body), the idea of democracy.<sup>94</sup> The impact of information exchange in times of elections in a democratic society is very crucial as it influences the direction of the votes and also ensures the election stays free and fair.<sup>95</sup> It is believed that wikileaks played a vital role in the 2007 Kenyan

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<sup>91</sup> Ward Stephen J. A. "Global journalism ethics: widening the conceptual base" (2008) *Global Media Canadian Edition 1 (1)* p 137-149

<sup>92</sup> Black J. "Who is a journalist? in Christopher Meyer (ed) *Journalism ethics: a philosophical approach*" *New York: Oxford University Press 103-116.*

<sup>93</sup> n11

<sup>94</sup> n 41

<sup>95</sup> n74

presidential elections exposing the corruption of the then regime which helped the people make an informed decision as to who could be a worthy president for the country.<sup>96</sup>

Wikileaks made Kenyans aware of the wrong-doings of the regime leading to its downfall and consequently fostering democracy in the country. This shows that the emergence of wikileaks led to positive effects on the democratic process as it ensures that governments remain accountable to their people and that civil and political rights are properly upheld. In other words, wikileaks is an outlet that functions as a facilitator of democracy.<sup>97</sup>

According to Baraba Thomaß, the mystery of WikiLeaks is that it advocates free speech beyond the means of the conventional media<sup>98</sup>. Nevertheless, though freedom of expression is a vital human right, some democratic states have restricted this freedom.<sup>99</sup> In a democracy, there should always be a bias for openness against secrecy, although secrecy can have its democratic justifications in cases where; its rationale is made public and reviewable (that is when there is no secret about the existence of secrets); when it is needed to protect personal dignity, autonomy and safety.<sup>100</sup> It is the ethical dilemma of the media to balance its freedoms with its responsibilities when working with material which have been declared confidential or secret. It would appear that Wikileaks is much less concerned by these ethical questions and is focused on simply disclosing information<sup>101</sup> which fosters democracy.

Like a coin with two sides, the controversy over wikileaks provides grounds for doubt as to wikileaks being a media outlet. Looking at the comment Amnesty International made about wikileaks not editing the Afghanistan War Diary properly, thereby endangering people's lives by disclosing the identity of those who collaborated with the coalition<sup>102</sup>, definitely makes it not to be regarded as journalism. The second point to back up the fact that it's not journalism is the fact that they did not respect the privacy policy which journalism must respect as they

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<sup>96</sup> Tanzania on the lookout for Wikileaker Assange, who has lived in Tanzania and Kenya From the Citizen "Tanzania's connection in leaked US secrets" (2010) <http://africommons.com/2010/12/03/tanzania-on-the-lookout-for-wikileaker-assange-who-has-lived-in-tanzania-and-kenya/> (2-10-2013).

<sup>97</sup> n74

<sup>98</sup> Thomaß Barbara "Wikileaks and the question of responsibility within a global democracy" (2011) *European View. Vol. 10 Issue 1 p.17-23*

<sup>99</sup> Tiffen Rodney "Wikileaks and mega plumbing issues unresolved dilemmas revisited" (2011) *Global Media Journal Australian Edition Vol.5 Issue 1*

<sup>100</sup> n1

<sup>101</sup> n 41

<sup>102</sup> Siddique Haroon "Press freedom group joins condemnation of wikileaks' war logs" (2010) *The guardian* <http://www.guardian.co.uk/media/2010/aug/13/wikileaks-reporters-without-borders>

disclosed private conversations, banking details,<sup>103</sup> and personal emails as in the case with Sarah Palin.<sup>104</sup> The consequences of wikileaks not regarded as media is that in case of prosecution, it might not benefit from international laws that protect freedom of expression.

## 2.6 The Link Between wikileaks and Freedom of Expression

Wikileaks is rooted in International Human Rights law, specifically the right to freedom of expression. Wikileaks' foundation is based on article 19 of the UDHR which emphasizes the human right to expression and receipt of information not taking into account frontiers as civil rights.<sup>105</sup> In the Pentagon Papers case which is considered as a corner stone when it comes to whistleblowing, Judge Hugo Black said "only a free and unrestrained press can effectively expose deception in government"<sup>106</sup>. He went further to say that "paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people."<sup>107</sup> Julian Assange has compared his actions to that of Daniel Ellsberg who leaked the pentagon papers as an example why principled leaking would be necessary for good governance<sup>108</sup> and promote transparency between the government and its citizens. Wikileaks created an avenue for transparency with its disclosures thereby promoting freedom of expression. Governments are created by people, therefore these people should have a say in the administration of the government;<sup>109</sup> this can only be done when people have the right to express themselves and they can only do so if they are aware of government's activities. The disclosures of wikileaks created that link for the public to exercise their right to freedom of expression. As some of the various sources previously quoted, have suggested, governance done in the dark gives room for wrong doing. If a man does not fear accountability and knows that "no one will know" about the decisions and actions that he undertakes, he is likely to operate from a less than honorable place. Good governance should be open for public review and Wikileaks have helped this kind of openness in many ways. Wikileaks was only

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<sup>103</sup> Gordon R. Michael and Eric Schmitt "Cross-border chases from Iraq O K document" *New York Times* (2008).

<sup>104</sup> Mesnick Mike "Debunking the faulty premises of the pirate bay-criminalization treaty" TECHDIRT.com (2008) <http://www.techdirt.com/articles/20080523/1203101212.shtml>

<sup>105</sup> n31

<sup>106</sup> *New York Times Co. v. United States* 403 U.S. 713 1873 1971

<sup>107</sup> Hugo Black. Brainyquote.com. xplore inc (2013).

<http://www.brainyquote.com/quotes/h/hugoblack110612.html> (3-10-2013).

<sup>108</sup> Jnerot "The consequences of wikileaks toward the world and the society" (2013) *Katho New Media* Available at; <http://kathonewmedia.wordpress.com/2013/06/12/the-consequences-of-wikileaks-toward-the-world-and-the-society/> (10-8-2013).

