CONSULAR RELATIONS: A COMPLEX AND OFTEN MISUNDERSTOOD PEOPLES' SERVICE

RADZIAH ABDUL RAHIM

Faculti of International Studies
Universiti Utara Malaysia

ABSTRACT

Consular relations are as essential in inter-state relation as diplomatic relations, although theirs are focussed on servicing the people or corporate bodies overseas. Nevertheless, the conduct of consular relations is not as simple as most people think for prior to the Vienna Convention on Consular Relations (hereinafter, VCCR), 1963, there existed numerous consular treaties. Nor does the service receive as much attention as diplomatic relations. This article examines the factors that gave rise to these situations, which were traced as far back to ancient times with the implementation of the "personality of laws". The emergence of the modern European states had not diminished the practice of providing "customised" jurisdiction for consular agents or officers although states have become more territorial. Conscious effort to bring about some uniformity in consular law and, thus, reduce the confusion that arose from the diversified consular functions and jurisdiction came about only in the twentieth century.

Keywords: *Consular Relations and diplomatic relations*

INTRODUCTION

Consular relations are as much an important part of diplomacy as diplomatic relations. Yet it is unfortunate that it took the December 2004 tragedy to bring the importance of this service to the forefront. When the tsunami hit parts of South-east Asia and South Asia, consular staff from Britain and other western states like Germany, France and Sweden were among the critical staff mobilized by their governments to the affected areas. Their functions: to assist nationals who were caught in the catastrophe, to

collaborate with the local authorities in tracing those missing and identifying the dead, and to liaise with the victims' families.

These are but only a few of the significant non-political functions of consular officers listed in Article 5 of the 1963 Vienna Convention on Consular Relations (hereinafter, VCCR) in the conduct of consular relations. Nevertheless, consular work has received scant attention and is often poorly understood by both the politicians and the laymen. This article examines the complexity of the "Cinderella service"[1] that contributed to the situation. In so doing, the article reveals that their complexity is deeply rooted in their historical beginnings – the practice of various "customised" consular functions and jurisdiction. It also traces the development of the institution and looks at the efforts of the world body to create a uniform consular law in line with the progressive codification of international law.

LOW-PROFILE "CINDERELLA SERVICE"

Despite the fact that consular institution has been around for ages, not many literature on consular services are available in the market. Between 1955 - when the International Law Commission (hereinafter, ILC) started work on the codification of consular laws - and the end of March 2006, only a couple of books have been written solely on the subject of consular relations. Even then, they were written by the same author, Luke T. Lee. *Consular Law and Practice* first appeared in 1961 at the time when the draft on consular intercourse and immunities was debated by the United Nations General Assembly.[2]

The book was updated 30 years later. The 2nd edition contains a comprehensive analysis of states' consular practices and legislations against the background of the provisions of the 1963 VCCR.[3] In between this period, Lee wrote on the same subject-matter in 1966 that analysed the VCCR against the ILC draft articles on consular intercourse and immunities, state practices and consular codes.[4] Meanwhile, other authors who have written on consular relations did so as part of their discussion on other aspects of international relations or topics of international law. They include Clive Parry, William McHenry Franklin, Paul Gore-Booth, and Ludwig Dembinski.[5]

Nor do the main textbooks on diplomacy do much more than touch on the consular angle, and the indexes of two do not even contain the word "consul".[6] Meanwhile, of a total of 98 Clingendael *Discussion Papers in Diplomacy* only two are related to consular work.[7] Apart from these literature, Babesil's thesis was centred on derogations arising from the implementation of the VCCR in relation to the Vienna Convention on Diplomatic Relations (hereinafter, VCDR). As regards books on consular work before 1955, writers such as Graham Stuart and Irvin Steward looked at the subject from the point of view of American consular practice.[8]

In many cases, the writings of these authors are too specialised or academic – most were written from the international law perspective. Hence, the public are often left none the wiser about consular services until they have to deal with the issue of visas or passports which is also among one of the 13 consular functions listed in Article 5 of the VCCR. As the next section shows, consular services have been the sole responsibility of the consular institution since ancient time until they were assimilated into the services of diplomatic missions in the 19th century.[9]

CONSULAR INSTITUTION IN ANCIENT TIMES[10]

Consular relations have played a significant role in international relations, longer in fact than diplomatic relations. Its significance was noted by Bernhardt, who points out that the service:

> covers the totality of relations established between two States – the sending State and the receiving State – as a result of the exercise of consular functions by organs of the former on the territory of the latter. The ability to establish consular relations belongs *ipso jure* to sovereign States and, like the right of legation, is one of the fundamental elements of their capacity as subjects of international law.[11]

Like diplomatic relations, consular relations have an antiquated history but unlike the former, the roots of their history lie deeper than the practices of ancient Rome and Greece. This observation was based on the writings of authors like Shih and later, Kassan, who wrote on the origins of "extraterritorial" jurisdiction which is closely associated with consular activities.[12] Bernhardt concurs, claiming that 'The roots of consular jurisdiction go back to principles and institutions much older than the figure of the consul, who is, of course different from the Roman official whose name he bears.'[13] Kennedy was more direct. He places the origins of consuls to almost two millennia before the existence of permanent ambassador.[14]

Nevertheless, these writers did not provide descriptions of consular activities that were characteristic of the pre-Greek and Roman epoch. In general, most writers on consular relations agree on two points. Firstly, the consular institution has its roots embedded in trade and commercial activities engaged by foreigners in neighbouring and distant lands; and, secondly, that special arrangements existed to cater to that foreign community. Generally, the locals tolerated the presence of foreign merchants, although some would look upon them with suspicion, and sometimes with hostilities because of the latter's differing customs and values.

