

CHAPTER TWO

LITERATURE REVIEW

A. Diplomatic Immunity

Since the existence of countries in the world, since then the principles of international relations, international law and diplomacy have developed. States sent their diplomat to negotiate with other countries to secure their respective interests in addition to striving for the realization of mutual interests. Until 1815, the provisions relating to diplomatic relations came from customary law. At the Vienna Congress in 1815, the kings participating in the conference agreed to codify the customary law into written law.

In 1954, the international legal commission formed by the UN General Assembly began to discuss relations and diplomatic immunity issues. Before the end of 1959, the General Assembly through Resolution 1450 (XIV) decided to hold an international conference to discuss diplomatic problems and immunities. The conference was named The United Nations Conference on Diplomatic Intercourse and Immunities which established 1961 Convention on Diplomatic Relations on 18 April 1961.¹

In 2019, there were 192 parties to the Convention. Almost universal acceptance of the Convention indicates the importance states attach to the law governing

¹ Boer Mauna, 2013, *Hukum Internasional: Pengertian Peranan dan Fungsi dalam Era Dinamika Global*; Bandung, Bandung: Penerbit Alumni, p. 166.

diplomatic relations.² This immunity regulates in two treaties: the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations.³

The right of immunity that can be enjoyed by state officials is obtained from national law and international law. This right in international law can be seen in the diplomatic immunity and privileges acquired by the representatives of countries that are carrying out their duties and obligations in the territory of the sovereignty of other countries. The representatives of this country in international law and national law are known as diplomatic officials.

The most powerful justification for diplomatic immunity is a functional necessity. In the absence of such immunity, diplomats would not be able to represent their countries effectively. The main idea in the Vienna Convention on Diplomatic Relations endorses the idea of functional necessity by explaining that the treaty's goal is to develop good relations between nations and stressing that the purpose of diplomatic immunity is "to ensure the efficient enactment of the functions of diplomatic missions".⁴

Diplomats are inviolable to arrest; they are immune from criminal prosecution, and they are immune from civil suits except when activities outside their official

² Eileen Denza, 2008, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, 3rd ed., Oxford: Oxford University Press, p. 150.

³ Ian Brownlie, *Loc. Cit.*

⁴ Joshua D. Groff, 2000, "A Proposal for Diplomatic Accountability Using the Jurisdiction of the International Criminal Court: The Decline of an Absolute Sovereign Right", *Temple International and Comparative Law Journal*, Vol. 14, No. 1, Philadelphia, Temple University Beasley School of Law Press, p. 216.

functions as the diplomats. However, diplomatic immunity still belongs to the state, and it may be waived if the sending state desires.⁵

Diplomats as representatives of sending state in the receiving state have burdensome duties, and missions often referred to as carrying out a sacred mission. The agents of the diplomat as a whole are given immunity rights to support efficiency in carrying out its mission. Immunities and privileges are not only given to the heads of representatives such as Ambassadors but also by members of their families who live with him, including other diplomats who are members of representatives (such as Counselors, Secretaries, etc.).

It is commonly accepted that state officials are immune in certain circumstances from the jurisdiction of foreign states.⁶ Theories about why are given immunities and privileges, in international law, there are three theories, namely:⁷

1. Theory of Exterritoriality. It means that a diplomatic representative is deemed not to be in the territory of the receiving country, but in the territory of the sending country, even though in reality in the territory of the receiving country. Therefore, the diplomatic representative naturally does not submit to the law of the recipient country. Likewise, he is not controlled by the law of the recipient country and is not subject to all regulations of the recipient country.

⁵ Ernest Satow, 1979, *Guide to Diplomatic Practice*, Edited by Lord Gore-Booth, Longman, London and New York, 5th Edition, p. 176-177.

⁶ Antonio Cassese, 2013, *International Criminal Law*, Third Edition, Oxford University Press, Oxford, p. 155.

⁷ Setyo Widagdo dan Hanif Nur Widhiyanti, 2008, *Hukum Diplomatik dan Konsuler*, Malang, Bayumedia, p. 72-78.

2. Representative Character Theory; This theory bases the granting of diplomatic immunity and privileges to the nature of a diplomat, namely because he represents the head of state or his country abroad.
3. Functional Needs Theory. According to this theory, the basics of immunity and the privileges of a diplomatic representative are that diplomatic representatives must and need to be given the widest opportunity to do their jobs perfectly. Everything that affects badly must be prevented.

