SKRIPSI

INTERNATIONAL LAW REVIEW ON THE LAW AGAINST WIRETAPPING CASE IN INTERNATIONAL RELATIONS BETWEEN OTHER COUNTRIES

Written and submitted by

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LEGAL STUDY PROGRAM / INTERNATIONAL LAW DEPARTMENT

FACULTY OF LAW

HASANUDDIN UNIVERSITY

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THESIS APPROVAL

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On Tuesday, October 17, 2023

And declared to have met the graduation requirements

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PAGE OF TITLE

INTERNATIONAL LAW REVIEW ON THE LAW AGAINST WIRETAPPING CASE IN INTERNATIONAL RELATIONS BETWEEN OTHER COUNTRIES

Submitted by:

Muhammad Jihad Ibrahim

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THESIS

As a Final Thesis in the Context of Completion of Undergraduate Studies

of the Department of International Law, Legal Studies Program

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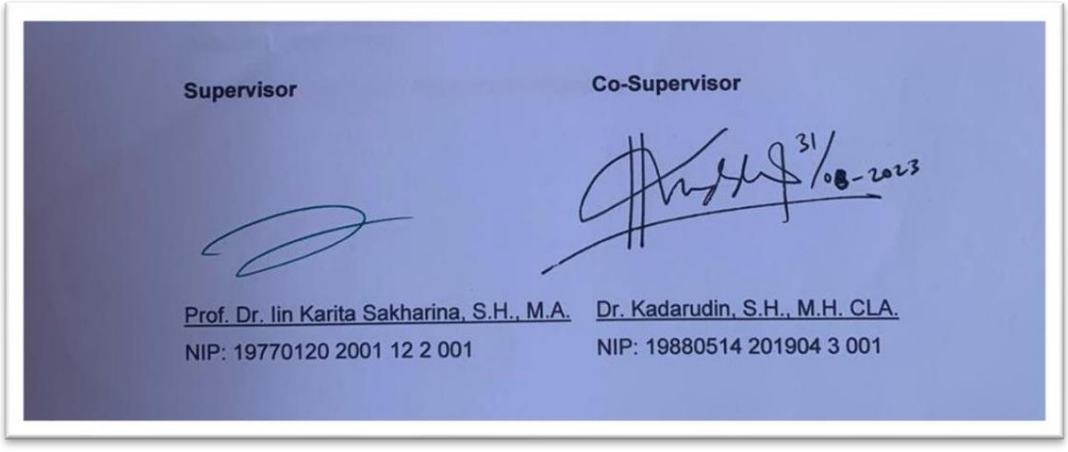

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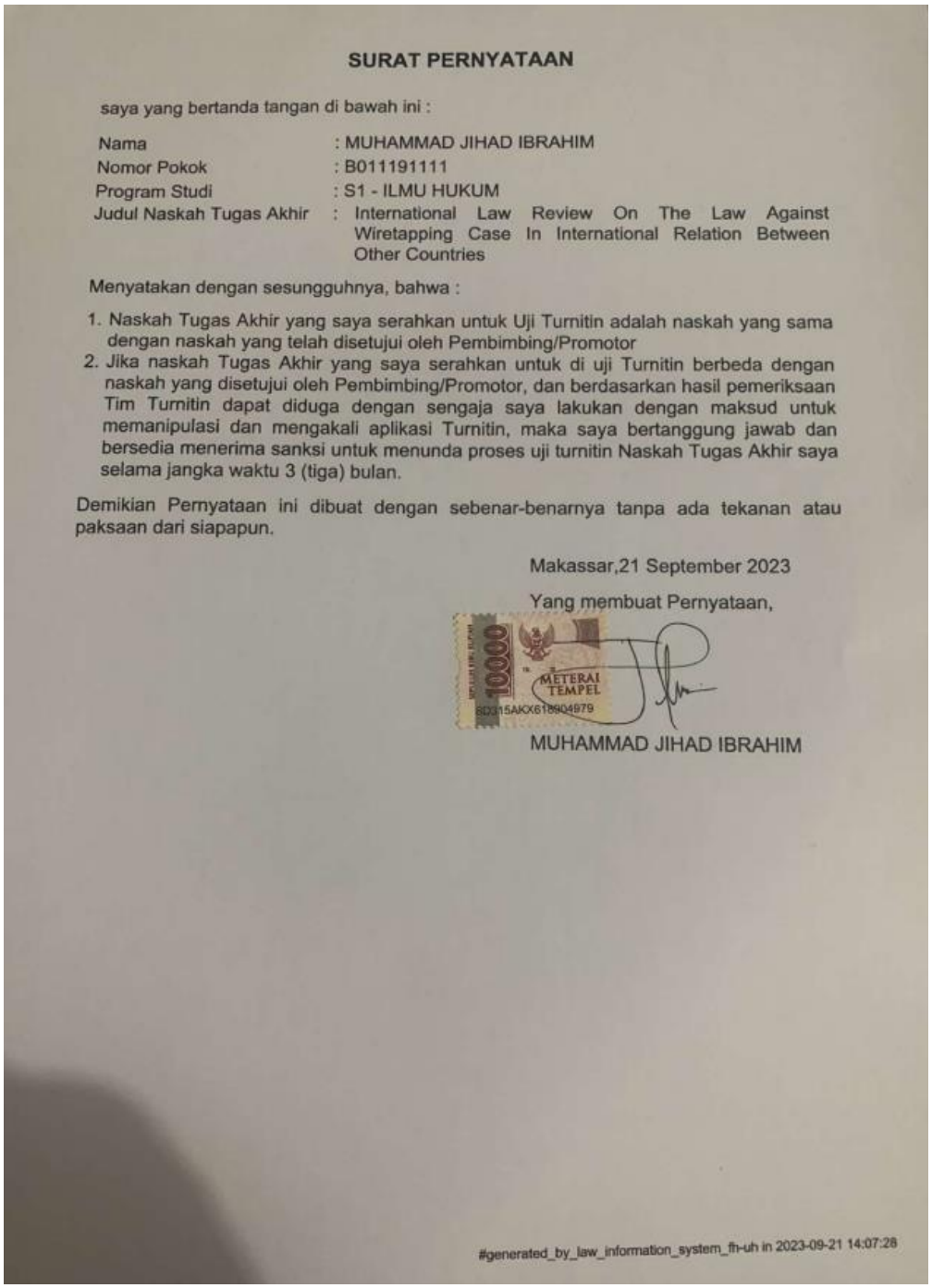

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ABSTRACT

MUHAMMAD JIHAD IBRAHIM (B011191111) with title ***"International Law Review on The Law Against Wiretapping Case in International Relations Between Other Countries".*** Supervised by **Iin Karita Sakharina** and **Kadaruddin**.

This study aims to determine the international law instrument regulate towards the act of wiretapping in Diplomatic relations between state and see the impact of wiretapping practices as a violation of the right to immunity and the right to inviolability in international law.

This study uses cases and normative research methodologies. Primary and secondary legal resources are the types and sources of legal materials considered in this study. These legal documents were gathered utilizing a literature-based research technique, which was then examined using a descriptive technique.

As the results of this study, are 1) There is no single legal instrument that specifically regulates the practice of wiretapping, but there are elements of international law that regulate a personal right to privacy and data., 2) Effectiveness of International Law, Especially the 1961 Vienna Convention on Diplomatic Relations, in Overcoming the Problem of Wiretapping Between Other State.

Keywords**:** Diplomatic Relations, Diplomatic Violation, Wiretapping

FOREWORD

All praise be to Allah subhanahu wata'ala for His power, grace and favor to facilitate and move the heart so that researchers can complete the final thesis with the title **" INTERNATIONAL LAW REVIEW ON THE LAW AGAINST WIRETAPPING CASE IN INTERNATIONAL RELATIONS BETWEEN OTHER COUNTRIES"** which is a requirement for completing a bachelor's degree (S1) and for obtaining a Bachelor of Law degree at the Faculty of Law, Hasanuddin University.

