

# CHAPTER I

## INTRODUCTION

### A. Background

State sovereignty is a fundamental right in international law, which governs a community and mainly encompasses a state with a uniform legal personality.<sup>1</sup> Furthermore, the term sovereignty is defined as the legal competence of a particular function by involving a rationale for its exercise.<sup>2</sup> Historically, the state sovereignty concept was mentioned in the Peace of Westphalia in 1648, where according to this treaty, the idea of territoriality requires states to make their laws and govern their affairs without any intervention.<sup>3</sup> Therefore, all states must respect each other, by not intervening in their territory.

To maintain sovereignty, the United Nations mandated states to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples and to achieve international cooperation.<sup>4</sup> As the manifestation of state cooperation, states agree to obey the principle of state equality. According to Brad Roth, states are only bound to norms under their consent. The state has the right to determine the effects of international law in their domestic legal orders, and norm violating state do not forfeit their right to territorial integrity or political independence.<sup>5</sup>

Here, the principle of state equality plays a role in achieving justice between states. State equality is defined as the right of a state to determine its political, economic, and ideological system.<sup>6</sup> However, a country cannot stand alone. Thus, every country needs other countries to support the sustainability of its country, which through international cooperation.

Diplomacy is a method of communication between states, where the rules regulating diplomatic relations are expressed in international law.<sup>7</sup> Diplomatic agents conduct diplomatic relations as the representatives of their states. Diplomatic agent functions are divided into six categories under Article 3 of the VCDR 1961, which are:

- a. Representing the sending state;
- b. Protecting the sending state's national within the receiving state;
- c. Negotiating with the receiving state nationals within the receiving state;

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<sup>1</sup> Muhammad Bahrul Ulum. Sovereignty and Legal Personality: A Lesson From European Union's Evolution to Supranationalism. *Lampung Journal of International Law (LaJIL)*, 4(1). pp. 25-38.

<sup>2</sup> Crawford, Brownlie's Principles of Public International Law, p. 448.

<sup>3</sup> Syed Hammad Khan, Ayesha Tasawar, Muhammad Hamza Zakir, Said Ali. The Concept of State Sovereignty in International Law. *Asian Social and Applied Research*, Vol. 2(4). p. 2021.

<sup>4</sup> Article 1, UN Charter.

<sup>5</sup> Janne E. Nijman; Wouter G. Werner. Legal Equality and the International Rule of Law. *Netherland Yearbook of International Law*. 2013. doi:10.1007/978-90-6704-915-3\_1. p. 24.

<sup>6</sup> Quincy Wright. The Equality of States. *Cornell International Law Journal*, 3(1). 1970. Available at: <https://scholarship.law.cornell.edu/cilj/vol3/iss1/1>

<sup>7</sup> Malcolm N. Shaw. *International Law Sixth Edition*. Cambridge University Press. 2008. p. 919.

- d. Notifying the sending state of conditions and developments within the receiving state;
- e. Promoting friendly relations between states and developing the economic, cultural and scientific relation between states.

Moreover, to protect the interests of the states, the agents are protected through immunity and privileges. Diplomatic immunity is defined as a special right given to foreign government official, where they are not subject to the jurisdiction of local courts and other authorities for both their official and to a large extent, their personal activities.<sup>8</sup> In Oppenheim's perspective, diplomatic immunity is defined as safety and the right to inviolability must be given even though he has not been officially accepted in the recipient state because the position as ambassador is considered to take effect since he obtained a letter of credentials from his government.<sup>9</sup>

Two theories prescribe diplomatic immunity, which are personal inviolability and extraterritoriality. Generally, personal inviolability describes the agent as directly representing the sovereign state, an affront to the agent was an insult to the state.<sup>10</sup> Specifically, Article 29 of the Vienna Convention on Diplomatic Relations 1961 (VCDR) provides that diplomatic agents shall be inviolable. Under this article, there are two important aspects, *firstly* the diplomatic agents are free from any sort of arrest or detention by the authorities of the receiving state, and *secondly*, duty to protect the diplomatic agents.<sup>11</sup>

While extraterritoriality is defined as the agent while present in the state in which he is accredited, is legally still residing in the state which he represents and so cannot be reached by legal process.<sup>12</sup> The extraterritoriality theory suggests that a host state may neither enter nor be subject to legal process, real property held by another state.<sup>13</sup>

The term extraterritoriality is subject to many things, and it does not provide adequate guidelines for determining the scope and limits of diplomatic privileges and immunity. Here, the extraterritoriality in nature means that diplomatic immunity is based upon absolute independence because nations are interdependent in the area of international relations.<sup>14</sup>

According to Jan Osmanczyk, diplomatic law is a branch of customary international law, consisting of a set of legal rules and norms that establish the position and functions of diplomats, including the organizational form of the political service or letter of

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<sup>8</sup> United States Department of State Office of Foreign Missions. Diplomatic and Consular Immunity: Guidance for Law Enforcement and Judicial Authorities. [https://www.state.gov/wp-content/uploads/2019/07/2018-DipConImm\\_v5\\_Web.pdf](https://www.state.gov/wp-content/uploads/2019/07/2018-DipConImm_v5_Web.pdf)

<sup>9</sup> Syahmin. Hukum Diplomati dalam Kerangka Studi Analisis. Jakarta: PT Raja Grafindo Persada, 2008, p. 147

<sup>10</sup> Leyland, Herbert T. (1921) "Limitations on the Doctrine of Diplomatic Immunity," Kentucky Law Journal: Vol. 10: Iss. 1, Article 3. Available at: <https://uknowledge.uky.edu/klj/vol10/iss1/3>. p. 26.

<sup>11</sup> René Värk, Personal Inviolability and Diplomatic Immunity in Respect of Serious Crimes, Juridica International VIII, 2003. p. 112.

