

## The Violation of Immunity And Diplomatic Rights: Study Of Indonesian Embassy Wiretapping Case in Myanmar 2003-2004 in The ASEAN Community Security Resistance Based On The 1961 Vienna Convention

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### Abstract

*Immunity rights and diplomatic immunity are guaranteed protection of the rights granted by the international community legally through a collective agreement in the 1961 Vienna Convention to the diplomatic representatives to be able to perform their duties properly. The guarantee rights are in the form of the right to do their activities, the right from immunity to regulation regarding assets acquired, including the place of the embassy building. Wiretapping is an effort or attempt to legally invade the private space of another party. At the state level, wiretapping can be used as a threat for security issues. In this study, the author tried to describe the case of wiretapping the Indonesian Embassy in Myanmar in 2004. Besides explaining through the Vienna Convention perspective, as Myanmar and Indonesia are ASEAN Member Countries, the author will try to reveal ASEAN role mainly in ASEAN Security Community project.*

## INTRODUCTION

Diplomatic Relations are a major instrument in International Relations by becoming a forum for interaction between one country and another. Since the meaning of 'diplomacy' itself is very broad and includes various subjects in it, it is necessary to have boundaries in interpreting diplomacy. According to Ian Brownlie in his book "Principle of Public International Law",

*"... Diplomacy refers to any method by which states establish or maintain mutual relations, communicate with one another, or carry out political or legal transactions, all of which are carried out through their authorized agents.[1]"*

From the definition we can conclude that diplomatic relations refer to a medium of relations and communications among countries purposefully of political interest although legal transactions policies through agent authorities. The 'Agent' itself referred to diplomatic representatives. Having to represent the voice of people in countries, diplomatic representatives are appointed as representatives of their country and as agents who carry out their national interest in bilateral as well as multilateral relations.

In state-owned practices, there are instruments to regulate the relationship, especially in this case the main actor is the State. State is a legal subject to law in international societies. What the country mean is the countries that

met the precondition of Montevideo Convention in 1933 Article 1 (in Huala Adolf, “Aspek-aspek Negara dalam Hukum Internasional, 1990) with the following points:

- (a) Permanent residents;
- (b) Territory;
- (c) Government;
- (d) Ability to connecting with other countries [2].

The last point implies that it is an obligation for a country to be able to establish relations with other countries. Further need is a forum that regulates both the reception and delivery of diplomatic representatives within the scope of International Law. In opening diplomatic relations, the state must follow the precondition of a joint agreement at the 1961 Vienna Convention. In the convention, each state makes an agreement based on mutual consent principles and with relationship and diplomatic exchanges based on reciprocity principles[3]. The Vienna Convention not only regulates diplomatic relations but also administrative matters until the rights of diplomatic and consular representatives. This includes the rights of immunity and diplomatic immunity.

Article 29 of the 1961 Vienna Convention stated:

*“The person of diplomatic agent shall be inviolable. He shall not be liable to any form arrest or detention. The receiving state shall treat him with due respect and take all appropriate steps to prevent any attack on his person, freedom or dignity.[4]”*

The article clearly states that the diplomatic representatives have the right of freedom and dignity.

They have immunity, so as not to be prosecuted, detained or arrested while on mission. According to Prof. Boer Mauna, under any circumstances this immunity is absolute, so that diplomatic representatives cannot be tried or punished because their main duty is representing their state and its sovereignty [5].

Although there is already jurisdiction or international law that regulates the implementation of diplomatic and consular relations, including privileges and immunities, however in practice have not been fully implemented in the administration. This can be sourced both from the received state as well as diplomatic relations who disobey the applicable law. There have been many actions regarding violation of these immunities and privileges.

To accomplish it effectively and efficiently requires cooperation from both parties. The Vienna Convention or international law conserves only the granting of immunities and diplomatic privileges, while in its implementation it will be done in accordance with national law of the receiving state[6]. One of the violations that occurred was the case of Wiretapping Indonesian Embassy in Myanmar in 2004[7].