With all humility, the author dedicates this thesis to author’s father namely Muhammadiah Said and author’s mother Dwiyana Ruspianti Arief who with love, sincerity and patience have given birth to and educated the writer to be a useful person. To the author's brother and sister-in-law, Hilmi Mutmainnah Widiaputri, Muhammad Ilman Nafian, Aisyah Widiananda Putri, Muhammad Agung Syaifullah who have been generous and have expressed their prayers and support for the writer. The author also does not forget to thank all the big family, Andi Sulo Fam and Kr. Sila & Kr. Empo Fam that the writer cannot mention one by one. The author is grateful for all the support and prayers.

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Muhammad Jihad Ibrahim

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CHAPTER I

INTRODUCTION

A. Problem Introduction

International law refers to a body of rules and principles that govern the relationships between nations and other international actors, such as international organizations and individuals. International law can also be the start of relation between state that can be called diplomatic relations, even though Boer Mauna in the book International Law mentioned, "International law does not oblige a country to open diplomatic relations with other countries, on the other hand, there is no obligation to accept foreign diplomatic missions in a country."[1] Diplomatic relationship itself is a relationship conducted between one country and another to mutually fulfill the interests of each country, this has been done for centuries. To be able to conducted diplomatic relations with other countries, it is necessary to have prior recognition of that country, especially by a country that will receive a diplomatic representative of a country (Receiving State). However, if a country has not recognized a country that wants to accept diplomatic relations, then diplomatic relations cannot be conducted.[2]

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[1] Boer Mauna 2018, *Hukum Internasional Pengertian Peranan dan Fungsi dalam Era Dinamika Global* (Bandung: P.T. Alumni) p. 521

[2] Sumaryo Suryokusumo, 2013, Hukum Diplomatik dan Konsuler Jilid I, Tatanusa, Jakarta, p.8

The opening of diplomatic relations was emphasized in article 2 of the 1961 Vienna Convention, namely: The establishment of diplomatic relations between States, and permanent diplomatic missions, takes place by mutual consent.[3]

Nations engages in diplomatic practice by sending diplomatic envoys to the recipient nation as a representation of the nation and as a channel of communication with other nations to protect and advance their individual interests and realize common interests. Additionally, in nations that engage in diplomatic relations with other nations, every nation diplomatic representative will be granted immunity and privileges by the receiving nation, but these privileges and immunity are only functional and not absolute (bound to a diplomat), and they cannot be misused. There are 3 theories regarding the basis for granting diplomatic privileges and immunity, namely:[4]

1. Exterritoriality Theory

The fundamental principle of this theory is any diplomatic representative is deemed not to be within the territory of the host state, but within the territory of the sending state, even though he is actually within the territory of the host state. Therefore, of course, in his diplomatic mission he cannot be subject to the laws of the host country (receiving country). Likewise, a diplomatic representative cannot be

[3] Article 2 of the Vienna Convention on Diplomatic Relations 1961
[4] Boer Mauna 2018, *Op. Cit,* p. 547-548

controlled by the laws of the receiving state and cannot be subject to all the regulations that exist in the receiving state. *Extraterritorialiteit* diplomatic representatives are controlled only by the laws of the sending state.

2. Representative Character Theory

The word represent here is aimed at diplomats who are sent as representatives of their countries, with the intention of this theory giving privileges and immunity to every official and diplomatic representative to enjoy the rights that have been granted.

3. Functional Necessity Theory

According to this theory, diplomatic privileges and immunities and diplomatic missions are only based on functional requirements so that diplomats can carry out their duties and functions with perfect results. This theory was later supported by the 1961 Vienna convention in its preamble, namely:

> *"The purpose of these privileges and immunities is not to benefit individuals but to assist in the efficient carrying out of the functions of diplomatic missions as representatives of the state."*[5]

However, international relations between countries do not always run smoothly. In fact, many factors often cause diplomatic relations to be unconducive and even to the point of termination of relations which weakens. Some of them are if a diplomat of the sending country interferes

[5] The preamble of Vienna Convention on Diplomatic Relations 1961

in the internal affairs of the receiving country, diplomat of the sending country violates the laws and regulations of the receiving country, as well as the practice of wiretapping by the diplomat of the sending country against the receiving country.

Wiretapping can be defined as a practice of secretly listening to the conversations of others through legal and illegal methods[6], such as through telephone tapping or other electronic interception. Wiretapping is also part of espionage activities. Some similarities can be seen between espionage and wiretapping activities, namely:

1. Unauthorized access,
2. Non-violence,
3. minimize physical contact,
4. Using equipment, technology, and utilizing global telematics (telecommunications, media, and informatics) networks,
5. Acts committed illegally, without rights or unethically occur in cyberspace,
6. The act is conducted using any equipment related to the internet,
7. These acts result in material and immaterial losses (time, value, services, money, goods, self-respect, dignity, confidentiality of information) which tend to be greater than conventional crimes,
8. A culprit is a person who masters the use of the internet and its applications.[7]

A brief history of wiretapping, beginning when a former telephone operator who had joined the city police in 1895 proposed that it could be a good idea to listen in on wires used by criminals, wiretapping officially began

[6] Nugraha Purna Atmadja, 2017, Dukungan Indonesia Terhadap Resolusi Anti Spionase Perserikatan Bangsa-Bangsa, Faculty of Social and Political Sciences Mulawarman University

[7] Rofi'a Zulkarnain, Herman Suryokumoro, Patricia Audrey Ruslijanto, "Acts of espionage through wiretapping between countries as cybercrime" available at https://media.neliti.com/media/publications/35242-ID-tindakan-spionase-melalui-penyadapan-antar-negara-sebagai-cybercrime.pdf accessed on February, 10 2023, 04:25

in New York. The initiative had the mayor's approval at the time, William L. Strong, and for many years after that, covert wiretapping was a thriving business. Since the telephone was not widely recognized as a staple of the home in the 1990s, the general people of the time wouldn't have worried about it. When police were using wiretaps, they used to simply walk into the offices of the telephone company, ask for the location of the wires they were interested in, and then quickly obtain the information they needed.[8]

Wiretapping itself is a practice that is prohibited inside International Covenant on Civil and Political Rights (ICCPR), article (17) paragraphs (1) and (2) which contains:[9]

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

However, cases of wiretapping can occur by exploiting diplomatic relations between countries, with each country sending its diplomatic representatives to the receiving country. It can be seen that wiretapping may be conducted by the receiving country against diplomatic representatives in the country. An example of a case that has occurred is the wiretapping of the diplomatic representative of Timor Leste in Australia. It can be seen that

[8] Meyer Berger 1938, “Tapping the Wires”, Publishing at The New Yorker and available in <https://www.newyorker.com/magazine/1938/06/18/tapping-thewires#:~:text=Wiretapping%20got%20its%20start,on%20wires%20used%20by%20criminals> accessed on February, 03 2023, 19:30

[9] Article 17 of International Covenant on Civil and Political Rights (ICCPR) 1966

in the Vienna Convention on Diplomatic Relations, article (31) point (1) which contains:[10]

> *A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:*
> *(a) A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the mission;*
> *(b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir, or legatee as a private person and not on behalf of the sending State;*
> *(c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.*

Based on the article above, it confirms that diplomats are immune from the jurisdiction of the receiving country and are entitled to protection, but in reality, some countries do not protect them. So, from the background above, the writer is interested in raising the title "International Law Review on The Law Against Wiretapping Practice in International Relations Between Other Countries".

[10] Article 31 of Vienna Convention on Diplomatic Relations 1961

B. Research Questions

Based on the background described above, the author in this study took the following research questions:

1. How does International Law Regulate Wiretapping Cases?
2. How the impact of wiretapping practices as a violation of the right to immunity and the right to inviolability in international law?

