

## Dispute Settlement of Diplomatic Relation Reviewed In International Law (Case Study of *Spionageburning* Australia on The President of Indonesia)

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### Abstract

The case of espionage or spying by Australia against Indonesia is not the first time, but there have been several attempts of espionage against Indonesia. This espionage act is an act of secretly collecting intelligence data in international relations in a country. In this paper, we discuss the wiretapping case and its resolution. This paper uses normative legal research with a qualitative approach. This paper examines the chronology of cases of tapping by Australia against Indonesia, wiretapping in human rights and international law, as well as the final settlement of tensions between Indonesia and Australia through an agreement on the Code of Conduct to normalize bilateral relations between the two countries.

**Keywords:** International Law, Tapping, Indonesia, Australia

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### INTRODUCTION

In international law, the term "state" itself cannot be defined with certainty and precise, however by looking at the development of an increasingly modern world, through the main characteristics of a country as a reference in seeing the shape of a country (Starke, 2015: 127). According to Article 1 *1933 Montevideo Convention*: (Montevideo Convention 1933)

*"The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) the capacity to enter into relations with the other states"*

That "the state is a person of international law who should have the qualifications: a permanent population, a territory / territory, a government and the ability to make relations with other countries". International relations by countries are not only carried out for *National Interest Issues* but interests related to regional and global issues with the aim of providing benefit to each country that collaborates, in this way creating mutual respect between countries to promote better relations. As described in Article 1 (2) of the UN Charter:

*"To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other Appropriate Measures to Strengthen universal peace"*

Whereas in establishing linkages friendship between nations is based on the principles of *equality* and the right to self-determination of people and, to take other appropriate steps to strengthen universal peace.

The form of the implementation of international relations by a country in recognizing its existence or existence by the international community is one form of establishing international relations by building diplomatic relations. Basically, the implementation of diplomatic relations is understood as a complementary tool for the state to carry out international relations with fellow countries as well as international legal subjects as well as to support the *National Interest*.

Diplomatic relations are a form of relationship based on the intermediary between two or more countries that carry out a relationship to meet the interests of their countries (*National Interest*). The legal basis for the existence of diplomatic relations refers to the *1961 Vienna Convention on Diplomatic* as a guide or diplomatic legal instrument that regulates international relations between countries based on mutual agreement (*Consensus*). (Sefriani, 2009: 20)

In Indonesia, diplomatic relations as regulated in Article 1 paragraph (1) of Law No.37 of 1999 on Foreign Relations as explained that "*Foreign relations are any activities involving regional and international aspects, which are carried out by The government at the central and regional levels, or its institutions, non-governmental organizations, or Indonesian citizens.*"

In its implementation, violations of diplomatic law often occur in the form of tapping. The tapping incident that has occurred in Indonesia is the tapping incident carried out by Australia to Indonesia where Australia tapped the Head of State, Susilo Bambang Yudhoyono and the First Lady, namely Ani Yudhoyono and several state officials. Starting from the admission of former members of the *National Security Agency* who leaked high-level secret intelligence activities and documents belonging to allied intelligence agencies such as the UK's GCHQ (*Government Communications Headquarters*), Australia's DSD (*Defense Signals Directorate*), Canada's CCSE (*Canadian Communications Security Establishment*), The NSA (*National Security Agency*) of the United States, and NZGCSB (*New Zealand's Government Communications Security Bureau*) where these allies made an intelligence alliance called SIGINT or *Five Eyes*. Furthermore, the DSD (*Defense Signals Directorate*), which is the intelligence agency, was assigned to collect the cellular numbers of Indonesian officials, especially in the fields of defense and security, socio-politics, and economics. In this mission, they only managed to get the cellular number of the Bali Police Chief, namely Inspector General Pol. Sutisna, therefore, developed a wiretap network through the Australian Embassy and the Australian Consulate General.

