



ABUSE OF POWER AND THE RIGHT OF INVIOABILITY BY FOREIGN DIPLOMATS (A CASE STUDY OF ESPIONAGE BY THE AUSTRALIAN AMBASSADOR AGAINST INDONESIA IN 2013)

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Abstract

This research aims to analyze the abuse of diplomatic power by foreign diplomats, focusing on the case of Australian espionage against Indonesia in 2013. It evaluates the impact of this espionage on diplomatic relations, trust between the two nations, and the legal implications under international law, including state responsibility. This study employs normative legal research methods, combining document analysis, case studies, and a review of international legal literature. The findings highlight violations of international law, a deterioration in diplomatic relations, and a decline in trust. It underscores the need for fair enforcement of laws addressing breaches of diplomatic immunity. This research emphasizes the principles of international law, the responsibility of states for unlawful actions by diplomats, and the importance of strict oversight to uphold the integrity of diplomatic relations.

Keywords : abuse of power ; the right of inviolability ; diplomatic Foreign

A. INTRODUCTION

The right of Inviolability is the right of a diplomatic official to obtain protection from the power tools of the receiving country. In the right of inviolability, there are two things, namely inviolability and immunity, which are inherent in a diplomatic official. Inviolability in question is immunity against the instruments of power of the receiving country and immunity against interference that is detrimental to diplomatic officials in carrying out their duties and functions in the receiving country.

The granting of immunities and privileges intended for diplomatic officials is a decision from a very long history of diplomacy which ultimately means that granting such rights is considered an international custom, and is based on customary rules contained in international law, namely that diplomats are appointed to represent a country. Notably, diplomats have strong immunity from the jurisdiction of the sending country. The granting of these rights is based on the principle of reciprocity between countries and this principle is also necessary to, first, develop friendly relations between countries, without considering their different constitutional systems and social systems. Second, not for individual interests but to ensure that diplomatic officials carry out their

duties efficiently, especially in carrying out the duties of the country they represent. That is the reason diplomatic officials enjoy their privileges and immunities.¹ So the right of inviolability is the right of a diplomatic official to obtain protection from the instruments of power of the receiving country.²

However, this does not rule out the possibility of violations committed by diplomatic representatives in carrying out their duties in the receiving country. Even though the Treaty regulating diplomatic relations has been ratified, its developments still give rise to many acts of violence and endanger the safety of both diplomatic representatives carrying out diplomatic missions³ and receiving countries where diplomatic officials serve. Acts of violation and abuse of rights and powers. by diplomatic officials in carrying out their duties in the receiving country, so that it can have an impact on the country or diplomatic officials legally in carrying out duties and missions by the country or diplomatic officials.

Apart from that, due to the influence of the development of technology and information which ultimately revealed many records of criminal cases that occurred and involved diplomatic officials as the main perpetrators these diplomatic officials had obtained the right to immunity and diplomatic privileges. But because of the granting of this right, special immunity has resulted in many abuses of the power and privileges given to diplomatic officials. One of the cases involving diplomatic officials was the espionage case carried out by Australian diplomatic officials in 2013 in Indonesia.

The espionage case is one of the ongoing cases, meaning it does not rule out the possibility that something similar will happen in the future because the public has made Information and Communication Technology a necessity for society in the 5.0 era.⁴

The practice of espionage or wiretapping has become an aspect of customary international law. However, no country openly admits to engaging in it, as it constitutes a violation of diplomatic relations. The focus of the issue lies in the fact that the perpetrator of the espionage or wiretapping was a diplomatic official assigned to the receiving country. According to the 1961 Vienna Convention, diplomatic officials enjoy diplomatic and legal immunity, which prevents the receiving country from initiating legal proceedings against them, as stipulated in Article 29 of the convention.⁵