C. Research Purpose

Based on the problem statements above, the author has the following research objectives:

1. To find out the form of international legal protection regarding Wiretapping Case
2. To find out the wiretapping impacting the Practice of VCDR on Violation of Immunity and Inviolability

D. Research Benefit

Moving on from the purpose of this research, it is expected to provide theoretical and practical benefits, namely as follows:

1. Academically

Academically, this scientific paper is expected to contribute to providing theoretical input for the development of science and international law, especially in the field of the diplomatic legal system.

2. Practically

Practically it is expected that the results of this legal research can provide legal knowledge for parties involved in the field of employment and

the public who want to research violations committed by diplomatic officials themselves and the receiving country in Diplomatic relations.

E. Research Originality

This thesis, entitled International Law Review on The Law Against Wiretapping Practice in International Relations Between Other Countries, this research was originally conducted by the author in looking at legal issues regarding how international law regulates wiretapping practices in diplomatic relations between other countries. The discussion contained in these studies has material that has similarities with research. Some of the research in question is as follows:

1. Thesis research entitled "Praktik Spionase Dalam Hubungan Diplomatik Antar Negara Ditinjau dari Hukum Internasional", which was written in 2013 by a student at the Faculty of Law, Hasanuddin University on behalf of Floriny Deasy Victorina Pinontoan. In brief, this study discusses the freedom of diplomatic staff and the use of embassy buildings of sending countries in receiving countries in International Law (1961 Vienna Convention on Diplomatic Relations) and the role of the 1961 Vienna convention in overcoming espionage problems.
2. Thesis Research entitled “Penyadapan Alat Telekomunikasi Presiden Republik Indonesia Oleh Pemerintah Australia Ditinjau Dari Hukum Internasional” which was written in 2014 by a student at the Faculty of Law, Hasanuddin University on behalf of Dima

Adinsa. In brief, this study discusses Australia's wiretapping of the President of the Republic of Indonesia is not expressly regulated in general international law and is not considered illegal.

3. Thesis research entitled “Kejahatan Spionase Yang Dilakukan Oleh Pejabat Diplomatik (Studi Kasus Penyadapan Oleh Pejabat Diplomatik Australia Terhadap Pejabat Pemerintah Indonesia)”, which was written in 2016 by a student at the Faculty of Law, Atma Jaya University of Surabaya on behalf of Albertus Ardian Prastowo. In brief, this study discusses Legal Consequences of the Crime of Espionage Committed by Diplomatic Officials, the author also divides into 2 discussions of consequences, namely: 1. Legal Consequences of the Crime of Espionage According to the 1961 Vienna Convention on Diplomatic Relations 2. Legal Consequences of Wiretapping Acts Committed by Australian Diplomatic Officials against Indonesian Government Officials.
4. Thesis research entitled "Hubungan Diplomatik Indonesia-Australia Pasca Penyadapan Australia Terhadap Negara Indonesia", which was written in 2016 by a student at the Faculty of Social Science and Political Science, Pasundan University on behalf of Agi Setiawan. In this thesis, the author does not explain the application of law to wiretapping violations that occur in diplomats, but rather the author explains the description of the possibilities of the method wiretapping conducted by Australia against Indonesia, and also the

author explains the effectiveness of wiretapping activities in diplomacy.

F. Research Method

1. Type of Research

The type of research that the authors use is normative legal research.[11] Normative research is Normative research is a legal study that is conceptualized as what is written in laws and regulations (law in book) or law is conceptualized as a rule or norm which is a standard of human behavior that is considered appropriate.[12]

The author on this research uses two approaches, namely the statute approach and conceptual approach.[13] The statute approach is conducted by interpreting statutory rules and regulations relating to the legal issues at hand.[14] Meanwhile, the conceptual approach is a type of research that offers an analytical point of view on solving legal research problems from the perspectives of the underlying legal ideas or even from the perspectives of the values embodied in the norming of regulation in relation to the concept of law.[15]

2. Type and Source

1.1. Type of Legal Material

[11] Irwansyah, 2020, Hukum: Pilihan Metode Dan Praktik Penulisan Artikel, Mitra Buana Media, Yogyakarta, p. 98
[12] Amiruddin and Zainal Asikin, 2014, *Pengantar Metode Penelitian Hukum*, Rajawali Pers, Jakarta, p. 118.
[13] Kadarudin, 2021, *Penelitian di Bidang Ilmu Hukum (Sebuah Pemahaman Awal)*, Formaci, Semarang, p. 193
[14] Peter Mahmud Marzuki, 2005*, Penelitian Hukum*, Kencana, Jakarta, p. 134
[15] Bachtiar, 2018, *Metode Penelitian Hukum, Unpam Press*. Tangerang Selatan. p. 82

The types of legal materials used by the author in this proposal are divided into primary and secondary legal materials. According to Peter Mahmud Marzuki, primary legal material is legal material that is authoritative, which means it has authority.[16] Meanwhile, secondary legal material, is materials that provide explanations regarding primary legal materials, such as draft laws, research results, or opinions of legal experts.[17]

1.2. Source of Legal Material

The legal material that will be the source used by the author in this study is:

a. International Conventions and other relevant legal instruments;
b. International Laws books;
c. Scientific journals as well as literature and other sources of information both in hard copy and a soft copy obtained either directly or through internet search results that are relevant to the topic being researched.

3. Legal Material Collection Techniques

The author used literature research as a method of gathering legal evidence. Data were gathered by the author through reading materials analysis and study.

[16] Bambang Sunggono, 2003, *Metode Penelitian Hukum*, 5th Printed, PT Raja Grafindo Persada, Jakarta, p. 67
[17] Amiruddin and Zainal Asikin, *Op.Cit,* p. 119

CHAPTER II

LITERATURE REVIEW OF THE FIRST PROBLEM STATEMENT

A. International Law

A.1. Definition of International Law

One of the most complete international definitions is written by J.G. Starke in Sefriani's book "Hukum Internasional Suatu Pengantar" is: [18]

> *"International law may be defined as that body of law which is composed for its greater part of principles and rules of conduct which states feel bound to observe, and therefore, do commonly observe in their relations with each other, and which includes also:*
> *a) the rules of law relating to the functioning of international institutions of organizations, their relations with each other, and their relations with states and individuals; and*
> *b) certain rules of law relating to individuals and non-states entities so far as the rights or duties of such individuals and non-states entities are the concern of the international community".*

Based on the definition described above, international law itself is divided into 2 based on its form, namely:[19]

1. Public International Law
2. Private International Law

According to Mochtar Kusumaatmadja in the book "*Pengantar Hukum Internasional*" explaining public international law is;

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[18] Sefriani 2011, *Hukum Internasional Suatu Pengantar*, (Jakarta: Rajawali) p. 2
[19] Boer Mauna 2018, *Op. Cit*, p. 2

> *"The whole rule and principles of law governing relations or issues that cross the borders of countries (international relations) that are not civil in nature. "*[20]

While referring to private international law, Mochtar Kusumaatmadja argues that;

> *"All legal rules or principles governing civil relations that cross national borders or can be said to be international private law are laws governing civil law relations between legal actors who are each subject to different civil (national) laws."*[21]

A.2. Source of International Law

The source of international law is one of the most important topics in international law, because the sources of international law will provide information about the forms of international law itself. The basic question is, what is meant by the source of law itself, because Article 38 of the Statute of the International Court of Justice (ICJ), which is often referred to as the source of international law, does not explicitly mention the term "source of law". The answer to this question is not easy to answer, because it involves a comprehensive discussion, namely understanding the source of law not limited to the source of law in the formal sense." The discussion of the source of law must enter the philosophical realm because it involves fundamental questions, namely the origin of law including aspects of