In 2009, DSD also tapped several telephone numbers of Indonesian officials prior to the Indonesian Presidential Election in 2009. These wiretaps were carried out on several Indonesian officials. This wiretapping was discovered by Edward Snowden, who was only leaked in 2013 and Australia did not deny or confirm the wiretapping action after Indonesia asked the Australian representative about the wiretapping issue. Finally, it resulted in the Indonesian President, Susilo Bambang Yudhoyono, to withdraw the Indonesian Ambassador in Canberra for a while until the normalization of diplomatic relations was completed.

The espionage act violates the sovereignty of a country which if in a diplomatic relationship between countries in the event of this espionage case violates international law, namely in Article 3 paragraph (1) letter d of the Vienna Convention 18 April 1961 states that the sending State delegation can report in any way that legal developments and conditions of the receiving State to the sending State. However, the act of obtaining information by espionage is prohibited in international law, because it is considered to interfere with the sovereignty and security of the receiving State.

Based on the above background, the formulations of the problems to be discussed are; How are disputes resolved between Indonesia and Australia regarding tapping cases reviewed under international law?

## **METHODS**

The type of this research uses normative legal research. In this paper, we also use descriptive methods to explain the various symptoms and facts contained in the case of the wiretapping of Indonesian officials by Australia. The type of research used in this paper is legal approach by examining all rules and regulations related to legal issues, namely the case of wiretapping of Indonesian officials by Australia. (Peter, 2005: 136) In this paper, primary data is used in the form of Conventions, International Decisions, and existing Legislation, as well as secondary data in the form of legal books, legal articles and articles related to the legal issues raised. (Peter, 2005: 136).

## **RESULTS AND DISCUSSION**

### **Diplomatic Relations**

Etymologically, the term diploma comes from Greek which is defined as a credential. The word diploma later became the term diplomacy, diplomacy and diplomatic. According to Herman F. Eilts in his book *"Diplomacy-Contemporary Practice"*, he explains that diplomacy is an art / science that must be carried out in relation to inter-state affairs by using recognized state intermediaries or tools such as state guardianship or diplomatic agency.

Diplomatic relations are relations that are based on liaising representatives between two countries who carry out an interaction or establish a relationship. According to Article 2 of the 1961 Vienna Convention:

*"The establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent."*

Whereas the establishment of a diplomatic relationship between countries and a permanent diplomatic mission occurs when there is mutual agreement. Thus, diplomatic relations can occur if each country can establish or establish international relations with a country. As regulated in Article 1 paragraph (1) of Law No.37 of 1999 on Foreign Relations as explained that *"Foreign relations are any activities involving regional and international aspects, carried out by the Government at the central and regional levels, or their institutions, non-governmental organizations, or Indonesian citizens."*

In diplomatic relations, it is divided into six patterns including:

- a. Bilateral, is the practice of international relations which refers to the relationship between two countries. This pattern emerged before World War I, in practice bilateral diplomacy aimed to unite the goals and common good between two actors. With this pattern, international relations are very closed and secret is recognized only in the national interest between the two countries;
- b. Multilaterally, this pattern developed in the 4th century BC as evidenced by the existence of an alliance of Greco-Persian countries and reappeared in the 20th century. This pattern is an answer to the limitations of bilateral diplomacy. In this modern era, the number of international actors is increasing so that countries can gain trust and every problem arises resolved by consensus;
- c. Association, a pattern formed because of the similarity of perceptions and national interests (*National Interest*) between countries that have a joint relationship. The Association's diplomacy first appeared during the implementation of the *Declaration of the United Nations on the Human Environment in Stockholm in 1972*.
- d. Conference, is a diplomatic activity that discusses certain issues in conflict resolution and agreements between international actors who are members. This pattern is the development of a multilateral pattern where there is an official forum that can bind all parties that are accommodated by the UN.

- e. Personally, this diplomacy is carried out by the Head of State to another country for some state or personal affairs, outside of the diplomat's duties, but his thoughts affect diplomats in the country visited. Usually this pattern is carried out by a single actor in the form of individuals who have less powerful power in achieving certain interests.
- f. *Summit Diplomacy*, is a pattern carried out by international governments where heads of state meet face to face (*face to face*) to negotiate directly.

