

1-1-1991

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Recommended Citation

Cami Green, *Counsel, Consul, or Diplomat: Is There Any Practical Significance for Practitioners?*, 1 U. Miami Int'l & Comp. L. Rev. 143 (2015)

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COUNSEL, CONSUL OR DIPLOMAT: IS THERE ANY PRACTICAL SIGNIFICANCE FOR PRACTITIONERS?

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I. BACKGROUND

Picture the following: one of your major clients wakes you up at midnight with a characteristic call to action: "Sue the bastards!" The facts seem rather clear: your client entered into a contract to print membership directories for a group of consuls calling themselves "The Consular Corps of Main City." The invoice remains unpaid by both the group's treasurer and the consul with whom your client was dealing. In order to come to terms on this transaction, the two parties had agreed to share a friendly drink, which ended in a disagreement. As the parties left the establishment, the consul ran into the side of your client's brand-new Cadillac. At this stage of his story your client was highly irate and the facts became somewhat confused. It seems the consul's car had red, white and blue license plates. As far as you can tell, the police arrived, whereupon the consul produced some impressive-looking documents causing the officer to comment, "a diplomat, eh?" and no citation was issued. His only comment to your client was something vague about "diplomatic immunity for this

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distinguished counsel general," whereupon your client loudly demanded his "counsel."

Still half asleep, you are not quite sure what a "counsel general" might be, and how you are expected to advise your angry client. You recall from law-school something about diplomats being above the law in the United States. But you also remember your old international law professor saying something about a distinction between diplomats and consuls.

* * *

The above situation is not at all far-fetched, considering that throughout the United States there are some 2,000 consuls, while diplomats for the most part are found only in Washington, D.C. and New York City - the latter due to its hosting role for the U.N. So, what exactly is a consul? Can a consul injure your client tortiously or contractually, and not be liable to suit?

II. THE IMPORTANCE OF USING PROPER TERMINOLOGY

In order to fully understand consular status within the United States, it is necessary to emphasize proper terminology. Very few fields of law are as heavily inundated with incorrect terms and misunderstood stipulations, even by those who are themselves the focus of the subject matter. Although the *Vienna Convention on Consular Relations*¹ (VCCR) partly succeeded in setting out uniform terminology for heads of consular posts,² it still permits signatories to designate their own titles for other consuls.³ Therefore, it is not at all uncommon to find such terms as vice consul-general, alternate consul, deputy consul, adjunct consul, private consul, chancellor, consular attaché, etc. Since these titles are laid out in the foreign appointment documents, of which the United States approves when admitting a consul to the country, there is little done subsequently to eliminate the confusion. For instance, usage of the generic

¹ Vienna Convention of Consular Relations, opened for signature April 1963, Multilateral 211 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261 (entered into force with respect to the United States Dec. 24, 1969)(hereinafter VCCR). See *Com. v. Jerez*, 390 Mass. 456, 457 N.E. 2d 1105 (1983). The Convention, being self-executing in terms of the United States, does not require any domestic legislation adopting the provisions. Cf. the Vienna Convention on Diplomatic Relations, 1961, Multilateral, 23 U.S.T. 3229, T.I.A.S. No. 7502, 500 U.N.T.S. 95, (emphasis added; hereinafter VCDR), which was domestically adopted in the Diplomatic Relations Act of 1978, Pub. L. No. 95-393, 92 Stat. 808 (codified at 22 U.S.C. Sections 254a-254e (1978), 28 U.S.C. Sec. 1364 (1978))(hereinafter DRA).

² The VCCR, *supra* note 1, Art. 9.1, lists four classes of heads of consular posts: consul-general, consul, vice-consul, and consular agent. A *post* is either the consulate-general, consulate, vice-consulate or consular agency. The corresponding terms on the diplomatic side are a *mission* and its head. See VCDR, *supra* note 1, Art. 1.

³ The VCCR, *supra* note 1, Art. 9.1. sec. 2, makes it acceptable for a sending state to determine the designation of *other* consular officers.

consul would be appropriate and sufficient when internal ranking or standing within the domestic administrative order is not material.⁴ Sometimes, however, consuls are incorrectly referred to as "real" as opposed to honorary. But all consuls are real when properly appointed by their sending state and recognized by the United States. Consuls are not counsels, councils, consulates,⁵ counsellors, ambassadors, or many of the other terms erroneously used by academicians and judiciary alike.⁶

A. *Honorary v. Career Consuls*

World-wide, there are two broad categories of consular officers: career and honorary.⁷ In some instances, it is quite difficult to make an initial distinction between the two, particularly if the consul at issue is a foreign citizen.⁸ Since immunities enjoyed by representatives of each category are quite different,⁹ however, it is vital that the status of the consul at issue - career or honorary - be ascertained at the outset. Knowing the status of the consul is particularly important in determining the standards of consular treatment to

⁴ Interestingly, the U.S. Constitution, Art. III, Sec. 2, cl. 2, speaks of *consuls* only, while 28 U.S.C. § 1351 distinguishes between *consuls* and *vice consuls*. Neither makes a provision for the highest ranking consuls: *consuls-general*. As for ranking, it is important to note that this is done by the sending or appointing state, not the receiving state.

⁵ Although a *consulate* commonly refers to the office or building which houses the consular post, it is not a term defined by the VCCR. Instead, the VCCR uses the term "consular premise." See VCCR, *supra* note 1, Art. 1.1(j).

⁶ See, e.g., 91st Congress, 1st Sess. Report of the United States Delegation to the United Nations Conference on Consular Relations, Vienna, Austria, March 4 to April 22, 1963, *Recommendations* 75 (U.S. Gov't. Printing Office, 1969); Belotsky, *The Diplomatic Relations Act*, 11 CA. WESTERN INT'L L.J. 354, 374, n. 122 (Spring 1984); Rosenn, *Brazil's Legal Culture: The Jeito Revisited*, 1 FLA. INT'L L. J. 1, 2 (1984); Flynn v. Shultz, 748 F.2d 1186 (7th Cir. 1984), 1186, hn. 1; and U.S. v. Chindawongse, 771 F.2d 840, 848 (4th Cir. 1985). To compound the problem, the VCCR does not define the word "consul." Instead, it uses the general term "consular officer," and defines it as any person, including the head of a consular post, entrusted in that capacity with the exercise of consular functions. See VCCR, *supra* note 1, Art. 1.1(d.) "Foreign" is considered redundant, as consular exchange is of necessity based on foreign intercourse and the concept of duality. See VCCR, *supra* note 1, Art. 2.1.