Based on Vienna Convention on Diplomatic Relations 1961, anyone who has the right to privilege and diplomatic immunity will begin to enjoy it since his appointment is given to the Ministry of Foreign Affairs or to other ministries as may have been approved. Article 39 paragraph 1 of the 1961 Vienna Convention states that: “Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed”.⁸

The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.⁹

The most important consequence of not being disturbed by a diplomatic claim is the right to be free from the jurisdiction of the receiving state in connection with criminal matters. Proceedings against state officials and diplomats can only occur if

⁸ Vienna Convention on Diplomatic Relations 1961.

⁹ *Ibid.*

they are apprehended and surrendered to the ICC with the consent of their home states.¹⁰ It can be said that the immunity of diplomats is absolute and under no circumstances should they be tried or punished. If a diplomat commits a criminal act in an accreditation country, of course it depends on the government or its head of representative to abandon diplomatic immunity from a diplomat.¹¹

B. Journalist Protection and Freedom of Expression

Definition of Journalist is a person who writes for newspapers, magazines to prepares news to be broadcast.¹² A journalist is a person who collects, writes, or distributes news or other current information to the public. A journalist's work is called journalism. A journalist can work with general issues or specialize in certain issues. However, most journalists tend to specialize, and by cooperating with other journalists, produce journals that span many topics.¹³

Jamal Ahmad Khashoggi, born October 13, 1958 - died 2 October 2018 at the age of 59 years is a Saudi journalist, Washington Post columnist, writer, and former general manager and editor in chief of Al Arab News Channel. Internationally, he is known for his contribution to Al Watan so that it can pose a threat to progressives in Saudi Arabia.¹⁴

¹⁰ Arthur Watts, 1994, *The Legal Position in International Law of Heads of State, Heads of Government and Foreign Ministers*, 247 Hague Recueil des Cours 13, p. 133.

¹¹ Ernest Satow, *Op. Cit*, p. 178.

¹² Merriam Webster Dictionary.

¹³ Denis Diderot, 2005, *Journalist*, Michigan Publishing, University of Michigan Library, p. 77.

¹⁴ Paul Hendley, 2018, "Saudi Newspaper Head Resigns after Run-in with Conservatives", taken from <https://www.afp.com>, accessed on 1 December 2018 at 3:20 pm.

He fled from Saudi Arabia on September 18, 2017. Since then, he regularly writes articles that criticize his country. Khashoggi is the main critic of the Crown Prince and de facto leader of Saudi Arabia, Mohammad bin Salman. Khashoggi was detained at a Saudi consultancy in Istanbul on October 2, 2018.¹⁵

The Khashoggi case could disrupt the Saudi succession,¹⁶ King Salman already 82 years old, although mostly decision making that has been delegated to Prince Mohammed, has on occasion seized hold of the policy steering wheel. The storm ignited by Saudi Arabia's savage assassination of the journalist Jamal Khashoggi in its Istanbul consulate has momentarily taken attention to the world. The purported Saudi investigation into the murder has put on hold any international response even though it looks like a cover-up to shield Mohammed bin Salman, the kingdom's crown prince and de facto ruler.

Freedom of expression can take many forms, encompassing verbal, artistic, and physical expression. Freedom of opinion and expression is the cornerstone of any democratic society. However, it is a freedom which, as history attests, has been, and is, compromised in a number of States.¹⁷

The right to freedom of expression, guaranteed both at the international level (Universal Declaration of Human Rights, and International Covenant on Civil and Political Rights) and regional level, constitutes one of the essentials in a democratic

¹⁵ Doug Mills, 2018, "Journalist Detained in Saudi Consulate in Istanbul", taken from www.nytimes.com, accessed on 1 December 2018 at 1:10 pm.

¹⁶ David Gardner, 2018, "The Khashoggi affair could disrupt the Saudi succession", taken from <https://www.ft.com>, accessed on 22 December 2018 at 5:15 pm.

¹⁷ Rhona K.M Smith, 2012, *Textbook on International Human Rights*, 5th edition, Oxford: Oxford University Press, p. 301.

society, ensuring, amongst others, the sound information of the citizens and, if properly implemented, an adequate functioning of the rule of law.

Freedom of Expression is guaranteed on Universal Declaration of Human Rights as stated in Article 19. The Article states "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".¹⁸ Based on the convention, it is clear that everyone has the right to seek and gather information even free to share information, as long as the information is valid.

Based on The International Covenant on Civil And Political Rights (ICCPR) in article 19 also states that¹⁹:

1. Everyone has the right to argue without getting interference.
2. Everyone has the right to freedom of expression. This right must include the freedom to seek, receive and provide information and all kinds of thoughts regardless of restrictions, verbally, written or printed, in the form of works of art, or through other means of choice.
3. Implementation of the rights given in paragraph (2) of this article creates special obligations and responsibilities. Therefore certain restrictions can be imposed, but this can only be done in accordance with the law and only to the extent necessary to:
 - a. Respect the rights and good name of others;
 - b. Maintain national security, public order, health and public. Morality.²⁰

¹⁸ Universal Declaration of Human Rights.