### **Tapping in International Law**

The term wiretapping in English is called "*Interception*" or also called "*wiretapping*". Tapping is an activity or act of secretly listening to other people's conversations through electronic transmission or interception. According to the Oxford Dictionary which explains:

*"interception is the act of stopping somebody / something that is going from one place to another from arriving."*

That Tapping is the act of stopping someone / something going from one place to another from arriving. And, according to A. Hale said:

*"interception: a person intercepts a communication in the course of its transmission if, as a result of his interference in the system or monitoring of the transmission, some or all of the contents are made available, while being transmitted, to a person other than the sender or the intended recipient of the communication "*

That is, "tapping is the act of someone intercepting communication during its transmission if, as a result of interference in the system or monitoring transmission, some or all of the content is available, while it is being sent. , to someone other than the sender or recipient of the intended communication ". This statement is supported by Jeffrey B. Wellty that wiretapping is used to refer to the interception of electronic communication contexts in any format, whether the communication occurs via telephone, fax e-mail, text message, and others.

Tapping is generally classified as an act that is prohibited in international regulations, as regulated in Article 12 of the *Universal Declaration of Human Right* as it is explained that:

*"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attack upon his honor and reputation. Every one has the right to protection of the law against such interference attacks. "*

That is, "No one should be subject to arbitrary interference with his privacy, family, home or correspondence, nor should he attack his honor and reputation. Everyone has the right to legal protection from interference attacks ". Because everyone has the right to get legal protection to be personally attacked or attacked by doing the wiretapping. In Article 17 of the *International Covenant on Civil and Political Right* as explained:

*"(1). No one shall be subjected to arbitrary or unlawfull interference with his privacy, family, home, correspondence, nor to unlawful attack on his honor and reputation (2). Every one has the right to the protection of the law against such interference or attacks "*

That "(1). No one can be the target of arbitrary or unlawful interference with privacy, family, home, correspondence, or unauthorized attacks on his / her honor and reputation (2). Everyone has the right to legal protection from such harassment or attack. "General Comment No. 16 on Article 17 of the *International Covenant on Civil and Political Rights* agreed to by the *United Nations Commission on Human Rights* at its twenty-third hearing, 1988 which commented on the content of Article 17 of the *International Covenant on Civil and Political Right*, at point 8 states:

*"... that the integrity and confidentiality of correspondence must be guaranteed de jure and de facto. Correspondence must be delivered to the address intended without obstruction and without being opened or read first. Surveillance, whether electronically or otherwise, tapping telephones, telegrams and other forms of communication, as well as recording conversations must be prohibited ... "*

That the integrity and confidentiality of correspondence must be guaranteed *de jure* and *de facto*. Correspondence must be sent to the address without obstruction and without being opened or read too first. Surveillance, whether electronic or otherwise, tapping telephone, telegram and other forms of communication, as well as recording conversations should be prohibited.

In Article 8 paragraph (1), 1958 European Convention on Human Rights as it is explained that *"Everyone has the right to respect for his private and family life, his name, and his correspondence"*. That everyone has the right to be respected personally, in his family, in his household and in correspondence. Furthermore, the prohibition of wiretapping is imposed for diplomatic offices and representatives, as regulated in Article 27 paragraph (1). 1961 Vienna Convention on Diplomatic :

*"The receiving state shall permit and protect free communication and the part of the mission for all official purposes. In communication with the government and the other missions and consulates of sending states, where ever situated, the mission may employ all appropriate. However, the mission may install and use a wireless transmitter only with the consent of the receiving state. "*

Then in verse (2) also explains: *"The official correspondence of the mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its function. "* The prohibition of wiretapping for diplomatic representatives is related to immunity or diplomatic immunity and privileges as representatives of the state.

Based on the provisions described above, that in principle, tapping acts and any form constitutes a violation of human rights itself. International law guarantees that anyone cannot or is prohibited from being disturbed arbitrarily, whether personal, family, household or correspondence matters cannot be disturbed or even attacked on his reputation and honor.