Like the locals, foreign merchants also received a degree of protection. However, because of cultural differences, the host authorities considered them unsuitable to be governed by the law of the land. The case was more obvious in a situation where the locals considered themselves to be superior to the foreigners. One way to deal with the presence

of foreign tribes or communities, therefore, was to impose the principle of "personality of laws". According to this principle, each man or tribe would follow his or their own community law when domiciled in a foreign land as the notion of sovereignty and territoriality was alien to the people of this period. Hence, different jurisdiction existed to cater to the needs of different trading communities. However, in the case of serious crime, the law of the injured party or plaintiff would apply.[15]

The evidence of such arrangements were found around sixth century B.C. in Egypt during the reign of Amasis. Merchants from Greece were allowed to settle in Naucratis, a city at the delta of the Nile, where they were free to administer their own law, practice their own customs and appoint their own governors or magistrates. So, too, were the Jews (who settled in Goshen around 1500 B.C.), the nomadic tribe of Mentin (Goshen, 1580-1350 B.C.) and the Pheonicians (Memphis, 1292-1225 B.C.).[16] To this end, Phillipson observes that:

> The Egyptian government often allowed foreign merchants to avail themselves of local judges of their choice and even of their own nationality in order to regulate questions and settle differences arising out of mercantile transactions, in accordance with their foreign laws and customs – the Greeks especially enjoyed these privileges on Egyptian territory.[17]

Shih and Kassan believe that the exemption of outsiders from the local jurisdiction of the foreign land was what gave rise to the system of "extraterritoriality".[18] The system was widely exercised in the Levant, North Africa and Far East by the European powers in later years in the fifteenth and nineteenth centuries. Kennedy considers the ancient Egyptian arrangement to have been part of a strategy to provide a sense of security to the foreigners while encouraging trade; to spare the pharaoh's officials from having to deal with disputes amongst the traders; and to contain foreign influences from the locals.[19]

The Greek Era

In ancient Greece the system of *proxenia*, which Phillipson considered to be the prototype of modern consular system, is believed to have existed at about the end of the seventh century before the Christian era.[20] In the city-states of Greece foreigners were allowed to choose protectors known as *prostates* to act as their intermediaries in legal and political relations with the host state.[21] Similarly, *proxenoi*, (a term equivalent to 'consuls') were appointed by foreign states from among citizens of the host states to assist and to look after their interests. The post is similar to that of present day honorary consuls.

Examples could also be found of such citizens being nominated by their own states to 'take cognisance of the affairs of foreigners in general', for example, Thucydides (who is an Athenian) at Pharsalos.[22] Although the *proxenoi* were chosen from among outstanding citizens such as magistrates, it was also not unheard of for some of the Greek city-states to appoint foreign citizens as *proxenoi*, who had formerly been hostages

and who had become respected residents.[23] The *proxenoi* had a multitude of duties among which were to serve as intermediary between two cities and as protector of foreigners in general; to act in their favour before the political assemblies and the local tribunals to protect their financial, judicial and religious interests; and to introduce to the court advocates to plead the cause of the city he represented in legal proceedings.[24]

In addition, the *proxenoi* often engaged in diplomatic activities such as receiving foreign ambassadors and other diplomatic officials; procuring for them admission to the assemblies, temples and theatres; and, in some cases, assisting in the formulation and conclusion of treaties. There had also been times when the *proxenoi* would intervene to prevent war between the state they represented and that of their own.[25] It is not, then, surprising that the *proxenoi* would often be called upon to serve as ambassador of their country to the state they once represented.

However, it is unclear whether the *proxenoi* received payments for services rendered, although the practice of providing emoluments was observed, as also was the bestowal of honours and distinctions. In addition, in recognition of the office and services they rendered, the *proxenoi*, enjoyed certain privileges - honorary or special - such as protection over their persons and property; exemption from certain taxes and custom duties; the right of access to public assemblies; priority in having their cases heard in court; and the use of a special seal in all transactions and in the importing and exporting of goods.[26]

The Roman Era

The Romans did not exercise as much enthusiasm over trade as the Greeks and, with the decline of the latter's civilization, the institution of *proxenia* also suffered. However, there existed two institutions that benefited from the presence of a large number of foreigners, called *peregrins*, in Rome: the institution of patronage and the institution of *praetor peregrinus* (foreign magistrate). The former was similar to *proxenia* while the latter was comparable to modern-day consuls. The main difference between the institutions of patronage and *proxenia* was in the nationality of the protectors or patrons. They were normally Roman aristocrats who agreed to act on behalf of a foreign city that owed allegiance to Rome.[27] The patrons were chosen either by the foreign communities or the Roman Senate. In the case of the latter, it was not unusual for them to appoint protectors from among the conquerors of the vanquished peoples.[28]

Meanwhile, the *praetor peregrinus*, which was believed to have been instituted between 242 and 247 B.C, was not so much as a move to limit the powers of the patrons as to address 'the inadequacy of the urban praetor [*sic*] to cope with the necessities of the constantly increasing multitude of foreigners, which, consequently, brought about the appointment of a special official for that purpose'.[29] The office of the *praetor peregrinus* was held by magistrates who applied the provisions of *jus gentium* (law of nations),

which included both foreign law and customary trade practices, in judging disputes between foreigners or between Roman citizens and foreigners. The Roman civil law, the *jus civile* (municipal law), was deemed inappropriate to the *peregrins*.[30] This clearly reflected ancient Egyptian practices.

The *praetor peregrinus* often performed other duties as were required of him from time to time. These included taking command of the Roman legions, equipping ships, quelling servile insurrections, acting as master of the mint, overseeing the distribution of corn, and acting as guardian of temples and public monuments.[31] Like the *proxenus* in Greece, the *praetor peregrinus* was also sometimes engaged in diplomatic affairs. But the significance of this institution began to erode and eventually diminished under the rule of the Roman emperors who, Phillipson wrote:

> with their subtle and rigorous invasions into established institutions, with their all-transforming policy, the importance of the *preator peregrinus* began to decline, and his judicial competence became more and more diminished. ... it has practically sunk into insignificance; so that what was formerly a magistracy of great power had ... declined to an empty name.[32]

Nevertheless, Stuart claims that it was during the Roman days that the word "consul" began to be used to refer to one of the two principal magistrates in the Roman Republic.[33] Similarly, the term came to popular use in the cities of Southern Europe like in Southern France in 1000 A.D. On the other hand, Gore-Booth maintains that 'Comparable appointments, for which the term 'consul' came to be used were devised in Byzantium .... It was in Constantinople that consular work as we understand it today had its real beginning.'[34]

CONSULAR DEVELOPMENT IN THE MIDDLE AGES

Despite the fall of the Roman Empire in 476 A.D., the institution of special judges to arbitrate disputes among merchants continued to exist. A law of the Visigoths in the fifth and sixth centuries revealed the existence of such judges, known as *telonarii*. They were authorised by the local authorities to exercise jurisdiction over their nationals in accordance with their own laws.[35] A century later, merchants from western European cities were granted permission by the Arab conquerors of a large part of the Roman Empire to continue the practice without fear of interference from the host states. Similar institutions were noted in China and India in the eighth and ninth centuries respectively.