<sup>12</sup> Leyland, Herbert T. (1921) "Limitations on the Doctrine of Diplomatic Immunity," Kentucky Law Journal: Vol. 10: Iss. 1, Article 3. Available at: <https://uknowledge.uky.edu/klj/vol10/iss1/3>. p. 26.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid*, 117.

credentials.<sup>15</sup> Moreover, a letter of credentials is defined as a letter of credence given by the government of the sending state to the government of the receiving state.<sup>16</sup>

By admitting the state representatives, according to Article 31 of the VCDR, the state parties shall give immunity from criminal jurisdiction of the receiving State. Besides that, diplomats also shall enjoy immunity from civil and administrative jurisdiction, except in the situation of:

- a. Action relating to private immovable property
- b. Action relating to succession
- c. Action relating to any professional or commercial activities outside of his official function.

Historically, the immunity of ambassadors from criminal jurisdiction in the receiving country dates back to the 17th century. The Russian ambassador to Great Britain was arrested on charges of fraud. To avoid war if the Russian ambassador was arrested, Great Britain passed a law stating that every foreign representative must be considered sacred and inviolable, known as "7 Anne, Cap.12.2/706".<sup>17</sup>

In 1961 the Vienna Convention on Diplomatic Relations was formed and formally came into force in 1964 as members of the United Nations agreed and ratified it to become part of international law to regulate diplomatic law. This Convention aims to ensure the efficient performance of the functions of diplomatic missions as representing States. Simultaneously, necessity forced most states to provide envoys with basic protection, both within the state of final destination and in states of transit.<sup>18</sup> Thus, as a consequence of sovereign immunity, independence, and equality of states, special immunities and privileges related to diplomatic agents are granted.<sup>19</sup>

Referring to article 1(e) of the VCDR, diplomats or diplomatic agents are defined as: *"The head of the mission or a member of the diplomatic staff of the mission."*

The concept of diplomatic relations comes from diplomacy. There are several definitions in defining diplomacy. Satow argues that diplomacy is *"the application of intelligence and tact to the conduct of official relations between the governments of independent states, sometimes extending also to their relations with vassal states; or, more briefly still, the conduct of business between states by peaceful means."* Harold Nicolson (1969) stated that *"diplomacy is the management of international relations by negotiation."*

The method by which these relations are adjusted and managed by ambassadors and envoys, the business or art of the diplomatists. Hedley Bull argues that *"diplomacy*

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<sup>15</sup> Syahmin. Hukum Diplomatik dalam Kerangka Studi Analisis. Jakarta: PT Raja Grafindo Persada, 2008, p. 8.

<sup>16</sup> S.M. Noor (et.al). Hukum Diplomatik dan Hubungan Internasional. Makassar: Pustaka Pena Press, 2016, p. 41.

<sup>17</sup> Ibid, p. 137.

<sup>18</sup> Maginnis "Limiting Diplomatic Immunity: Lessons Learned from the 1946 Convention on the Privileges and Immunities of the United Nations" (2002-2003) 28 Brooklyn Journal of International Law, p. 997.

<sup>19</sup> Shaw, Malcolm N.. (2010). *International Law* (Ed. 6). New York: Cambridge University Press.

*refers to the conduct of relations between states and other entities with standing in world politics by official agents and by peaceful means, such conduct of relations by professional diplomats and such conduct of relations between states that is carried out in a manner [...] that is, tactful or subtle.”* Martin Wight (2002) defines diplomacy as a “*master institution of international relations.*” Lastly, Hamilton and Langhorne stated that diplomacy is defined as “*the peaceful conduct of relations amongst political entities, their principals accredited agents.*”

While the Oxford English Dictionary define diplomacy as the profession, activity, or skill of managing international relations, typically by a country’s representatives abroad. From all these definitions, diplomacy is basically defined as a medium of communication of state parties, accompanied by peaceful means.

Fundamentally, the concept of diplomatic law is derived from state immunity. State immunity refers to inalienability under international law. This is demonstrated mainly by way of legal process exceptions, where a particular court does not have jurisdiction over a foreign judgment.<sup>20</sup> The respective receiving states is under legal obligation to respect, assist, and protect a diplomat and shall not interfere with his functions.

Moreover, a diplomatic agent is granted inviolability and privilege from the jurisdiction of the receiving state, to enable him to exercise his function effectively and independently. Therefore, in particular diplomatic cases, diplomats cannot be sued when they are repatriated to their home countries

Practically in international law, immunity is divided into functional and personal immunity. Functional immunities refer to states' obligation to respect and shall not interfere with other states. Therefore, the agents are not accountable to other state for acts conducted in an official capacity and which will be attributed to the state. The functional immunities consist of:<sup>21</sup>

- i. Any substantive law, that amounts to a substantive defense
- ii. Cober official act of any de jure or de facto state agent
- iii. Do not cease at the end of the discharge of official functions by the state agent
- iv. Are constitute *erga omnes* which may be invoked towards any states.

Personal immunities refer to immunity to avoid foreign states infringing sovereign prerogatives of the state or interfering with state agents' function under the pretext of dealing with an exclusive private act. The personal immunities consist of:<sup>22</sup>

- i. Any procedural law, that granted immunity from civil or criminal jurisdiction
- ii. Cover official or private acts carried out by the agent while in office

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<sup>20</sup> Cristina Elena Popa Tache 'State Immunity, Between Past and Future' 2023 1(18) Access to Justice in Eastern Europe. <https://doi.org/10.33327/AJEE-18-6.1-a000121>. p. 110.

<sup>21</sup> Cassese, Antonio. International Criminal Law Second Edition., Oxford University Press, Oxford, 2008, p. 304.

<sup>22</sup> Emelie Munoz, Diplomatic Immunity - a functioning concept in the society of today. Lund Univeristy, Department of Human Rights Studies. 2012. p. 20.

- iii. Intended to protect some categories of state officials
- iv. Come to an end of cessation of the official functions of the agent
- v. May not be *erga omnes*.

Both functional and personal immunity are correlated. The agents possess personal immunity as they are in office, which remains absolute. However, after the agents leave the office, they possess only functional immunity, which relates solely to acts they performed in their capacity.

Diplomatic law consists of receiving state obligations regarding the facilities, privileges, and immunities to be accorded to diplomatic missions and on the other foresees possible abuse by members of the mission and specifies the means at the disposal of the receiving state to counter any such abuse.<sup>23</sup> Traditionally, diplomatic law consists of rules regulating diplomatic relations that diplomat agents conduct.