<sup>109</sup> United Nations "Global issues: democracy and the United Nations." [www.un.org/en/globalissues/democracy/democracy\\_and\\_un.shtml](http://www.un.org/en/globalissues/democracy/democracy_and_un.shtml) (31-8-2013).

playing the role of a press which as Judge William Byrne described is to prevent the people from being deceived by their governments.

## 2.7 Wikileaks and National Security

National Security has been universally recognized as a legitimate reason for governments to restrict freedom of expression where it is obvious that national security is threatened.

Wikileaks has been said to constitute a serious risk to national security<sup>110</sup> this has been stressed by many observers and experts around the globe, but strange enough is the fact that very little of the information contained in the cables was surprising to the public.<sup>111</sup> Indeed much of it was already in the public sphere.

The abuse of restrictions on freedom of expression and information in the name of national security is one of the most serious obstacles to freedom of expression around the globe. The Johannesburg Principles on National Security, Freedom of Expression and Access to Information<sup>112</sup> developed by a group of experts and endorsed by the UN Human Rights Commission, can be considered in this study as a starting point in evaluating concerns related to national security information in the issues raised in the Wikileaks debate. Under international law, governments must show that any restrictions on access to information are prescribed by law and necessary in a democratic society to protect national security interest.

Governments in this regard are the ones with the burden to prove that disclosure of such information would cause considerable harm. This notwithstanding, if the benefits of disclosure outweighs that of secrecy, then such information must be disclosed since it serves the greater good. Studies on the effects of right to information legislation in many countries have found little impact on the amount of information that is recorded and no evidence that

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<sup>110</sup> Tom Leonard “Pentagon deems wikileaks as a national security threat” (2010) <http://www.telegraph.co.uk/technology/7475050/pentagon-deems-wikileaks-a-national-security-threat.html> (24-7-2013).

<sup>111</sup> Mushahid Ali and Captain Benjamin Ho “Wikileaks and the new politics of diplomacy” *Pointer Journal of the Singapore Armed Forces Vol.38 No.4 p.65*.

<sup>112</sup> n116 (These principles had been endorsed by Mr Abid Hussain UN Special Rapporteur on freedom of expression, in his report to the 1996, 1998, 1999 and 2001 sessions of the UN commission on human rights).

opinions are muted following an increase in transparency. In fact, in some cases, the quality of documents has improved with the knowledge that they will become public someday.<sup>113</sup>



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<sup>113</sup> Callamard Agnes “Leaks and wikileaks: impact on human rights” *Digital Development Debates Issue 4 Media p.3* ARTICLE 19 (ARTICLE 19 is an independent human rights organisation that works around the world to protect and promote the right to freedom of expression. It takes its name from Article 19 of the UDHR which guarantees free speech.)

## CHAPTER 3: FREEDOM OF EXPRESSION AND WIKILEAKS' IMPACT

Everything secret degenerates, even the administration of justice; nothing is safe that does not show how it can bear discussion and publicity. - Lord Acton<sup>114</sup>

Wikileaks' emergence goes a long way to advance this saying. If there is a foolproof channel that protects the person who discloses secret incriminating evidence of wrongdoing by major corporations or governments, we can be sure that every secret will have its day in the sun. By looking at some of the governments that wikileaks has been able to touch in its efforts to foster freedom of expression, it is safe to say that no one is immune from the wrath of the wikileaks probe. Wikileaks is far more than an organization that exposes secrets; it's a way of life, a revolution, and different way of approaching the business of open governance. This chapter journeys through these relationships and examines the way the concept of wikileaks impact of the movement on the established legal structures in some governments.

### 3.1 Freedom of Expression As Enshrined in International Law

Freedom of expression has been the central point for the important human rights development of modern history. Struggles to establish freedom of expression led to historic agreements such as the US Bill of Rights of 1791, the 1688 English Bill of Rights. A more recent historic development to foster freedom of expression was when the UN General Assembly supported the need to protect free expression by passing Resolution 59(I) in 1946. This Resolution is to the effect that the freedom to gather, transmit and publish information is a fundamental human right and the touchstone of all the freedoms to which the United Nations is consecrated.<sup>115</sup>

The evolution process of freedom of expression led to the creation of the Universal Declaration of Human Rights. The UDHR is considered to be binding to all member states as a matter of customary international law. Article 19 defends the right to free expression in these terms "everyone has the right to freedom of opinion and expression; this right includes

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<sup>114</sup> Lord Acton. Brainyquote.com xplore inc (2013). <http://www.brainyquotes/I/lordacton154528.html> (1-10-2013).

<sup>115</sup> The GA Resolution 59(1) para 1(1946) freedom of information used here is meant in its widest sense to include free flow of information and ideas in the society and freedom of expression. It alludes to the values of personal freedom and democracy.



freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”<sup>116</sup> As customary international law, this fundamental tenet of human rights binds all state parties signatory to it.

In an effort to strengthen the laws laid down in the UDHR especially that of free expression, in 1953, the UN Commission on Human Rights drafted the International Covenant on Civil and Political Rights (ICCPR)<sup>117</sup> which entered into force in 1976. Article 19 of the ICCPR pertains to the right to freedom of expression and uses protective language which is similar to that of the UDHR. It states “everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.”<sup>118</sup> The ICCPR has been ratified by 165 states and it is a formally binding legal treaty. The ICCPR language removes any doubt left that international law protects free expression and all members’ states have the obligation to comply with the terms of the treaty.

Regional instruments of international law have in a similar way obliged their signatories to respect the right to freedom of expression. The Council of Europe in 1950, inspired by the UDHR, drafted the European Convention on Human Rights (ECHR) which came into force in 1953. Section 10(1), also using similar language as that of the UDHR mandates that “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...”the Inter-American Convention on Human Rights and the African Charter on Human and Peoples Rights are not left out when it comes to protecting free expression. The latter in its article 9(1) (2) states "Every individual shall have the right to receive information. Every individual shall have the right to express and disseminate his opinions within the law." The above freedom of expression documents are legally binding to their signatories and are enforced through the necessary institution set up for the purpose.