[20] Jawahir Thontowi & Pranoto Iskandar, 2006, Hukum Internasional Kontemporer, PT. Refika Aditama, Bandung, p. 4
[21] Ari Purwadi 2016, *Basics of International Civil Law*, (Surabaya: Wijaya Kusuma University) p. 1

legality, normativity, and legitimacy of the law. Thus, the discourse of legal sources tends to be a scientific (legal) discourse, not a legal discussion based on firm and definite legal texts. [22]

The source of law is only related to the process and formality of law formation, but the excavation of materials or legal materials. In fact, according to Rosalyn Higgins (former judge of the International Court of Justice), the discussion of the source of law is all about the provenance of norms that make up the law itself. The same applies to international law. If the definition or nature of international law is something that relates to the identity of international law, then the source of international law is something that concerns the identification of the norms that make up the law itself. The source of international law is something that concerns the identification of what is called international law. [23]

In brief, the definition of sources of law in the formal sense or formal sources of law is a response to the question of where the law is found and how the law is formed and binding. However, legal experts, especially international law, have different opinions regarding the use of the terms formal source of law and material source of law. Ian Brownlie, for example, criticizes the use of this term as odd and misguided. According to Brownlie, the distinction of sources of international law into formal and material

[22] Samant Besson, "Theorizing the Sources of International Law" in Samantha Besson & John Tasioulas (Eds.), 2010, The Philosophy of International Law, Oxford University Press, Oxford, p. 185 & available at Atip Latipulhayat, “Hukum Internasional: Sumber-Sumber Hukum”, 2021, (Jakarta, Sinar Grafika) p. 31

[23] Rosalyn Higgins, 2000. Problems and Process: International Law and How We Use it, Clarendon Press, Oxford, p. 17

sources of law may be appropriate for national legal systems but does not apply to international law, because this legal system does not have the institutions and authority that the national legal system has already compromised.[24]

In the national legal system, formal sources of law are sources of law related to international mechanisms in the formation of statutory provisions whose validity is binding on all citizens. Meanwhile, international law does not have legislative, judicial and executive institutions as known in the national legal system. The International Court of Justice, the UN General Assembly or a special UN body that creates an international convention, does not have the authority to impose its decisions to bind states.[25]

Brownlie's opinion seems to see formal sources of law in the sense of institutions that make law. It is true that international law does not have a law-making institution like national law, but international law has procedures and mechanisms for how international law applies and binds, for example how an international treaty applies and binds countries.[26]

According to Hart, a British legal philosopher, the source of formal law relates to the criteria that determine whether a law is valid and binding. Hart calls it a "source in a formal or legal sense. The source of formal law relates to the procedure or mechanism of how the law is made and becomes binding (law-creating). Thus, the source of law in the formal sense will be

[24] Ian Brownlie, 3008. Principles of Public International Law, 7 edition Oxford University Press, Oxford, p. 5.
[25] *Ibid*
[26] Atip Latipulhayat, *Op. Cit,* p. 37

tangible and related to the formal form of law. According to Mochtar Kusumaatmadja, the source of formal law is the answer to the question of where we find the law.[27]

In general, international law experts will refer to Article 38 of the Statute of the International Court of Justice when discussing the sources of international law in the formal sense, because the Article contains the formal form of international law. Examples are international treaties and customary international law. An international treaty is a formal source of law, as it creates law for the parties, rather than simply listing obligations. The same goes for customary international law, as it is the medium through which international law is formally established.

The sources of international law refer to the origins and means by which the law is created and defined. The sources are significant in determining the scope and application of the law, as well as the legal obligations of states and other international actors. There are various sources of international law based on the reading article 38 paragraph (1) Statute of the ICJ Court (International Court of Justice), the sources of international law are as follows; [28]

> *The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:*
> *a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;*

[27] Mochtar Kusumaatmadja, 1982. Pengantar Hukum Internasional, Binacipta, Bandung, p. 106.
[28] Article 38 paragraph 1 of International Court of Justice Statute

b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law

1. International Agreement;

An international treaty is an agreement made between countries that have agreed to enter into an agreement, which from the agreement creates rights and obligations. International treaties also there are various terms in its mention such as final act, convention, declaration, agreement, memorandum of understanding (MOU), protocol and so on.[29]

2. International custom;

International Custom is a general custom that has become a part of international law and has become a practice for part of international law and become a practice for the countries concerned. The custom itself has two conditions so that it can be said to be as an international custom, namely (1) The custom must be of a general nature, (2) The custom must be general, meaning that it is included as a material element; (3) The custom that is accepted as law as a psychological element. law as a psychological element.

3. Principles or Principles of Law;

[29] Article 1 Paragraph 1 of International Court of Justice Statute

Principle or principle of law means a principle that underlies all modern legal systems in the world. Modern legal systems in the world, as it is not only limited to the scope of international law, but involves procedural law, procedural law, and international law. International law alone, but involves procedural law, civil law, criminal law, environmental law and so on that are found through the practices of a country. The principles or legal principles relating to international law are: [30]

a. Voluntary, which means that no party can be bound by a treaty through a way that is done by the state. a treaty thro ugh a method that is done by international law (signing, ratifying or accessioning) without consent.
b. *Pacta Sunt Servanda*, means that the treaty is binding like a law for the parties concerned.
c. *Pacta tertiis nocunt nec prosunt*, an agreement does not bind other parties who did not make the agreement, or in other words, third parties.

4. Court decisions and teachings of scholars

Article 38 of the MI Statute states that court decisions are as an additional source of law (subsidiary) to higher-level sources of law. Because this source of law cannot stand alone and needs a decision taken by a judge, this court decision is said to be an additional source of law. According

[30] Dewa Sudika Mangku, 2021, Pengantar Hukum Internasional Publik, Jawa Tengah: Lakeisha, p. 15

to Article 59 of the ICJ Statute, it is stated that court decisions can only bind the parties concerned and at the same time are only likened to supporting the idea of the existence and truth of legal norms. In general, this additional law is obtained from leading legal experts or scholars whose works are often used as guidelines in international law. Meanwhile, Article 38 paragraph (2) authorizes the ICJ to decide cases appropriately and fairly (*ex aequo et bono*) in accordance with general principles. Therefore, Article 38 paragraphs 1 and 2 serve as guidelines for the Court when considering and deciding a case that has been submitted to it.

The order as set out in Article 38 paragraph (1), does not indicate the order of the most important and main, but only for convenience. According to Mochtar Kusumaatmadja, the four sources, can be further grouped into two groups, including the main or primary sources of law (international treaties, international customs, and general principles) and additional or subsidiary sources of law (court decisions / opinions of scholars). The issue of which source of law is the most important or the most important depends on where the judge's point of view is in deciding the dispute. [31]

With the existence of sources of law in international law, resulting in parties or countries concerned must follow all the main provisions and rules. main provisions and rules. This is because the rules are contained in the form of international treaties, so that countries bind themselves to international treaties, or it can be said that the state is bound by pacta sunt

[31] Mochtar Kusumaatmadja, Op.Cit, p. 34

servanda. From what is contained in Article 38 paragraph (1), it is said that in resolving an inter-state problem, it must be based on international law, such as treaties and international customs. at the same time this is a recognition of treaties as a source of formal law and Statutes as a source of material law.

A.3. Subject of International Law

In the beginning, international law only saw the state as the subject of international law. That is because in the early days it can be said that there was no or even rarely the existence of international legal persons other than states conducting international relations.[32] International law can be defined as the law governing international entities. This is what distinguishes it from the national laws of each country, which regulate only national entities.