The case was considered quite serious considering that at the Bali Concord II at the 9th ASEAN Summit, Indonesia was one of the countries that initiated ASEAN Community Security [8]. Consequently, every step that will be taken by Indonesia must be carried out peacefully and decisively, in accordance with ASEAN Community Security (ASC) principles to resolve conflicts peacefully within the ASEAN regional community.

It is also a challenge in the security of ASEAN economic community. This is because if the conflict between Indonesia and Myanmar were to develop further, there will be a possibility of a conflict with a larger scale of escalation. The widening conflict between Indonesia and Myanmar will serve as a representative ASEAN's inability as regional organizations to help resolve its member countries' conflict. Moreover, this case coincided one year after the launch of ASEAN Community Security in 2003.

Based on the description above, this paper will further analyze the perspective of International Law through the Vienna Convention in analyzing case of violation immunities rights and diplomatic immunities with case study of wiretapping Indonesian Embassy in Myanmar, along with how ASEAN as regional organization that accommodates the two countries can provide facilities to help resolve the current disputes.

## **CONCEPTUAL FRAMEWORK**

### ***Extraterritorial Theory***

Extraterritorial has several forming words, first 'Extra' that have an out of range definition, 'Territory' which has the definition of an effort to influence or control interaction by reinforcing and trying to establish control over geographic area[9]. Through this definition we can draw conclusions regarding the definition of Extraterritorial as public control over a certain area beyond its territory. Territorials have a close relationship with the concept of the states. Article 7 of the Covenant of the League of Nation states that any place inhabited and representing a

member of the League of Nation could not be challenged as to its rights of immunity and diplomatic rights [10].

Under international law we recognize Extraterritorial Jurisdiction, which has a definition of a state's legal ability to exercise authority beyond its geographical territorial boundaries [11]. It can be said that Extraterritorial Theory is one of the immunities rights and diplomatic immunities, where the territory/ places occupied by diplomatic representatives is included in the authority and sovereignty of the sending state. The territory itself refers to the embassy building that is the diplomatic office and represents the activities of the sending state.

Be in accordance with Extraterritorial Theory definition by Wood and Serres, which states that diplomatic representatives and what they have should be treated as if they were in the sending state[12]. According to this theory, all activities that occur in the embassy are part of the authority of the sending state and the receiving country must not invade it.

The theory provides an understanding of the immunity rights of the diplomatic representative along with the place or building they live in. Including in the case of the Indonesian Embassy wiretapping in Myanmar, with Extraterritorial Theory we can analyze how international law perspectives are being made in wiretapping cases.

### ***Functional Necessity Theory***

Functional Necessity Theory simply is a combination of Extraterritorial Theory and Representative Character Theory.

Previously would be more obvious if we found out about Representative Character Theory first. Same as the Extraterritorial Theory, but the Representative Theory makes diplomatic representatives as its main subject. Representative Character Theory emphasizes that a diplomatic representative represents the sovereignty of an independent state where their immunity rights and diplomatic immunity can be a fact that their sending state's sovereignty should be respected[13]. Meanwhile, according to Paul Bahren in his book 'Diplomatic Law in Millenium', consider the basis or source of the immunity rights and diplomatic immunity lies in the fact that diplomatic representatives must be enabled to fulfill the functions of their offices abroad[14].

To determine the correlation with the case of the Indonesian Embassy Wiretapping in Myanmar, the author is closer to the definition that was revealed by Edy Suryono, that is the basis of immunity rights and diplomatic immunity lies in granting diplomatic representatives the full amount of opportunities to perform their duties perfectly[15]. Through this theory, we can conclude that to be able to do their duties 'perfectly' diplomatic representatives must not be limited or interfered with by external parties.

In the case of Indonesian Embassy wiretapping in Myanmar, through Functional Necessity Theory, it is the right of of the Indonesian Diplomatic Representatives in Myanmar, to utilize of all the facilities they have, including the buildings and rooms of the Indonesian Embassy on doing their duties properly without being interfered with external parties, especially the receiving countries.