Australia's towards Indonesia in 2013 was a violation of the diplomatic code of ethics because Australia refused to apologize and clarify the actions they had taken.⁶ Diplomatic officials on duty are bound by a professional code of ethics, which serves as a reference for foreign services worldwide. This highlights the critical role and position of the receiving country in addressing espionage activities carried out by diplomatic officials. In such cases, the receiving country is inevitably harmed by the actions of these officials. Consequently, the receiving country has the right to take measures to address espionage activities conducted by diplomatic officials. Naturally, the repercussions of

1 Sumaryo Suryokusumo, *Diplomatic Law Theory and Cases*, Cet, 2, Ed, 2, PT.Alumni, Bandung, 2005, p.56

2 Annisa, *Diplomatic Immunity, Functions, Types and Examples*, <https://fahum.umsu.ac.id/kekebalan-diplomatic-pengertian-fun-jen-dan-cepatnya/> accessed on 18 November 2023

3 Setyo Widagdo dan Hanif Nur Widhiyanti, Ed, 1, *Hukum Diplomatik dan Konsuler*, Banyumedia Publishing, Malang, 2008, hlm. 140

4 Marcelino M. Jusuf, Maarthen Tampanguma, Franky Mewengkang, Jil, 1, 2022 "*Criminal Acts of Interception (Wiretapping) Outside Information and Communication Technology Law Enforcement in Indonesia*", p. 10

5 Eddy O.S. Hiariej, , *Introduction to International Criminal Law*, First Printing, Erlangga publisher, Jakarta, 2009, pp, 46,- 54

6 Jawahir Thontowi, "*Tapping in International Law and its Implications for Indonesia's Diplomatic Relations with Australia*", Faculty of Law, Islamic University of Indonesia, Law journal, IUS QUIA IUSTUM, Vol 22, Yogyakarta, 2017, p. 18

such espionage cases can significantly impact diplomatic relations between the two countries involved.

The authors formulate the research problems as follows: First, what are the impacts of the abuse of the right of inviolability by Australian diplomatic officials against Indonesia, as outlined in the 1961 Vienna Convention? Second, what legal remedies can be pursued to address espionage cases as a violation of the integrity of diplomatic officials?

Furthermore, this research aims to analyze and explain the impact of espionage activities conducted by Australia in 2013, based on the provisions of the 1961 Vienna Convention. It also seeks to examine the legal measures that can be taken to address such espionage cases, specifically those committed by Australian diplomatic officials against Indonesia in 2013, which were proven to violate the right of diplomatic inviolability as stipulated in the Vienna Convention, the foundational source of diplomatic law.

The scope of this research encompasses the legal measures that can be applied to diplomatic officers proven to have engaged in espionage, as well as the abuse of power and diplomatic privileges. This includes examining the concept of the *Internationally Wrongful Act* as a basis for establishing state responsibility. The research further explores the principles and legal remedies available under the 1961 Vienna Convention, which serves as the foundation and primary source of diplomatic law.⁷

B. METHOD

This research employs normative legal methods, which position the law as a system of norms. These norms include international conventions or agreements, doctrines, court decisions, legal principles, and legal theories. Normative legal research involves identifying legal rules, principles, and doctrines necessary to address specific legal questions. This type of research is library-based, relying on the analysis of legal materials and literature. In this context, the research specifically refers to legal norms found in international legal conventions related to diplomatic law.

C. ANALYSIS AND RESULT

1. Impact of Inviolability Abuse of Power Cases by Australian Diplomatic Officials.

In diplomatic relations between countries, there is a means of liaison in the form of diplomatic relations between the *sending country* and *receiving country*. This relationship is regulated in the Vienna Convention of 1961 which establishes reciprocal agreements between the countries involved. According to *Hans J. Morgenthau*, there are four tasks of diplomacy, namely determining goals based on available forces, assessing other countries' goals, determining the extent to which these goals are compatible, and determining ways to achieve these goals.

Diplomatic officials have rights and obligations, as well as immunities and privileges which include immunity and inviolability. Immunity rights and diplomatic privileges aim to provide freedom in carrying out duties as a diplomatic official. The 1961 Vienna Convention adheres to the theory of functional requirements to maintain the efficient implementation of diplomatic mission functions.