The Crusades, which broke out in the eleventh century, were no barrier to international trade in Constantinople and other towns of the Byzantium Empire. Merchants from the Italian cities of Venice, Amalfi, Genoa and Pisa, as well as others such as Bulgaria and Russia continued to flock to these places. There they set up businesses, warehouses and administrative offices. With the establishment of their own colonies, they acquired the right to appoint special magistrates. These officials were known by various titles –

governors, protectors, anciens, aldermen, syndics, jurats, prévosts, capitouls and *échevins* – depending on the customs of each country.[36] This proved that "customised" consular practice had not faded over the centuries.

The officials administered justice and oversaw disputes between members of the community and, in some instances, between the foreigners and citizens of the Byzantine.[37] This practice of appointing special magistrates spread widely in the East between the European and Moslem states after the conquest of the Ottoman Empire with the signing of treaties called "capitulations". Among the treaties were those signed between Turkey and Genoa (1453), Venice (1454), and France (1535). The establishment of similar trading posts and warehouses in various Christian principalities during and after the Crusades also witnessed the development of consular practices. Montpellier, for one, had consuls at Antioch and Tripoli (1243), in Cyprus (1254) and in Rhodes (1356).[38]

The practice was certainly not alien to the commercial towns of Italy, Spain and France during the second half of the Middle Ages. In those towns, merchants would appoint fellow countrymen to act as arbitrators in commercial disputes. These arbitrators were called *juges consuls* (judge-consuls) or *consuls marchants* (merchant-consuls). When the merchants traded and settled in the Eastern countries, they brought along this institution to those places.[39] As international trade prospered, independent cities also sent *consuls d' outre mer* (overseas consuls) or *consuls à l' étranger* (foreign consuls) to the ports and cities of foreign countries to protect national commerce, especially in matters of shipwreck, to watch over national interest of the sending state and that of their merchants and ships' masters as well as to arbitrate disputes between sailors and merchants.[40]

Examples of these were widely seen in the establishment of foreign consulates between the thirteenth and fifteenth centuries with the Italian Republics establishing a few in the Netherlands, and London, while the English had some in the Netherlands, Sweden, Norway, Denmark and Pisa. Mattingly states that 'by 1400 most of the *consuli electi* ha[d] been replaced by *consuli missi* sent out by the state, and at last as much as its spokesman as they were representatives of the community whose interests they were expected to guard'.[41] The political role was indeed a necessity for the commercial metropolitans in the period where permanent diplomatic missions had not been established.[42] In fact, Phillimore stated that it was around this period that:

> The organization of the Consulate was more or less complete, as the interests which the Consul had to protect were more or less regular, as the obstacles they had to encounter were greater or less, as the Municipal Laws of the State in which they were established were more or less penetrated by the commercial spirit. The Levant produced the best specimens of the institution; and Venice, Genoa, Marseilles, and Barcelona appear to have been the cities in which it attained the greatest perfection.[43]

The consular service of the Venetians, for example, had developed much earlier. They had consuls-general, also known as *prévosts*, and these *prévosts* often had other posts under their jurisdiction. In 1192, the Venetian *prévost* in Acre (Syria) was in charge of another *prévost* in Tyre and consuls in Tripoli, Beirut and Antioch.[44] In addition, there had been occasions where the Venetian *bailo* in Constantinople would be required to fulfill both diplomatic and consular functions. Thus, it was not unusual for Venetian consuls to be given diplomatic credentials to facilitate them in the exercise of that duty.[45] In general, Salles observes that it was the special and innate abilities of the Venetians for diplomacy that had placed them well above consuls from other cities; they were quick to take advantage of an opportunity to extend the influence of their country and they did this not only of their own accord but also at the explicit wish of their government.[46]

The evolution of the consuls' duty, from representing the trading community in foreign cities to representing states (be they home or host countries), was not surprising given the fact that more and more states had began to take interest in international trade and relations. Consuls gradually began to serve as the mouthpiece of their governments, channelling political information and sending news as regularly as possible. The direct control over the consular institution came about in the sixteenth century as more state authorities became centralised. Consuls who were dispatched to foreign locations 'assumed the character of public ministers, performed certain diplomatic functions, and enjoyed the corresponding privileges and immunities'.[47]

The above developments provided consuls with an official status and they gradually ceased to represent the trading communities. In a way, the experience with consular representation had assisted the growth of permanent diplomatic missions, much to the detriment of the consular institution. It declined as a result of the development of the diplomatic missions. Not only were consuls losing their traditional judicial powers but their diplomatic powers when these were gradually transferred to diplomatic missions. In fact, because of their rich experience in dealing with foreign governments, some of these consuls were even assimilated into the diplomatic service. Hence, the presence of consular division in diplomatic missions today is no more a modern concept as it is a prudent exercise to cut the cost of running overseas missions.