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<sup>116</sup> n12

<sup>117</sup> Created by GA Resolution 2200A (XXI) (1966) and entered into force after 35 states ratified it on the (1976)

<sup>118</sup> Article 19 of the ICCPR

The European Organization on Security and Cooperation (OSCE)<sup>119</sup> has also made a declaration outlining its commitment to human rights especially the right to free expression in the 1973 Helsinki Final Act and in subsequent documents for instance in the 1989 concluding documents of the OSCE Vienna meeting that confirmed member states' commitment with regard to seeking, receiving and imparting information of all kinds, to ensure that individuals have the right to freely choose their sources of information.<sup>120</sup> The OSCE's commitments are soft laws therefore are not legally binding but one thing remains very clear, that it has a very strong political impact due to the fact that it has a widespread dissemination in the public sphere. Reading the wording of the OSCE Commitments indicates that the participating states have considered the UDHR to be a binding document right from the inception of the Helsinki Process. It is stated in the Helsinki Final Act's Decalogue<sup>121</sup> that in the field of human rights and fundamental freedoms, the participating states will act in conformity with the purpose and principles of the Charter of the UN and with the UDHR. They will also fulfill their obligations as set forth in the international declarations and agreements in this field, including inter-alia the International Covenants on Human Rights, which they may be bound.

The nature of the obligation of the OSCE to the UDHR is that upon the adoption of a variety of human rights in the 1989 Vienna<sup>122</sup> and Copenhagen documents,<sup>123</sup> member states to the OSCE stated that the UDHR is a body of international commitments and an obligation under international law. The members states even went further to agree that in the exercise of the human rights, they will also abide by the UDHR terms with no restrictions except those provided by the law and consistent with the obligations in international law for instance, those stated in the ICCPR.<sup>124</sup> The above mentioned international and regional instruments attest to the fact that states have the obligation under international law to protect and not obstruct freedom of expression.

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<sup>119</sup> Robert- Jan Uhl and Bernhard Knoll The OSCE: a commitment to human rights. P.435; OSCE human dimension commitments. Vol.1, p.18-19, (Thematic Compilation) (2d ed) Published by the OSCE office for democratic institutions and human rights (2005). Designed by Nona Reuter printed in Poland by Pligrafus Andrzej Adamiak.

<sup>120</sup> n116

<sup>121</sup> Helsinki Final Act's Decalogue (1975) p.2

<sup>122</sup> Vienna documents (1989) OSCE, (conference for security and co-operation in Europe concluding document of the vienna meeting questions relating to security in Europe principles) para.21

<sup>123</sup> Copenhagen (1990) preamble

<sup>124</sup> n126

These international human rights instruments allow a reciprocal flow of information which consists of both the right to receive and impart information. However, the ICCPR, ACHPR and the ECHR, which as noted binds states to varying degrees, also permits states to limit the right to free expression, illustrative of the fact that the right to freedom of expression is not an absolute right. Article 19(3) of the ICCPR declares that states may restrict freedom of expression if it is to protect the rights and reputation of others, safeguard national security, protect public order and defend the public's health or morals. Article 10(2) of the ECHR provides a broader range of restrictions, including allowing states to protect its territorial integrity, prevent disclosure of information considered as confidential, and secure the judiciary's integrity.

The legitimate reason for limitation provided for in ACHPR can be found in article 27(2)<sup>125</sup> of the Charter. This article stipulates that the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security morality and common interest. States are not obligated to enact the above ICCPR, ACHPR or ECHR restrictions; they are just available for the state to employ whenever the need arises. It should be noted that National Laws cannot set aside the right to express one's freedom or opinion guaranteed at international level because national laws does not have precedence over international law rather it is the other way round.<sup>126</sup> Therefore, limitations at national level must be in conformity with that of international instruments.

Let's look at a few cases in the European Convention which will illustrate more on the above discussion In *Klass v. Federal Republic of Germany*<sup>127</sup>, the European Court of Human Rights ruled that restrictions placed on a guaranteed freedom are to be firmly interpreted and should be in conformity with the below two-step process. Firstly, the state must offer proof to show that the restriction is allowed under the treaty, and, secondly, the state has the burden to proof that the said exception is necessary in order to preserve a democratic society. For instance, as already discussed, Article 10(2) provides instances where a restriction to the right to free express would be permitted. These restrictions also include restrictions on blasphemous speech. This restriction does not imply, however, that governments should restrict all

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<sup>125</sup> Article 27(2) of the ACHPR

<sup>126</sup> Communication 140/94 145/95 Constitutional Rights project Civil Liberties Organisation *Media Rights Agenda v. Nigeria* 15 (1999).

<sup>127</sup> *Klass v. Federal Republic of Germany* ECHR Series A 28 (1979-80) 2 EHRR 214 (1979).

speeches considered to be blasphemous, only the ones that are a threat to the democratic society. Recalling the case of *Handyside v. United Kingdom*<sup>128</sup> mentioned above, the European Commission on Human Rights decided in this case that although limitations on free expression are allowed under international law, they are simply exceptions to the universal right of free expression. This case qualified the restriction clause of ECHR Article 10(2) as that of a simple exception to the general rule of free speech. And, these restrictions can only limit freedom of expression to the extent drawn in the applicable treaty.

International law takes into consideration a person's situation in society when restricting freedom of expression. The "duties and responsibilities" of a person, as called for in ICCPR Article 19(3), may differ from one person to another. A person's right to be protected against defamatory or slanderous speech must be analyzed in relation to his societal duties. An example to illustrate this point is, in *Lingens v. Austria*<sup>129</sup>, where the European Court of Human Rights held that a government official accused of holding an "accommodating attitude" towards the Nazis had to endure more criticism as a result of his public position. The Court ruled that public figures must endure more criticism than private persons<sup>130</sup>; this is so, in order for political debate, which is essential in democracy, to function properly. Defamation laws must honor this distinction.

