

CHAPTER TWO

LITERATURE REVIEW

A. Bilateral Agreement

Currently, inter-state cooperation can no longer be avoided. Complex forms of life are very vulnerable to disputes. To avoid that disputes, the international community must always obey the norms and rules. These rules are not only made to avoid disputes but also to discipline, regulate, and maintain the relations between or among countries.

The embodiment of the cooperation is stated in the form of agreement.¹⁹ The international agreement can be classified into four types, namely an International agreement in terms of the number of participants; International agreement in terms of the legal rules that it creates; International agreement in terms of the procedure or stage of its formation; International agreement in terms of the period of validity.

One of the agreements between countries is distinguished based on the number of members of the agreement, and one of the types is a bilateral agreement. Bilateral itself comes from the word "*bi*," which means two, so it can be said that bilateral is an agreement between two countries.

¹⁹ Anthony Aust, 2010, *Handbook of International Law*, Cambridge, Cambridge University Press, p. 6.

Legal rules from bilateral agreement are specific and closed treaty, meaning that both parties must fully or completely obey all the contents or articles of the agreement or do not want to submit at all, so that the agreement will never be binding and apply as positive law, and the agreement only applies for the two concerned parties. The member of parties in this agreement is not specified. This is because a bilateral agreement is more personal than other agreements because just two parties involved.²⁰

B. Consular Relations

International law does not require every country to open diplomatic and consular representatives throughout the world.²¹ This is because the formation of foreign country representatives is only based on mutual consent, as stated in Article 2 of the Vienna Convention on Consular Relations 1963.²²

Diplomat and Consul are like an extension of the sending country. This extension then provides the essence that there are interests between the two countries, in the form of cooperation, trade, and protection of citizens and others. Because of it, a diplomat and consul have immunity and privilege in carrying out their duties in other countries.

²⁰ Malcolm N. Shaw, 2003, *International Law 5th edition*, Cambridge, Cambridge University Press, p. 88.

²¹ John B. Quigley, 2013, "Vienna Convention on Consular Relations: In Retrospect and Into the Future Vol. 38", *SIU School of Law*, Carbondale, Southern Illinois University School of Law, p. 5.

²² Art. 2 of VCCR stated that: the establishment of consular relations between State takes place by mutual consent.

Both diplomat and consular officers have different duties. There are several diplomat duties stated in Art. 3 of the Vienna Convention on Diplomatic Relations, such as:

1. Representation

Diplomat serves as a liaison between the sending country and the receiving country. Diplomat acts as defenders of the interests of the sending country, and as a symbol of the sending country in the receiving country.²³

2. Negotiating

Diplomat negotiates technical matters between two countries. The negotiations include bilateral cooperation in the fields of politics, economy and military.²⁴

3. Reporting

Diplomat has duties to provide reports on the circumstances and developments in the country where the diplomat is placed. The diplomat also provides reports related to performance in the receiving country.

4. Protecting

Diplomat shall protect the interests of sending countries and their citizens in the receiving country. But protecting duties based on the

²³ Widodo, 2009, *Hukum Diplomatik dan Konsuler pada Era Globalisasi*, Surabaya, Laks Bang Justitia, p. 53.

²⁴ Sumaryo Suryokusumo, 2013, *Hukum Diplomatik dan Konsuler*, Jakarta, PT. Tatanusa, p. 73.

Vienna Convention on Diplomatic Relations emphasize state responsibility.²⁵

There are several consular functions based on Article 5 of the Vienna Convention on Consular Relations that is changed surely and incorporate the security of the interests of the sending state, and it's national, namely:²⁶

- Defending the interest of sending State in the receiving state, both in people and bodies corporate, inside the points of confinement allowed by international law.
- Promoting the development of business, monetary, social, and reasonable relations between the receiving state and the sending state;
- Determining legitimate conditions and advancement in the business, monetary, social and explicit existence of the receiving state;
- Issuing passports and travel documents to citizens of the sending State, and visas or appropriate documents to persons wishing to make a trip to the sending State;
- Assisting and helping nationals, both individuals and bodies corporate, of the sending State;

²⁵ *Ibid*, p. 69.

²⁶ Shaymin Ak., 1998, *Hukum Diplomatik Suatu Pengantar*, Bandung, Armico, p. 111.

- Acting as notary and civil register and in capacities of a similar kind, and performing certain functions of an administrative nature, provided that there is nothing contrary in the laws and regulations of the receiving State and etc.

While the duties of Consul include protecting the interests of the sending country and its nationals; promoting and developing in the field of economic, cultural and science; providing assistance to citizens or business entities; acting as notaries and civil registry officials (registration of marriages, birth certificate and death); issuing passports, visas and travel documents; sending juridical or extra-judicial documents.²⁷ Moreover, when needed by a local court, assisting ships or aircraft to sending State.