¹⁹ the International Covenant on Civil and Political Rights.

²⁰ Adami Chazawi, *Loc. Cit.*

Based on article 10 of The European Convention for the Protection of Human Rights (ECHR):

1. 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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with its duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties. Such conditions are prescribed by law, and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary²¹

C. Sovereignty of States

Etymologically, sovereignty is derived from the Arabic word “daulah” which means power. In other languages, sovereignty is known as *Supremus* which means the highest. In Italian it is known as *Sovranità*, namely “*La sovranità è l'espressione della somma dei poteri in governo (legislativo, esecutivo e giudiziario), riconosciuta ad un soggetto di diritto pubblico internazionale (es Stato) che può essere una persona od un*

²¹ The European Convention for the Protection of Human Rights (ECHR).

organo collegiale". These terms mean that sovereignty is an expression of the total powers of government in terms of legislative, executive and judiciary.²²

The term sovereignty was first put forward by Jean Bodin. Jean Bodin (1530-1596) was a French philosopher, lawyer, political scientist, and economist. He was born in Angers and studied in Paris and Toulouse.²³ Jean Bodin investigated sovereignty based on two aspects, namely the internal and external. From the internal aspect, sovereignty refers to the power of the state within the boundaries of its territorial environment, while in the external aspect, sovereignty is interpreted as the state's authority outside its borders. Internal sovereignty is the supreme authority of its external state, particularly with other states. External sovereignty is more commonly known as independence or equality.²⁴

Sovereignty is also an exclusive right to control a territory of government, society, or itself. Sovereignty consists of two theories; the theory which is based on the granting of God and on society.²⁵ Both constitutional and International Law have the concept of sovereignty relating to a government which has full control over a territory or geographic boundary of its internal affairs. In some contexts, the Laws are related to organizations or institutions that have their own jurisdiction.²⁶

The state is considered free and sovereign only to or within its territory. Sovereignty at this point is interpreted in a narrow perspective. Differences of sovereignty can exist

²² Anonymous, 2017, "Universitas Sumatra Utara, Tinjauan Umum Mengenai Kedaulatan Negara", taken from <http://repository.usu.ac.id/bitstream/handle/123456789/44976/Chapter%20II.pdf?sequence=3>, accessed on 11 February 2019 at 3 pm.

²³ Anonymous, 2017, Universitas Atmajaya, Teori Negara dan Kedaulatan Negara, taken from <http://e-journal.uajy.ac.id>, accessed on 11 February 2019 at 3:30 pm.

²⁴ Dedi Supriyadi, 2013, *Hukum Internasional*, Bandung, CV Pustaka Setia, p. 123.

²⁵ *Ibid*, p. 124.

²⁶ *Ibid*, p.123.

in various degrees between the two states or different countries. Some responsibilities can bind a free and sovereign state, for example:

1. The obligation not to implement the sovereignty in other countries.
2. The obligation does not allow its citizens to commit acts that violate the freedom or supremacy of the territory of other States.
3. The obligation does not interfere in national affairs in other countries.

The sovereignty of a state is a state with full sovereignty over all of its affairs, territory, and existence.²⁷ The sovereignty of a state over its land territory is fundamental as one of the conditions within the state. The sovereignty of a state is so necessary that other states do not arbitrarily enter the territory of the sovereignty of other States. The term of sovereignty is often used to describe a position as the subject of International Law of a state. The term of sovereignty also describes a legal competence held by a state in general. Sovereignty can be used as a synonym for the term independence.²⁸

D. Non-Intervention Principle

The principle of non-intervention is the principle of International Law that limits every foreign country to interfere with the internal affairs of other nations. The principle is the territorial sovereignty rights held by other countries.²⁹

²⁷ Merriam Webster Dictionary

²⁸ Anonymous, 2017, Universitas Sumatra Utara, Tinjauan Umum Mengenai Kedaulatan Negara, taken from <http://repository.usu.ac.id/bitstream/handle/123456789/44976/Chapter%20II.pdf?sequence=3>, accessed on 11 February 2019 at 3:45 pm.

²⁹ Carolyn A. Dubay, 2014, "A Refresher on the Principle of Non-Intervention", taken from at http://www.judicialmonitor.org/archive_spring2014/generalprinciples.html, accessed on 12 February 2019 at 1 pm.