In this paper, the author will be more focused on Functional Necessity Theory but also will mention a little about Representative Character Theory. Because the main problem of the case of Indonesian Embassy wiretapping in Myanmar is a violation of state sovereignty, in which case the receiving country enters the territory and takes information without permission. The actions of the receiving country can be said disrespect the sovereignty of the sending state as an independent and sovereign state and do not respect the diplomatic representative staff as the sending state representation. Based on Representative Character Theory, disrespecting the diplomatic representative concerned is the same as not respecting the sending state.

However in this paper, the author will focus more on using two theories, specifically Extraterritorial Theory and Functional Necessity Theory, because the role of diplomatic representatives in this case is less dominant. Functional Necessity Theory will help the author to analyze more complex things and have been included in the analysis through the Representative Character Theory, which makes this research more effective and efficient.

### **Regional Security Complex Theory (RSCT)**

Regional Security Complex Theory (RSCT) is one of the derivative theories of the Copenhagen School, especially in Securitization Theory. Copenhagen School promotes a comprehensive understanding of the securitization concept by combining various non-

military elements, such as politics, economics, social, environment, etc[16]. This theory was first proposed by Barry Buzan in his book *'Regions and Power: The Structures of International Security'*. Buzan assesses that in assessing security we can use global and regional approaches, but it will be more effective if we use regional approaches. Quote opinion from Morgan and Lake (1997), that regional analyses provide clear results on the detail of conflict and cooperation in contemporary securitization problems[17].

RSCT is a theory that examines interactions between countries that exist in a regional scope by combining Neorealist and Constructivist assumptions [18]. With the understanding of neorealists, RSCT apprehends the basis of international relations is a decentralized anarchy structure among states. The role of constructivism here is a complement of neorealism in RSCT. Neorealism defines anarchy culture towards the military, however constructivism in here considers anarchy culture not only as leading to military conflict but can lead to a harmless culture with the role of International Organization whose authority can guide the behaviour of its member states[19]. Thus the definition of RSCT can be described as follows:

*“a set of units whose major processes of securitisation, desecuritization, or both are so interlinked that their security problems cannot reasonably be analysed or resolved apart from one another.” [20]*

Units here are a state, which define the securitization process. The remaining process cannot be

separated by the role of international organizations to defend their authority from security threats but still maintain the harmonization of regional cooperation with complex problems. The case of wiretapping can be compared to a case of espionage that threatens the security of the states' sovereignty. The existence of this case proves that in international relations there is an anarchy structure, even though it is already under regional organization (ASEAN). In accordance with the RSCT theory, where relations between countries are basically anarchy, egocentric and aggressive, but structured in a regional system.

It was a challenge for ASEAN as a regional organization which had established ASEAN Community Security in the same year to maintain its authority as an organization that can accommodate the interest of its member countries and resolve the disputes peacefully.

## **ANALYSIS**

### ***Wiretapping of the Indonesian Embassy in Myanmar***

The case of wiretapping of the Indonesian Embassy revealed after the Indonesian Ambassador in Myanmar, Wyoso Projowarsito revealed the results of an investigation carried out by the State Intelligence Agency (BIN), the National Password Institution and the Strategic Intelligence Agency (BAIS) on 24 June 2004. This inspection is a continuation of strong indications of wiretapping in the Ambassador's room and the Defence Attache's room at the Indonesian Embassy building in Yangon, Myanmar[21]. The

indication is based on the decrease in the frequency of the telephone line in the room that is concerned when it is used.

Knowing the result of the investigation, a spokesman for the Indonesian Ministry of Foreign Affairs, through the AFP (Agence France Presse), a news media from France, said that the Department immediately summoned the Myanmar Ambassador in Jakarta to straighten out the problem. Furthermore, Wyoso Projowarsito, as the Indonesian Ambassador in Myanmar has been informed of the results of the investigation and is urged to take immediate anticipation as soon as possible.