According to J.G. Starke, international law can be defined as the entirety of law which for the most part consists of principles and rules of behavior to which states feel themselves bound to adhere and which, therefore, are actually adhered to in general in their relations with each other.[33] Legal rules relating to the functioning of international institutions or organizations, their relations with each other, and their relations with states and individuals; and Certain legal rules relating to individuals and non-state

[32] I Wayan Phartiana, 2003, *Pengantar Hukum Internasional*. Bandung: Mandar Maju, p. 85

[33] J.G. Starke, 2001, *Pengantar Hukum Internasional Edisi Kesepuluh.* Jakarta: Sinar Grafika, p. 3

entities to the extent that the rights and obligations of individuals and non-state entities are important to the international community.[34]

Then according to Mochtar Kusumaatmadja, international law is the overall rules and principles governing relationships or issues that cross state borders: between states and states; and states with other legal subjects not states or non-state subjects with each other.[35] In general, international law is defined as a set of rules and regulations that bind and regulate relations between States and other legal subjects in the life of the international community.[36] Furthermore, still from the same book, Mochtar Kusumaatmadja explained that the subject of international law is everything that according to the law can have rights and obligations, and has the authority to conduct legal relations or act according to the provisions of applicable international law. Subjects of international law, among others:

1. State

The state is a full subject of international law. According to the 1949 Montevideo Convention, the qualifications of a state as a subject of international law are having a permanent population, a certain territory, a legitimate or sovereign government, and the state has the ability to enter into relations with other countries.

2. International Organization

[34] J.G. Starke. *Introduction to International Law*, Edisi-9, translated by Sumitro L.S. Dauredjo, 1984, *Pengantar Hukum Intrnasional*, Jakarta: Aksara Persada Indonesia, p. 1
[35] Mochtar Kusumaatmadja, Op.cit, p. 4

The classification of international organizations includes:

a. International organizations that have global membership with general purposes and objectives. For example, the United Nations (UN).
b. International organizations that have global membership with specific goals and objectives. Examples include the World Bank, the International Monetary Fund (IMF), and the World Health Organization (WHO), among others.
c. International organizations with regional membership with global goals and objectives. Examples are ASEAN (Association of Southeast Asian Nations), European Union, and others.

The position of international organizations as subjects of international law is now unquestionable, and they have rights and obligations stipulated in international conventions which are a kind of statutes.[37]

3. International Red Cross

The International Red Cross, based in Geneva, has its own place in the history of international law. The International Red Cross as a subject of international law has a limited scope. However, PMI's position is strengthened by international treaties and conventions. As the PMI's mission is for humanity, this international organization must be independent and conducted without the intervention of any state.

[37] Mochtar Kusumaatmadja and Etty R. Agoes. 2003, *Pengantar Hukum Internasional.* Bandung: PT Alumni, p. 101

4. The Holy See of the Vatican

Quoting from the article Vatican as a Subject of International Law, the Vatican is a subject of international law because it is recognized by countries in the world and is a party to international treaties and a member of several international organizations. This happened after the treaty between Italy and the Holy See on February 11, 1929 (Lateran Treaty) which returned a piece of land in Rome to the Holy See and allowed the establishment of the Vatican state, which with the treaty was also established and recognized.[38]

5. Belligerent

According to the laws of war, a rebel group can be a subject of international law if it is organized, obeys the laws of war, has a controlled territory, has the ability to enter into relations with other states, can determine its own destiny, controls natural resources in the territory it controls, and chooses its own economic, political, and social system.

B. Wiretapping

B.1. Definition of Wiretapping

The term wiretapping is usually associated with the English word "interception" or "wiretapping". Wiretapping generally means the secret listening of another person's conversation through telephone tapping or other electronic interception.

[38] Mochtar Kusumaatmadja and Etty R. Agoes, Op.Cit, p. 100

Amanda Hale explains that: Interception defined as 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.[39]

As for wiretapping, Jeffrey B. Welty explains that wiretapping is used to refer to the interception of the context of electronic communications in any format, whether the communication occurs via phone, fax email, text messaging, and many more.[40] In the repertoire of international law and human rights, wiretapping is generally categorized as a prohibited act in the categorized as prohibited acts in several regulations.

First, Article 12 of the Universal Declaration of Human Rights (UDHR) 1948 explains:[41] No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to protection of the law against such interference attacks. This article makes it clear that no one shall be subject to arbitrary interference with his privacy, family, home or correspondence, nor to attacks on his honor and reputation. Everyone is entitled to legal protection against such interference or attacks.

[39] Amanda Hale and John Edwards, 2006, "Getting its Taped", Computer and Communications Law Review, p. 71.
[40] Jeffrey B. Welty, 2009, "Prosecution and Law Enforcement Access to Information about Electronic Communication", Administration of Justice Bulletin, p. 8
[41] Article 12 of The Universal Declaration of Human Rights 1948

Second, Article 17 of the 1966 International Covenant on Civil and Political Rights (ICCPR) explains: (1). No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home, correspondence, nor to unlawful attacks on his honor and reputation (2). Everyone has the right to the protection of the law against such interference or attacks. The meaning of this article states:[42]

(1) No one shall be arbitrarily or unlawfully interfered with in matters of his person, family, home or correspondence, his private affairs, his family, his home or his correspondence, or unlawfully attack his honor and good name. and good name.

(2) Everyone shall be entitled to the protection of the law against such interference or attacks as aforesaid.

Third, in General Comment No. 16 on Article 17 of the ICCPR which was agreed by the United Nations (UN) Human Rights Committee at its twenty-third session in 1988. twenty-third session, 1988, which provided comments on the material content of Article 17 of the International Covenant on Civil and Political Rights, at point 8 stated: [43]

> *"…that the integrity and confidentiality of correspondence must be guaranteed de jure and de facto. Correspondence should be delivered to the address to which it is addressed without obstruction and without being opened or read first. Surveillance, electronic or otherwise, tapping of telephones, telegrams and other forms of communications, and the recording of conversations shall be prohibited"*

[42] Article 17 of The International Covenant on Civil and Political Rights 1966
[43] Supriyadi Widodo Eddyono & Erasmus A. T. Napitupulu. 2013, Komentar atas Pengaturan Penyadapan Dalam Rancangan KUHAP. Institue for Criminal Justice Reform. Jakarta p. 7.

Fourth, in Article 8 paragraph (1), the European Convention for the protection of human rights and Fundamental Freedom (1958) stated that “Everyone has the right to respect for his private or family life, his household and correspondence”. Fifth, the ban on wiretapping is also enforced on offices and offices diplomatic officer. Article 27(1) of the 1961 Vienna Convention: 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 paragraph (2) it is stated: 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 the diplomatic corps is related to diplomatic privileges and immunities. Sixth, the prohibition is based on the Due Process of Law explained by Tobias dan Petersen: The origin of Due Process of law principle can be traced back at least as far as 1215, when it was part of the Magna Charta in England.

The original purpose of the principle was to prevent the crown from acting against an individual that an not under the protection of the law due to the process of law. It is also stated in the American Constitution that: No person be deprived of life, liberty, or property, without due process of law

nor shall any state deprive any person's life, liberty, or property without due process of law. Based on several provisions as described above, it appears that in principle the act of wiretapping in any form is constitutes a violation of Human Rights. International law ensure that no one shall be arbitrarily disturbed in this regard his personal, family, household or correspondence affairs, nor may he be subjected to no attack on his honor and reputation shall be permitted.

B.2. Wiretapping vs. Bugging: Understanding the Differences

Wiretapping

A “wiretap” is a device attached to the telephone or telephone line that either records both sides of the conversation, or transmits the conversation to a listening post, where it can be recorded. A wiretap always involves the telephone.[44] This technique involves accessing the communication infrastructure, such as telephone lines or network cables, to capture and record conversations or data. Wiretapping can be conducted with the assistance of service providers, law enforcement agencies, or intelligence organizations.

Wiretapping allows authorities to eavesdrop on targeted conversations, providing real-time access to the information being transmitted. The collected data can be used for various purposes, such as criminal investigations, intelligence gathering, or national security concerns.