Historically, diplomatic relations and the personal inviolability of diplomats can be traced back to several ancient civilizations. The Romans considered diplomatic immunity to be sacred and they placed a great emphasis on the inviolability of envoys. The ambassadors were considered as “messengers of the gods”. They were required that mistreatment of foreign agent could be considered as capital crime and the trial proceeding should be held in public.

During the Islamic period, diplomatic immunity was originated by Prophet Muhammad in 570-632 AD, while dealing with other nations. Furthermore, the diplomats were granted protocol by the host community. The protocol consists of receiving delegations, facilitating their livelihood, and providing accommodation. In honoring the delegation, Prophet Muhammad welcomed the delegation of Tameem, honored them, and ordered Bilal to improve their hospitality.

In the sixteenth century, the concept of diplomatic immunity was strengthened. The English government accused the Spanish Agent in London of the crime of conspiracy against the sovereign for his involvement in the Throckmorton plot. The plot aimed to eliminate Queen Elizabeth I and to free Queen Mary from Scots. Although the Agent was expelled, this situation has raised the rule that the diplomat enjoys immunity from criminal jurisdiction, subject to the receiving State's right to act in defense against the violent acts of the agent.<sup>24</sup>

After this period, the concept of *droit d'ambassade* had established. Thus, the concept refers to the state's right to send and receive state representatives. Following by the adoption of Treaty of Westphalia in 1648, which aims to maintain the prevailing balance of power in Europe and necessitated the close monitoring of the external

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<sup>23</sup> ICJ Reports, 1980, p. 40; 61 ILR, p. 566. German Federal Constitutional Court of 10 June 1997, Former Syrian Ambassador to the German Democratic Republic 115 ILR, p. 597.

<sup>24</sup> Barry Cohen, The Diplomatic Relations Act of 1978, 28 CATHOLIC UNIV. L. REV. 797, 804 (1978).

situation. This resulting the establishment of permanent diplomatic missions became the normal practice.<sup>25</sup>

Supported by legal international scholars, such as Hugo Grotius, which is contributed to the various explanations in developing the diplomatic law, especially for agents to granting privileges and immunity. The first draft to codify diplomatic immunity was stipulated under Regulation of Vienna 1815 and was revised at the Vienna Convention on Diplomatic Relations 1961, which asserted the rules of international customary law concerning diplomatic immunity and privileges.

Accordingly, the VCDR was established through the mutual consent of states. This comes back to the "right of legation" doctrine that granted towards states. The interdependence of every state leads every states to developing friendly relations between them. The Draft of VCDR stated that this right only deals with sovereign states

In 2009 a private servant of Saudi Arabia Diplomat in Berlin, Germany started her job. She signed an employment agreement that stipulates a minimum wage for a domestic helper for diplomats in Germany of 750 Euros per month with a 40-hour work week, and one month of annual leave.<sup>26</sup> However, in reality, she was required to work from morning to night, even though her salary was not paid, her passport was confiscated, she was not provided with warm clothes. Furthermore, she also received torture such as being beaten with sticks or hands and was forbidden to leave the house. Eventually, in 2010 the victim reported the incident to a Berlin-based human rights association that helps migrant women from Southeast Asia.

In the face of this situation, the Saudi Arabian government took responsibility by submitting an official request to the Indonesian government and providing compensation to the victims. The Saudi Arabian government also took responsibility for the actions of its diplomatic officials by removing immunity and recalling its diplomatic officials.

In 2015, abuse of power occurred in Bangladesh. North Korean diplomatic official Son Young Nam was arrested at Dhaka airport after being caught smuggling 27 kilograms of gold. On the other hand, Article 36(2) of the VCDR gives immunity for diplomatic agents that they shall be exempt from inspection, unless there are serious grounds for presuming that the quarantine regulations of the receiving state prohibit the import or export. As a result, Son Young Nam was sent home, and North Korea also apologized as a form of accountability. However, Bangladesh's request for North Korea to prosecute Son Young Nam was not granted.

In another case, in 2019, two Chinese diplomatic agents in the US were expelled after conducting espionage/infiltrating sensitive US military bases.<sup>27</sup> As a result, diplomatic agents were given sanctions in the form of *Persona non grata*. However, China

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<sup>25</sup> Nehaluddin Ahmad, Gary Lilienthal, Arman Haji Asmad. Abuse of Diplomatic Immunities and its Consequences under the Vienna Convention: a Critical Study. at: <https://www.researchgate.net/publication/355904128>

<sup>26</sup> Ghea Pisca Reskati. Tanggung Jawab Negara Arab Saudi atas Pejabat Diplomatiknya di Jerman yang Melakukan Tindak Pidana terhadap Tenaga Kerja Wanita Indonesia. Skripsi. Universitas Brawijaya, Fakultas Hukum, 2013. P. 4.

<sup>27</sup> Novi Christiastuti. "AS Diam-diam Usir 2 Diplomat China Terkait Dugaan Spionase" AS Diam-diam Usir 2 Diplomat China Terkait Dugaan Spionase (detik.com)

denied that its diplomatic officials had committed espionage, so it responded by expelling American diplomatic officials in China. This has implications for the worsening relationship between the two countries.

From the cases above, there are various responses from countries in responding to violations committed by their diplomats, but how does international law regulate the right of inviolability of a diplomat? Therefore, this research will analyze pertain to the diplomatic inviolability right in receiving state if such offences are committed.

## **B. Research Questions**

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

1. How does international law regulate the enjoyment and limitation of a diplomat's right of inviolability in the receiving state?
2. How does the sending and receiving state respond when criminal offenses occur during the mission?

## **C. Research Objectives and Benefits**

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

1. To find out the enjoyment and limitation of the right of inviolability of diplomat in the receiving state
2. To find out the sending and receiving state response when criminal offenses occurred during the mission.

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

1. This research is expected to be a source of information, knowledge, and understanding for the work of Hasanuddin University towards the right of inviolability in the receiving state.
2. The findings of this research are expected to contribute to public understanding of international human rights, especially those related to the right of inviolability in the receiving state.