THE DECLINE AND RISE OF THE CONSULAR INSTITUTION

The decline of the consular institution was attributed to several factors. Firstly, there was the change in the political climate and structure of the international system. The Renaissance in Europe, and certainly the Peace of Westphalia, had influenced the movement of peoples and changed the way states conduct foreign relations. Commerce and industry were flourishing during the Renaissance while the evolution of small city-states had created a 'multi-polar international system in miniature where each state had expanded to fill the geographical and political space available'.[48] With this came possession of territorial and state sovereignty, concepts which were practically unknown

in the ancient world. Consequently, sovereigns especially from among the western powers became reluctant to grant immunities from local jurisdiction to foreign merchants.[49]

Secondly, the growth of commercial intercourse and international law provided states with better ways of dealing with foreigners in their territories. Keeton elaborates

> From being a person whose rights had depended almost exclusively on treaty and concession from the local sovereign, he progressively became a person who, in private law at least, was entitled to all the rights of a citizen, unless expressly excepted – and express exception might amount to diplomatic remonstrance. Again, throughout Western Europe there was a movement to incorporate mercantile law into the fabrics of the national laws.[50]

Moreover, as public order in Western Europe grew and international intercourse increased, the activities of the foreign merchants became widely spread. They were no longer restricted to ports. Nor were they located in particular areas. As a result, their lives became intermixed with the local population, thus making it difficult to monitor their location and movements.[51] The rise of nationalist sentiments in the eighteenth century against the centuries-old consular jurisdiction or "extraterritoriality" did not help matters. The exercise of the judicial function by consuls was viewed as incompatible with the principle of sovereignty of territorially independent states. The opponents of "extraterritoriality" felt that foreigners should be subject to local laws as far as their property and personal safety were concerned.

Given the above scenario, the duties of the consuls were, henceforth, relegated to the task of merely looking after their states' interests, particularly in shipping and navigation and the protection of their citizens. Potter considers the diminishing importance of the role of consuls during this era quite alarming. He feels that there was 'serious danger of the office disappearing entirely from the field of international organization and practice'.[52] The situation was magnified, for example, by provisions in the treaties between France and the Netherlands: of Ryswick (1697, Article 30), Utrecht (1713, Article 38) and Versailles (1739, Article 40).

These treaties provided that 'in future no consuls will be admitted by either party, and if one considers it appropriate to send residents, agents and commissioners to the other, they can establish their place of residence only in the ordinary residence of the court'.[53] Such changes did not affect the duties of consuls in the states that had signed "capitulation" treaties. Nevertheless, the expansion of maritime trade, commerce and industry during the second half of the eighteenth century changed the gloomy outlook of the consular institution.

Governments now began to take more interest in foreign trade as international trade expanded, involving an increasing number of their citizens. Foreign trade soon became

a fixed feature of government activities, forcing states to engage in not only bilateral but also multilateral agreements. In addition, the number of people travelling or residing abroad, if only for such purposes, had also grown. These changes required governments to mobilise various machinery and institutions to administer them, one of which is the consular institution. Soon consuls were actively dispensing the familiar duties of protecting the interests of appointing states and their citizens. To these responsibilities were added others such as 'the work of the consul on behalf of seamen flying the flag of his government and seamen claiming citizenship in his state' and 'the various functions assigned to him in assisting in the enforcement of the customs, quarantine, immigration, and navigation laws of his government.'[54] However, the prestige and power once enjoyed by consuls were never quite the same as it had once been.

The creation of new departments to handle international trade and commerce, not to mention the transfer of some of the consular functions to diplomatic officers like commercial attachés, had diminished the monopoly of consuls in this field. At the same time, it had also created new responsibilities such as acting as an intermediary between diplomatic or trade missions and the authorities or traders in consular districts.[55] Moreover, the regulation of trade activities via international treaties also necessitated the coordination of consular functions that later influenced the codification of consular law, not only bilaterally or regionally, but also on an international level in the form of conventions.

MODERN CONSULAR CONVENTIONS

As commerce spread to all parts of the world, treaties became the most common and important tool for merchants overseas, as also for states when the consular institution was absorbed into government services. Such treaties secured the position and jurisdiction of consuls, facilitated business activities and ensured the protection of nationals and state interests' overseas. However, the increase in the number of treaties meant diverse instructions, privileges and jurisdiction for the consuls as different states had different arrangements with the host government, thus, compounding the issue. The earliest attempt to create some form of uniformity is believed to have been made by the Dutch in the seventeenth century.

The general consular regulation adopted by the Netherlands in 1658 covered her consuls in Spain, France and Italy. It was modified by successive enactments leading to the regulation of 1871. Nevertheless, the most outstanding regulation was the *Ordonnance de la Marine* (Maritime Ordinance) issued by France in 1681. Like the Dutch regulations, it underwent several changes and was used as a model for other countries including the USA (that drafted her laws on consuls in 1792), Russia (1820, which was amended in 1858), Britain (1825) and the Netherlands (1838).[56] In Russia, the rights and duties of her consular representatives were officially defined in the 'Regulations for Consuls in Europe and America'. The provisions in the 1820 regulation allowed consuls-general

and consuls to appoint consular agents or 'honorary consuls' in their district subject to the approval of the Russian diplomatic missions.

Besides regulating their consular service, states had also begun to conclude bilateral treaties to define the legal position of consuls in strengthening trade relations. One of the earliest was the 1769 Franco-Spanish Convention of Pardo which is considered to be the first modern consular treaty.[57] France followed this with similar conventions with Britain in 1786, Russia in 1787, and the USA the following year. France's move was imitated by other nations eager to emphasize provisions that governed the status, functions, privileges and immunities of their consular representatives.

Hence Britain, which had not legislated any regulations with regard her consuls since she first sent them to Italy in 1410, consulted the 1853 Franco-American consular convention when she decided to negotiate a similar treaty with the USA.[58] The provision that was of particular interest, and was considered a basis for the Anglo-USA negotiations, was Article 1. This Article touched on the reception and recognition of consuls, the furnishing of the exequatur, and the reservation of the right of withdrawal of the exequatur.[59] However, the exequatur was not something that emerged in the nineteenth century. Authorisation had, in fact, been issued many years earlier in the form of letters patent or charters of privileges.

