

Consular Diplomacy:

A Conceptual Framework for Analysis and Decision-making

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DECLARATION

I hereby declare that this dissertation is my own original work.

Signed:

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I started this dissertation because of a practical problem that I faced doing consular work. I found that there is general agreement about the importance of consular services in contemporary diplomacy, yet no one seemed to have attempted to place the consular institution clearly within diplomacy. This is a modest attempt to find some common meaning to the role of the relatively underappreciated and mundane, but important duties that consuls perform.

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ABSTRACT

This dissertation explores the consular functions performed in three developed countries and draws from that data to develop a conceptual framework for decision making and analysis of consular affairs. The paper examines the historical evolution of consular functions and the problems of defining consular functions on a universal basis. The findings of this research initially define the categories of consular services performed in contemporary diplomacy, and subsequently, conceptualises how each function may become relatively more important to a nation state. Among the important finding of this research are the distinct differences in the nature of consular functions related to ‘protection’, ‘documentary’, and ‘border control’ services. This paper argues that the scope of consular work is in fact broader than ‘protection’ of nationals abroad. Moreover, the paper highlights the inherent theoretical conflicts between representing individual interests and national interest while performing these multifarious functions, and moreover, how this conflict may not only lead to rifts between consuls and diplomats, but also how consular immunity may be the target of promoting strategic interests in times of conflict. In conclusion, the dissertation argues that the importance given by any state to enhance and broaden the consular institution is indicative of the value it places on its own nationals, thereby signalling the value it places on its national identity. The consular function thus becomes a window through which a state projects its ‘nationhood’ in competition with rival identities and interests in the nation-state system.

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Chapter 1: INTRODUCTION

In 1856, the British Consul at Para, Samuel Vines, described the office of a consul as,

“...one *sui generis*, and perfection in it is to be obtained by practical experience alone; within its spheres it includes many of the duties of the Statesman, the Magistrate, the Lawyer, the Notary, the Merchant, the Accountant, the Geologist, the Naturalist, the Linguist and indeed the man of Science generally, it demands a clearness of head, a determination of mind, and a prudence of action, greater perhaps than in any other profession...” (Vines to Clarendon, 15 November 1856 cited in Platt, 1963, p. 494)

In 1949, after centuries of consular relations among societies and nations, the then UN Secretary-General Trygve Lie noted that “in view of the continual expansion of international trade, the legal position and functions of consuls should be regulated on as universal a basis as possible” (cited in Lee, 1991, p. 23). This task of codifying the consular customs and practices was designated to the International Law Commission which worked on a draft provisional article submitted to the General Assembly (GA) in 1962. The GA decided to convene the United Nations Conference on Consular Relations from 4 March to 22 April 1963. The outcome of the Conference was the Vienna Convention on Consular Relations (VCCR) containing 79 Articles¹ (Lee, 1991). The VCCR of 1963 was a historic agreement in that it codified centuries old customary consular laws and practices that characterize the modes of engagement between peoples of different cultural backgrounds. It was an agreement reached between, small, large, old and new states within a significantly small timeframe, setting the stage for consular law and practice on a more universal basis. To this day, the VCCR remains the fundamental treaty that governs the way that states exercise authority over their nationals abroad.

In spite of the consular institutions broader functions in diplomacy, and despite its relevance to international relations and foreign policy making, the consular institution has

¹ Together with the convention, the VCCR contains three optional protocols concerning Acquisition of Nationality, Settlement of Disputes and the Final Act

traditionally been a greatly neglected field both in International Relations (IR)² and in practice. There is, however, renewed interest in the consular institution which can be mainly attributed to questions of prioritizing consular issues in a ‘borderless’ world. Only this time, the interest resurfaced with the expansion of international travel rather than trade, leading to efforts to control national borders. In many countries, the change in consular institution has been however driven by public scrutiny of foreign ministries’ handling of consular issues rather than a universal concern over the direction of the consular affairs among states. Nonetheless, the newfound interest, from both practitioners and academics, has led to a rethinking of the consular institution within foreign policy frameworks in many developed countries. These internal changes have been predominantly observed in European Union member countries as the region becomes more integrated.