⁷ This is not to say that all countries utilize both kinds. By custom, the United States appoints consular *agents*, but no honorary consuls abroad. Currently, there are 39 U.S. consular agents around the world (per discussion with the Executive Office, Bureau of Consular Affairs, Department of State, Jul. 15, 1991). Traditionally, Communist countries did not appoint honorary consuls either. With the break-up of the Eastern bloc, however, this system appears to be changing. Thus, some East European countries have already appointed, and received recognition for, honorary consuls. See U.S. Department of State, *Foreign Consular Offices in the United States* (Pub. No. 7846, Mar. 1991).

⁸ Although the VCCR contains separate provisions for honorary consuls in Chapter III, it offers no help in defining the differences between career and honorary consuls. Also, it distinguishes between honorary consuls who are nationals or permanent residents of the receiving state and those who are not. See VCCR, *supra* note 1, Art. 58.

⁹ Some writers distinguish between privileges (positive courtesies or rights) and immunities (restrictive rules on jurisdiction by the receiving state). See C.E. WILSON, *DIPLOMATIC PRIVILEGES AND IMMUNITIES* viii (1967). For purposes of this article, only the latter will be considered.

which he is entitled based on reciprocity.

A career consul is a member of a country's foreign, diplomatic or consular service.¹⁰ He is in the employ of his government, and his salary therefrom is his only means of income and support. His work as a consul is his career, his profession. He should be a citizen of the country he serves,¹¹ and should be subject to transfers from one post to the other, depending on the administrative and political purposes of his home country.

In contrast, an honorary consul can be a citizen of the United States,¹² a citizen of the country he represents, or even a citizen of a third country. He is not employed as a consul by the appointing state, nor does he have a contract or receive a salary from his services. Usually he is privately employed or has a profession or occupation from which he makes a living.

On the surface, then, to determine consular status, a test of citizenship and employment may be applied: if the consul is American, or has another "private" occupation, he cannot be a career consul for a foreign country in the United States. The distinction, however, is not as clear as may appear at first glance. For instance, the VCCR initially considered six criteria for distinguishing honorary from career consuls. The adopted draft, however, contains none.¹³ In any event, once the status of the consul has been established,¹⁴ the importance of further classification loses its significance, except for matters of ranking and social protocol.

¹⁰ Countries use different names for this arm of their foreign policy administration. Since World War II there seems to be a trend toward combining both the consular and diplomatic service into one: the foreign service. The United States Foreign Service is one example. See B. SEN, A DIPLOMAT'S HANDBOOK OF INTERNATIONAL LAW AND PRACTICE 245 (3rd rev. ed. 1988).

¹¹ See VCCR, *supra* note 1, Art. 22.1, which modifies this requirement by the term "in principle." For political and practical reasons, it makes little sense for a country to employ a foreign national to protect the interests of nationals of the sending state, in addition to performing other consular functions. Economic reasons usually motivate a country to appoint honorary consuls, most of whom are nationals of the receiving state, to perform consular functions purely on an honorific basis.

¹² This is the most prevalent case in the United States. For an enlightening discussion on honorary consuls who are U.S. citizens, see *Foxgord v. Hischmoeller*, 820 F.2d 1030 (9th Cir. 1987).

¹³ See L.T. LEE, VIENNA CONVENTION ON CONSULAR RELATIONS 21 (1966). Municipal law of different countries is not consistent in the criteria used to distinguish career consuls from honorary consuls. Hence, the Convention agreed on none. See *U.N. Conference on Consular Relations*, 1 U.N. GAOR (38th mtg.) at 427, U.N. Doc. A/CONF./25/16 (1963).

¹⁴ In some communities in the United States it is not at all unusual to find a largely staffed career post, headed by a career consul-general, in addition to various and sundry honorary consuls for the surrounding municipalities. An example is the County of Dade, Florida, where the career post may be located in Miami and honorary consuls for the same country are respectively assigned the areas of Key Biscayne, Coral Gables, Miami Beach, etc. Such honorary consuls seldom perform consular functions but often serve as aids in social activities.

B. Establishment of Status

A consul receives from his appointing or sending nation a document certifying such matters as his full name, consular category (honorary or career), class (consul-general, consul, vice-consul, or any other term the state may be using), jurisdiction (state or states, city, county), and the seat of the post (location of the consular offices). Since the establishment of consular relations between nations takes place by mutual consent, the appointee does not become a consul¹⁵ until his commission has been recognized by the government of the receiving state.¹⁶ There have been instances where consul-designates have demanded immunity based on their provisional status,¹⁷ and, on occasion, have been so acknowledged by the receiving nation. In the United States, however, the Department of State¹⁸ is the only government agency authorized to grant consular status,¹⁹ and, therefore, documentation such as a diplomatic passport,²⁰ or identification papers²¹ from the country represented, do not

¹⁵ When a consul is appointed, he obtains consular status only in relation to the laws of the appointing or sending state, but not in relation to those of the receiving state (which for purposes of this article is the United States). See L. LEE, *supra* note 13, at 20. Authorities on international law agree that consular functions may be performed only by mutual consent, express or implied, of the appointing/sending and receiving states. Mere issuance of appointment documentation does not confer consular status in so far as the receiving state is concerned. See *In Re Bedo's Estate*, 207 Misc. 35, 136 N.Y.S.2d 407 (1955); VCCR, *supra* note 1, Art. 12.1. See also 4 G.H. HACKWORTH, DIGEST OF INTERNATIONAL LAW 666 (1940), and B. Sen, *supra* note 10, at 251.