### **The Australian-Indonesian Tapping Case International Law Prepective**

Tapping is an act of recording, listening to, modifying, obstructing and / or recording the secretly transmission of electronic information, either using a wired or wireless network. Australia itself has its own laws regarding wiretapping by passing the *Telecommunications (Interception and Access) Act 1979* which specifically regulates the prohibition of telecommunication wiretapping.

In international law, especially diplomatic law is regulated in Article 3 paragraph (1) 1961 Vienna Convention on Diplomatic Relations as explained:

*The functions of a diplomatic mission consist, inter alia, in:*

- a. Representing the sending State in the receiving State;*
- b. Protecting in the receiving State the interests of the sending State and of its national, within the limits premotted by international law;*
- c. Negotiating with the Government of the receiving State;*
- d. Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;*

- e. *Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.*

It was explained that the representatives of the sending country to the receiving country are legal, and the legal protection of the diplomatic corps of the sending country to the receiving country is within the limits permitted by international law. In Article 3 paragraph (1) letter d that it is stated "*Ensuring by all conditions of legal means and developments in the receiving State, and reporting it to the Government of the sending State*". However, if the security and sovereignty of the sending country is threatened and disturbed, such as wiretapping which is prohibited in international law, it can be seen in Article 45 1961 *Vienna Convention on Diplomatic Relations* that it is explained:

*If diplomatic relations are broken off between two States, or if a mission is permanently or temporarily recalled:*

- a. *The receiving State must, even in case of armed conflict, respect and protect the premises of the mission, together with its property and archives;*
- b. *The sending State may entrust the custody of the premises of the mission, together with its property and archives, to a third State acceptable to the receiving State;*
- c. *The sending State may entrust the protection of its interests and those of its nationals to a third State acceptable to the receiving State.*

It was explained that the representative building of the sending country cannot be contested, even in cases of armed conflict, both its property and archives must be protected in the diplomatic building located in the receiving country, which basically involves two aspects, namely: first, regarding the obligation of the receiving country to provide full protection for foreign representatives in the country from any threats and disturbances; second, the position of the foreign representative is *immunity* from examination, including his belongings and all the files contained therein.

This wiretapping case is nothing new in the world of intelligence. Although in principle wiretapping is an act that is prohibited and considered a human rights crime, on the one hand, the behavior of relations between states, tapping has shifted its meaning is no longer a crime but a diplomatic code of ethics because there are no more violations against territorial areas where tapping must penetrate into the territory targeted countries and installed wiretapping electronic devices. However, in cases of cross-border wiretapping, not even one case of wiretapping in a country has been brought to the International Court of Justice because there are external factors, namely globalization where the use of massive information technology and the absence of territorial boundaries or better known as *borderless*.

Indonesia previously had an espionage case committed by Myanmar in 2004, where the Myanmar Government deliberately installed a bugging device on the Indonesian Embassy in Yangon building on the wall of the Indonesian Ambassador's office to Myanmar during the Military Junta. However, this diplomatic law violates Article 45 letter (b) 1961 *Vienna Convention on Diplomatic Relations* which states that the representative and consular building of the sending country cannot be contested even in military conflicts.

At this time, after entering the 21st century with the rapid development of information technology and innovation that continues to develop, it presents sophisticated equipment without having to act in the diplomatic or consular general building or even to the territory of other countries. Technological developments have created modern transmission tools such as satellites, panels and smartphones (*Smartphones*) that can reach all places, with the help of these technologies being able to obtain accurate information and data without having to

infiltrate the territories of other countries. With this technology, the party carrying out wiretapping acts does not have to enter illegal items such as wiretapping devices or espionage transmissions into the diplomatic building area or territorial areas to other countries. As a result, this kind of tapping status is difficult to prosecute as a crime and only as a violation of diplomatic ethics.

Regarding the Australian wiretapping case against Indonesia with the leak of intelligence secrets by Edward Snowden, there are facts about the involvement of the Australian Intelligence Service (DSD) with several state officials. However, the diplomatic resolution of the wiretapping case is not smooth, as happened between the United States government, where the large-scale protests by the European Union countries were staged over Edward Snowden's admission of wiretapping data by the United States Intelligence Service, namely the NSA that was collected from all countries in a manner secretly. This also happened to Indonesia when Australia did not apologize and admit to wiretapping acts against Indonesian state officials.