## **D. Research Originality**

This research was conducted by the author in looking at legal issues regarding the international legal review on diplomat's inviolability right in receiving state (diplomat's criminal offenses case study). Based on the author's analysis to provide an overview of the comparison, presented with previous research on limitations on the right of

inviolability, the author attaches previous research as a comparison for the current author:

**Table 1. 1 Research Originality 1**

Author Name	: Hizkia F. H. Raduck
Title of the article	: <i>Pelanggaran Terhadap the Right of Inviolability dalam Kaitannya dengan Kekebalan Perwakilan Diplomatik (Studi Kasus United States of America v. Devyani Khobragade</i>
Category	: Skripsi
Year	: 2014
University	: Universitas Sriwijaya

Description of Previous Research	Research Plan
<p>Issues and Problems:</p> <ol style="list-style-type: none"><li>1. How is the violation of the right of inviolability in the case of United States of America v. Devyani Khobragade viewed from the 1961 Vienna Convention?</li><li>2. How is the settlement of the United States of America v. Devyani Khobragade case viewed from the 1961 Vienna Convention?</li></ol>	<ol style="list-style-type: none"><li>1. How does international law regulate the enjoyment and limitation of a diplomat's right of inviolability in the receiving state?</li><li>2. How does the sending and receiving state respond when criminal offenses occur during the mission?</li></ol>
Research Methods: Normative	Research Methods: Normative

Here, the author tries to analyze on the form of violation of the right of inviolability in the case of US v. Devyani in terms of the 1961 Vienna Convention, as well as the settlement of the case. Based on the author's analysis, the United States has committed violations in the form of arrest, search, and detention of diplomatic representatives from India, namely Devyani Khobragade. However, the judge dismissed the case because Devyani had full diplomatic immunity and was immune to American jurisdiction. Here, the author only analyzed the breach of right of inviolability, neither comparison nor scope were discussed under this thesis.

**Table 1. 2 Research Originality 2**

Author Name	: Zeffa Alifah Pangestu
Title of the article	: <i>Analysis of Diplomatic Immunities and Privileges: Case Study of Abuse of Diplomatic Rights by Representatives of North Korean Diplomats</i>
Category	: Journal



Year : 2022	
Publisher : Journal ASEAN Dynamics and Beyond, Vol. 3(1)	
Description of Previous Research	Research Plan
<p>Issues and Problems:</p> <p>what immunity and privilege rights are obtained by diplomatic representatives and what are the legal consequences of abuse of immunity rights and privileges, with an example of a case study of gold smuggling by a diplomatic representative of North Korea to Bangladesh?</p>	<ol style="list-style-type: none"> <li>1. How does international law regulate the enjoyment and limitation of a diplomat's right of inviolability in the receiving state?</li> <li>2. How does the sending and receiving state respond when criminal offenses occur during the mission?</li> </ol>
Research Methods: Normative	Research Methods: Normative
<p>Here, the author analyzes the rights of immunity and privileges obtained by diplomatic representatives and the legal consequences of the abuse of immunity rights and privileges, in case study of gold smuggling by a diplomatic representative of North Korea in Bangladesh. The author found that diplomatic representatives receive various immunity rights and privileges. There are three ways that the receiving country can choose to respond to the abuse, such as the declaration of persona non grata, the removal of immunity and privileges, or the termination of diplomatic relations between the two countries as a last resort. In this journal, the author did not give any comparative implementation on the enjoyment of immunities and privileges. The author also did not determine the inviolability right, as well as this thesis tries to emphasize.</p>	

**Table 1. 3 Research Originality 3**

Author Name : Nehaluddin Ahmad, Gary Lilienthal, and Arman bin Haji Asmad	
Title of the article : <i>Abuse of Diplomatic Immunities and its Consequences under the Vienna Convention: a Critical Study</i>	
Category : Journal	
Year : 2022	
Publisher : Transnational Law and Contemporary Problems. Vol. 30	
Description of Previous Research	Research Plan
<p>Issues and Problems:</p> <p>This paper attempts to answer questions that relate to the existing remedies of hosting States in response to diplomatic intervention in their domestic affairs, measures that exist to restrain the issues of diplomatic abuses, the circumstances that give hosting States the possibility to refer to this sanction, the effectiveness of this remedy, and the position of</p>	<ol style="list-style-type: none"> <li>1. How does international law regulate the enjoyment and limitation of a diplomat's right of inviolability in the receiving state?</li> <li>2. How does the sending and receiving state respond when criminal offenses occur during the mission?</li> </ol>

international conventions in relation to this declaration.	
Research Methods: Normative	Research Methods: Normative
Here, the author only attempts to answer questions that relate to the existing remedies of hosting States in response to diplomatic intervention in their domestic affairs, measures that exist to restraint the issues of diplomatic abuses, the circumstances that give hosting States the possibility to refer to this sanction, the effectiveness of this remedy, and the position of international conventions concerning this declaration. However, this journal did not discuss the limitation of inviolability rights.	

## E. Theoretical Background

### 1. Enjoyment and Limitation of Diplomat's Inviolability Right Theory

#### 1.1.State Sovereignty Theory

In 1530, Jean Bodin created the concept of state sovereignty. State sovereignty is a cornerstone of international law, affirming that each state possesses exclusive jurisdiction within its own territory, governing legal, political, and social matters without external interference.<sup>28</sup> This principle serves as the foundation for diplomatic relations, shaping the legal framework under which states interact while maintaining their autonomy. The doctrine of sovereignty, however, is not absolute in the context of diplomatic engagements, as states voluntarily accept certain limitations on their authority to facilitate international relations. One such limitation is the grant of diplomatic immunity, which enables foreign envoys to carry out their functions without being subjected to the host state's legal system.<sup>29</sup>

Diplomatic immunity derives from the notion that the receiving state, as a sovereign entity, consents to limit its jurisdiction over foreign diplomats.<sup>30</sup> This legal construct is enshrined in the Vienna Convention on Diplomatic Relations (VCDR) 1961, which codifies the principles of diplomatic privileges and immunities. By extending immunity to diplomats, the host state acknowledges the necessity of uninterrupted diplomatic functions while simultaneously preserving its sovereign authority through mechanisms such as persona non grata declarations.<sup>31</sup> The ability to expel a diplomat under Article 9 of the VCDR is a critical expression of state sovereignty, allowing the host state to maintain control over diplomatic activities within its territory.<sup>32</sup> While diplomatic immunity is derived from the receiving state's sovereign discretion, it does not override the

<sup>28</sup> Castellino, Joshua, 2021, *International Law and Self-Determination: The Interplay of the Politics of Territorial Possession with Formulations of Post-Colonial 'National' Identity*, Volume 38, BRILL, p. 78

<sup>29</sup> Akani, N., 2024, A Critical Analysis of Diplomatic Immunity in International Relations: Myth or Reality, *The Journal of International Trade Law & Contemporary Issues*, Volume 4 Nomor 3, p. 67.