¹⁶ The courts will insist on evidence by the Executive. See, e.g., *Moracchini v. Moracchini*, 126 Misc. Rep. 443, 213 N.Y.S. 168 (1925). The Office of Protocol stays in close contact with the embassies vis-à-vis career consuls, and will also verify the status of honorary consuls. Quite frequently, when recognition of an *honorary* consul is questioned, verification is much harder to obtain, mainly because embassies are slow in reporting changes to the State Department and sometimes are not even cognizant of, or oblivious to, having representation by an honorary consul somewhere in the United States. This is often the case with those countries which have had repeated changes in governments.

¹⁷ See *In re Bedo's Estate*, 207 Misc. 35, 136 N.Y.S.2d 407 (1955).

¹⁸ See, e.g., *Matter of Terrence K.*, 135 A.D.2d 857, 522 N.Y.S.2d 949 (A.D. 2 Dept. 1987).

¹⁹ In the past, heads of consular posts received a document from the Department of State spelling out the right to perform consular duties in this country. This *exequatur* is no longer a document in the United States but merely represents the formal act of recognition.

²⁰ See, e.g., *U.S. v. Arizti*, 229 F. Supp. 53 (S.D.N.Y. 1964).

²¹ Several embassies now include honorary consuls in their identification procedure, which can include some very impressive-looking documentation frequently designed - so it seems to this author - to elevate honorary consuls to a status to which they are not entitled. Automobile license plates have become a particularly sore subject among honorary consuls, since the State Department assumed the responsibility for issuing these to career consuls. Individual states have an option of designing their own tags for honorary consuls. Honorary consuls frequently complain that states which offer no special license tags are ignoring, or worse, denying, their status and special immunities. Nothing is, of course, further from the truth. Immunities are not contingent upon the display of these outward signs of status. See also OFFICE OF PROTOCOL AND OFFICE OF FOREIGN MISSIONS, GUIDANCE FOR LAW ENFORCEMENT OFFICERS 12 (1987) (U.S. Dept. of State Pub. No. 9533).

constitute *prima facie* evidence of consular or diplomatic status.²² Although the State Department's determination is a purely political decision, it constitutes conclusive evidence of status,²³ even when presented in the form of an affidavit. This determination is non-reviewable by the courts,²⁴ on the basis that doing otherwise would embarrass the Executive branch in its conduct of foreign affairs.²⁵ Thus, before a consul may assert any consular rights, he must provide proof of recognition.²⁶ Such recognition, however, may take place after commencement of the suit.²⁷ In any event, wrongfully impersonating a diplomat, and by implication a consul, is a violation of 18 U.S.C. § 915.²⁸

III. CONSUL OR DIPLOMAT?

It is a well-established principle of international law that consuls are not diplomats.²⁹ This doctrine is clearly reflected in Art. III of the U.S. Constitution, which refers to ambassadors, other public ministers, *and* consuls (emphasis added). The mention of consuls as a separate designation would hardly have been necessary if they were included in the other terms - ambassadors or other public ministers.³⁰ Were there no such distinction, both

²² State Department lists of diplomats and consuls are only presumptive evidence of status. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 464 *reporters' notes*, 1 (1987). Because of changes, sometimes daily, in diplomatic and consular status, these lists cannot be, and are not, conclusive evidence.

²³ See *Carrera v. Carrera*, 174 Fed. 2d 496 (1949); *Abdulaziz v. Dade County*, 741 F.2d 1328 (11th Cir. 1984); *Republic of Philippines v. Marcos*, 665 F. Supp. 793 (N.D. Cal. 1987). *But see* *Vulcan Iron Works v. Polish American Machinery*, 479 F. Supp. 1060 (S.D.N.Y. 1979).

²⁴ See, e.g., *U.S. v. Enger*, 472 F. Supp. 490 (D.N.J. 1978); *In re Baiz*, 10 S.Ct. 854, 135 U.S. 403 (1890); *Carrera v. Carrera*, 174 F.2d 496 (D.C. 1949).

²⁵ See *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945).

²⁶ See *In re Bedo's Estate*, 207 Misc. 35, 136 N.Y.S. 2d 407 (1955).

²⁷ See *Abdulaziz v. Metropolitan Dade County*, 741 F.2d 1328 (11th Cir. 1984). Even to assert property rights on behalf of his nationals, a consul must show proof of recognition. *In Re Bedo's Estate*, 207 Misc. 35; 136 N.Y.S.2d 407 (1955).

²⁸ See *United States v. Callaway*, 446 F.2d 753 (1971). In *Callaway*, the defendant was initially successful in avoiding custodial arrest by claiming that he was attached to a diplomatic mission. The court found an unambiguous violation of 18 U.S.C. § 915.

²⁹ See *Wacker v. Bisson* 348 F. 2d 602 (1965); *Anderson v. Villela*, 210 F.Supp. 791 (D. Mass. 1962); *Emmett v. Lomakin*, 84 N.Y.S.2d 562 (1948). See also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 74(2)(a) comment a. Yet, anyone can be a "diplomat" in the loose sense of the word. Establishing the distinction, however, is vital to determine the immunities to which each one is entitled. See Valdez, *Privileges and Immunities under the Vienna Convention on Diplomatic Relations and the Diplomatic Relations Act of 1978*, 15 INT'L LAW. 411, 418 (1981).

³⁰ See *Ill. Commerce Commission v. Salamee*, 54 Ill. App.3d 465, 11 Ill. Dec. 781, 361 N.E. 2d 235, 238 (1977).

groups would be entitled to the same immunities, be they diplomatic immunities for consuls, or consular immunities for diplomats. Indeed, the courts have long held that consuls are not entitled to the more extensive immunities possessed by diplomats.³¹

At first glance; the distinction between consuls and diplomats may seem clear, given that the receiving state recognizes a representative of a foreign government as either one or the other. Making the distinction, however, becomes somewhat more problematic as a result of some ambiguous provisions of the VCCR. For instance, Art. 3 permits diplomatic missions to exercise "consular functions," a term which is not easily defined.³² Furthermore, according to Art. 70.4, a recognized diplomat engaging in "consular functions" does not restrict his diplomatic immunity. *A contrario*, a consular officer who is authorized to exercise a diplomatic function under very limited circumstances,³³ does not assume the immunities attached to a diplomat, as that would clearly circumvent the purpose and intent of the Vienna Convention on Diplomatic Relations.³⁴ In addition, Art. 2.3 of the VCCR provides that a termination of diplomatic relations does not *ipso facto* sever consular relations. Thus, while the practical possibility of a consul acting as a diplomat is rare, practitioners should carefully distinguish not only whether the individual at issue is a consul or a diplomat, but also whether he is performing the functions of a consul or those of a diplomat.³⁵ The latter distinction is critical in determining the functional immunities to which the individual at issue may be entitled.