### 3.2 How Did Wikileaks' Infringed on the Right to Privacy

As mentioned above, it is a universal knowledge that the right to freedom of expression is a fundamental human right which is of great importance because it is a cornerstone to democracy, key to the protection of both human rights and human dignity. Conversely, it is also an acknowledged fact that it is not an absolute right and democracies have created some system of limitations on this right.<sup>131</sup> This subsection will examine mainly privacy as an exception to the right to freedom of expression as related to international law and the wikileaks case.

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<sup>128</sup> n10

<sup>129</sup> *Lingens v. Austria* 9815/82 (1986.)

<sup>130</sup> This position was also established in communication 105/93, 128/94, 130/94, *Media Rights Agenda and Constitutional Rights Project v. Nigeria* (1998) comment by Rachel Murray *South African Journal on Human Rights Vol.17 Part 1 (2001) p.161.*

<sup>131</sup> Toby Mendel "Restricting freedom of expression: standards and principles" p1-23 *Centre For Law and Democracy*)

The right of privacy is well established in international law. The fundamental privacy principle in modern law can be found in the Universal Declaration of Human Rights. Article 12 of the UDHR states that "no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks."<sup>132</sup> Information collected without the consent of the owner from online or electronic sources like internet, email, social media networks, are possessions of an individual<sup>133</sup> or a group of persons or government as the case may be, therefore it should be considered as private personal data. Wikileaks disseminating such information to the public is considered to have infringed on the right to privacy as enshrined in international law instruments.

The UN Guidelines for the Regulation of Computerized Personal Data Files (1990) laid down Fair Information Practices for persons using computerized personal data files and also recommend the adoption of national guidelines which complies with the above, to protect personal privacy. Suitably, the UN Guidelines note that there could be derogation from these principles as long as it is specifically provided for when the purpose of the file is the protection of human rights and fundamental freedoms of the individual concerned or humanitarian assistance.<sup>134</sup> The protection of privacy is considered as vital human right, which is indispensable for the protection of liberty and democratic societies. William Pfaff elaborated on issue when he wrote in the *Register-Guard Magazine* that, "The defining characteristic of totalitarianism is its assault on privacy. The individual in a totalitarian state is deprived of privacy in order to destroy his or her liberty."<sup>135</sup>

As already stated, the right of privacy is well established in international and national law. Following the adoption of the UDHR in 1948 and the adoption of article 12 which speaks directly to privacy issues, similar provisions related to the right to privacy were adopted in the ICCPR, the ECHR, as well as other regional conventions.

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<sup>132</sup> Article 12 of the UDHR

<sup>133</sup> American civil liberties union of Minnesota (ACLU) social networking your privacy rights explained. (2012)

<sup>134</sup> Marc Rotenberg, Preserving Privacy in the Information Society.

[http://www.unesco.org/webworld/infoethics\\_2/eng/papers/paper\\_10.htm](http://www.unesco.org/webworld/infoethics_2/eng/papers/paper_10.htm) (30-9-2013).

<sup>135</sup> The register-guard magazine (1998) p.10; William Pfaff "Kill privacy kill freedom Armagedon in cultural wars magazine" *Commonweal* Vol.125 No. 17.

At the national level, most governments have a general right of privacy set out in their Constitutions. Privacy rights have also been established by means of case law and enactments of legislatures. Such laws typically seek to protect privacy in a particular context, such as laws that protect the privacy of communication by limiting the circumstances in which police may undertake wiretapping or when a merchant may sell personal data.

Many scholars like Anita, L. Allen have defended the right to privacy and its protection by listing the values, relate to privacy: Self-expression: privacy laws give individuals the opportunity to better express their true personalities and values. Likewise, Privacy helps preserve peoples' reputations. When individual are guaranteed their right to privacy, it is observed that they become more composed and relaxed. Privacy enhances creativity and reflection, which is good for an individual's own sake, and which can also lead to useful cultural products and inventions, thereby improving on the intellectual life of the said individual. Privacy allows the individual or groups of like-minded individuals the ability to plan undertakings and live in accord with preferences and traditions.

Privacy norms sustain civility by condemning behaviors that offend courtesy, honor, and appropriateness. Philosophers have said that respect for privacy is, in many ways, respect for human dignity itself. Privacy rights against government demand that state power is limited and unobtrusive, as liberal democracy requires. Privacy rights demand that government tolerate differences among individuals and groups. As an aspect of liberty, privacy fosters the development and exercise of autonomy. Privacy fosters individualism, and it is not fairly condemned as a purely individualistic value at odds with ideals of a cooperative, efficient democratic community.<sup>136</sup> Worthy of note is the right to privacy also has a down side as it prevents the effective and efficient implementation of national security measures, law enforcement; it hampers free speech and free press. It keeps information that the public has a right to know<sup>137</sup> and also gives governments the upper hand to shield information from the citizenry

The Watergate scandal<sup>138</sup> led to the public distrusting the government which eventually brought about the enacting of the 1974 Privacy Act in the U.S. Congress declared personal

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<sup>136</sup> Anita L. Allen "What must we hide: the ethics of privacy and the ethos of disclosures" *St Thomas Law Review* Vol.25 p.5-6 (2012).

<sup>137</sup> n 94.