[44] Skipp Porteous **(**TSCM Specialist), 2021, How to Locate Bugs and Wiretaps: A Guide for Family Law Clients, available at: https://familylawyermagazine.com/articles/bugs-and-wiretaps/#:~:text=A%20“wiretap”%20is%20a%20device,in%20a%20room%20or%20vehicle. Accessed on 23/07/2023 at 21:12

The legal framework surrounding wiretapping varies across jurisdictions, with regulations in place to protect individuals' privacy rights and prevent unauthorized interceptions.[45]

Wiretapping often requires a court order or other legal authorization, as it involves accessing and monitoring private communications. The regulations surrounding wiretapping aim to strike a balance between the need for surveillance in criminal investigations or national security and protecting individuals' privacy rights.

Bugging

A "Bug" is a device that is placed in an area, which then intercepts communications and transmits or conducts them out of that area to a listening post. The eavesdropper can be just a few feet away from the victim, hundreds of feet, or even miles away depending on the kind of bug used.[46] One of a bug's components is a microphone. The microphones in these devices are usually very small. Some bugs transmit their signal to an external listening post.[47]

Bugging is generally considered a violation of privacy unless authorized by law enforcement agencies under specific circumstances, such as during criminal investigations with proper court orders.

[45] James A. Hudson, "Electronic Surveillance: Wiretapping and Bugging" p. 78
[46] Granite Island Group, Types of Wiretaps, Bugs and Methods available at: http://www.tscm.com/typebug.html. Accessed on 23/07/2023 at 21:29
[47] Skipp Porteous **(**TSCM Specialist), 2021, How to Locate Bugs and Wiretaps: A Guide for Family Law Clients, available at: https://familylawyermagazine.com/articles/bugs-and-wiretaps/#:~:text=A%20"wiretap"%20is%20a%20device,in%20a%20room%20or%20vehicle. Accessed on 23/07/2023 at 21:32

Unauthorized or non-consensual bugging is illegal and can result in severe legal consequences for the perpetrator.

Differences Wiretapping & Bugging:

1. Method of Interception:

The primary difference between wiretapping and bugging lies in the method of interception. Wiretapping involves the interception of signals or data while they are in transit over communication lines or networks. In contrast, bugging requires physical placement of listening or recording devices in specific locations to capture conversations or audio data.

2. Target of Surveillance:

Wiretapping is typically targeted at telecommunication systems and digital communications, capturing information transmitted over networks or phone lines. Bugging, on the other hand, is focused on specific physical spaces, such as rooms, offices, or vehicles, where the conversations or audio data occur.

3. Covert Nature:

While both wiretapping and bugging involve covert surveillance, bugging is often considered more intrusive as it involves physically planting surveillance devices in private spaces, making it difficult for individuals to detect their presence.

4. Legal Implications:

The legal frameworks surrounding wiretapping and bugging may differ. Wiretapping is subject to specific regulations and may require legal

authorization or court orders, as it involves accessing private communications. Bugging is also subject to legal restrictions, as it infringes upon privacy rights, and unauthorized or non-consensual bugging is typically considered illegal.

B.3. Wiretapping of Legal Instrument

A. Vienna Convention on Diplomatic Relations (VCDR) 1961

After the establishment of the 1961 Vienna Convention with all the provisions contained therein, especially regarding the guarantee of immunity rights and privileges for diplomatic representatives, there were still many violations committed by countries that even participated in ratifying the convention. There are certain kind of things that can described as how VCDR does require the protection on diplomats regarding to the wiretapping cases. For example:

1. Diplomatic Representative Building Cannot be Contested This has been included in article 22 of the 1961 Vienna Convention, which is stated as follows:
    a) The representative building cannot be contested (inviolable) State instruments from the receiving country are not allowed to enter the representative building, except with the permission of the head of representative;
    b) The receiving country has a special obligation to take the necessary steps to protect the representative building from any disturbance or

damage and to prevent any disturbance of the peace of the diplomatic representative or which degrades its dignity.

c) Representative buildings, their furniture and other property inside the building as well as vehicles of the representative will be exempted from inspection, prosecution, bondage, or confiscation.[48]

Diplomatic law recognizes the existence of exterritoriality theory, this theory assumes that the diplomatic representative building is an area that is considered outside the territory of the receiving country so that what applies is the law of the sending country, thus the representative building is inviolable or inviolable because it is part of the region. territory of the sending country. Not only the building, but all his Furniture and belongings in diplomatic mission buildings are not affected Inspections or searches, seizures and enforcement are exempt from inspections or searches confiscation and execution.

2. Off-site protection for foreign agents

This is also contained in Article 22 of the 1961 Vienna Convention. The host country has stated that it is not only obliged to protect the representative buildings of the foreign countries, but also the environmental conditions outside the buildings. Therefore, with reference to the situation around the diplomatic mission, the host country government must take necessary measures to prevent this. Threats and those that may disturb or

[48] Effendi, A. Masyhur, (1994). Hukum Konsuler-Hukum Diplomatik Serta Hak dan Kewajiban Wakil- wakil Organisasi Internasional/Negara,IKIP Malang, Malang, p. 30

disturb the peace, dignity and value of the representatives. On the other side stranger agents cannot expect continued security protection from recipients Suspected interference, threat, or being a foreign head of state. The representative will notify you of the occurrence of malfunctions or other malfunctions. Receiving countries can use security guards (police) on a pro-rata basis Consider the degree of confusion.

3. Limitation of application and interpretation of 1961 Vienna Convention

You can't even challenge the construction of a diplomatic mission Civil servants and civil servants of the host country cannot enter the country without permission agency head. However, if the host country has solid evidence or a claim that the function of the foreign agent is inconsistent with its provisions of the 1961 Vienna Convention, Host Governments. You can enter the representative building. However, it does not prevent receiving prevent the country from taking action against its foreign agents according to opinion, in the context of self-defence or crime avoidance International Law Commission.

Protection of officials Diplomacy is regulated in the Convention Vienna 1961 concerning Diplomatic Relations especially in article 3 paragraph (3) which stated that one of the duties of a diplomatic representative is to collect information on the state of the receiving country

accurately and in a lawful manner to be reported to the sending country.10 Making a report on the situation is also referred to as the most basic obligation of the representative diplomacy to the sending country. Provided

that the report is obtained with legitimate way, so the report of the results spying or espionage practices will be considered as acquired information in an unlawful manner according to International Law and Customs.[49]

Relating to action abuse of immunity and privileges of diplomatic officials, then immunity and the privileges of diplomatic officials have been regulated in the Vienna Convention in 1961, in example that diplomatic officials cannot inviolable any form of detention of arrest. Furthermore, Article 45 of the 1961 Vienna Convention also explains that a state building located in a country cannot be contested, that is basically it involves two aspects. The first aspect concerns the state's obligations recipient who provides full protection for foreign representatives in the country from any interference.[50] If something extraordinary happens such as a conflict occurs armed forces and the severing of diplomatic relations between the two countries, the receiving country has the obligation to protect the representative building with property and the archives. Second, the position of the foreign representatives themselves are declared immune from the inspection including his belongings and all the archives that are in inside.

B. International Covenant on Civil and Political Rights (ICCPR) 1988

The development of technology and civilization has brought mankind to a new dimension of life, including the development of crime. Currently conventional crimes have shifted their motives and forms to follow

[49] Syahmin AK., 2008, Hukum Diplomatik dalam Kerangka Studi Analisis, Jakarta: PT RajaGrafindo Persada, p. 93

[50] Sumaryo Suryokusumo, 2005, Hukum Diplomatik Teori dan Kasus, PT Alumni, Bandung, p. 71.

technological developments. technological developments. Crimes such as corruption, terrorism, narcotics and other serious crimes can no longer be traced by conventional methods used by law enforcement officials. Conventional methods previously used by law enforcement officials, for this reason, law enforcement officials need to balance the ability of criminals with the application of more effective methods in carrying out their law enforcement functions its law enforcement function.