⁷ Eddy O.S. Hiariej, , Introduction to International Criminal Law, First Printing, Erlangga publisher, Jakarta, 2009, pp, 46,- 54

Abuse of diplomatic power is an act that violates international law and can result in consequences for the sending country and diplomatic officials. Indonesia, which has ratified *the 1961 Vienna Convention*, is bound by the provisions on immunity and privileges for diplomatic officials. Australia, as a country that is also involved in a diplomatic conflict with Indonesia, carried out acts of espionage that violated international law. This has consequences for Australia as the sending country and its diplomatic officials. The Indonesian government evaluated bilateral relations with Australia in response to the actions taken, apart from that, several notes on the impacts that occurred included:

- a. Cooperation or exchange of information and intelligence between the two countries being canceled.
- b. Joint training between Indonesia and Australia consisting of the Army, Navy, Air Force, and POLRI,
- c. There is a *Travel Advisory* for Australian citizens who will visit Indonesia,
- d. Influence on Economic cooperation related to Trade and Investment activities.

2. Responses and Consequences for Diplomatic Officials as Perpetrators of Espionage.

Diplomatic officials have inviolable immunity which means they cannot be arrested or detained. However, in the case of actions by Australian diplomatic officials that are considered trivial and refuse to apologize for these actions, it has damaged diplomatic relations between Indonesia and Australia. Indonesia, under the leadership of President SBY, responded by sending a letter to Australia condemning this action, stopping bilateral cooperation, and recalling the Indonesian Ambassador to Australia.

Australia's actions, including intervention in Indonesia's internal affairs, violate the 1961 Vienna Convention and international law. Indonesia has the right to declare *persona non grata* against diplomatic officials who commit violations.

Article 32 of the 1961 Vienna Convention, which states:

- a. *The immunity from the jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending State.*
- b. *Waivers must always be express.*
- c. *The initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction under Article 37 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claimed.*

Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply a waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary. The suspension of diplomatic immunity must be carried out clearly and must have approval from Australia, and *Persona non-Grata* is a consequence that must be accepted by diplomatic officials who have made mistakes and violated international law, including in this case Australian diplomatic officials. Acts of espionage carried out by Australia also violate international law and may result in legal consequences. In handling cases like this, Indonesia can take steps such as declaring *persona non grata*, terminating cooperation relations, and taking the case to the *International Court of Justice (ICJ)*. The *1961 Vienna Convention* provides a clear legal framework for handling cases of violations of diplomatic immunity. Efforts to maintain sovereignty and diplomatic relations between countries are important in international relations.

3. Efforts to Prevent Abuse of the Right of Inviolability.

Relations, These diplomatic officials are obliged to obey the laws of the receiving country and are not permitted to interfere in the affairs of the receiving country.⁸

The espionage case carried out by Australia is a case of internationally wrongful acts which resulted in state responsibility efforts requested by Indonesia. This is one of the legal efforts taken by Indonesia because it is based on the 1961 Vienna Convention which serves as fundamental principle in implementing diplomatic law.

The legal basis for addressing the abuse of diplomatic immunity includes the framework for actions taken by the receiving country, such as expelling diplomatic officials or declaring them *persona non grata*. Each country acts based on applicable regulations, with international law serving as the sole benchmark for resolving issues related to the abuse of immunity by foreign diplomats. The recipient country's actions are significant because the initial response to misconduct by foreign diplomats is typically taken by the receiving country, often involving expulsion or a *persona non grata* declaration.

Acts of espionage carried out by diplomatic officials must be regarded as serious offenses, as they harm the receiving country. Diplomatic officials who misuse diplomatic immunities and privileges beyond the scope of the Vienna Convention violate their duties and missions, as outlined in Article 3, paragraph 1, letter (d) of the 1961 Vienna Convention. This article states:

“Ascertaining by all legal means conditions and developments in the receiving State and reporting thereon to the Government of the sending State.”