Similarly, with regard to the appointment and freedom to travel of consuls, the Anglo-Japanese treaty of 1858, stipulated that:

> Her Majesty the Queen of Great Britain and Ireland may appoint ... Consuls or Consular Agents to reside at any or all of the ports of Japan, which are opened for British Commerce by this Treaty; The ... Consul-General of Great Britain shall have the right to travel freely to any part of the Empire of Japan; His Majesty the Tycoon of Japan may appoint ... Consuls, or Consular Agents, at any or all the ports of Great Britain. The ... Consul-General of Japan shall have the right to travel freely to any part of Great Britain.[60]

Meanwhile, the USA left no doubt of her view regarding the status of consuls in her consular convention with Colombia in 1850 and Salvador in 1870. The Americans refused 'to recognize any diplomatic character of consuls and specifically denied them the privileges and immunities attaching to diplomatic offices'.[61] The Latin American states reciprocated. Nevertheless, the contracting parties had agreed to accord consuls certain privileges to facilitate the performance of their duties. The issue of privileges and immunities of consuls, *vis-à-vis* their functions and public status, continued to take precedence in the signing of consular conventions between states in the following century.

The rise of socialism in the first quarter of the twentieth century and the eventual division of the international system into two opposing ideologies did not change greatly the way states conduct their consular relations. On the contrary, states adjusted the management

of their consulates to accommodate the new international order. One of the actions that the Russian Communist Party took when it came to power after the 1917 October Revolution was to repudiate all Tsarist treaties having 'a colonial, annexationist and unequal character'.[62] This was in line with one of three principles of the October Revolution aimed at creating a Socialist international legal order - the principle of equality and self-determination of nations and peoples.[63] The other two principles were socialism internationalism and peaceful coexistence.

In the period where colonialism flourished overseas in parts of Asia and Africa, the principle of equality and self-determination was bound to cause discord between the Russians and the Western Powers for it promoted the expression of struggle against national oppression of colonial masters. Meanwhile, the conduct of Russia's consular intercourse with other Communist states was guided by the principle of socialist internationalism. The norms of consular conventions concluded between these states ran on the premise of the will of states-parties which was aimed at developing and strengthening relations between them. However, Lee observed that it was not until 1957 that the first consular convention between two Communist states was concluded.[64] It was signed between the USSR and the German Democratic Republic. This set the course for other Communist states to follow. The provisions of the conventions between these countries were, in most cases, similar.

In contrast, the USSR's consular intercourse with states outside the socialist circle was based on the principle of peaceful coexistence whereby treaties would express the concordant wills of the states. Hence, Article 8(1) the 1958 Soviet treaty with the Federal Republic of Germany states that 'The consul and consular offices shall not be subject to the jurisdiction of the receiving state in respect of acts performed in their official capacity.'[65] Another principle that underlies consular relations between the Communist and non-Communist states in the late 1930s was the "principle of parity". Lee claims that the principle has its origin in the 'espionage psychosis' and the desire to keep the USSR isolated.[66] Nevertheless, at the Soviet Union's insistence, the principle evolved whereby the number of Soviet consular posts in any one state would match the number of posts that that state had in the Soviet Union.[67]

THE IMPETUS TOWARDS MULTILATERAL CONVENTION

The presence of various consular treaties in the international scene by states of different political system has, more or less, complicated the conduct of consular relations. A conscious effort at the international level to address this issue and create some form of uniformity in consular law took shape in the twentieth century.[68] The subject on consuls was one of 21 topics that the League of Nations' Committee of Experts identified in 1924 to facilitate the progressive codification of international law in order to meet the needs of the existing international system.[69] Except for a report of a sub-committee that

was formed to conduct a study on the legal position and functions of consuls, no further action was taken to follow up on its recommendations.

Following the League of Nations' initiative, the Faculty of the Harvard Law School undertook a similar project three years later. The School consulted a vast amount of material such as national laws and regulations, bilateral and multilateral treaties, draft codes, cases and judicial incidents. It completed its project in 1932. The comprehensive draft convention on the legal status and functions of consuls, famously referred to as the "Harvard Research Draft", remained one of the most authoritative references up to the Second World War.[70] Nevertheless, there were some states, like Britain and the USA, who objected to any regulations that would infringe on their traditional rights to determine the position of consuls.

The scenario changed after the Second World War. As more countries gained independence from colonial powers and the USA acquired more responsibilities in the international arena there was a badly felt need among many states for a uniform consular law. Moreover, the greater complexity of international commerce and trade showed that countries could not afford to rely merely on customary international law. In 1949, the UN took the initiative to pursue a uniformed consular law and mobilised the International Law Commission (hereinafter, ILC) for that purpose.[71] It took the ILC six years, beginning 1955, to come up with the draft on consular immunities and privileges before the world body decided to convene an international conference in Vienna in 1963.[72] The result of this meeting was the VCCR.[73]

The adoption of the Vienna Convention on Diplomatic Relations, 1961, had no doubt influenced the codification of the VCCR. Lee sums the situation as follows:

> The adoption in 1958 of the diplomatic *Draft* [VCDR] was occasion for the International Law Commission's decisions not only to accord top priority to the codification of "Consular Intercourse and Immunities," but also to harmonise it as far as possible with that of diplomatic practice. ... The result is the addition of several articles in the consular *Draft* which had their counterparts in the diplomatic *Draft*. Some of these articles are expressions of existing laws (*lex lata*); others are *de lege ferenda* – in conformity with one of the Commissions objectives: the progressive development of international law.[74]

Although states may still experience problems in implementing some of the articles in the VCCR, the Convention has proved beneficial to many parties.[75] This is especially true of newly-independent countries that have no experience in this specialised field. To-date, there are 48 states signatories to the Convention, which came into force in 1967, while 165 others are parties to the multilateral treaty.[76] In addition, states that have continued to enter into bilateral consular conventions did so along the guidelines established by the VCCR.

CONCLUSION

Consular relations have been in the international scene much longer then diplomatic relations. Yet these non-political services have scarcely received the attention and the acknowledgement that they richly deserve. Part of the problem lies in the complexity of this subject which is drawn from the ancient and varied customs. The community-based principle of "personality of laws" resulted in various "customised" consular jurisdiction to cater to the needs of different foreign traders. This practice continued to exist with the emergence of modern European states, thus, making the irregularity of consular functions and jurisdiction a common feature.