<sup>30</sup> Ahmad, Nehaluddin, 2020, The Obligation of Diplomats to Respect the Laws and Regulations of the Hosting State: A Critical Overview of the International Practices, *Laws*, Volume 9 Nomor 3, p. 18.

<sup>31</sup> *Ibid.*

<sup>32</sup> Wanyela, Charity S., 2014, *Diplomatic Privileges and Immunities: A Critical Analysis of the Vienna Convention on Diplomatic Relations (1961)*, Disertasi, University of Nairobi, p. 89.

state's fundamental authority. Instead, it is a reciprocal arrangement designed to facilitate diplomatic engagements while respecting the principles of sovereignty.<sup>33</sup>

As the international legal order evolves, there have been increasing debates on whether state sovereignty should permit greater restrictions on diplomatic immunity, particularly in cases where diplomats engage in criminal misconduct. The tension between sovereignty and immunity remains central to discussions on the scope of diplomatic protections in contemporary international law.

## 1.2. Functional Necessity Theory

The functional necessity theory provides the primary legal justification for diplomatic immunity, emphasizing that such protection is not an individual privilege but a fundamental requirement for diplomats to perform their duties effectively.<sup>34</sup> Satow argue that this theory asserts that diplomatic agents must be free from legal harassment, coercion, or undue pressure from the host state to ensure unimpeded diplomatic functions.<sup>35</sup> Without immunity, diplomatic representatives could be subjected to judicial or administrative actions that may hinder their ability to engage in diplomatic negotiations, facilitate intergovernmental cooperation, and protect their home state's interests abroad.<sup>36</sup>

One of the central tenets of this theory is that diplomatic missions operate within foreign jurisdictions where legal and political systems may differ significantly from those of the sending state.<sup>37</sup> Immunity ensures that diplomats are not influenced by the host state's domestic pressures or legal reprisals, thereby maintaining the integrity of diplomatic relations.<sup>38</sup> The legal foundation for inviolability is established in Article 29 of the VCDR, which explicitly prohibits the arrest, detention, or prosecution of accredited diplomats.<sup>39</sup> Furthermore, Article 22 of the VCDR reinforces this principle by safeguarding diplomatic premises from intrusion by the host state's law enforcement authorities.<sup>40</sup> These

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<sup>33</sup> Hathaway, Oona A., 2008, International Delegation and State Sovereignty, *Law & Contemporary Problems*, Volume 71, p. 115.

<sup>34</sup> Ahmad, Nehaluddin, Arman Haji Asmad, dan Norulaziemah Binti Zulkiffle, 2022, Evolution and Practices of Diplomatic Immunity under Islamic Traditions and International Law, *Journal of International Law and Islamic Law*, Volume 18, p. 15.

<sup>35</sup> *Ibid.*

<sup>36</sup> Akani, N., 2024, A Critical Analysis of Diplomatic Immunity in International Relations: Myth or Reality, *The Journal of International Trade Law & Contemporary Issues*, Volume 4 Nomor 3, p. 53.

<sup>37</sup> Daniella, 2024, Critically Analyze on the Challenges of Enforcing International Law in Sovereign States, Disertasi, ULK, p. 103.

<sup>38</sup> *Ibid.*

<sup>39</sup> Okosa, C. B., 2025, Inviolability of Diplomatic Premises and South Africa's Breach of Nigeria's Consulate, *Chukwuemeka Odumegwu Ojukwu University Law Journal*, Volume 8 Nomor 1, p. 351.

<sup>40</sup> Butt, J. S., 2024, The Abuse of Diplomatic Immunity: Examining Cases and Implications for International Relations—A Research, *Acta Universitatis Danubius. Relationes Internationales*, Volume 17 Nomor 2, p. 67.

provisions reflect the practical necessity of ensuring that diplomatic functions can be carried out free from external interference.

However, the functional necessity argument also acknowledges that diplomatic immunity is not a blanket protection against all forms of legal accountability. Under Article 41 of the VCDR, diplomats are required to respect the laws and regulations of the receiving state, highlighting that immunity does not equate to impunity.<sup>41</sup> While immunity protects diplomats from direct legal action, it does not exempt them from diplomatic accountability, as states retain the right to pursue recourse through diplomatic channels, such as requesting a waiver of immunity from the sending state or expelling diplomats who violate host state laws.

With the increasing frequency of diplomatic misconduct cases, legal scholars and policymakers have debated whether the functional necessity justification should be reconsidered. Some argue that immunity should be subject to limitations, particularly when diplomats engage in serious criminal offenses unrelated to their official duties. The challenge remains in striking a balance between preserving diplomatic immunity for legitimate purposes and preventing its misuse as a shield against legal consequences.

### 1.3. Diplomatic Immunity Theory

The diplomatic immunity theory governs the extent and limitations of immunity granted to diplomats, defining the scope of legal protection afforded to them under international law. Michael argue that it aims to balance the need for diplomatic inviolability with the principle of state sovereignty, ensuring that diplomatic personnel can carry out their official functions without interference while also preventing the abuse of immunity in cases of criminal misconduct.<sup>42</sup>

Diplomatic immunity is traditionally categorized into two primary approaches, reflecting different perspectives on the extent to which diplomats should be shielded from legal accountability:<sup>43</sup>

#### 1. Absolute Immunity

- a. Under the doctrine of absolute immunity, a diplomat is entirely exempt from the host state's criminal and civil jurisdiction, regardless of the nature of their actions. This approach, historically dominant, is based on the principle that any legal proceedings against a diplomat could undermine diplomatic relations between states.
- b. The absolute immunity framework ensures that diplomatic personnel cannot be prosecuted, even for serious offenses such as violent

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<sup>41</sup> *Ibid.*

<sup>42</sup> Michaels, David B., 2024, *International Privileges and Immunities: A Case for a Universal Statute*, Martinus Nijhoff Publishers, p. 81.