According to the advice of the investigation team, it is recommended to diplomatic staff in the Indonesian Embassy building who want to use telephone facilities to turn on the television and radio[22]. This is done to minimize the frequency of telephone, considering the previous investigation result revealed that two vital rooms at the Indonesian Embassy were the location of the wiretapping. Wyoso further explained that in this case, the damage and losses suffered by Indonesia, apart from the violation of privacy in the Indonesian Embassy building, also leaked information.

From Myanmar perspective, Aung Bakyu as Myanmar Ambassador in Indonesia at that time, asserted that the Myanmar government did not carry out any involvement or planning in the wiretapping case[23]. The Myanmar government gave the reasons that the wiretapping case that occurred were not planned but was the result of the old information and

technology facilities in Myanmar which were still using facilities since the Second World War. The backwardness of technology being the reason and there is a possibility that Myanmar will not tap Indonesia due to the cable system in Myanmar will not display unusual waves[24]. Responding to objections from the Myanmar government, the Indonesian government again sent information technology experts to Myanmar. The results of all investigations were submitted by the Minister of Foreign Affairs of Indonesia at that time, Hassan Wirajudha on July 14, 2004 in Pandeglang, Banten. Hassan exposed that the losses received by Indonesia were in the form of information leaks found in the 5 megahertz wave and also at the 2.9-3 Megahertz level. Hassan assessed that this information leak was a violation of the diplomatic code of ethics from the 1961 Vienna Convention[25]. Responding to this case, diplomatic officials and staff are advised not to carelessly speak through telephone communication media, especially when on duty and occupying rooms in other countries.

### ***Position of the Diplomatic Representative Building in the 1961 Vienna Convention and International Law***

The previous statement from the Indonesia Minister of Foreign Affairs regarding this wiretapping case was a violation of the diplomatic code of ethics of the 1961 Vienna Convention. This can be seen from article 22 of the 1961 Vienna Convention with the following points:

- a. *The premises of the mission shall be inviolable. The agents of*

*the receiving states may not enter them, except with the consent of the head of the mission.*

- b. The receiving state is under a special duty to take all appropriate steps to protect the premises of the mission against any instruction or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity*
- c. The premises of the mission, their furnishings, and other property thereon and the means of transport mission shall be immune from search, requisition, attachment or execution[26].*

At the first and second point it is emphasized that 'premises' or the place where diplomatic representatives work is 'inviolable' from any situation and condition in the receiving state. According to Extraterritorial Theory, an area that is given special authority as a place to work for diplomatic representatives is a representation of the sovereignty of the sending state. Where this sovereignty is the same as the authority of the sending state in their original territory. This point also emphasizes that agents from the receiving country cannot enter the territory without the approval of the diplomatic representative of the sending state.

Historically, the protection of diplomatic representative buildings has continued to evolve following the times. In the 20th century, where globalization has dominated various sectors and has become a supporter of the development of information technology, diplomatic immunity has also been affected by the current flow. The importance of communication provides a new form of diplomatic immunity. The protection of the immunity rights

and immunity of diplomatic buildings which were previously only limited to buildings and archives or other important documents, has now transformed into a new diplomatic form using wireless transmitter communication for diplomatic representatives[27]. Wireless transmitter is a technology that has the ability to channel information through signals. Because it is in charge of transmitting information, Wireless Transmitter has transformed as a security medium in society where information and communication data contain certain privacy[28].

In the International Law Commission (ILC) there is a regulation on state responsibility. In this case Indonesian Government feels aggrieved by the wiretapping actions by the Myanmar Government, in international law Indonesia is the 'injured state' which in the ILC Draft Article 42 allows injured states to ask for responsibility for all losses received[29]. The regulation on the responsibility of the receiving state can be seen in the form of Cessation and Non-Repetition (Article 30), Forms of Reparation (Article 34), and Satisfaction (Article 37) in the 2001 ILC Draft. With this accountability, it is hoped that the relations among countries that had been at odds in conflict can be reconciled to create a new, more harmonious relationship.