This irregularity was compounded by the changing political climate and structure of the international system over the centuries. Different states made different arrangements with host countries. Moreover, it was not unusual for diplomatic missions to perform consular functions, thus, misleading some into thinking that consular functions are part of diplomatic relations. Although the League of Nations had attempted to bring some form of uniformity to consular practice, it was the United Nations that had eventually succeeded in bringing about the codification of the VCCR in 1963.

ENDNOTES

[1] The term "Cinderella service" was popularised by Platt to describe the consular service. See Platt, D. C. M. (1971). *The Cinderella Service: British Consuls Since 1825*. London: Longman.

[2] Luke T. Lee. (1961). *Consular Law and Practice*. London: Stevens & Sons Ltd.

[3] Ibid, (1991). *Consular Law and Practice*. 2nd edn. Oxford: Clarendon Press.

[4] Ibid, (1966). *Vienna Convention on Consular Relations*. Durham, N. C.: A. W. Sijthoff-Leyden/Rule of Law Press.

[5] Clive Parry, ed., A British Digest of International Law: Compiled Principally from the Archives of the Foreign Office, part VII, vol. 8., (London: Stevens & Sons, 1965); William McHenry Franklin, Protection of Foreign Interest: A Study in Diplomatic and Consular Practice, (New York: Greenwood Press Publishers, 1969); Gore-Booth, ed., Satow's Guide to Diplomatic Practice, 5th edn., (New York: Longman Group Ltd., 1979); and Ludwik Dembinski, The Modern Law of Diplomacy: External Missions of States and International Organisations, (The Netherlands: Martinus Nijhoff Publishers, 1988).

[6] These are R.P. Barston, *Modern Diplomacy*, 2nd edn., (Harlow: Longman, 1997) and Adam Watson, *Diplomacy. The Dialogue between States*, (London: Menthuen, 1984, first published 1982). There are short discussions in G.R. Berridge, 2004, and Keith

Hamilton and Richard Langhorne, *The Practice of Diplomacy, its Evolution, Theory and Administration*, (London: Routledge, 1995).

[7] The two Clingendael Discussion Papers in Diplomacy are by Kevin D. Stringer, *The Visa Dimension of Diplomacy*, Diplomacy Paper issue 91, (The Hague: Clingendael Institute, 2004) and Simon Kear, *The Political Role of Consulates: The British Consulate-General in Hanoi During the Vietnam War*, no. 37, January 1988. See http://www.clingendael.nl/cdsp/publications/discussion%2Dpapers/backissues.html; http://www.clingendael.nl/cdsp/publications/discussion%2Dpapers/list.html

[8] Graham H. Stuart, *American Diplomatic and Consular Practice*, (NewYork: Appleton-Century-Crofts Inc, 1952) and Irvin Steward, *Consular Privileges and Immunities*, (New York: Columbia University Press, 1926).

[9] The French were the first to amalgamate their diplomatic and consular services in 1880. This was followed by others; the Russians (1918), the Americans (1924), the British (1943) and the Italians (1953). See Cardinale, Hyginus Eugene. (1976). *The Holy See and the International Order*. England: Colin Symthe Ltd., p. 281.

[10] The historical fact presented in this paper were mainly based on the writings of Oppenheim, L. (1905). *International Law: A Treatise*. vol. 1. London/New York/ Bombay: Longmans, Green and Co.; Phillipson, Coleman. (1911). *The International Law and Customs of Ancient Greece and Rome*. vol. 1. London: Macmillan and Co.; Potter, Pitman B. (May 1926). 'The Future of the Consular Office', *American Political Science Review*, vol. 20. issue 2.; Harvard Law School. (Supplement, 1932). 'Drafts of Conventions Prepared for the Codification of International Law' (hereinafter, Harvard Research Draft), *American Journal of International Law* (hereinafter, *AJIL*). vol. 26.; Stuart, Graham H. (1952). *American Diplomatic and Consular Practice*. New York: Appleton Century; Stuart, Graham. (1934). 'Le Droit et la Pratique Diplomatiques et Consulaires', *Recueil des Cours*. vol. II. (trans. Manuela Contardi-Lane and Véronique Lebourg); Salles, G. (1897). 'L'Institution Des Consulates: Sons Origine, Son Dévelopement Au Moyen-age Chez Les Differents Peuples', in *Reveu D'Historie Diplomatue*. vol. II. no. 2. (trans. Manuela Contardi-Lane); Zourek, Jaroslav (1957). 'Consular Intercourse and Immunities' (hereinafter, Zourek Report), *Yearbook of the International Law Commission*. vol. II.; Parry, Clive. (1965). *A British Digest of International Law*. Phase 1. vol. 8. London: Stevens & Sons; and Luke T. Lee, (1991). *Consular Law and Practice*. 2nd edn. Oxford: Clarendon Press.

[11] Bernhardt, R. ed. (1986). Encyclopaedia of Public International Law: International Relations and Legal Cooperation in General, Diplomacy and Consular Relations. Netherlands: North-Holland, p. 35.

[12] Shih Shun Lin. (1925). *Extraterritoriality: Its Rise and Decline*. New York: Columbia University, p. 23, and Kassa, Shalom. (April 1935). 'Extraterritoriality Jurisdiction in the Ancient World', in *AJIL*. vol. 29. issue 2. In distinguishing between

"extraterritoriality" and "exterritoriality", Lee points out that the former involves the 'establishment of an international servitude by elevating the nationality principle of jurisdiction over the territorial principle' while the latter refers to 'immunities conferred upon a diplomatic envoy and his suite in accordance with international law. See Lee, 1991, p. 8.

[13] Bernhardt, 1986, p. 33.

[14] Kennedy, Charles S. (1990), *The American Consul: A History of the USA Consular Service, 1776-1914*. New York: Greenwood Press, p. 1. Although most writers on the history of modern diplomacy were cautious in stating the period for the establishment of the institution of resident permanent legations, Mattingly believes that it began to develop during the Renaissance period in Italy, not later than the early decades of the fifteenth century. After the Peace of Westphalia in 1648, most of the independent European states had established permanent diplomatic missions with all powers with mutual interests. See Mattingly, Garrett. 'The First Resident Embassies: Mediaeval Italian Origins of Modern Diplomacy', in *Speculum*. vol. XII. issue 4. October 1937, p. 423.