<sup>43</sup> Ji, Xueliang, 2024, A Tale of Two Immunities: The Ongoing Transition from Absolute to Restrictive Sovereign Immunity in China, *Asia Pacific Law Review*, Volume 32 Nomor 1, p. 23-40.

crimes, corruption, or human rights violations. The rationale behind this broad protection is to prevent the host state from using its legal system as a tool of political coercion against foreign representatives.

## 2. Restrictive Immunity

- a. In contrast, the restrictive approach to diplomatic immunity limits protections strictly to official acts (*acta jure imperii*) performed in the course of diplomatic duties. Private acts (*acta jure gestionis*), which are unrelated to diplomatic functions, are considered outside the scope of immunity.
- b. This modern interpretation is increasingly favored by legal scholars and some states, particularly in cases involving grave crimes such as human trafficking, sexual offenses, or violent misconduct. Advocates of restrictive immunity argue that while diplomats must be protected from undue interference, they should not be shielded from legal consequences for personal acts that violate the host state's laws.

While the Vienna Convention on Diplomatic Relations (VCDR) 1961 provides broad immunity to diplomats, distinctions exist regarding the nature of their actions. The classification of diplomatic conduct into official acts and private acts plays a crucial role in determining the extent of immunity and the potential for legal accountability.

### 1. Official Acts (*Acta Jure Imperii*)<sup>44</sup>

- a. Actions undertaken in the execution of diplomatic duties are fully protected under international law. These include activities such as engaging in negotiations, attending state functions, and issuing diplomatic communications on behalf of the sending state.
- b. Even after the termination of diplomatic status, former diplomats may retain immunity for official acts conducted during their tenure. This principle prevents retrospective prosecution for actions that were legally protected at the time they were performed.

### 2. Private Acts (*Acta Jure Gestionis*)<sup>45</sup>

- a. Activities unrelated to diplomatic functions, such as personal business transactions, financial dealings, or private criminal conduct, theoretically fall outside the scope of diplomatic immunity. However, in practice, prosecution is often hindered due to the strong protections afforded by diplomatic status.
- b. Some states have sought to challenge the application of diplomatic immunity in cases where the diplomat's actions have caused significant

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<sup>44</sup> Shi, Xinxiang, 2021, *Diplomatic Immunity Ratione Materiae, Immunity Ratione Materiae of State Officials, and State Immunity: A Comparative Analysis*, *Leiden Journal of International Law*, Volume 34 Nomor 1, p. 51.

<sup>45</sup> *Ibid.* p. 57

harm to individuals or the host state's interests. This has led to increasing discussions on whether limitations should be introduced to ensure that diplomatic immunity does not serve as a shield for unlawful activities.

As diplomatic relations evolve, there is growing legal discourse on the potential need for reforms to diplomatic immunity. While the principles of inviolability and non-interference remain central to international law, states are increasingly advocating for mechanisms that would allow for greater legal accountability in cases where diplomats engage in serious offenses unrelated to their official duties.

## **2. States Responsibility for Crimes by the Diplomat Legal Norms**

### **1.1. Vienna Convention on Diplomatic Relations (VCDR) 1961**

The Vienna Convention on Diplomatic Relations (VCDR) 1961 is the cornerstone of modern diplomatic law, providing a comprehensive framework for diplomatic privileges and immunities while also outlining the obligations of the sending state when a diplomat engages in unlawful conduct. While the convention primarily aims to facilitate diplomatic engagement and protect foreign envoys from undue legal interference, it also imposes duties on sending states to ensure that their diplomats do not engage in misconduct and, if they do, to take appropriate remedial action.<sup>46</sup> The VCDR reflects a delicate balance between diplomatic inviolability and the responsibility of states to uphold international legal norms, particularly in cases where diplomats commit serious offenses that would otherwise be punishable under the host state's jurisdiction.<sup>47</sup>

#### **a. Sending State's Responsibility of Diplomat's Misconduct**

The sending state bears the primary responsibility for ensuring that its diplomatic representatives conduct themselves in a manner that aligns with both international law and the domestic laws of the receiving state. This obligation extends beyond merely appointing qualified personnel to diplomatic missions; it also includes an ongoing duty to monitor their behavior and take corrective actions if violations occur. The principle of good faith underlies this obligation, as states are expected to exercise diligence in preventing diplomatic abuses.<sup>48</sup>

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<sup>46</sup> Butt, Junaid Sattar, 2024, The Abuse of Diplomatic Immunity: Examining Cases and Implications for International Relations—A Research, *Acta Universitatis Danubius. Relationes Internationales*, Volume 17 Nomor 2, p. 55.

<sup>47</sup> Carroll Beaty, Olivia M., 2022, *Diplomatic Immunity: The History and Enduring Significance*, Disertasi, p. 76.

<sup>48</sup> Ollino, Alice, 2022, *Due Diligence Obligations in International Law*, Cambridge University Press, p. 79.

# 1. Obligation to Ensure Compliance with Local Laws<sup>49</sup>

- a. Article 41 of the VCDR explicitly states that diplomats must respect the laws and regulations of the receiving state, even though they are shielded from its jurisdiction.
- b. Despite this obligation, there is no enforcement mechanism under the VCDR to compel compliance with local laws, nor is there a punitive measure against sending states that fail to act when their diplomats violate host state regulations.

# 2. Due Diligence in Diplomatic Appointments<sup>50</sup>

The sending state must ensure that individuals appointed to diplomatic positions possess the integrity, qualifications, and character befitting their role. While the VCDR does not specify vetting procedures, many states have implemented internal screening mechanisms to prevent individuals with questionable backgrounds from receiving diplomatic credentials.