Based on the duties of Diplomat and Consul above, it can be concluded that the diplomatic relations are a form of representation that deals with public affairs and contain political aspects.²⁸ While consular relations represent more private affairs and not contains political aspects, such as trade, shipping, culture, and other matters relating to the needs of citizens.²⁹

The Vienna Convention on Consular Relations 1963 (VCCR) is a multilateral treaty that regulates the privileges, immunities, rights, and duties

²⁷ Juridical documents are documents related to law, while extra-judicial documents are documents outside the legal field.

²⁸ James Crawford and Ian Brownlie, 2012, *Brownlie's Principles of Public International Law 8th edition*, United Kingdom, Oxford University Press, p. 411.

²⁹ Boer Mauna, 2003, *Hukum Internasional: Pengertian, Peranan, dan Fungsi dalam Era Dinamika Global*, PT. Alumni, Bandung, p. 527-529.

of consulate and Consul.³⁰ Signatories by 48 countries and has 180 parties.³¹ International Customary Law and the Vienna Convention on Consular Relations 1963 Art. 73 paragraph 2 are the legal basis of Consular Relation.

Article 73 paragraph 2 stated that “Nothing in the present Convention shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof”. From this article, it can be concluded that bilateral and multilateral agreement on the consular relations is allowed by international law since it is just supplements, confirmations, addition and expansion from the Vienna Convention on Consular Relations 1963.³²

In Indonesia, consular notifications are regulated on Criminal Code Procedure Number 8 of 1981, Art. 57 (1) & (2), Art. 59, 60, 61, 62 (1), (2) and (3).³³ There is also Law Number 1 of 1982 on the ratification of Vienna Convention on Consular Relations 1963.³⁴

Consular Notifications in International Law are also regulated in the Vienna Convention on Consular Relations 1963 Art. 36³⁵ and other Conventions such as Art. 16 point 7 of International Convention on the

³⁰ Anne James, Joanne Cecil & Mark Warren, 2008, “Equal Protection: Consular Assistance and Criminal Justice Procedures in the USA: An Introductory Guide for Consulates”, *International Justice Project & Human Rights Research*, Ottawa, Kannada, p. 9.

³¹ United Nations Treaty Collection, 2019, “Privileges and Immunities, Diplomatic and Consular Relations”, etc, taken from https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-6&chapter=3&clang=en accessed on February 18th, 2019 at 8:15 pm.

³² Suryonokusumo, 1995, *Hukum Diplomati Teori dan Kasus*, Alumni, Bandung, p. 26.

³³ Criminal Code Procedure Number 8 of 1981.

³⁴ Law Number 1 of 1982 on the Ratification of VCCR 1963.

³⁵ VCCR 1963 Art. 36.

Protection of the Rights of All Migrant Workers and Members of Their Families 1990³⁶, Part I No. 38 Contact with the Outside World of The Standard Minimum Rules for the Treatment of Prisoners.³⁷

C. The Sovereignty of the State under International Law

The notion of “Sovereignty of State” is the basic concept of modern international law.³⁸ The sovereignty of states represents the basic constitutional doctrine of the law of states, which governs a community of states in principle of legal personality.³⁹ Sovereignty in international law is also stated as one of the important components that must be owned by the state in carrying out its rights and duties based on Article 1 of the Montevideo Convention 1933⁴⁰ concerning State Rights and Duties.

The term sovereignty comes from the Arabic word "*daulah*" which means power. The term “sovereignty” was first used by Jean Bodin (1530 - 1596), a French philosopher, legal expert, political and economic scientist. In his book entitled *Les Six Livres de la Republique*, Bodin argues that sovereignty has four basic characteristics, namely permanent, genuine, round or cannot be

³⁶ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990 Art. 16, point 7.

³⁷ Standard Minimum Rules for the Treatment of Prisoners.

³⁸ Karen A. Gevorgyan, 2014, “Concept of State Sovereignty: Modern Attitudes”, *Faculty of Law of the Yerevan State University*, Yerevan, YSU Press, p. 431.

³⁹ ICJ Report, 1949, “Reparation for Injuries Suffered in the Service of the United Nations, p.174,177-178”, taken from <https://www.icj-cij.org/files/case-related/4/004-19490411-ADV-01-00-EN.pdf> accessed on January 23th, 2019 at 9 pm.

⁴⁰ Montevideo Convention 1933.

divided and is not limited. There are four main components of the sovereignty of the state, namely:

1. Permanent population living there;
2. Territory;
3. Government and
4. Recognition from another state.

Sovereignty as one of the important points must be owned by a country to carry out its rights and obligations, and also be able to make decisions without being influenced by other authorities.