One of the methods of handling and one of the emerging methods of handling and overcoming crime is the Wiretapping Method. Tapping is very useful as one of the methods of investigation as well as the best alternative in criminal investigation against the development of alternative in criminal investigations against the development of current crime modes. today. With wiretapping, it is possible that many perpetrators of serious crimes can be brought to the table or prevented. cases can be brought to the table or prevented before committing bigger crimes. a bigger crime. [51]

For the aforementioned purposes, although in principle all forms of wiretapping is prohibited under international law and human rights, there are several exceptional circumstances in which wiretapping may be conducted. These exceptional circumstances are set out in Articles 1 and 2 of The International Covenant on Civil and Political Rights (ICCPR) 1950 which states:

> *(1) everyone has the right to respect for his privacy and family life, his home, and his correspondence;*

[51] Supriyadi Widodo Eddyono & Erasmus A. T. Napitupulu, Op.Cit

> *(2) there shall be no interference by public authority with the exercise of his rights except such as in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

Based on Articles 1 and 2 of the ICCPR 1950 above, it can be emphasized that wiretapping which in principle is prohibited can be exempted if it is done for matters relating to a). national security, b). public security or economic security of the state, c). prevention of crime or criminality, d). protection of health or moral protection, and e). protection of the rights and freedoms of others.

Exceptions to the prohibition of wiretapping also occur as Lex Specially in International Crimes in the context of overcoming International Crimes, especially in relation to core crimes. The core crime as regulated by the 1998 Rome Statute according to William Habach includes: a). gross violations of human rights, b). ethnic rights, c). genocide/ethnic cleansing, based on the Newremberg Adhoc Tribunal 1946, d). war crimes, based on the Tokyo Adhoc Tribunal 1948, e). crime against humanity, and f). aggression (the act of aggression).[52] Exceptions to the prohibition of wiretapping in the realm of international criminal law are international

[52] Regarding Core crime can be seen on Rome Statute of the International Criminal Court. Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by processverbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002.

criminal law, in addition to core crimes, also applies to transnational organized crime because it is an (extra ordinary crime).[53]

C. Budapest Convention on Cybercrime 2001

The Budapest Convention on Cybercrime, also known as the Budapest Convention, is an international treaty adopted by the Council of Europe in 2001. The main purpose of the convention is to address the challenges posed by cybercrime and encourage international cooperation in combating such offenses. One important aspect of cybercrime investigations is the interception of electronic communications, commonly known as wiretapping. The regulations in the convention are designed to strike a balance between law enforcement objectives and the protection of individuals' fundamental rights, such as the right to privacy.

Budapest Convention regulates wiretapping within the scope of cybercrime investigations:

1. Legal Framework for Wiretapping under the Budapest Convention:

   The Budapest Convention provides a comprehensive legal framework for the interception of communications, including wiretapping, during cybercrime investigations. Article 20 of the convention specifically addresses the interception of content data, which includes monitoring and recording electronic

[53] Jawahir Tantowi, "Penyadpaan dalam Hukum Internasional & Implikasinya terhadap Hubungan Diplomatik Indonesia dengan Australia" p. 191

communications. This article lays down several key principles that govern the practice of wiretapping under the convention.[54]

2. Subject to Domestic Law:

   The convention emphasizes that the interception of content data, including wiretapping, must be conducted in accordance with the domestic laws of the Party conducting the interception. This means that each member state's national laws govern the conditions, procedures, and safeguards for wiretapping activities. The legal requirements for authorization and oversight are essential to ensure the legitimacy and lawfulness of wiretapping practices.[55]

3. Legal Authorization and Proportionality:

   Wiretapping under the Budapest Convention requires legal authorization obtained through appropriate legal procedures, such as court orders or warrants. The principle of proportionality is a critical aspect, ensuring that any interception of content data is necessary and proportionate to the objectives pursued in a criminal investigation. This principle prevents indiscriminate or excessive use of wiretapping and upholds human rights and privacy protections.[56]

[54] Article 20 of Budapest Convention on Cybercrime 2001
[55] Council of Europe, "Explanatory Report to the Budapest Convention on Cybercrime," Chapter V, Paragraph 44.
[56] UNODC, "Handbook on Cybercrime Legislation," Chapter 5, Section 5.3. available at:

4. Protection of Human Rights:

   The Budapest Convention places a strong emphasis on respecting human rights, particularly the right to privacy and the protection of personal data. Wiretapping activities must comply with the principles of necessity, proportionality, and legality to safeguard individual rights and avoid undue intrusion into private communications.[57]

5. International Cooperation and Mutual Legal Assistance:

   The Budapest Convention promotes international cooperation among member states in combating cybercrime. It encourages Parties to provide mutual legal assistance in intercepting content data for criminal investigations, allowing for the exchange of information and evidence across borders. This cooperation enhances the effectiveness of law enforcement efforts in addressing transnational cyber offenses.[58]

6. Exclusion of Intelligence Gathering and National Security Operations:

   It is essential to note that the Budapest Convention's regulations on wiretapping apply explicitly to cybercrime investigations.

(https://www.unodc.org/documents/organized-crime/UNODC_CCPCJ_EG.4_2013/Cybercrime/Handbook_on_Cybercrime_Legislation.pdf)

[57] European Court of Human Rights (ECtHR), "Handbook on European Data Protection Law," Chapter 7, Paragraph 7.33. available at: (https://www.echr.coe.int/Documents/Handbook_data_protection_ENG.pdf)

[58] Council of Europe, "Convention on Cybercrime: A Guide for Criminal Justice Authorities," Section 5.3. Available at: (https://rm.coe.int/convention-on-cybercrime-guide-2020/16809c5620)

Wiretapping for intelligence gathering or national security operations falls under different legal frameworks and is outside the scope of the convention. These activities are subject to the respective laws and regulations of each member state.[59]

C. Analysis of International Law Regulate Wiretapping

Wiretapping is an activity that is never acceptable to any country in the world.[60] But many countries continue to practice wiretapping. Tapping is part of espionage activities, and the difference between tapping and espionage can be seen:

DIFFERENTIATOR	WIRETAPPING	ESPIONAGE
Definition	- Wiretapping is an activity or a series of investigation or investigation activities by tapping conversations, messages, information, and/or communication networks carried out by telephone and/or other electronic communication devices.	- Espionage is the secret investigation of other countries' military and economic data - Espionage is the secret investigation of other countries' military and economic data and everything related to the ins and outs of spinose.

[59] Council of Europe, "Explanatory Report to the Budapest Convention on Cybercrime," Chapter V, Paragraph 45. Available at: (https://rm.coe.int/168007cf98)

[60] Floriny Deasy Victorina Pinontoan, 2013, Praktik Spionase dalam Hubungan Diplomatik Antar Negara Ditinjau dari Hukum Internasional, Hasanuddin University Faculty of Law

	- Interception or wiretapping is an activity to listen to, record, deflect, change, inhibit, and/or record the transmission of Electronic Information and/or Electronic Documents that are not payable, either using wired communication networks or wireless networks, such as electromagnetic or radio frequency transmissions.	
Terms	(1) It is used because other methods of criminal investigation have failed, or (2) No other means other than wiretapping can be used to obtain the required information and (3) There must be a sufficiently strong and credible reason to believe	-

	that the wiretapping will lead to the discovery of new evidence that can be used to convict the targeted criminal.	
Functions	- To prevent and detect in the case of very serious crimes - The basis of special interest for national security, law enforcement and economic stability in a country.	- Part of the constitutional effort is usually done for military purposes
Limitations	(1) There is a clear official authority based on the laws of the countries that authorize wiretapping (including a clear and objective purpose). (2) The guarantee of a definite period of time in conducting wiretapping (3) Restrictions on the handling of intercepted material	Collecting information by accessing the place where the information is stored or the person who knows about the information and will leak it through various pretexts.