## b. Sending State's Obligation to Address Diplomatic Crimes

While diplomatic immunity shields diplomats from legal proceedings in the host state, it does not exempt the sending state from addressing misconduct. The Vienna Convention on Diplomatic Relations (VCDR) 1961 provides mechanisms such as *persona non grata* under Article 9, allowing expulsion, though this does not ensure legal accountability.<sup>51</sup> Article 32 permits a waiver of immunity, enabling prosecution in the host state, but this is rarely granted due to diplomatic and political concerns.<sup>52</sup> Instead, international law expects the sending state to investigate and prosecute returning diplomats, though the VCDR lacks enforcement measures to ensure compliance.<sup>53</sup> While some diplomats face prosecution following public pressure, many continue their careers without consequence, fueling concerns that diplomatic immunity is often misused to shield serious offenses rather than uphold diplomatic integrity.<sup>54</sup>

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<sup>49</sup> Ahmad, N., Lilienthal, G., dan Asmad, A.B.H., 2021, Abuse of Diplomatic Immunities and Its Consequences Under the Vienna Convention: A Critical Study, *Transnational Law & Contemporary Problems*, Volume 30, p. 78.

<sup>50</sup> *Ibid.* p. 83

<sup>51</sup> Stępień, Michał, 2024, Reciprocity and Diplomatic and Consular Law, *In Reciprocity in International Law*, Cham: Springer Nature Switzerland, p. 189.

<sup>52</sup> *Ibid.* p. 193.

<sup>53</sup> Hamukwaya, Nghihepavali Michael, 2024, Diplomatic and Consular Privileges and Immunities Abuse in Relation to the Principle of Reciprocity vis-à-vis the Victims' Rights Guarantee in Namibia and International Law, *University of Namibia*, p. 93.

<sup>54</sup> *Ibid.* p. 65.

## 1.2. International Law on Extradition and Diplomatic Prosecution

The prosecution and extradition of diplomats present significant legal and diplomatic challenges due to the protections afforded under the Vienna Convention on Diplomatic Relations (VCDR) 1961. While diplomatic immunity shields diplomats from legal action in the receiving state, the question arises as to whether the host state can prosecute a diplomat or request their extradition to a third country for trial.<sup>55</sup> In principle, the VCDR prohibits the host state from initiating legal proceedings against a diplomat without a waiver of immunity from the sending state. This immunity extends even to serious criminal offenses, creating a legal gap where diplomats may avoid prosecution simply by invoking their protected status.<sup>56</sup>

In cases where a diplomat commits a grave offense, the receiving state has limited options. One possibility is to request the sending state to waive immunity under Article 32 of the VCDR, allowing prosecution to proceed in the host country.<sup>57</sup> However, such requests are often denied due to diplomatic sensitivities, as states fear setting a precedent that could weaken their own diplomats' protections in the future.<sup>58</sup> Another option is declaring the diplomat *persona non grata* under Article 9, effectively expelling them from the country.<sup>59</sup> While this ensures their removal, it does not amount to legal accountability, as the diplomat may return to their home country without facing any judicial consequences.

Regarding extradition, the VCDR does not provide a direct mechanism for the extradition of diplomats.<sup>60</sup> A receiving state cannot unilaterally extradite a diplomat to a third country while they still enjoy immunity. However, if the sending state revokes immunity and allows prosecution, extradition may become legally possible under bilateral or multilateral extradition treaties between the states involved.<sup>61</sup> In practice, this rarely happens, as most states prefer to handle such cases internally rather than surrender their diplomats to foreign jurisdictions.<sup>62</sup>

Despite these limitations, there have been notable cases where states successfully pressured the sending country to waive immunity, leading to prosecution. In 1997, Russia waived immunity for one of its diplomats in Canada who was involved in a fatal drunk driving accident, allowing Canadian authorities

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<sup>55</sup> Vasciannie, Stephen, dan Lisa Vasciannie, 2024, Some Questions of International Law, *In Jamaica's Foreign Policy: 1962-2022*, Cham: Springer Nature Switzerland, p. 120.

<sup>56</sup> Dantes, Lorenz Fernand D., 2023, Abuse of Privilege: Evaluating the Application of the Laws on Diplomatic Immunity in Cases of Migrant Trafficking and Exploitation, *Philippine Law Journal*, Volume 96, p. 82.

<sup>57</sup> Janwa, Isha, 2024, Are Diplomats Really Immune?: Assessing Devyani Khobragade Case in International Law, *International Journal of Law, Management & Humanities*, Issue 2, Volume 7, p. 435.

<sup>58</sup> Berridge, Geoff R., 2022, *Diplomacy: Theory and Practice*, Springer Nature, p. 103.

<sup>59</sup> Janwa, Isha, 2024, *Loc. Cit.*, p. 441.

<sup>60</sup> Labardini, Rodrigo, 2024, Inviolability of Diplomats and Diplomatic Premises, *International Enforcement Law Reporter (IELR)*, Volume 40, p. 249.

<sup>61</sup> Butt, Junaid Sattar, 2024, The Abuse of Diplomatic Immunity: Examining Cases and Implications for International Relations—A Research, *Acta Universitatis Danubius. Relationes Internationales*, Volume 17 Number 2, p. 41.