IV. CONSULAR CORPS, CORPS CONSULAIRE

Whenever there is more than one consul stationed at a specific location, a consular body known as a *Corps* or *Corps Consulaire* is formed.³⁶ It appears automatically, without any action by its members or by the local government. Its creation is not contingent upon whether its members adopt bylaws, elect

³¹ See, e.g., *U.S. v. Chindawongse*, 771 F.2d 840 (1985); *Anderson v. Villela*, 210 F. Supp 791 (D. Mass. 1962); *Carrera v. Carrera*, 174 F.2d 496 (D.C. 1949); *Emmett v. Lomakin*, 84 N.Y.S. 2d 562 (1948). See also *Ill. Commerce Commission v. Salamie*, *supra* note 30, where the court held an honorary consul's pleading of diplomatic immunity under the Diplomatic Relations Act to be "totally without merit." 22 U.S.C. § 252. For a judicial discussion the nature of consuls, see *Hollander v. Biaz*, 41 Fed. 732 (1890), *aff'd*, *In Re Baiz*, 135 U.S. 403 (1890).

³² See *infra* § V., B.

³³ See VCCR, *supra* note 1, Art. 17.1.

³⁴ See VCCR, *supra* note 1, Preamble. See also *Juan Ysmael & Co. v. S.S. Tasikmalaja*, 1952 Hong Kong L. Reports 242, 288 (Adm. Jurisdiction), 1952 I.L.R. Case no. 94.

³⁵ See L.T. LEE, *supra* note 13, at 174.

³⁶ International custom established the French term after the better known *Corps Diplomatique*, Diplomatic Corps. Frequently, a Corps is presided over by a "Dean," who, as in the Diplomatic Corps, should be the highest ranking *career* consul. The Dean is merely a ceremonial figurehead, who does not preside over a legal entity.

officers, charge dues, or perform other association-like functions. Therefore, a corps is a body *sui generis*, lacking independent legal standing.³⁷ It cannot be broken up or abolished by one of its members or by government action; it ceases to exist only if the number of consuls at one location falls below two.³⁸ In at least one U.S. state, there are examples of a corps electing to incorporate, similar to a business corporation, with an elected president and other officers. Such a group may very well be considered to have voluntarily assumed liability, by the sole act of incorporating, to the same extent as any other corporation in that state.

The VCCR does not include reference to a Consular Corps or a Dean. Membership is derived solely by consular status *ipso facto*, and not by choice or vote. A consul who fails to remit dues or attend meetings remains just as much a member of the corps in a legal sense as the colleague who timely submits dues and never misses a function. The corps, however, may rightfully exclude the "delinquent" consul from its mailings and other ceremonial activities, which may be contingent upon payment of dues or other obligations. While there is no precedent for holding a Consular Corps responsible for the actions of one of its members acting in the name of the corps, legal writers contend that action by the corps does not bind individual members.³⁹ Even if the action of an individual member were imputed to the corps, this body probably would be immune to prosecution, for it lacks legal personality. A consul who enters a contract on behalf of the corps, however, is not immune from liability, as such an act is not an official consular function.⁴⁰ Thus, legal recourse is available against the individual consul engaging in a non-official consular function, but not against the corps.

V. CONSULAR IMMUNITY

A. General

As a general principle, diplomats enjoy absolute civil and criminal immunity in the receiving state. Jurisdictional immunity for consuls, however, is by no means absolute; rather, it is directly related to the functions they perform, and is not easily or briefly defined. The reasoning behind *consular* inviolability has customarily been that consular functions would be impeded if

³⁷ M. GAMBOA, *ELEMENTS OF DIPLOMATIC AND CONSULAR PRACTICE, A GLOSSARY* 69 (1966); G.E. SILVA, *DIPLOMACY IN INTERNATIONAL LAW* 163 (1972).

³⁸ Since the French term refers to a body of people it presupposes a plurality of members, not one singular. Webster's dictionary concurs.

³⁹ See B. SEN, *supra* note 10, at 54; M. GAMBOA, *supra* note 37, at 69.

⁴⁰ For a discussion of the functional immunity of consuls, see *infra* § V., B.

a consul were to become subject to the jurisdiction of the receiving state.⁴¹ In discharging his consular functions, a consul acts on behalf of his appointing or sending state, which cannot be sued for its sovereign acts.⁴² The two traditional types of consular immunity that have been universally recognized for both career and honorary consuls, and that have been adopted by the VCCR,⁴³ are: (a) inviolability of consular archives and documents, and (b) immunity for acts performed in the exercise of consular functions.

Consular archives and documents belonging to an *honorary* consul must be kept separate from the consul's personal materials in order to be inviolable. If the consul is a *career* officer, however, his archives may not be entered even with a search warrant.⁴⁴ An exception to this general rule occurs in case of fire or a similar emergency, where consent is presumed and the premises may be entered.⁴⁵ Consular immunity for acts performed in the exercise of *consular functions* is a more complex issue and is separately considered below.

B. Functional Immunity

The VCCR clearly exempts honorary and career consuls from jurisdiction with respect to their official functions.⁴⁶ Although consular functions are enumerated in Art. 5,⁴⁷ however, the list is not comprehensive. Furthermore, the history behind the list reveals much discord.⁴⁸ The enumerated functions are grouped into separate paragraphs according to their character, with the last group encompassing "any other functions" to which the receiving state does not object. This objection clause is an important consideration - especially for practitioners - whenever a consul claims functional immunity from actions arising out of automobile torts.⁴⁹ When determining what is an official act, the

⁴¹ Analogously, the VCDR states in its Preamble that the purpose of diplomatic immunities is to ensure the efficient performance of diplomatic functions. For a definition of *consular functions*, see *infra* § V., B.