<sup>138</sup> Aman C Alfred C JR and Mayton William T. "Administrative Law" (2001) p.697 (2d ed)

privacy a constitutional right. Arthur Miller, who is a law professor specialized in privacy law, stated the importance of privacy law during the hearing for the Privacy Act, he said that; “the information gathering and surveillance activities of the Federal Government have expanded to such an extent that they are becoming a threat to several of every American’s basic rights, the rights of privacy, speech, assembly, association, and petition of the Government.”<sup>139</sup>

The Privacy Act covers the maintenance, use and dissemination of federal agency records pertaining to individual citizens, and limits record collection to information needed to carry out agency functions. Under the Privacy Act, personal records may only be disclosed to agency employees who require the records to perform their duties. With narrow exceptions, dissemination outside of permitted agency employees can only occur when the subject of the record permits disclosure.<sup>140</sup> The Privacy Act achieves its goals by focusing on the protection of individuals’ “records.” Records protected by the law include information about a person’s education, financial transactions, medical history, criminal or employment history, as well as items containing a person’s name, identifying number, symbol, or other identifying particular assigned to the individual, including finger or voice print or photograph. It also protects “systems of records,” which include any group of records from which information is retrieved by the individual’s name, identifying number, symbol or other “identifying particular” assigned to the individual.<sup>141</sup>

In the quest to promote transparency/freedom of expression, the wikileaks organization violated the privacy and confidentiality rights of some governments, corporations and individuals. Instances that can be stated to illustrate this accession is the disclosures of Sarah Palin’s private yahoo email content to the public, the bank account details of individuals, disclosures of personal conversations between the then secretary of state Hillary Clinton and Tony Blair, disclosures of private conversation held behind closed doors meant to foster diplomatic relations. The above disclosures breaching the right to privacy could have serious consequences if not immediately, then in future ranging from corporations (banks) losing their clients because of lack of trust that their information will be kept confidential which

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<sup>139</sup> Shik Sarah Lamdam “Protecting the freedom of information act requestor: privacy for information seekers” (2012) *Kansas Journal of Law and Public Policy*. Vol.21 Issue 2 p. 245.

<sup>140</sup> n 95

<sup>141</sup> n 95

might also lead to bankruptcy and we all know the adverse impact this will have on the economy. Such disclosures could also as already predicted have a negative impact on diplomacy. But miraculously, this is not yet the case. This only goes to show one can set out to do something beneficiary to the society but in the course of doing so, create harm along the way. Wikileaks set out to promote transparency, but from the disclosures, it is observed that transparency comes with consequences. Worth noting though is the fact public interest should always override privacy concerns as long as it is to serve a greater good. This can arguably be used in defense in the wikileaks case if it should ever be brought up for prosecution.

### **3.3 Controversies that arose from the Wikileaks Disclosures and how it influenced both democracy and freedom of expression.**

The disclosures of wikileaks raised a lot of reactions globally both positive and negative. Leaking the content of US diplomatic cables caused dramatically harder reactions in different countries than any other of the earlier actions of WikiLeaks. It also made civil rights organizations reconsider their stand on Wikileaks. The reactions shows that freedom of expression is essential in a democratic society but also that we must respect the privacy rights of others while exercising our right to free expression as it doing so we might infringe on others' rights. in this subsection, we will examine those reaction in order to have a clear picture of the effect wikileaks has on free expression and in doing so we will also be illustrating how it has foster democracy. We will examine the positive and negative reactions separately beginning with the negative or adverse reaction to the wikileaks disclosures. As Mark Fenster argues, the complex nature of the WikiLeaks disclosures, as well as the international geopolitical world through which they have flowed, demonstrates the impossibility of exercising such omniscience in determining their effects in hard cases. It is difficult, if not impossible, to find any clear or meaningful pattern of effects caused by such a broad set of documents that would help determine whether the balance of interests tips in favor of secrecy or disclosure.

In addition, the presence or absence now of relatively short-term effects does not preclude the later manifestation of long-term effects or the disappearance of earlier impacts.<sup>142</sup>

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<sup>142</sup> n 47



Critics of wikileaks say that unleashing government secrets will lead to body counts.<sup>143</sup> Military officials such as the Chairman of the Joint Chiefs of Staff Michael Mullen, made numerous allegations in the aftermath of the Afghanistan releases about the immediate and likely future effects of the disclosures on American military operations.<sup>144</sup> The claims appeared to be real especially after a spokesman from Taliban proclaimed that their organization would be using WikiLeaks' documents to identify people that are collaborating with the Americans against them.<sup>145</sup> Then, in a joint statement e-mailed to WikiLeaks, five human-rights groups, including Amnesty International and the International Crisis Group, complained that the release of uncensored Afghanistan documents would endanger their operations by disclosing the names of those working with them.<sup>146</sup> These claims constitutes grounds which the state can use to defend its right to keep certain information secret as they demonstrate that reckless disclosures can cause grave danger to the persons whose names are mentioned in it.

The above allegations also prove that disclosures during wartimes can put a nation's military operations at stake including the lives of combatants; therefore any unauthorized disclosure of such documents should result in criminal prosecution.<sup>147</sup> But worthy of our attention is the fact that up to the time of this writing, no case has been reported of the disclosures leading to any actual harm to a human life or even to diplomatic relations. This notwithstanding, if Wikileaks should be considered as news public media as has been propagated even on the website, it too should follow sound ethical practices that ensure the information disclosed by them is accurate, fairly presented and does not result to causing harm on persons. As this has been one of the main reasons for the organization being criticized. But we should remember that, this was the reason why they collaborated with the best traditional media outlets to

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<sup>143</sup> n 20

<sup>144</sup> Wikileaks files 'potential threat' continues to rattle Washington (2010) [http://www.pbs.org/newshour/bb/military/july-dec10/wikipolitics\\_07-27.html](http://www.pbs.org/newshour/bb/military/july-dec10/wikipolitics_07-27.html) (29-8- 2013).

<sup>145</sup> Ron Moreau & Sami Yousafzai "Taliban seeks vengeance in wake of WikiLeaks" (2010) *DAILY BEAST* <http://www.newsweek.com/2010/08/02/taliban-seeks-vengeance-in-wake-of-wikileaks.html> (30-9-2013).

<sup>146</sup> Whalen Jeanne "Rights groups join criticism of WikiLeaks" (2010) *Wall Street Journal* <http://online.wsj.com/ardcle/SB10001424052748703428604575419580947722558.html> (30-9-2013)

<sup>147</sup> This was the position taking in the following united states cases *Haig v. Agee* 453 U.S. 280, 308-09 1981 where the courts refused to extend First Amendment protection for disclosure of an intelligence operative's identity) and *Near v. Minnesota* 283 U.S. 697 716 1931 (in this case the courts noted that the First Amendment does not protect anyone for disclosing the movements of troop).

ensure that subsequent leaks after the Afghanistan war logs were accurate and met the standard of news Medias.