<sup>62</sup> *Ibid.*

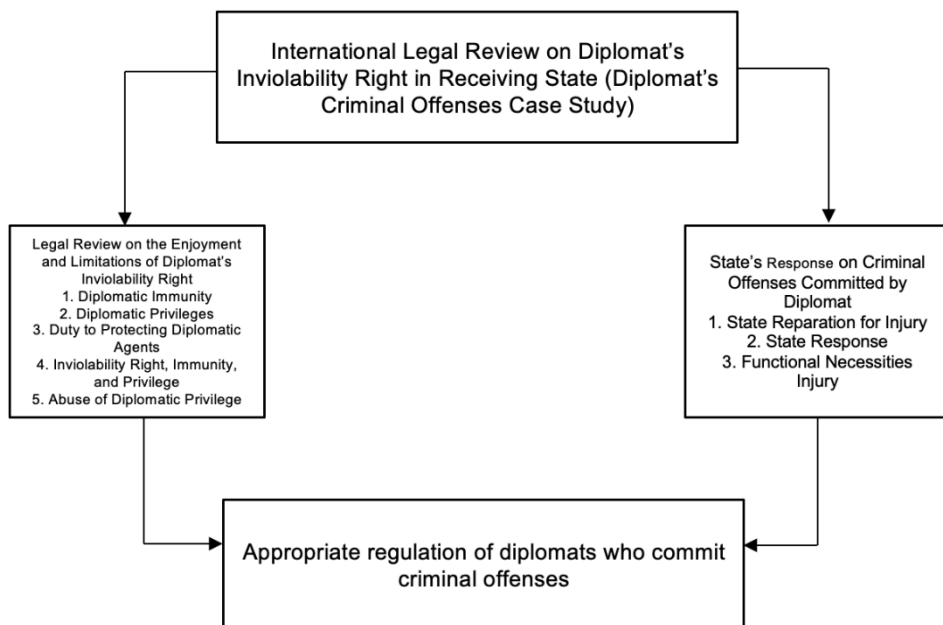


to proceed with legal action.<sup>63</sup> Similarly, in 2013, India requested the United States to waive immunity for one of its diplomats accused of visa fraud, leading to a diplomatic standoff before the matter was resolved through diplomatic channels.<sup>64</sup>

These cases demonstrate that while diplomatic immunity remains a powerful legal protection, international pressure, diplomatic negotiations, and public scrutiny can sometimes lead to the revocation of immunity and prosecution of diplomats. However, such instances are rare, and most cases of diplomatic misconduct go unpunished due to the reluctance of sending states to expose their diplomats to foreign legal systems. As the debate over accountability versus immunity continues, some legal scholars argue for reforms to the VCDR, particularly in cases involving serious crimes, to prevent diplomatic immunity from being misused as a shield against justice.

## F. Framework of Thought

**Figure 1. FRAMEWORK CHART**



The framework in this study focuses on a review of international law regarding diplomatic immunity rights and how recipient countries respond to violations of the law by diplomats. This framework begins with an analysis of the principle of diplomatic immunity rights in international law, which is the basis for diplomats in carrying out their duties in

<sup>63</sup> Butt, Junaid Sattar, 2024, *Loc. Cit*, p. 54.

<sup>64</sup> *Ibid*, p. 61.

recipient countries. However, this right has limitations that need to be further studied, especially in the context of crimes committed by diplomats.

The current law regulating the enjoyment and limitation of a diplomat's inviolability rights are diplomatic immunity and privileges. This right offer a special treatment of an alien in the receiving state. Therefore, a diplomat shall be protected and the receiving state has duty to protect the diplomat of the sending state.

Furthermore, this study examines the recipient country's response to criminal acts committed by diplomats, including policies or regulations that can be applied to address these cases without violating the principles of international law. In the final stage, this study aims to provide more appropriate regulations for diplomats who commit crimes, so as to maintain a balance between diplomatic immunity rights and the supremacy of law in the recipient country. Thus, this study will provide legal recommendations that can be used to improve the rules regarding the accountability of diplomats in criminal cases.

## **CHAPTER II**

### **RESEARCH METHOD**

#### **A. Research Type and Approach**

This research is a study that uses normative juridical methods. Normative research is research that seeks to examine library materials in the form of legal materials, both primary, secondary and tertiary legal materials. The research was conducted using the following research approach:

##### **a. Statute Approach**

In this research, the statute approach will focus on legal sources that come from legislation such as laws, conventions, statutes, etc. as the basic reference material in this research.

##### **b. Conceptual Approach**

In this research, the conceptual approach will focus on giving perspective on the topic and research question under the legal concept or either from the values contained in the enactment of a regulation in relation to the concepts used.

##### **c. Study Case Approach**

In this research, the study case approach will focus in giving perspective based on jurisprudence and its relevancy with the present research. The cases that will brought are from international courts such as, International Court of Justice and case studies.

#### **B. Types and Sources of Legal Materials**

In legal research, research materials are unknown because in legal research, especially normative ones, they are obtained from the literature. In normative legal research, library source materials are part of secondary legal materials.

##### **a. Primary Legal Materials**

Primary legal materials are legal materials that are authoritative. In this research, primary legal materials consist of laws and regulations, conventions, statutes, and others as basic materials in conducting research.

##### **b. Secondary Legal Materials**

Secondary legal materials are materials consisting of textbooks written by influential legal scholars or legal experts, journals, jurisprudence, and case studies related to the research topic.

##### **c. Tertiary Legal Materials**

Tertiary legal materials are legal materials that provide guidance on primary and secondary legal materials in the form of dictionaries, articles, news, and explanations accessed via the internet.

#### **C. Legal Material Collection Technique**

The legal material collection technique in this research was carried out using 2 (two) methods of legal material search techniques, namely:

### 1. Literature Study

By utilizing primary, secondary, and tertiary legal materials that have been collected, analyzed to obtain explanations and solutions to the case under study. The data collection method is applied to obtain scientific information related to the discussion of theories, and concepts relevant to this research.

In addition, the author also studies and quotes legal materials from sources in the form of laws and regulations and literature related to this research. Legal materials will be obtained from the author's personal collection, the Hasanuddin University central library collection, and the Hasanuddin University Faculty of Law library collection.

### 2. Internet Access

The collection of legal materials is done by accessing websites and journals accessed through internet media that have relevance to the legal issues in this research. The legal materials were then systematically analyzed and formulated in accordance with the problem formulation raised in this research.

Literature study and internet access were conducted to gather relevant information as well as to assist the author in interpreting the inviolability right of a diplomat.

## **D. Analysis of Legal Materials**

The analysis of legal materials used in this research is a descriptive method of analysis and is carried out by grammatical interpretation techniques of laws and regulations. The descriptive method of analysis is carried out so that the author can describe thoroughly and in depth the regulation of the inviolability right of a diplomat and state practices in facing offenses by the diplomats.

Interpretation of laws and regulations is carried out to find and apply the understanding of the arguments contained in the law in accordance with the ordinary meaning. After conducting research with existing findings, the author will then describe systematically, following the flow of systematic discussion. Then, analysis is carried out related to the legal review on the inviolability right of a diplomat and state practices in facing offenses by the diplomats.