[15] Shih, 1925, p. 29.

[16] Kassan, 1935, pp. 241-42.

[17] Phillipson, 1911, p. 193.

[18] See Shih (1925) and Kassan (1935).

[19] Kennedy, 1990, p. 1.

[20] Phillipson, 1911, 149.

[21] Zourek Report, 1957, p. 73; Lee, 1991, p. 4.

[22] Phillipson, 1911, p. 150.

[23] Ibid, p. 151.

[24] Ibid, p. 152.

[25] Ibid, p. 153.

[26] Ibid, pp. 154-56.

[27] Phillipson, 1911, pp. 154-56.

[28] Stuart, 1952, p. 279.

[29] Niebuhr, quoted in Phillipson, 1911, p. 268.

[30] For a detail discussion of the application of the rule of *ius gentium* on the *peregrines* see Phillipson, 1911, pp. 271-274.

[31] Ibid, p. 269.

[32] Ibid, p. 271.

[33] Stuart, 1952, pp. 279-80.

[34] Gore-Booth. ed. (1979). *Satow's Guide to Diplomatic Practice*. 5th edn. New York: Longman Group Ltd., p. 211.

[35] Stuart, 1934, p. 487; Zourek Report, 1957, p. 74.

[36] Phillimore, quoted in Parry, 1965, p. 4.

[37] Zourek Report, 1957, p. 73

[38] Lee, 1991, pp. 73-74.

[39] Oppenheim, 1905, p. 463. According to Twiss, quoted in Parry, 1965, p. 5, the office of *juges consuls* was first introduced at Barcelona in Spain in 1279.

[40] Phillimore quoted in Parry, 1965, p. 3; Stuart, 1952, p. 280; and Zourek Report, 1957, p. 74.

[41] Mattingly, 1937, pp. 425-26. Oppenheim defines *consuli missi* as professional consuls who were subjects of the sending States and who were required to devote their time to the consular office. Meanwhile, *consuli electi* were those who might or might not be appointed from among citizens of a sending State who not only served as consul but run other jobs as well. See Oppenheim, 1905, p. 466.

[42] According to Mattingly, Milan had led the way to the establishment of permanent non-commercial diplomacy when, in 1490, Ludovico Sforza of Milan sent a resident ambassador to the court of Ferdinand and Isabella in Spain. He also accredited a Genoese merchant living in London as his ambassador to the court of Henry VII the same year. Others followed suit with Milan having residents in the courts of Habsburgs (Austria) and Paris in 1492 and 1493 respectively while Naples sent theirs to Spain, England and Germany in 1493. The rapid extension of permanent embassy was attributed to the threat of the French invasion to that part of Europe thus forcing these Italian city-states to forge cooperation against a common enemy. See Mattingly, 1937, p. 438, and

Hamilton, Keith and Langhorne, Richard. (1996). *The Practice of Diplomacy: Its Evolution, Theory and Administration*. London and New York: Routledge, p. 36.

[43] Quoted in Parry, 1965, p. 4.

[44] Salles, 1897, p. 574.

[45] Mattingly, 1937, p. 426.

[46] Ibid, p. 581.

[47] Lee, 1991, p. 6. For the debates on the public character of consuls, see Parry, 1965, p. 5, and Oppenheim, 1905, pp. 465-66.

[48] Hamilton and Langhorne, 1995, p. 30.

[49] Keeton, G. W. (1949). *Extraterritoriality in International and Comparative Law*. Paris: Libraire du Recueil Sirey, p. 11.

[50] Ibid.

[51] Ibid, p. 12.

[52] Potter, 1926, p. 286.

[53] Harvard Research Draft, 1932, p. 202.

[54] Ibid, p. 289.

[55] Zourek Report, 1957, p. 77.

[56] See the Harvard Research Draft, 1932, p. 288; Zourek Report, 1957, p. 76.

[57] Gore-Booth, 1979, p. 212.

[58] Stuart, 1952, p. 288.

[59] Parry, 1965, p. 12. An "exequatur" is defined by the *Dictionary of Diplomacy* as a 'document supplied by the receiving state to the head of a consular mission authorising the officer to exercise consular functions within the mission's district'. See Berridge, G. R. & James, Alan. (2001). *A Dictionary of Diplomacy*. Hampshire: Palgrave, p. 87. The document is issued in response to a "commission" that a sending country sends to the host government through the former's diplomatic channel. The "commission" gives the appointed consul the authority to exercise consular functions on behalf of the sending

country and carries the name, consular rank, consular district and post of the officer. See Feltham, R. G. (1998). *Diplomatic Handbook*. 7th edn., Harlow: Pearson Education, p. 52.

[60] Parry, 1965, p. 13.

[61] Steward, Irvin. (1926). 'American Treaty Provisions Relating to Consular Privileges and Immunities', in *AJIL*, vol. 20. no. 1., p. 83.

[62] Tunkin, G.I. (1974). *Theory of International Law*. London: George Allen & Unwin Ltd, p. 11.

[63] Ibid, p. 4.

[64] Lee, 1991, pp. 21-22.

[65] Tunkin, 1974, p. 4.

[66] Lee, 1991, p. 53.

[67] Ibid, p. 51. Unsurprisingly, the USSR tended to invoke the principle when it was advantageous. For example, before the Second World War she established three consulates in the USA, despite the latter having none in her territory.

[68] Similar efforts were made by individuals and institutions in the nineteenth century. For example, private ventures were written by Bluntschli and Field. Bluntschli's work on the *Das moderne Völkerrecht der civilisirten Staten als Rechtbuch dargestellt* (The Codification of Modern International Law of Civilised States) appeared in 1868 while Field's 'Draft Outlines of an International Code' was published four years later. On the institutional front, the Institute of International Law (hereinafter, IIL) looked into the legal status of consuls in 1888 in Lausanne and produced draft regulations on the immunities of consuls.

