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DIPLOMATIC PROTECTION FOR CITIZEN BASED ON INTERNATIONAL LAW

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ABSTRACT:

The state has the obligation to provide diplomatic protection for its citizens. Based on the principle of maximum protection the state is obliged to provide protection for its own citizens. However, in reality the state is often unable to carry out the responsibility of providing protection, even other states actually carry out oppression acts to their citizens. This study aims to analyze the regulation related to diplomatic protection for its citizen who is abroad based on international law, and analyze the implementation of the 2006 ILC Draft Articles on Diplomatic Protection to the case of football players. The type of this study which used was normative legal research. Diplomatic protection was carried out with three conditions, namely, an international wrongful act, Exhaustion of Local Remedies and Link of Nationality. There was significant difference related to Diplomatic Protection which carried out by developed country and developing country.

Keywords: Cases, Citizen, Diplomatic Protection, Football.

INTRODUCTION

Recently, there has been a shift in the concept of human security. The issues such as poverty, respect for human rights including the protection of migrant workers receive greater attention as a threat to human security. In this human security concept, the state still has a great responsibility to the individual security (Denza, 2018). A state is obliged to protect its citizens who are

migrating or working abroad (Laube, 2019). As a subject of international law, the state has international rights and obligation (Berliana et al., 2019). There are also the rights and obligation of the state to individual which are essentially determined by the state's region and the nationality of the individual concerned.

Citizen is one of the real elements and the main elements of a state (Pabyantara & Dharmaputra, 2019). Citizenship status creates a reciprocal relationship between citizen and their state. Every citizen has the rights and obligation towards his country. One of them is the state has the obligation to provide protection for its citizens (Simatupang & Edorita, 2015).

The responsibility and obligation of a state to protect its citizens abroad is carried out by a state's consular function. The consular function is regulated in Article 5 of the 1963 Vienna Convention in Sumolang, (2018) concerning Consular Relations. In one of the points of Article 5 of the 1963 Vienna Convention, it is stated that, "Consular functioning consists in: protecting in the receiving State the interests of sending state and of its nationals, both individuals and corporate bodies, within the limits permitted by international law". Based on this article, it can be seen that the consular representative of sending state in the receiving state is obliged to protect their citizens and their interests. If a citizen of a sending state experiences a problem in the receiving state, the consular representative of the sending state in the receiving state must provide assistance and support (Gede Wahyu Wicaksana, 2019).

A few years ago precisely in 2012, there was an incident that quite became a concern of Indonesian public Setiowati, (2013) namely the death of a Paraguayan football player named Diego Mendieta who played for the *Persis* Solo club. Diego died because of illness, but Diego was unable to pay for hospital costs because Diego did not get a salary from the club where Diego played namely *Persis* Solo. But after he died, the management of *Persis* Solo finally paid the salary of the late Diego Mendieta and repatriated his body to his native Paraguay.

A similar case also occurred in 2013, this time had afflicted to a Cameroon football player named Salomon Begondou who played for the *Persipro* Probolinggo club. Salomon did not get a salary from the club where he played and he also had an illness. Even to continue his life, Salomon begged on the streets of Probolinggo. However, in the end Salomon died due to his illness and Salomon was unable to pay the hospital costs. In the two cases above, the author finds an interesting phenomenon related to the protection of the state for its citizen who is abroad.

In the opinion of Parthiana, (2003), all people who are in the region of a state whether their own citizen or foreigner must submit to the power and law of that state. Although, for foreigner will apply several exceptions such as not having the rights to vote in general election and not having the rights to

occupy certain position, this is understandable because foreigners also submit to the law of their home state. On the other hand, the state also has an obligation to protect its citizens who live (reside) abroad. However, in reality there are still many states that neglect to protect their own citizen in other state. This study aims to analyze the regulation related to diplomatic protection for its citizen who is abroad based on international law, and analyze the implementation of the 2006 ILC Draft Articles on Diplomatic Protection to the case of football player.

RESEARCH METHODS

The type of the legal study used in this paper was normative legal research. Normative legal research was often called doctrinal research (Smits, 2009). According to Hutchinson, "doctrinal research is research which provides a systematic exposition of the rules governing a particular legal category, analyzes the relationship between rules, explains areas of difficulty and, perhaps, predicts future development (Puspita, 2013).