The Australian Prime Minister, Tony Abbott, who visited Indonesia in 2013, saw the pros and cons of the wiretapping accusations that the bilateral relationship between Indonesia and Australia had a temporary tense by pulling the Indonesian Ambassador in Canberra and canceling several collaborations such as people smuggling and military cooperation. Likewise, the Australian Prime Minister did not apologize for wiretapping by the Australian Intelligence Service to Indonesian State Officials.

The Indonesian Government's legal efforts in the case of Australian wiretapping against Indonesian officials took two forms, namely preventive and repressive means. Preventive legal measures are efforts to prevent or prevent violations from happening again, again in this case, the Indonesian Government made bilateral efforts and the Indonesian Government signed the *Code of Conduct on the Framework for Security Cooperation* with Australia to agree on cooperation to not take actions that harm the interests national both sides, including espionage activities. Furthermore, repressive legal remedies are to commit an action in which a rule that has been made is violated. These legal remedies can occur if preventive legal measures fail to comply and become the last step if they occur again. In this case, Indonesia can bring it to the *International Court of Justice*, Indonesia must be able to ensure that it is the state organ or that is carrying out wiretapping *agent of the state*. DSD is the Australian intelligence service and is an organ of the Australian state. It has fulfilled its basic requirements in bringing this case to international law.

*The International Court of Justice* has the authority to resolve cases of wiretapping Australia against Indonesia, as stipulated in Article 1 paragraph of the *Statute of The International Court of Justice* as explained

*"The International Court of Justice established by the Charter of the United Nations as the principal judicial organ of the United Nations shall be constituted and shall function in accordance with the provisions of the present Statute. "*

Whereas the *International Court of Justice* has the authority to conduct justice and is part of the United Nations organs in accordance with the provisions of the statute. Also, in Article 34 paragraph (1) of the *Statute of The International Court of Justice* as explained *Only states may be parties in cases before the Court*. Whereas based on the provisions of the statute, Indonesia can submit the case to the international court.

### **Efforts to Restore Diplomatic Relations between Indonesia and Australia**

Both Indonesia and Australia ended the tense bilateral relationship that was hit by the wiretapping case by Australia against Indonesia. Indonesia and Australia sit together to negotiate and sign a joint agreement, namely the *Code of Conduct on Framework for Security*

*Cooperation*. This is done to improve relations between Indonesia and Australia, as well as to rebuild trust between the two countries which had collapsed due to the wiretapping case. In resolving this case the two countries are trying to rebuild the relationship that had collapsed with the *Code of Conduct on the Framework for Security Cooperation*. The result of the agreement is that Indonesia has regained confidence and is carrying out the protocol and international code of ethics where the cooperation has stopped and can resume for the benefit of both parties.

This agreement has had a good impact on the two countries bilateral relations returned to normal with the return of cooperation such as education, military cooperation, exchange of intelligence information related to terrorism which was frozen. The case regarding wiretapping was resolved through diplomacy through the agreement on the *Code of Conduct on Framework for Security Cooperation* on August 8, 2014. After the end of the matter at the end of 2015 the Indonesian and Australian governments met at the prime meeting of the Council of Ministers between Indonesia and Australia in the field of Law and Security, both both parties agreed to be committed to maintaining the relationship between the two parties and continuing the cooperation between the two. The forum discussed issues of national law and security, particularly in the field of terrorism (*Counter-terrorism*). In the following year, in 2016 the Indonesian and Australian delegations met in the *Australia-Indonesia Ministerial Council on Law and Security*. During the meeting discussed the cooperation between the two countries in the framework of the Lombok Treaty which has entered its tenth year, and reaffirmed the joint commitment in the vision of the *Lombok Treaty* through coordinated and sustainable cooperation in overcoming all global and regional security challenges.