[69] Other topics on the list were nationality, territorial waters, diplomatic privileges and immunities, public vessels engaged in commerce, extradition, responsibilities of states for damages to aliens in person or goods, procedure of international conferences; the drafting of treaties, piracy, prescription, exploitation of marine resources, extraterritorial criminal jurisdiction, commissions rogatory in penal matters, international corporations formed not for profit, domicile, most-favoured-nation clause, revision of established classification of diplomatic agents, jurisdiction of national courts over foreign states, the nationality of commercial corporations and their diplomatic protection, recognition of juridical personality of foreign commercial corporations, and conflicts of laws as to sales of merchandise. The list is extracted from the American Society of International Law's Report of Special Committee on Collaboration with the League of Nations Committee for the Progressive Codification of International Law dated 24 April 1926.

[70] See *AJIL*, Supplement, 1932, pp. 193-375, for the full draft and subsequent comments that accompany each article.

[71] The other topics were recognition of states and governments; succession of states and governments; jurisdictional immunities of states and their property; jurisdiction with regard to crimes committed outside national territory; regime of high seas; regime of territorial waters; nationality, including statelessness; treatment of aliens, right of asylum; law of treaties; diplomatic intercourse and immunities; state responsibility; and arbitral procedure. See *The Work of the International Law Commissions*. 2004. vol. 1. 6th edn. New York: The United Nations, p. 30.

[72] The ILC initiated its work on the subject of consular intercourse in 1955 and appointed Jaroslav Zourek of Czechoslovakia as its Special Rapporteur.

[73] The United Nations conference also adopted the Optional Protocol Concerning Acquisition of Nationality and the Optional Protocol Concerning the Compulsory Settlement of Disputes.

[74] Lee, Luke T. (1961). *Consular Law and Practice*. London: Stevens and Sons Ltd., p. 325.

[75] At the United Nations' international conference on consular relations in 1963, Article 36 on communication and contact with nationals of the receiving state was the most difficult provision that delegates had to deal with. It remains so to this date.

[76] The figures are true as of July 2005. The document is also accessible from the United Nations website at http://untreaty.un.org/sample/EnglishInternetBible/partI/chapterIII/treaty6.asp.

REFERENCES

Bernhardt, R. ed. (1986). *Encyclopaedia of Public International Law: International Relations and Legal Cooperation in General, Diplomacy and Consular Relations*. Netherlands: North-Holland.

Berridge, G. R. & James, Alan. (2001). *A Dictionary of Diplomacy*. Hampshire: Palgrave.

Cardinale, Hyginus Eugene. (1976). *The Holy See and the International Order*. England: Colin Symthe Ltd.

Feltham, R. G. (1998). *Diplomatic Handbook*. 7th edn., Harlow: Pearson Education.

Gore-Booth. (ed.) (1979). *Satow's Guide to Diplomatic Practice*. 5th edn. New York: Longman Group Ltd.

Hamilton, Keith & Langhorne, Richard. (1996). *The Practice of Diplomacy*: *Its Evolution, Theory and Administration*. London and New York: Routledge.

Harvard Law School. (Supplement, 1932). 'Drafts of Conventions Prepared for the Codification of International Law' (hereinafter, Harvard Research Draft), *American Journal of International Law* (hereinafter, *AJIL*). vol. 26.

Kassan, Shalom. (April 1932). 'Extraterritorial Jurisdiction in the Ancient World', *AJIL*. vol. 29. issue 2. pp. 237-47.

Keeton, G. W. (1949). *Extraterritoriality in International and Comparative Law*. Paris: Libraire du Recueil Sirey.

Kennedy, Charles S. (1990), *The American Consul: A History of the USA Consular Service, 1776-1914*. New York: Greenwood Press.

Lee, Luke T. (1991). *Consular Law and Practice*. 2nd edn. Oxford: Clarendon Press.

Lee, Luke T. (1961). *Consular Law and Practice*. London: Stevens and Sons Ltd.

Mattingly, Garrett. (October 1937). 'The First Resident Embassies: Mediaeval Italian Origins of Modern Diplomacy', *Speculum*. vol. XII. issue 4. pp. 423-39.

Oppenheim, L. (1905). *International Law: A Treatise*. vol. 1. London/New York/ Bombay: Longmans, Green and Co.

Phillipson, Coleman. (1911). *The International Law and Customs of Ancient Greece and Rome*. vol. 1. London: Macmillan and Co.

Parry, Clive. (1965). *A British Digest of International Law*. Phase 1. vol. 8. London: Stevens & Sons.

Platt, D. C. M. (1971). *The Cinderella Service: British Consuls Since 1825*. London: Longman.

Potter, Pitman B. (May 1926). 'The Future of the Consular Office', *American Political Science Review*, vol. 20. issue 2. pp. 284-98.

Salles, G. (1897).'L'Institution Des Consulates: Sons Origine, Son Dévelopement Au Moyen-age Chez Les Differents Peuples', in *Reveu D'Historie Diplomatue*. vol. II. no. 2. (trans. Manuela Contardi-Lane). pp. 565-95.

Shih Shun Liu. (1925). *Extraterritoriality: Its Rise and Decline*. New York: Columbia University.

Steward, Irvin. (1926). 'American Treaty Provisions Relating to Consular Privileges and Immunities', in *AJIL*, vol. 20. no. 1. (467-87).

Stuart, Graham H. (1952). *American Diplomatic and Consular Practice*. New York: Appleton Century.

Stuart, Graham. (1934). 'Le Droit et la Pratique Diplomatiques et Consulaires', *Recueil des Cours*. vol. II. pp. 483-565. (trans. Manuela Contardi-Lane and Véronique Lebourg).

Tunkin, G.I. (1974). *Theory of International Law*. London: George Allen & Unwin Ltd, p. 11.

United Nations. (2004). *The Work of the International Law Commissions*. vol. 1. 6th edn. New York: United Nations.

Zourek, Jaroslav. (1957). 'Consular Intercourse and Immunities', *Yearbook of the International Law Commission*. vol. II.