⁴² See *infra* note 91 and accompanying text for a further exploration of the doctrine of *sovereign immunity*.

⁴³ See VCCR, *supra* note 1, Art. 43.1, 61.

⁴⁴ See VCCR, *supra* note 1, Art. 33.

⁴⁵ See L.T. LEE, *supra* note 13, at 88-89.

⁴⁶ See VCCR, *supra* note 1, Arts. 43.1 and 58.2.

⁴⁷ See VCCR, *supra* note 1, Art. 5. Cf. VCDR, *supra* note 1, Art. 3, which lists diplomatic functions. Generally speaking, the functions of a diplomat are more political in nature, while those of a consul relate to trade and notarial functions.

⁴⁸ See *U.N. Conference on Consular Relations*, *supra* note 13, at 124-136, 139-166.

⁴⁹ See the discussion *infra* § V., C. The Department of State specifically holds that the operation of a consular vehicle is not an official function.

court will look closely to the function performed by the consul,⁵⁰ and, if necessary, will consult on the issue with the Department of State.⁵¹ The prevailing presumption is that criminal acts are outside the definition of consular functions and outside the VCCR.⁵²

Although the courts frequently defer to the political executive branch in determining what constitutes functional immunity,⁵³ the general principle is that a consul does not enjoy *absolute* immunity, and, therefore, must plead and prove his official acts immunity.⁵⁴ In principle, there is no distinction between the functional immunity of honorary and career consuls. But the demarcation between the *private* and *official* functions of an honorary consul is frequently quite blurred.⁵⁵ Moreover, even with career consuls the courts have found it difficult to define an official function. In at least one case, the court used the common law principle of *agency* to analyze whether a consular act was an official function, although the ruling on immunity was not based on that principle but on the VCCR provisions relating to consular functions.⁵⁶ Also, while an act of libel has been held not to be a consular function, generating adverse publicity against a foreign government has.⁵⁷ In this regard, whenever a consular act constitutes interference with the internal affairs of the United States, it is not an official consular act.⁵⁸

C. Private Acts of Consul

⁵⁰ See, e.g., *Commonwealth v. Jerez*, 457 N.E.2d 1105 (Mass. 1983); *Arcaya v. Paez*, 145 F. Supp. 464 (S.D.N.Y. 1956), *aff'd*, 244 F.2d 958 (2nd Cir. 1957).

⁵¹ The State Department may determine what constitutes an official act. See RESTATEMENT, *supra* note 22, at § 465, *reporters' notes*, 1. But see *Koeppel & Koeppel v. Federal Republic of Nigeria*, 704 F. Supp. 521 (S.D.N.Y. 1989), where the State Department specifically advised the Court it would not offer an opinion but left it to the Court having subject matter jurisdiction.

⁵² See VCCR, *supra* note 1, Art. 55(1), which requires all consuls to respect the laws of the receiving state. See also *Risk v. Kingdom of Norway*, 936 F.2d 393 (9th Cir. 1991).

⁵³ See *infra* note 62.

⁵⁴ See RESTATEMENT, *supra* note 22, § 465 comment a. See also *United States v. Wilburn* 497 F.2d 946 (5th Cir. 1974).

⁵⁵ See *State v. Killeen*, 39 Or. App. 365, 592 P.2d 268 (Ct. App. 1979). This ambiguity is most evident in matters of social etiquette and protocol. For example, how should a travel agent who is an honorary consul be introduced at a travel industry event? The answer lies in what *function* such a person performs at the assembly. In case of tortious conduct, the court would find it difficult to determine whether the consul was performing a function under Article 5 of the VCCR, or tending to a private, professional duty. Since career consuls are not permitted to be gainfully employed (VCCR, Art. 57.1), this situation does not occur with them.

⁵⁶ See *Commonwealth v. Jerez*, 390 Mass. 456, 457 N.E.2d 1105 (1983).

⁵⁷ See *Heaney v. Government of Spain*, 445 F.2d 501 (2nd Cir. 1971) and *Arcaya v. Paez*, 145 F.Supp. 464 (S.D.N.Y. 1956), *aff'd*, 244 F.2d 958 (2nd Cir. 1957).

⁵⁸ See *Gerritsen v. de la Madrid-Hurtado*, 819 F.2d 1511 (9th Cir. 1987).

Specifically excluded from the functional immunity doctrine are civil actions arising out of a contract into which the consul did not expressly enter as an agent of the sending state,⁵⁹ or civil actions initiated by third parties for damages arising from an accident caused by a vehicle, vessel or aircraft.⁶⁰ Although the VCCR specifically excluded traffic violations from the official acts immunity to which consuls are entitled, much case law has evolved around this issue. As may be expected, consuls have asserted functional immunity when being charged with moving violations.⁶¹ The Department of State, however, has assumed the position, consistent with the VCCR, that the operation of an automobile is not an official function, and the courts have followed the Department's determination.⁶² Nevertheless, serious jurisdictional problems,⁶³ and generous courtesy considerations in communities across the United States, have resulted in consuls enjoying the privilege of not being charged in many otherwise culpable traffic violations.⁶⁴

D. Consular Torts.

While the VCCR clearly establishes consular *civil liability* in contract disputes and automobile torts,⁶⁵ it also distinguishes civil from criminal liability. Art. 41.1 (the functional immunity provision) exempts both honorary and career consuls from local jurisdiction over acts performed within the scope of their official functions. Art. 43.1, however, exempts only *career* consuls from local jurisdiction over their criminal acts, unless the crime is perceived as grave. The apparent conflict between these two provisions is highlighted by the VCCR's failure to establish how the gravity of a crime is to be determined. In fact, the history behind the provisions' passage shows great concern among the

⁵⁹ See, e.g., *Hannes v. Kingdom of Rom. Monopolies Inst.*, 260 A. D. 189, 20 N.Y.S.2d 825 (1940). See also VCCR, *supra* note 1, Art. 57.1. But see *Heaney v. Gov't. of Spain*, 445 F.2d 501 (1971) where a consular action to contract for generating adverse publicity against another foreign government was held to be an official consular function.