In this case of wiretapping and the return to normalization between Indonesia and Australia, the calculation of the national and rational interests between the two is inseparable. Because both of them desperately need to maintain their friendship, especially in the field of diplomacy to perpetuate bilateral cooperation between the two parties. This cannot be separated from the tendency of a country to comply with the agreement even though the country is anarchic, this is influenced by three main things, namely *National Interest*, *Efficiency*, and *Norms*.

First, *Efficiency*. It is very important in an agreement on the efficiency factor because it is able to protect resources for certain interests and squeeze problems by means of analysis and calculation. In this case, Indonesia and Australia felt the need to carry out a *Code of Conduct on the Framework for Security Cooperation* which was the right and effective decision because it ended post-case tensions. So, if we use an *enforceable mechanism* by applying economic sanctions until unilateral sanctions are deemed ineffective and need to cost a lot of money and eventually failures will occur. In the opposite case, with obedience, the process of cooperation in obedience goes through a process of interaction in justification, persuasion and discourse. Thus, the implementation of the *Lombok Treaty* is considered efficient and effective for maintaining bilateral relations between the two parties and maintaining good members of the international community.

Second, the *National Interest*. In every country, surely they want to comply with an agreement or treaty if any of the country's interests are met. This can happen when their interests can be maintained and fulfilled. In this case, Indonesia and Australia each have their respective interests to be fulfilled. They will continue to maintain good relations because they carry out their national interests, such as issues of global security, terrorism to finance. One of them is finance where they establish a relationship by conducting international trade transactions to maintain economic stability between the two countries. This Indonesia-Australia cooperation also paves the way in fighting terrorism. On the Indonesian side, by cooperating with Australia, Australia is pleased to provide assistance in the form of facilities, funding, and exchange of intelligence information on terrorists who are netted in all countries



in the Asia Pacific region. In addition, Indonesia as a large country in ASEAN also maintains regional security stability by cooperating with Australia, thus maintaining peace and security from all existing threats.

Third, *norms*. This has to do with the history / habits of the international community and is also the most classic reason for the compliance of a country to the treaty, but if it does not comply it becomes fatal, especially maintaining a good image for the international community. The basic norm in international law is *pact sunt servanda*, which means that an agreement must be obeyed. In this case Australia has violated international human rights violating the freedoms stipulated in the *United Declaration of Human Rights*. This is not without reason, if this is not done, it will not only be sanctioned, but it will reduce Australia's image in the eyes of the international community.

However, if the mutual agreement, namely the Code of Conduct on Framework for Security Cooperation, is violated again, then Indonesia can take action *Persona non-Grata* against Australian State Representatives in Indonesia and terminate the cooperation relationship that has been carried out between Indonesia and Australia. Indonesia can also bring the matter to the International Court of Justice, this can be done based on Article 34 paragraph 1 of the ICJ Statute where only states can file such violations. In this regard, Article 4 of the Draft articles on Responsibility of States for Internationally Wrongful Acts states that the attitude of each State organ will be considered as the State's action.

## **CONCLUSION**

From the results of the above explanation, it can be concluded as follows. First, legally tapping is an act that is prohibited in international law and human rights as regulated in Article 12 of the *Universal Declaration of Human Rights*, Article 17 of the *International Covenant on Civil and Political Rights*, and Article 8 paragraph (1), *1958 European Convention on Human Rights*. As well as in the provisions of national law, Article 32 of Law no. 39 of 1999 concerning Human Rights and Article 31 paragraph (1) of Law no. 19 of 2016 on ITE. In Australia it also regulates wiretapping in the provisions of the *Telecommunications (Interception and Access) Act 1979*.

Second, after tense relations between Indonesia and Australia that both parties need to reconcile the case, and rebuild trust (*Trust Building*) which was realized by the *Code of Conduct on Framework for Security* which was inaugurated on 8 August 2014 as well as improving Indonesia's bilateral relations- Australia, and return to cooperation between the two parties in various fields.

Third, this settlement ends with good development by continuing with the *Lombok Treaty* between Australia and Indonesia. This is based on three things, namely *efficiency*, *national interest*, and *norms*.

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