Based on this provision, the act of reporting information about the conditions and developments in the receiving state to the sending state is permitted, but only when conducted through legal means. The espionage activities carried out by Australia against Indonesia violated this principle, prompting Indonesia, under the leadership of President Susilo Bambang Yudhoyono (SBY), to demand that Australia acknowledge its wrongdoing. President SBY emphasized the importance of accountability, stating:

- a. The President instructed Minister of Foreign Affairs Marty Natalegawa or his special envoy to discuss in-depth and seriously, including sensitive issues, related to bilateral relations between Indonesia and Australia.
- b. After there was mutual understanding and mutual agreement between both parties, the president followed up on a complete and in-depth discussion of the protocol and work code of ethics (*Code of Conduct*) with the two countries.
- c. The President directly examined the draft protocol and code of ethics after the wiretapping and assessed whether it had been able to fulfill the request of the Indonesian state.
- d. After the protocol and code of ethics are ratified, the president wants the ratification to be carried out before the head of government.
- e. The next task for the two countries is to prove that the protocols and code of ethics are fulfilled and implemented.
- f. Once the two countries, especially Indonesia, have regained trust and then the protocol and code of conduct (*Code of Conduct*) is implemented, then bilateral relations between the two countries can be resumed.

Thus, Indonesia did not report Australia to the international court or ICJ, due to various political and diplomatic considerations, but Indonesia carried out an official protest by summoning the Australian Ambassador to carry out an internal investigation

⁸ Ananda Surya Kinanti, “*Diplomatic Immunity Rights of a Diplomat in Carrying Out Duties in the Receiving Country*”, University of Surabaya, East Java, Indonesia.

and carry out strict supervision until finally signing *the Code of Conduct (COC) On Framework Cooperation* was a form of effort made to maintain state sovereignty at that time.

So learn to reflect on yourself, Indonesia as a sovereign country must have steps or legal remedies to anticipate that the same thing could happen again, namely using:⁹

- a. Law Enforcement against Cyber Crime This law enforcement aims to understand and analyze legal regulatory policies related to information technology crimes.
- b. Hague Convention IV 1907 carries out espionage when entering a country's territory.
- c. Cyber Security Bill (RUU) The government needs to encourage the passing of this bill in the House of Representatives (DPR).

This bill is important to help the government distinguish between handling attacks on cyber defense attacks and cyber crimes. With the legal efforts taken by Indonesia, Indonesia has tried to protect its national interests from the threat of espionage

D. CONCLUSION

The first thing that can be concluded is that in the case of abuse of power of The Right of Inviolability carried out by Australian diplomatic officials against Indonesia, it has given rise to legal consequences based on the *1961 Vienna Convention*, namely a violation of international law or the Internationally Wrongful Act committed by the Australian ambassador against Indonesia, which results in State Responsibility which is the principle of Internationally Wrongful Acts because State Responsibility is state responsibility which should be carried out by Australia as the country that carried out the espionage act, apart from that, it also has an impact on countries other than the occurrence of state responsibility which has an impact on bilateral relations that occur to both countries including the recall of the Indonesian Ambassador to Australia, which was the result of internationally wrongful acts which has an impact on Indonesian diplomatic officials and Australian diplomatic officials could be declared *persona non grata* based on the *1961 Vienna Convention* . These actions were also carried out by the Indonesian state as a form of Indonesian disappointment with the Australian government.

Furthermore, secondly, in cases of abuse of diplomatic immunity, the receiving country can take actions such as expulsion or declaring the diplomatic official *persona non grata*, as regulated in Article 9, paragraphs (1) and (2) of the *1961 Vienna Convention*. These provisions allow a state to address the abuse of diplomatic immunity by expelling a foreign diplomatic representative. This action is justified by the immunity rights granted to all foreign diplomatic representatives.

Declaring a diplomatic official *persona non grata* is also a legal remedy that Indonesia, as the injured party, can pursue. In addition to this, Indonesia can demand state responsibility from Australia as a form of accountability. Australia's responsibility for the violations it committed against Indonesia is consistent with the principles outlined in the *1961 Vienna Convention*.

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