⁶⁰ See VCCR, *supra* note 1, Art. 43.

⁶¹ Since passage of the Diplomatic Relations Act of 1978, *supra* note 1, pursuant to § 1364, career consuls must obtain automobile insurance as a pre-requisite for registering motor vehicles, and injured citizens are allowed to proceed directly against the insurer.

⁶² See, e.g., *State v. Killeen*, 39 Or. App. 365, 592 P.2d 268 (Ct. App.1979); *Anderson v. Villela*, 210 F. Supp. 791 (D. Mass. 1962)

⁶³ See "Jurisdiction," *infra* § V., E.

⁶⁴ See, e.g., Metro-Dade Police Department, *Florida Law Enforcement Handbook* 2-3 (1990). See also GUIDANCE FOR LAW ENFORCEMENT OFFICERS, *supra* note 21, at 1. In 1987 two bills were pending in Congress for severely limiting diplomatic and consular immunities. (S. 339 and S. 1437, 100th Cong., 1st Sess., 133 Cong. Rec. S. 8876-77 (1987)). Neither of these were subsequently enacted but they surely reflect a growing trend in Congressional and public opinion. See Beck, *Amending Diplomatic Immunity: Recent Congressional Proposals*, XII I.L.S.A. J. INT'L L. 117 (1988).

⁶⁵ See VCCR, *supra* note 1, Art. 43.2(b).

delegates of the various nations.⁶⁶ In the United States, for example, state jurisdictions have interpreted the word "grave" quite inconsistently.⁶⁷ Thus, practitioners should carefully consider this conflict before making a decision on how to approach the issue of liability. In any event, when criminal proceedings are instituted against an honorary consul, care should be taken to treat him with respect and with a minimum of delay.⁶⁸ If the consul is a *career* officer, he should be treated with due respect while all appropriate steps must be taken to prevent any attack on his person, freedom or dignity.⁶⁹

In actions arising out of other tortious acts, consuls have invoked immunity under the Foreign Sovereign Immunities Act (FSIA),⁷⁰ and the case law that has developed from such invocations is somewhat confusing. In principle, it is possible to construe an agency relationship between a consul and his sending state, and thus extend the sovereign immunity of the state to the consul. After all, a consul performing an official function acts on behalf of his sending or appointing government. Nevertheless, an exception to the rule of sovereign immunity has allowed plaintiffs to prevail in suits against consuls seeking the protection of the FSIA. This has been particularly the case in personal injury actions for damages caused by the acts or omissions of a state, or of one of its officials acting within the scope of his office or employment.⁷¹ In at least one case, however, an assault action has been dismissed against a foreign state based on the application, by analogy, of provisions of the Federal Tort Claims Act⁷² to the FSIA in determining the scope of the consul's official functions.⁷³ In that case, the court went so far as to admit deference to the political branch in its determination of certain immunities to foreign states and their representatives. The court even suggested diplomatic recourse with the ultimate remedy, a declaration of *persona non grata*.⁷⁴

E. Waiver of Immunity

⁶⁶ See U.N. Conference on Consular Relations, *supra* note 13, at 359-376.

⁶⁷ Sometimes "grave" corresponds to a felony, at other times to a misdemeanor. See RESTATEMENT, *supra* note 22, § 465 comment c. See also L.T. LEE, *supra* note 13, at 130-131. The RESTATEMENT raises the question of a serious traffic offense, such as driving while intoxicated, but notes that the requirement for a blood or breath test of a career consul may require a "decision of a competent judicial authority" in keeping with the VCCR, Art. 41.1.

⁶⁸ See VCCR, *supra* note 1, Art. 63.

⁶⁹ See VCCR, *supra* note 1, Art. 40. See also *Frend v. U.S.*, 100 F.2d 69 (D.C. 1938).

⁷⁰ 90 Stat. 2891, 28 U.S.C. § 1330, 1332, 1391, 1441, 1602-1611 (1976) (hereinafter "FSIA"). See also § V., G, *infra*.

⁷¹ See FSIA, 28 U.S.C.A. § 1605(a)(5).

⁷² 28 U.S.C. § 2674.

⁷³ See *Skeen v. Fed. Rep. of Brazil*, 566 F. Supp. 1414, 1417 (D.C. 1983).

⁷⁴ See *infra* § V., H.

Although a consul may be comfortable with hiding behind the shield of functional immunity, the receiving state may request that his immunity be waived. The right of a State to waive the immunity of its consular representatives, without their consent, is based on the theory that the immunity is not attached to the person, but rather that it is merely a functional necessity.⁷⁵ Under this theory, a consul cannot waive his immunity without the consent of his sending or appointing state.⁷⁶ The United States, for example, will waive the immunity of one of its consuls only under carefully controlled circumstances so as not to erode the principle of immunity. The goal is always to promote notions of comity among nations by enforcing respect for the internal procedures of the foreign courts.⁷⁷ The waiver must be express and may waive either consular functional immunity or the personal inviolability of career consuls in criminal matters.⁷⁸ Because of its internal and political nature, a waiver of immunity is a nonjusticiable question. If immunity is waived in the first instance, it cannot be pleaded later, such as during an appeal.⁷⁹ Likewise, if a consul initiates proceedings, he cannot plead immunity to related counterclaims.⁸⁰

F. Jurisdiction

The U.S. Constitution extends federal judicial power to cases affecting consuls and grants the Supreme Court original jurisdiction to hear those cases.⁸¹ This jurisdiction has been held to be original but not exclusive.⁸² Title 28, U.S.C. § 1351 grants original jurisdiction to the federal district courts in all civil⁸³ actions and proceedings against consuls or vice consuls.⁸⁴

⁷⁵ See, e.g., *Flynn v. Shultz*, 748 F.2d 1186 (7th Cir. 1984); *U.S. v. Arizti*, 229 F.Supp. 53 (S.D.N.Y. 1964).