This study studied the regulation and the implementation related to diplomatic protection by sending state which in this case was the state of Paraguay and Cameroon for their citizen who was abroad namely in Indonesia based on the 2006 ILC Draft Articles on Diplomatic Protection. From that study, it found an appropriate analysis related to the implementation of the 2006 ILC Draft Articles on Diplomatic Protection to the case of the football player.

The problem approach which used consisted of a statute approach and a conceptual approach (Muradian et al., 2010). The statute approach was carried out by analyzing the provision in the applicable international law sources relating to the provision regarding representation, duties and function, especially the regulation of diplomatic protection for the citizen abroad, thus it could find out the *legis ratio*, ontological basis, and what matters were has been regulated in the source of the international law.

The conceptual approach was carried out by moving to the views and doctrines of the experts and sources of the applicable international law related to the nationality, the function of citizen protection, the practice of states in providing protection and implementing diplomatic protection which was in the ILC Draft Articles on Diplomatic Protection of 2006 to the case of football player.

Legal Sources which used in International and national was: Vienna Convention on Diplomatic Relations and Optional Protocols, (III) ILC Draft Articles on Diplomatic Protection 2006, Indonesian State Law related to foreign relations.

RESULT AND DISCUSSIONS

Diplomatic Protection Theory

Protection of a state for its citizen who was abroad was known as Diplomatic Protection. The intended diplomatic protection was not the protection for representative who represented sending state both diplomatic representative or consular representative as regulated in the 1961 Vienna Convention and the 1963 Vienna Convention. Craig Forcese believed that diplomatic protection is an "action taken by a state against another state in respect of injury to the person or property of national caused by an internationally generous act or omission attributable to the latter state". Diplomatic could be associated with human rights without regard to other interests (Vermeer-Künzli, 2007).

Speaking of diplomatic protection, this would be closely related to the role of consular representative and demand of a state to another in relation to the violation of international law ("Espousal of Claims") (Alford, 2000). Craig Forcese said that there were at least three conditions that must be fulfilled in order to carry out diplomatic protection, namely: An international wrongful act, Exhaustion of local Remedies, Link of Nationality. In general, it could be said that diplomatic protection could only be carried out by state whose citizen experienced the violation acts of international law by other state. This was also stated in Article 3 paragraph (1) of the International Law Commission Draft Articles on Diplomatic Protection 2006 which stated that, "The state entitled to exercise diplomatic protection is the State of nationality" (Forcese, 2001).

This article turned out to open another discourse on the question of who was meant by the citizen and what was the status of citizenship? Regarding this article, Article 4 of the International Law Commission Draft Articles on Diplomatic Protection 2006 clearly stated that, "for the purposes of diplomatic protection of natural persons, a state of nationality means a state of nationality the individual sought to be protected has acquired, descent, succession of states, naturalization or in any other manner, not inconsistent with international law".

Based on this article, it could be seen that for the objective of diplomatic protection, a person's original citizenship could be obtained because of birth, descend, state succession, naturalization or other manner that did not contradict to the international law.

The Relation of Diplomatic Protection with the Concept of International Law

1. The State as the Subject of International Law

The State was one of the Subjects of International Law. The subject of international law was a party that could be burdened with the rights and obligation regulated by international law. As an international subject, the state had the international rights and obligation.

The rights and obligation of the state included, the state's rights and obligation relating to the region in international society relations, relating with other states, relating with people in the international society, relating to economic interests, and relating to the environment and state jurisdiction.

2. State Jurisdiction

State jurisdiction according to D.J. Harris in Puspita, (2013) was, "the power of the state under international law to govern persons and property by its municipal law" (Puspita, 2013). D.J. Harris also said that, "the rules of state jurisdiction identify the persons and the property within the permissible range of a state's law and its procedures for enforcing that law." This meant that a state had the authority over the people and property within its region.

The problem of state jurisdiction arose because every state in the world had its own sovereignty and they were related to one another. When the relations intersect, each state felt that they had the authority to defend their interests.

3. State Responsibility

State responsibility arose due to the principle of equality and sovereignty of the state which was admitted in the international law. The state's responsibility basically arose because of violation of international law such as the violation of international treaties, the violation of the sovereignty of another state's region, attack to other state to the violation of diplomatic representative from other state or foreign citizen.