### **ASEAN's role in settlement**

The Indonesia-Myanmar reconciliation effort cannot be separated from ASEAN's role as a regional organization that oversees the two countries. Moreover, this case emerged exactly one year after the establishment of ASEAN

Community Security (ASC) in 2003. Where in this ASC, ASEAN Member Countries have been bound by legal agreement to rely on peaceful process in resolving intra-regional disputes and consider their security to be fundamentally related to each other and have a common vision and goals[30].

Meanwhile, in this wiretapping case, there is a security or securitization issue where important information from the country in the conversation at the diplomatic representative building is leaked through the receiving state's information channel. This is a challenge in itself for ASEAN to be able to emphasize its position as a regional organization that has the authority, especially in the success of the ASC program.

In RSCT, the problem of wiretapping that leads to the leaking of important information of a country by another country is understandable. This is because in the RSCT perspective, the state establishes diplomatic relations with other countries in an anarchy culture where the state is egocentric and aggressive. However, this thought is not pessimistic, where RSCT is oriented that the possibility of cooperation between countries and the role of international organizations is an effective way to resolve regional disputes.

According to this theory, ASEAN considered to have an important role as a media that facilitates dispute resolution. ASEAN can act as the third parties by being a mediator or conciliator. As a mediator ASEAN can provide a forum for both parties to discuss together and lead the direction of the discussion so that it leads to reconciliation results[31]. But if it

was necessary, ASEAN can form a conciliation team which will later draw out the facts of both parties and can provide a decision that results in reconciliation. ASEAN can also facilitate dispute resolution through law in the form of a High Council, but this is considered ineffective because the dispute that occurs is a conflict between two countries that does not have a big impact regionally and in forming the High Council it is necessary to gather representatives from ASEAN representative countries[32]. And if this case is legally resolved, then there will be a potential for further conflict from the stigma between the 'winner' and the 'loser'.

In line with the RSCT, ASEAN can contribute to the peaceful resolution of this dispute with the two methods above, mediation and conciliation. This is also in line with ASC's mission of resolving regional problems peacefully using a political approach, establishing norms, conflict prevention, conflict resolution, post-conflict peace building, accompanied by implementation mechanisms[33].

## CONCLUSION

Diplomatic Relations is the main instrument in International Relations by being a forum for interaction between one country and another. The state is a legal subject in an international environment.

Countries are required to be able to establish relations with other countries through the conditions for the establishment of a state in the Montevideo Convention. For this reason, diplomatic relations are vital in international relations. In order for diplomatic relations to run



properly, there is a need for regulations that regulate so that the rights of various parties can be protected. Included in the rights for diplomatic representatives. The 1961 Vienna Convention regulates the course of diplomatic relations, including the rights and obligations of each actor. The Vienna Convention and international law only implements the granting of immunity rights and diplomatic representative's particular rights, while in its implementation it will be carried out in accordance with the national law of the receiving state. However, even though there are legal regulations, there are still many cases of violations of the immunity rights and diplomatic immunity.

In the case of Wiretapping of the Indonesian Embassy in Yangon, Myanmar in 2004, it can be concluded that in the reality of international relations, there is still a culture of anarchy as a fundamental culture. The wiretapping carried out by the Myanmar government leads to the

issue of securitization which can trigger conflicts between states. In this case, Myanmar has violated the agreement and code of ethics in diplomatic relations through the 1961 Vienna Convention. Meanwhile, Indonesia is the initiator of the ASEAN Security Community (ASC) which represents the settlement of regional disputes peacefully. Through Extraterritorial and Functional Necessity, Indonesia has full rights for the security of its Embassy building.

With those various perceptions, possible solutions can be seen at Regional Security Complex Theory (RSCT) where the state still views the securitization issue that occurs as the result of anarchy culture but its settlement can lead to a peaceful way and with the contribution of international organizations. ASEAN with these challenges can become agents of mediators and conciliators who lead to discussion of problems through political discussions and produce peace agreements between the two parties.

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