⁷⁶ See RESTATEMENT, *supra* note 22, § 464 comment j. But see *Wacker v. Bisson*, 348 F.2d 602 (5th Cir. 1965), where the consul waived his own and his government's immunity. This holding is, however, pre-Convention.

⁷⁷ See, e.g., *Flynn v. Shultz*, *supra* note 75.

⁷⁸ See VCCR, *supra* note 1, Art. 45.1, and Arts. 43 and 41, respectively.

⁷⁹ See, e.g., *Wacker v. Bisson*, 348 F.2d 602 (5th Cir. 1965).

⁸⁰ G.V. MCCLANAHAN, *DIPLOMATIC IMMUNITY: PRINCIPLES, PRACTICES, PROBLEMS* 137 (1989).

⁸¹ US Const. Art. III, § 2.

⁸² See, e.g., *Illinois Commerce Comm'n v. Salame*, *supra* note 30.

⁸³ A state court cannot claim jurisdiction of civil actions against a consul who brought suit in his official capacity. See *Kita v. Matuszak*, 21 Mich. App. 421, 175 N.W. 2d 551 (1970).

⁸⁴ It is the author's opinion that the Code incorrectly limits the provision to "consuls and vice consuls" when, in fact, the Congressional intent is to refer to the generic *consul*, regardless of class.

Families of consuls, however, are not included.⁸⁵ Courts have long made exceptions to the constitutional adjudicatory authority in, *inter alia*, matters relating to domestic relations.⁸⁶ Specifically, state courts have retained jurisdiction over traffic and parking violations, notwithstanding the objections of consuls who vainly claim exemption from state jurisdiction based on their official status.⁸⁷ Practitioners should bear in mind that federal pleading rules require an invocation of jurisdiction in the complaint.⁸⁸ Federal courts have also made it clear that once federal jurisdiction is retained in a specific case, state courts need not and should not consider issues going to the merits of the case.⁸⁹

G. Sovereign Immunity

Since a consul may specifically be an agent for his appointing government in some actions,⁹⁰ particularly in those contract matters involving real estate transactions, brief mention must be made of the doctrine of *sovereign immunity*,⁹¹ according to which a foreign state cannot be sued in the courts of other nations without its consent. This classical doctrine, as expressed in *The Schooner Exchange v. M'Faddon*,⁹² recognized the equality of states while waiving jurisdiction over the representatives of the sending state when on the territory of the receiving state. The United States eliminated this absolute principle in 1952.⁹³ The principle was further modified by the VCCR, and by the FSIA,⁹⁴ which subjects foreign nations, or their agents, to law suits

⁸⁵ See *Anderson v. Villela*, 210 F. Supp 791 (D. Mass. 1962). But since the amendment of § 1351, state courts are not denied jurisdiction to enforce state criminal laws against consular families, where existing law does not immunize such persons from the criminal jurisdiction of the United States. See *RESTATEMENT*, *supra* note 22, § 465 *reporters' notes* 12.

⁸⁶ See *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379 (1930), *cert. granted*, 279 U.S. 828 (1929). This case is heavily applied in *Silva v. Superior Court*, 52 Cal. App. 3d 269, 125 Cal.Rptr. 78 (Cal. Ct. App. 1975), which held that since federal courts could not try persons for violations of state law, § 1351 did not bar such trials in state courts. See also *Foxgord v. Hischemoeller*, 820 F.2d 1030 (9th Cir. 1987).

⁸⁷ See, e.g., *State v. Killeen*, 39 Or. App. 369; 592 P.2d 268 (1979); *Anderson v. Villela*, 210 F.Supp. 791 (D.Mass. 1962); *Bliss v. Nicolaeff*, 79 N.Y.S.2d 63 (1948). See also § V., C., *supra*. But see *Kita v. Matuszak*, 21 Mich. App. 421, 175 N.W.2d 551 (1970).

⁸⁸ See Fed. R. Civ. P. 8(a).

⁸⁹ See *Lacks v. Fahmi*, 623 F.2d 254 (2nd Cir. 1980).

⁹⁰ But a consul is not an agent of his government for the purpose of receiving service of process. See *Purdy Co. v. Argentina*, 333 F.2d 95 (7th Cir. 1964), *cert. denied*, 379 U.S. 962 (1965).

⁹¹ For a recent judicial discussion of this concept, see *Republic of Philippines v. Marcos*, 665 F.Supp. 793 (N.D. Cal. 1987).

⁹² 11 U.S. 116 (1812).

⁹³ See the so-called Tate Letter, 26 Dept. of State Bull. 984 (1952).

⁹⁴ See *supra* note 70.

initiated against them in state and federal courts based on their commercial or private acts. It has been said that this act was a congressional attempt to make the issue of sovereign immunity a legal, rather than political question,⁹⁵ although there seems to be no uniform rule. In 1982, the executive branch instituted an action apparently seeking to influence the judiciary for political reasons,⁹⁶ although there was no indication that the Executive's conduct of foreign affairs would have been jeopardized by the decision.⁹⁷

The doctrine of sovereign immunity, however, is not as clear-cut as may initially appear. For instance, in one case, the court clearly confused sovereign immunity with consular functional immunity.⁹⁸ In another, a land-lord was successful in an action against a foreign government, perhaps because sovereign immunity was not pleaded.⁹⁹

H. Recourse

While a defendant's claims of sovereign or consular/functional immunities may bar a plaintiff from receiving satisfaction by the courts, a long-standing international custom does provide for two kinds of recourse: a) declaration of *persona non grata*,¹⁰⁰ and b) diplomatic protest.