The Pentagon Report expressed concerns to the fact that the disclosures could aid the U.S's opponents as they could use the information disclosed to plan an attack on the U.S troops<sup>148</sup> though, the report did not mention any evidence of actual use or feasible actions. The wikileaks episode is a setback for the open government cause because it triggered a predictable tightening of control on government information and also increased the internal surveillance of the classified network systems.<sup>149</sup> This is disastrous to democracy and whistleblowers as the next leaker will face a tougher challenge, as expressed by Stephen Aftergood specialist in government secrecy at the Federation of American Scientist. Interestingly, he goes on to say that this is a regrettable impact on leakers of classified information as some disclosures of classified information really do serve the public's interest.<sup>150</sup> Stephen Aftergood was too fast in his predictions about the outcome of the wikileaks episode when he said that it would lead to tightening of control over government information and increase surveillance on classified networks thereby creating a challenge for would be leakers. Apparently the US government did not learn much from the wikileaks episode because it certainly did not improve on their surveillance systems as not long after wikileaks, there was the outbreak of the Snowden disclosures and interestingly enough, he was also able to sneak out of the US territory without being caught.

The negative impact of the disclosures have led to prominent human rights groups calling on the whistleblower organization to expunge the names of Afghans mentioned in the associated War Diary because of fears that they could be targeted by insurgents.<sup>151</sup> Governments around the world attacked the site as threatening or undermining their national security, effective diplomacy, the work as well as lives of their officials abroad. However, the negative impact of WikiLeaks on human rights in my view has been greatly exaggerated and in no way balances its positive impact on human rights awareness especially the right to free expression.

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<sup>148</sup> n 110

<sup>149</sup> n 47

<sup>150</sup> Kitfield James "Wikileaks collateral damage" (2013) *National Journal*

<http://www.nationaljournal.com/nationalsecurity/wikileaks-collateral-damage-20111216> (1-10-2013).

<sup>151</sup> n 126

Let us put aside wikileaks' guilt or innocence and ask ourselves what should wikileaks have done when it had obvious evidence of war crimes, other crimes and evidence of constant deception of the government and some high standard corporations in its possession? Should the wikileaks organization have hidden this evidence? If they did, would it not have been another crime that is an act of complicity? Wikileaks chose to exposed these crimes not because it is a terrorist organization as some government official such as Peter King have labeled it<sup>152</sup>, but because they strive to promote transparency in governments and corporations which they obviously believe that in doing so, it will foster democracy and making the world a better place. The proper response to the wikileaks disclosures should have been that of heroism and not villainy as some people make it to be.

Let look at it again from the perspective of the rule of law as illustrated in the Nuremberg Trials. A high point in the application of the rule of law to war came in the Nuremberg trials where leaders in Germany were held accountable for atrocities committed during World War II. Justice Robert Jackson, serving then as the chief prosecutor in the Nuremberg trials said "If certain acts of violation of treaties are crimes, they are crimes whether the United States does them or whether Germany does them, and we are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us."<sup>153</sup>

It should be recalled that one of the key effects of the Nuremberg trials was that those guilty of committing war crimes or crimes against humanity were held accountable for their actions whether they were following orders or not. This was done under the Nuremberg Principle IV which states: "The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law provided a moral choice was in fact possible to him."<sup>154</sup> These Nuremberg principles have been enshrined in a

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<sup>152</sup> Lawmakers call on administration to prosecute wikileaks designate as terror group (2010) <http://www.foxnews.com/politics/2010/11/29/lawmakers-administration-prosecute-wikileaks-designate-terror-group/> ( 23-9-2013)

<sup>153</sup> International conference on military trails department state publication 3880 p.330. This quotation was also reiterated in *Mitchell v. United States* 1012 supreme court of United States (1967) <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=386&invol=972> (23-9-2013)

<sup>154</sup> Principles of Nuremberg tribunal (1950) No.85 <http://deoxy.org/wc/wc-nurem.htm> (23-9-2013)

series of international treaties.<sup>155</sup> What this means is that international law crimes should not be overlooked irrespective of who committed them and in the case of wikileaks, having evidence of the commission of such crimes should not be hidden but rather exposed so that the perpetrators can be punished in accordance with the laws as laid down in international law for such crimes. We should remember at this point that according to the Rule of law, the law is no respecter of persons.

An examination of the Collateral Murder video shows American soldiers in an Apache helicopter gunning down a group of innocent men, including two Reuters employees, a photojournalist and his driver, killing 16. The video, which has been viewed by millions, shows initial blasts at the group killing and wounding people. U.S. forces watch as a van pulls up to evacuate the wounded. The soldiers again open fire from the helicopter, killing more people. A crew member of the helicopter is even heard saying, “Oh yeah, look at those dead bastards.” From an international law perspective, these are obvious war crimes with regard to International Humanitarian Law which is to the effect that, combatants must make a distinction between combatants and civilians.<sup>156</sup> And the attack must be proportionate.<sup>157</sup>

In this video, it is clear that the crew member knew that those they were attacking are civilians and not combatants since there was no evidence of the people carrying weapons or wearing a distinctive uniform which would have identified them as follow combatants neither can they say that the attacks they meted on their victims was proportional. These are obvious crimes and should be exposed because that is the only way in which the public can make informed decisions on the activities of government. Wikileaks and Bradley Manning should be giving credit for exposing these crimes and promoting freedom of expression and transparency rather than been prosecuted for disclosing the truth. The event of last year in the Marikana area in South Africa is similar to this and it opened a forum for the South African people to express themselves about this act of the South African policy which is meant to protect and not kill its citizens.