	(4) Restrictions on the persons who can access the interception and other restrictions.	

Table 2.1 The differences between wiretapping and espionage

Source: Dita Birahayu, 2015, Juridical Resolution of Wiretapping as Part of Espionage Activities Categorized as a Violation of Diplomatic Immunity

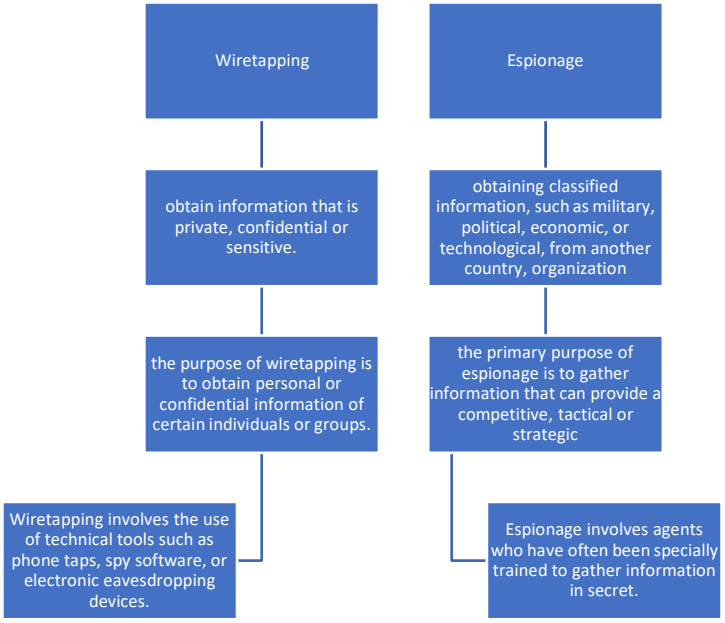

Chart 2.1, The differences between wiretapping and espionage

Until now, there is no international law regulates the practice of wiretapping itself, but there are several international legal instruments that regulate indirectly, namely:

A. International Covenant on Civil and Political Rights 1966

In the International Covenant on Civil and Political Rights, there is no article that specifically regulates wiretapping, however, the ICCPR regulates fundamental civil and political rights worldwide. One of the aspects regulated in the ICCPR is the right to privacy and the prohibition against unauthorized wiretapping.

Article 17 Stated that "(1). No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home, correspondence, nor to unlawful attacks on his honor and reputation (2). Everyone has the right to the protection of the law against such interference or attacks." This explicitly states that if wiretapping is done without permission (Illegal) then the practice violates a person's right to privacy, because the basic principle of the ICCPR is to respect the dignity of every individual and ensure that his or her rights are recognized and guaranteed by member states that have ratified this treaty. In some situations, wiretapping may be permitted if it meets certain legal criteria, such as in order to investigate serious crimes or threats to national security. However, there must be strict oversight mechanisms to prevent abuse.

B. Vienna Convention on Diplomatic Relations 1961

VCDR is international law that regulate about rights, obligations, and diplomatic procedures between member states. one of the important aspects regulated in this convention is the prohibition against wiretapping of diplomats.

Article 27 of the Vienna Convention on Diplomatic Relations states clearly that “diplomatic officials shall enjoy absolute immunity from the criminal jurisdiction of the receiving state.” This means that diplomatic officials cannot be prosecuted or tired for acts or crimes that may be committed during the course of their duties, including cases of wiretapping by the authorities of the receiving state.

The Convention also provides strong protection for diplomatic correspondence. Article 27 states that “diplomatic correspondence shall be inviolable” and “the addressee may not take knowledge of the contents of diplomatic correspondence without the permission of the mission country concerned”.

Where there are allegations of wiretapping practices against diplomatic mission, the receiving state is required to provide appropriate protection to diplomatic facilities or building, article 22 states that the receiving state may not enter the sending State’s premises unless the head of the sending state mission has consented to it. The receiving State is under special duty to protect the premises of the mission of intrusion, damage, disturbance of the peace and impairment of its dignity. The premises of the mission and means of transport of the mission shall be immune from search, requisition, attachment or execution.[61]

[61] INT LAW UK, “SUMMARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS 1961” Available at: https://intlaw.co.uk/viennaconvention#:~:text=Article%2022%20–%20The%20receiving%20state,and%20impairment%20of%20its%20dignity. Accessed on 03/08/2023 at 01:00

C. Budapest Convention 2001

Budapest Conventions itself regulating about the cybercrime. But on this convention, there are several regulations about wiretapping. The Budapest Convention is a criminal justice treaty that provides States with 3 points, namely:[62]

(i) The criminalisation of a list of attacks against and by means of computers;

(ii) Procedural law tools to make the investigation of cybercrime and the securing of electronic evidence in relation to any crime more effective and subject to rule of law safeguards; and

(iii) International police and judicial cooperation on cybercrime and evidence.

On the point (ii) it can be related to wiretapping, Procedural law plays a crucial role in ensuring that investigations of cybercrime and the securing of electronic evidence are effective while also upholding the rule of law and safeguarding individual rights. Several procedural law tools and mechanisms can enhance the investigation of cybercrime and the use of wiretapping while respecting legal safeguards. Below are some key tools:[63]

1. Search Warrants and Court Orders: Search warrants and court orders are fundamental procedural tools used to authorize law enforcement agencies to conduct searches and seize evidence,

[62] https://thegfce.org/the-budapest-convention-on-cybercrime-a-framework-for-capacity-building/#:~:text=The%20Budapest%20Convention%20is%20a,more%20effective%20and%20subject%20to

[63] European Union Agency for Cybersecurity (ENISA) - Cybercrime: https://www.enisa.europa.eu/topics/cybercrime

including electronic evidence. For cybercrime investigations, these orders can grant permission to access and collect data from computers, networks, or digital devices. Such warrants and orders must be issued by a competent judicial authority and should meet strict legal requirements, ensuring the necessity and proportionality of the measures.

2. International Cooperation: Cybercrime often transcends national borders, requiring international cooperation. Mutual legal assistance treaties (MLATs) and other forms of international cooperation mechanisms allow countries to share information and evidence, facilitating cross-border investigations. International cooperation is crucial in obtaining electronic evidence from service providers located in different jurisdictions and in upholding the rule of law in a global context.
3. Data Preservation Orders: Data preservation orders allow authorities to request service providers to retain data related to an ongoing investigation. This prevents the destruction or loss of crucial electronic evidence while the necessary legal procedures, such as obtaining a search warrant or court order, are being carried out. Data preservation orders help ensure the integrity and availability of electronic evidence during the investigation process.
4. Chain of Custody: Maintaining a proper chain of custody is essential when handling electronic evidence. This involves documenting the

handling, transfer, and storage of the evidence to establish its integrity and authenticity in court. A well-maintained chain of custody is critical to prevent tampering, contamination, or mishandling of electronic evidence, making it more robust and reliable during legal proceedings.

5. Encryption and Data Protection Safeguards: In cybercrime investigations, encrypted data may pose challenges to accessing evidence. To overcome this, legal frameworks should address the use of encryption and establish mechanisms to lawfully obtain decryption keys or assistance from relevant parties when required. Balancing the need for investigation with the protection of data privacy is crucial in maintaining the rule of law.
6. Judicial Oversight and Review: To ensure that investigations involving wiretapping or other surveillance measures comply with the rule of law, it is essential to have judicial oversight and review. Judicial authorities should review and authorize wiretapping requests to verify their legality, necessity, and compliance with human rights standards. Regular audits and oversight mechanisms can help prevent abuse and ensure adherence to legal safeguards.
7. Transparency and Accountability: Procedural law tools should promote transparency and accountability in cybercrime investigations. Reporting requirements and public disclosure of certain aspects of investigations, within the boundaries of national

security concerns, can foster public trust and hold authorities accountable for their actions.