The receiving state may at any time notify the sending state that a consular officer has been declared a *persona non grata*, which means that he has become unacceptable and may no longer function as a consul in the receiving state.¹⁰¹ The sending state may either recall the person concerned, or terminate his functions with the consular post. Should this request not be fulfilled within a reasonable time, the receiving state may withdraw the *exequatur* from the consul, or simply cease to consider him as a member of the consular staff. No reasons have to be given for this action. The *travaux préparatoires* of the VCCR show that there had been a proposal for the insertion of a "serious grounds" requirement as a precondition to the declaration of

⁹⁵ See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945), where the court abided by a "suggestion" filed by the State Department. See also P. Jannaco, *An Erosion of Judicial Authority in Granting Foreign Sovereign Immunity*, 9 BROOKLYN J. OF INT'L L. 432, 447 (1983); *Republic of Philippines v. Marcos*, *supra* note 91.

⁹⁶ See *United States v. Arlington*, 669 F. 2d 925 (4th Cir. 1982).

⁹⁷ See Halberstam, *Sabbatino Resurrected: The Act of State Doctrine in the Revised Restatement of U.S. Foreign Relations Law*, 79 AM. J. INT'L L. 68, 77, n.41 (1985).

⁹⁸ See *Waltier v. Thomson*, 189 F. Supp. 319 (1960).

⁹⁹ See *In re Bramalea Limited*, unpubl. opinion, Sup.Ct. of State of N.Y., Cty. of N.Y. (Index # 13537/83, Aug. 5, 1983), *aff'd*, 107 A.D.2d 1091 (1985).

¹⁰⁰ Through the VCCR, the formerly diplomatic-only term of *persona non grata* was first introduced into consular law.

¹⁰¹ See VCCR, *supra* note 1, Art. 23.

persona non grata.¹⁰² This proposal was not adopted, which seems to indicate that the text of the VCCR intended to leave full discretionary powers with the sending state. Furthermore, the decision includes purely political motives, since no reason has to be given by the disapproving state.

Normal recourse may also be had after consular immunities expire and the consul charged returns to the United States in a private unofficial capacity. A protest is handled through diplomatic, not consular, channels from one government to the other. The ultimate sanction is the severance of diplomatic and/or consular relations.¹⁰³ In at least one case, the Court went so far as to suggest a diplomatic action as the only recourse for the losing side.¹⁰⁴

VI. CONCLUSION

The first step in our hypothetical would be for counsel to informally establish whether the consul at issue has a career or honorary status. Does it matter if the consul presents a diplomatic passport or that he was in a borrowed car? Regardless of the outcome of the status issue, the plaintiff is likely to prevail in the contract and tort actions against the consul. If the functional immunity defense is invoked, it must be asserted in court.

Unfortunately, there is no available case law, domestic or international, relating to a body such as the Consular Corps. If responsibility could somehow be imputed by reason of a respondeat superior relationship, the fact that the Dean is the highest ranking career officer, and hence subject to broader immunities than honorary consuls, still does not affect the exception rule in civil actions involving contracts. If the defendant consul implied that he was acting as an agent for the state he represents, the issue of sovereign immunity might arise. In that case, counsel needs to consider the commercial activity and noncommercial tort exceptions of the FSIA.¹⁰⁵ This may be influenced by a bi-lateral consular treaty between the United States and the consul's state. But what if the United States has recently severed diplomatic relations with the consul's country, or if the consul's country is not a signatory to the VCCR, or if it has signed but never ratified the VCCR? Does it make a difference if the consul admits that he had a criminal intent when he damaged your client's car? It is quite clear that today's practitioner may well be confronted with issues such as those outlined above, which touch upon not only domestic but also

¹⁰² See U.N. Conference on Consular Relations, *supra* note 13, at 209.

¹⁰³ See Farahmand, *Diplomatic Immunity and Diplomatic Crime: A Legislative Proposal to Curtail Abuses*, 16 J. OF LEGISL. 89, 105 (1989).

¹⁰⁴ See *Skeen v. Federative Republic of Brazil*, 566 F. Supp. 1414 (D.C. 1983).

¹⁰⁵ See 28 U.S.C. §§ 1604, 1605(a)(2). See also *Schoenberg v. Exportadora de Sal*, 930 F.2d 777 (9th Cir. 1991); *Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.C. 1980).

international law. Groups of foreign consular officials are very much in evidence across the United States, and private citizens are awakening to the myriad of legal confrontations a consular presence entails. Practitioners can no longer be excused for an attitude of ignorance towards the status of foreign consuls.

Our hypothetical raised a great variety of issues. To be able to deal with those issues, counsel must not only be knowledgeable in federal and state law, as it pertains to foreign consuls, but also in international law, as it is reflected in the VCCR and any other bi-national or consular treaty between the United States and the state represented by the consul. Additionally, customary international law,¹⁰⁶ comity and reciprocity are areas with which counsel must be familiar. The age-old argument that there is no such concept as "international law" is no longer appropriate.¹⁰⁷ Moreover, since international courts often lack compulsory jurisdiction, domestic courts, and hence practitioners, play a significant role in the interpretation and development of consular law.¹⁰⁸

Although the VCCR is not a supernational law, it does express the generally prevailing rules observed by the world community in their consular intercourse. The practice of concluding bi-national consular treaties, however, continues, and some of these treaties grant more immunities to consuls than the VCCR does. In no case must treaty provisions be read in separate increments; they must be read together with other pertinent provisions and in the light of their passage.

Unfortunately for practitioners and the judiciary, there are few U.S. precedents in the consular field in general, and both literature and case law are particularly striking in their lack of the study of *honorary* consuls, notwithstanding that the presence of honorary consuls in the United States seems to be growing. This means that parallels have to be drawn between diplomatic and consular immunities both in the United States and abroad. The fact that consular law includes confusing and erroneous terminology has done little to bring clarity and consistency of treatment to this very important area of a country's foreign relations. This is where today's practitioner has an important role to play.

¹⁰⁶ The Preamble of the VCCR specifically provides for customary law to govern matters not expressly regulated by the provisions of the Convention.

¹⁰⁷ See Jennings, *An International Lawyer Takes Stock*, 1 U. MIAMI Y.B. INT'L LAW 1, 16 (1991)(*supra* this volume).

¹⁰⁸ The landmark case on international law being administered by U.S. courts, when appropriate, is *The Paquete Habana*, 175 U.S. 677, 20 S.Ct. 290 (1900).