In international law, there was no difference between civil and criminal responsibility as contained in national law. In addition, due to the differences in state responsibility according to international law and national law was that a state could not avoid its international responsibility with the reason that it contradicted to the national law.

International law essentially regulated the legal relations among states, thus in the concept of responsibility, the state was often the main subject. This was reflected in Article 1 of the International Law Commission Draft (Responsibility of States for Internationally Wrongful Acts 2001) which stated that, "Every internationally wrongful act of a state entails the international responsibility of that state". State responsibility itself had two general meanings, namely:

- a. The responsibility for state actions that violate international obligation which has been admitted, and;
- b. The responsibility that owned by the state for the violation against foreigner.

4. Diplomatic Protection in ILC Draft Articles on Diplomatic Protection 2006

The Background on the Birth of the ILC Draft Articles on Diplomatic Protection 2006:

The concept of diplomatic protection that has been around has changed. In the past, the concept of diplomatic protection was a protection reserved for the

representative, both diplomatic representative and consular representative which acted on behalf of sending state. At present, the concept of diplomatic protection was not only directed to diplomatic and consular representatives but was also directed to citizen or individual. This change was based on the Mavrommatis Palestine Concessions Case which later resulted in the ILC Draft Articles on Diplomatic Protection 2006.

Regulation of Diplomatic Protection in ILC Draft Articles on Diplomatic Protection 2006:

Article 1 explained the definition and limitation related to what was called diplomatic protection namely, "For the purposes of the present draft articles, diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility".

It aimed due to make uniformity related to what was meant by diplomatic protection. Diplomatic protection was a procedure used by the state of citizenship from the citizen who was the victim of international law violation. This draft article only contained the rules which regulated the conditions in which the diplomatic protection could be implemented and the condition that must be fulfilled before the diplomatic protection could be implemented.

Diplomatic protection was different from the consular assistance. Consular assistance was carried out by consular representative to represent the interest of individuals in conducting international business on behalf of the state based on the 1963 Vienna Convention on Consular Relations. Diplomatic protection was a protection which directed to the citizen who was not involved with international business.

5. Responsibilities of Receiving State Against Foreign Citizen Foreign Citizen Who Died in Other State:

The citizen from the sending state died because of something that happened in the receiving state, then, the receiving state had the obligation to immediately notify the Consular Representative where the disaster occurred in the consular region of the sending state. In addition, the receiving state must also notify the Consular Representative immediately regarding any incident where it was deemed necessary to appoint a guardian in order to provide protection to citizen of the sending state who was minors and who was fully underprivileged. However, the notification regarding information including such appointment was carried out without reducing the meaning of the laws and regulations of the receiving state.

Violation of the Law that Carried Out by Foreign Citizen in the Receiving State:

If it was in the region of a consular representative of sending state, there was a citizen of sending state who was arrested or put in prison or placed under surveillance while awaiting trial or in any case he must be detained, then, the authorized institution of the receiving state must notify immediately to the consular representative of sending state.

6. Definition of Representative

According to Article 1 Number 4 *Keppres* (Presidential Decree) No. 108 of 2003 concerning Diplomatic Representative Organization Abroad, Diplomatic Representative was the Embassies and the Permanent Delegation of the Republic of Indonesia who carried out diplomatic activity in all the regions of the receiving state and/ or in international organization to represent and fight for the interests of the Nation, State and Government of the Republic of Indonesia. While, the meaning of Consular Representative in Article 1 Number 5 of Presidential Decree No. 108 of 2003 was the Consulate General of the Republic of Indonesia and the Consulate of the Republic of Indonesia that conducted consular activity in the work area within the region of the Receiving State to represent and fight for the interests of the Nation, the State, and the Government of the Republic of Indonesia.

7. Representative's Duty and Function Based on the 1961 Vienna Convention and the 1963 Vienna Convention

The Duties of Diplomatic Representative Based on the Vienna Convention on Diplomatic Relations and Optional Protocols 1961 (Denza, 2009):

Regarding the duties of this representative, in Article 3 of the 1961 Vienna Convention stipulated as follows:

The functions of a diplomatic mission consist inter alia in:

- a) Representing the sending state in the receiving state;
- b) Protecting in the receiving state the interests of the sending state and of its nationals, within the limits permitted by international law;
- c) Negotiating with the government of the receiving state;
- d) Ascertaining by all lawful conditions and developments in the receiving state, and reporting there to the government of the sending state;
- e) Promoting friendly relations between the sending state and the receiving state, and developing their economic, cultural and scientific relations.