The International Court of Justice states in paragraph 164 of its judgment, and the *Nicaragua* case states, “The principle of non-intervention prohibits a state to intervene, directly or indirectly, with or without an armed force, in support of internal opposition in another state”.³⁰

In the internal affairs of the state, the principle of non-interference signifies that a country should not intervene in dictatorial or in the internal affairs of another country.³¹ Referring to the case of Nicaragua, the international tribunal says, "the element of coercion, which defines, and is indeed the essence of prohibited intervention".

The UN has also already regulated the non-intervention principle in Article 2 (4) and Article 2 (7) as seen below:

"All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or any manner inconsistent with the purpose of the United Nations."

And in Article 2 (7) it is mentioned that: "Nothing contained in the present of a charter shall authorize the United Nations to intervene in matters which essentially within the domestic jurisdiction of any state or shall require the Members to submit such matter to settlement under the present charter, but the principle shall not prejudice the application of enforcement measure under Chapter VII".³²

³⁰ *Ibid.*

³¹ Michael Wood, 2017, “Non-Intervention (Non-Interference in Domestic Affairs)”, taken from <https://pesd.princeton.edu/?q=node/258>, accessed on 13 November 2017 at 8:23 am.

³² Art. 2 Paragraph (4) and (7) of the United Nations Charter.

With the principle of non-intervention regulated in International Law, it becomes a dilemma for the international community to determine when interference in other internal affairs increases to the level of coercion in violation of International Law. The problem in determining the principle of non-intervention depends in the fact on many justifications such as intervention through customs, International Agreements, etc. For example, humanitarian intervention is permitted when there is civil war or other cases of internal violence.

E. Diplomatic and Consular Relations

An embassy is the main location for the diplomatic presence of one country in another. A country has at most one embassy in another country, and most embassies are located in capital cities. Consulates are like branch offices of the embassy; a nation can have several consulates in another country, usually located in all major cities of that country.³³ The embassy usually handles political and diplomatic relations. Consulate workers handle travel and immigration issues, help in improving trade between the countries, and facilitate cultural exchange.³⁴

Consulates provide the same services and carry out the same official functions as the Embassy. Consulates follow the lead of the Ambassador in engaging local government, civil society and other organization to address mission priorities. In many

³³ James Der Derian, 1987, *On Diplomacy: A Genealogy of Western Estrangement*, Oxford, Basil Blackwell Publications, p. 87.

³⁴ *Ibid.*

instances, consulates, because of their location within a country, may serve as the primary actor in achieving one priority or another.³⁵

Even though embassies and consulates are located in another country, they are legally considered the territory of the country they represent. So the host country does not have jurisdiction inside the embassy of a foreign country.

Based on the Vienna Convention on Consular Relations 1963, the Consulate has functions:³⁶

1. Protecting in the receiving State the interests of the sending State and its nationals, both individuals and bodies corporate, within the limits permitted by international law;
2. Furthering the development of commercial, economic, cultural and scientific relations between the sending State and the receiving State and otherwise promoting friendly relations between them in accordance with the provisions of the present Convention;
3. Ascertaining by all lawful means conditions and developments in the commercial, economic, cultural and scientific life of the receiving State, reporting thereon to the Government of the sending State and giving information to persons interested;

³⁵ Keith Hamilton & Richard Langhorne, 1995, *the Practice of Diplomacy: Its Evolution, Theory and Administration*, London, United Kingdom, Routledge, p. 34.

³⁶ Article 5 on Vienna Convention on Consular Relations 1963.

4. Issuing passports and travel documents to nationals of the sending State, and visas or appropriate documents to persons wishing to travel to the sending State;
5. Helping and assisting nationals, both individuals and bodies corporate, of the sending State;
6. Acting as notary and civil registrar and in capacities of a similar kind, and performing certain functions of an administrative nature, if there is nothing contrary thereto in the laws and regulations of the receiving State;
7. Safeguarding the interests of nationals, both individuals and bodies corporate, of the sending States in cases of succession mortis causa in the territory of the receiving State, in accordance with the laws and regulations of the receiving State;
8. Safeguarding, within the limits imposed by the laws and regulations of the receiving State, the interests of minors and other persons lacking full capacity who are nationals of the sending State, particularly where any guardianship or trusteeship is required with respect to such persons;³⁷
9. Subject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of the rights and

³⁷ *Ibid.*

interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests;

10. Transmitting judicial and extrajudicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending State in accordance with international agreements in force or, in the absence of such international agreements, in any other manner compatible with the laws and regulations of the receiving State;