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<sup>155</sup> Klamberg Mark “Evidence in international criminal trail: confronting legal gaps and the reconstruction of disputed Events” *International Criminal Law* Series 2 Chapter 1 Publisher Martinus Nijtoff.

<sup>156</sup> Rule 1 principle of distinction between civilians and combatants fourth Geneva convention (1949); article 48 of additional protocol I; article 4(1) of additional protocol II; Ottawa convention on anti-personnel mines is also to the effect that distinction must be made in an armed conflict between civilians and combatants.

<sup>157</sup> Rule 14 this principle is codified in 51(5) (b) of the additional protocol 1 and repeated in article 57.

This video alone brings forth multiple international law crimes especially that of customary international law. Firstly, the targeting and killing of civilians who do not pose a threat whatsoever, is a violation of the Geneva Conventions<sup>158</sup>. Secondly, when soldiers attacked the van which was attempting to rescue the wounded, they violated yet again another aspect of the Geneva Conventions which allows for the fallen and wounded in war to be rescued and protected.<sup>159</sup> Thirdly, rolling over a wounded man, splitting him in two, is a war crime and even if he were already dead, it still constitutes disrespecting a body which also is a violation of the Geneva Conventions. (Customary international law)

The Collateral Murder video documents war crimes according to both International human rights law and International Humanitarian Law. The wikileaks organization was only being keepers of international law regulations when they disposed these crimes. In fact, they should be applauded for informing the public and giving the public an opportunity to make informed decisions on what to do with the acquired information. This is the only way a democratic society can be achieved when transparency exists and wrongdoings are be curbed. Actually disclosure might just be the only remedy to put an end to all this atrocities perpetrated by governments and corporations. Let us not forget the impact the disclosures had on the Arab region in Africa which was a factor in the democratic process in that region.

Justice Robert Jackson, in his Opening Address at the Nuremberg Trials, said: “If we can cultivate in the world the idea that aggressive war-making is the way to the prisoner’s dock rather than the way to honors, we will have accomplished something toward making the peace more secure.”<sup>160</sup> In disclosing the wrongdoing of governments and corporations, wikileaks and Bradley Manning simply joined in this enlightened standpoint by working to promote transparency, democracy and above all peace in the world at large instead of terrorism and instability as some government portrays it to be doing. An open and independent society should rather encourage this honest reaction of wikileaks and Bradley Manning and be looking for ways promote open debates to ratify this wrongdoings from occurring again not waiting time looking for suitable laws to prosecute the wikileaks team.

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<sup>158</sup> Violation of the fourth Geneva Convention (1949).

<sup>159</sup> Fourth Geneva convention part II article 13.

<sup>160</sup> Leithner Chris “Virtuous leaders or War Criminal?” (2007) <http://www.lewrockwell.com/2007/01/chris-leithner/virtuous-leaders-or-war-criminals/> (16-9-2013)

As Thomas Jefferson warned that “oppressions are many” and that for the people to govern we should “leave open . . . all the avenues to truth.”<sup>161</sup> Wikileaks provided this avenue for truth where we can look honestly at our governments and radically change its direction for good.

An enlightened public would renounce such activities of those in control, activities such as spying on foreign officials no matter what the reasons for doing so may be. Wikileaks actions are simply against the oppressions of leaderships and not against leadership.

We should not lose sight of the fact that wikileaks informed the US government of the content of the leaks weeks before the cables were disclosed,<sup>162</sup> which enabled the Government to brief other Governments around the world about the likely implications prior to the press coverage of the disclosures. In response to this, the UK implemented particularly tedious defamation laws that placed a significant burden on what can be printed but, as in the nature of the Internet, one will have no problem reading about the disclosures online anywhere one is found. The UK press was also issued a DA (Defense Advisory) from the Government which does not imply legal actions could be taken to suppress publication of the cables but it did imply that the press should beware of printing anything that could affect military operations.

The papers did also confirm that anything that could endanger life or affect ongoing operations was not to be published. This goes to show that the United States government was offered the opportunity to go through the document content before they were disclosure to ensure that there was absolutely nothing in the documents that could cause or imperil life, or operational situations. This proves that the organization was working in good faith and never intended to bring down the reputation of the US government in particular and other governments in general. Their mission was simply to promote transparency and not terrorism. Ironically it is the international political drive towards defining citizens’ right to freedom of information over the past decade combined with the increased transparency generated by the Internet that is likely to hinder any legal action from the Government to prosecute the parties

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<sup>161</sup> Zeese Kevin “Wikileaks: Bradley Manning and the rule of law” (2011) <http://www.globalresearch.ca/wikileaks-bradley-manning-and-the-rule-of-law/22724>; <http://faculty.uml.edu/gallagher/cultural.con.htm> (16-9-2013).

<sup>162</sup> Post staff report “Wikileaks releases sensitive US cables” (2010) <http://nypost.com/2012/11/28/wikileaks-release-sensitive-u-s-cables/> (25-9-2013).

involved in the disclosures such as the wikileaks team and the newspapers that collaborated with it. It is kind of funny that prominent public figures like Tony Blair and Hillary Clinton who once were passionate supporters of the Freedom of Information in their various countries, would later stand against this same right when the searchlights are focused on their activities advocating that officials be allowed to deliberate 'with a reasonable level of confidentiality.'<sup>163</sup>

The impact of WikiLeaks was particularly strong in Tunisia. The November 2010 leaks revealed that, contrary to popular assumption, President Ben Ali and his family were not being supported by the superpower (that is the US). This information spread throughout the country via Facebook and other social media tools, coming to the attention of many Tunisians. Ironically as noted in the Guardian newspaper, the leaked comments by the US ambassador to Tunis played a major role in boosting Washington's image on the Arab streets.'<sup>164</sup>

This illustrates that the disclosures had a positive effect even for the US government in certain areas in the world. So while focusing on rigorous effort to silence the wikileaks organization and prosecute its organizers, the US government should be in mind that the disclosures also watered the fruitfulness of the otherwise famous Arab Spring. These leaks did worked miracles in the sense of uplifting the spirit of the Tunisian people who have for so long been under an oppressive government headed by President Ben Ali. In fact this has been the paradox of the WikiLeaks organization as perceived by some governments such as the US government as being a direct threat to national security when, in fact, all WikiLeaks did was help to promote those very values that such governments sought to promote and be recognized by, values such as free speech, anti-corruption, transparency, democracy and rule of law.