The Duties of Consular Representative Based on the Vienna Convention on Consular Relations and Optional Protocols 1963:

Consular representative had the different authority from diplomatic representative, consular representative did not act to represent their state because in general they were placed in big cities such as trading city and port city. The duty of consular representative was to create goodwill or mutual understanding and enhance international cooperation between government and the people of the two states.

Implementation of Diplomatic Protection

Based on the 2 cases which mentioned in the introduction, it could be known that the three conditions for a state (the Government of Paraguay and Cameroon) to provide diplomatic protection for its citizen abroad have been fulfilled. If the Government of the receiving state, in this case Indonesia, was unable and willing to put on a trial the perpetrator, then, the Government of Paraguay and Cameroon could implement diplomatic protection by implementing the principle of passive citizenship, namely punishing the perpetrator in Indonesia with Indonesian law or by bringing the case to the path of International Dispute Resolution or The International Court after surely passing the stages of peaceful dispute resolution (negotiation - mediation - good services (inquiry) - conciliation - Arbitration/ International Court) (Batubara & Purba, 2013).

A case could be put on a trial in the International Court if the litigating state admitted the jurisdiction of the International Court. Paraguay, Cameroon and Indonesia were the United Nations' member states and admitted the jurisdiction of the International Court.

Comparison of Diplomatic Protection between Developed Country and Developing Country in Various Cases

The Example of Case I (Developed Country):

In 2012 Erlanger, (2013) the United States Ambassador to Libya Christopher Stevens and three staff of the United States Embassy died due to the attacks from demonstrators. Demonstrators protested against the spread of films containing blasphemies against the Prophet Muhammad SAW. Stevens and three of his staff died while trying to evacuate staff when the consulate was attacked by demonstrators who fired automatic weapon and grenade. United States President, Barack Obama, strongly condemned the incident that resulted in the loss of life. In connection with the incident, the United States' Department of Defense stated that they would cooperate closely with the Department of Foreign Affairs to improve the security at its diplomatic facilities throughout the world. In addition, the Libyan Government through the Chairman of the Libyan National Assembly, Mohammed Magarief, conveyed an apology to the United States Government for the incident and promised to put on a trial the demonstrators who carried out the attack as fairly as possible and Magarief promised to guarantee the security and protection for foreign citizen in Libya.

The Example of Case II (Developing Country):

In the case of the shooting of film audience in Colorado on July 20, 2012 Telschow *et al.*, (2003) The shooting case of Indonesian Worker by Malaysian Diraja police, the Malaysian government was asked for its responsibility because in this case the police was the apparatus or state employees of Malaysia and had acted beyond the limits of the authority that stipulated by national law. Handling cases of the convoluted and prolonged shooting of Indonesian Workers in Malaysia should receive special attention from the

Government of Indonesia. In addition, the Government also needed to improve the performance of the Indonesian Consulate in other state (receivingstate). If this was carried out, then, the Indonesian government's legal authority will be upheld and admitted, thus, there would be no arbitrary violence / violation of the law against Indonesian citizen who lived or worked abroad.

The two cases above provide a striking difference in terms of resolving diplomatic problems between the United State which was arguably as a developed superpower state and Indonesia which was still developing, developed country more firmly provided strict protection for its citizen, the faster the process in solving the problems faced with the negotiations which existed.

CONCLUSION

Diplomatic protection was closely related to the role of consular representative and the demand of a state to another in relation to the violation of international law. Diplomatic protection could be carried out by a state (a state of citizenship) in the event that three conditions have been fulfilled namely, an international wrongful act, Exhaustion of Local Remedies and Link of Nationality.

There was significant difference related to the diplomatic protection which carried out by developed country with developing country. Developed country had more respect for the rights of their citizen abroad by providing diplomatic protection if caught up in a legal case. While developing country had less respect for the rights of their citizen abroad, as evidenced by the large number of cases involving Indonesian migrant workers, but the Indonesian Government did not provide diplomatic protection for them. The absence of diplomatic protection provided by both diplomatic and consular representatives could occur due to several factors, namely the representative did not receive the notification from the receiving state if there was a case or event that afflicted the citizen of that representative, a citizen who refused an assistance from his representative and a representative who did not carry out his duty and function properly.

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