By spying on the diplomatic missions, the US government violated the Vienna Convention on Diplomatic Relations which states in its article 27 that "the official correspondence of the mission shall be inviolable. Official Correspondences means all correspondences relating to

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<sup>163</sup> Tony Blair's statement during the introduction of the UK's freedom of information act (2000); Mwaura Peter "Kenya: freedom of information bill is set to establish the culture of openness" (2011) <http://allafrica.com/stories/201111140144.html> (1-1-2013).

<sup>164</sup> Leigh David and Harding Luke "Wikileaks: Tunisia knew its rulers were debauched but leaks still had impact" (2011)

the mission and its functions..."<sup>165</sup>It can be argued that wikileaks acted lawfully by disclosing such misconduct perpetrated by the US who from every indication seems to be violating international law and customary international law by spying on diplomatic missions. Wikileaks threw light into this aspect of the US foreign policy thereby promoting transparency. This act of spying on other governments and diplomats carrying out diplomatic missions by the US can also be considered as a violation of article 38 of the Statute of the International Court of Justice, therefore it must be denounced and by exposing this act, wikileaks simply did the international community a favor. It is left for this community to then make an informed decision on what should be done with the information gotten from the disclosures. It should be remembered that the US is a signatory to the UN UDHR therefore it is expected that she should respect the obligations laid down for every member state signatory to the Declaration. <sup>166</sup>

### 3.4 Conclusion

The impact to the affairs of world politics can however be best articulated by this quote: "What cannot be doubted, however, is that taken as a whole, the Cable gate disclosures have given citizens in many different parts of the world an unparalleled opportunity to learn about and evaluate the work that its governments and their officials undertake on their constituents' behalf in the pursuit of international diplomacy That is a beneficial thing. That general benefit is compounded in this instance by the revelation in many countries of maladministration, corruption and endemic human rights abuse. The public interest in the illumination of such practices cannot be doubted."<sup>167</sup> The impact of Assange's work and system of anonymous submittals of otherwise confidential information to the concept of free expression is yet to be felt in its entirety. A quote from an article reads "No national government, international organization or multinational company would escape its gaze. These were next to impossibly ambitious goals but between 2008 and 2010 the organization flew close but dangerously towards their achievement"<sup>168</sup>

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<sup>165</sup> Article 27 of the Vienna convention on diplomatic relations.

<sup>166</sup> Rengel Alexandra "International law American law and the legality of the US spying program" (2013) *International Law Perspectives* <http://arengel.edublogs.org/2013/07/02/international-law-and-the-legality-of-the-us-spying-program/> (4-10-2013).

<sup>167</sup> n 165

<sup>168</sup> n1



In the 2011 trial of Charles Taylor, a first of its kind trial as no African head of state before this had been tried by an International Criminal court. The defense opened its arguments by claiming that Taylor's prosecution was politically motivated. In its opening statement, the defense stated that Taylor had been indicted and arrested only because pressure from the US government. Two months before closing arguments, the defense successfully persuaded the Court to admit as evidence two confidential and classified US cables leaked by Wikileaks, which it claimed supported the theory that the prosecution of Taylor was politically motivated and deliberately designed to keep him out of West Africa.<sup>169</sup>

I believe it is foreseeable that there would be a lot more litigation that would continue to arise from the leaks that would continue to inevitably hit the world through wikileaks. Wikileaks will continue to find their way into the court room and trigger and influence legal actions by providing burden of proof that was not easy to come by before. The Taylor defense team on 10 January 2011, “argued that the indictment and trial of Mr. Taylor was an extension of the US foreign policy interests in West Africa” a claim that it substantiated by using WikiLeaks’ cables as proof.

For human rights law activists, the wikileaks developments constitute enormous opportunities: to gain access to information which under normal circumstances are beyond their reach, to release public interest information to a wide audience eager for such information, and to raise awareness and empower the general public to hold those in authority accountable for their actions. This is what Tunileaks did for the people of Tunisia under the influence of wikileaks. The main challenge remains what to do with the information disclosed. We should remember that the information gotten from WikiLeaks has not been met with an equal level of activism in response as could have been expected. So the real challenge is how to make the most of this abundance of information to produce the expected result which is promote freedom of expression, transparency, curb excessive secrecy in leadership and above all stop human rights violations. A wave of legal precedents could emerge out of the wikileaks case that could impact the laws that govern how information can be dispensed legally and what criteria an information has to meet to be

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<sup>169</sup> Developments in international criminal justice in Africa during the year (2011) Constitutional Library *Juta's Africa Human Rights Law Journal (2001- 2012/2012) Vol.12 part 1:1-300 recent developments.*

considered admissible in a court room. In this regard Wikileaks have a presence in the legal theatre that is still happening.

Governments and corporations are noted for demanding access to information from persons and organizations but are never willing to disclose their own information. They will rather prefer to keep it secret under the canopy of national security in the case of governments and protection of company secrets as regard corporations.<sup>170</sup> States have consensual obligations to respect international treaties and customary international law. If any state fails to respect these obligations, any concerned individual/organization has the right to bring their actions to the awareness of the international community and bring forth sanctions to the offending state usually levied and enforced by the international court<sup>171</sup> headquartered in The Hague. In disclosing confidential documents about the wrongdoings that goes on in governments, wikileaks was simply performing the role of an international watchdog meant to foster international law especially the right to free speech. It can be argued that wikileaks, in this respect was upholding its civic duty and rendering service to the international community.



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<sup>170</sup> n 1

<sup>171</sup> International court of military justice. The Hague Netherlands.

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