However, the surge in international travel and scrutiny of foreign ministries is not confined to that region alone: Foreign ministries across the globe have found a new interest in ‘consular diplomacy’ as a ‘soft’ form of diplomacy that widens a government’s reach to its nationals. In this new landscape, the role of the consul has arguably become just as important, if not more than the diplomat: Consuls who have been historically treated as a “sidekick to the diplomat”, serving under what has been called the ‘Cinderella Service’ of most foreign ministries, now find themselves playing the role of diplomat, and vice versa, diplomats too are being tasked with functions of the consul (Leira and Neumann, 2008, p. 4; Platt, 1971). The change in the consul’s role has meant that the various functions that consuls perform are sometimes beyond what is widely believed to be the primary functions of assisting and protecting nationals abroad. Consuls may not perform all the traditional duties that Samuel Vines described, but contemporary consular work encompasses functions of similar nature which might take the shape of the “Geologist” (for example, as the coordinator when disaster strikes) or the “Linguist” (for example, when a national needs a ‘sympathetic’ voice while aboard).

² Following contemporary practice, capital letters denote the academic field, and lower case denotes the phenomenon of international relations itself.

The modern day definition of the consular function as that of ‘assistance and protection’ has two origins: functions inherited from the duties performed by early consuls since ancient times; and functions that have stemmed from continuous redefinitions of consular institutions since the birth of nation-states in 1648. Although new studies help understand these functions, (since the VCCR), there has been little progress in finding a broader meaning of consular institution on a more universal basis. In other words, the VCCR may have established the legal position of consular *profession*, but there are several unanswered questions over what consular functions are and what importance it is to the state. The recent literature largely focuses, on the one hand, addressing particular consular issues of particular countries that are unique to each state and consular post. On the other hand, the literature records specific consular services provided by some states in the interest of examining the components that form the consular function in the foreign ministry (such as migration issues, visa diplomacy and emergency assistance). Moreover, the recent literature mostly draws on the experiences of reforming the consular institution undertaken as part of modernizing foreign services and foreign policy in individual foreign ministries, especially in European contexts. Hence, the literature largely focuses on narrow contexts, on particular foreign ministries’ attempting to understand what specific consular institution means a given country’s context.

In states that emerged after the Second World War, a history of diplomatic or consular institution structures did not exist. Nonetheless, many newly emerging nations have adapted the Western model of resident embassies and consulates in the spirit of the VCCR and its predecessor treaty, Vienna Convention on Diplomatic Relations (VCDR) of 1961. Whilst the model has worked for many countries, it has always been a challenge to understand what consular institution means under an international system dominated by state-to-state relations. The result is that questions still remain over whether consular institution is important at all in foreign policy. And even if this question is answered, it is not clear to what extent consular work is important for nations of different sizes and interests. These questions concern foreign policy makers in all foreign ministries as decision making about political, economic and consular matters

are interlinked to a great degree. In individual countries, consular affairs are no longer overseen just by the foreign ministry, since the nature of the consular function needs attention from other government agencies including enforcement and judicial authorities especially with relevance to cross border issues such as crime.

Consequently, one of the shortcomings of the literature and a challenge to practitioners has always been to explain the consular institution within the framework of IR and foreign policy decision-making at a theoretical level. This is particularly an important question for foreign policy decision making and analysis in smaller states or developing countries. These states have limited resources to expand their network of overseas representation. Hence, they face considerable challenge in establishing and maintaining diplomatic and consular representation overseas, in an efficient manner (Mohamed, 2002). The consular profession is still a profession where responsibilities change as and when duty calls, and in practice, the consul may be tasked with a variety of functions. Samuel Vines's portrayal of the consul as a multitasking professional still remains true to this day, but it is questionable whether these varying roles are equally applicable to consular institutions in every nation.

This paper argues that the lack of a clear theoretical framework to explain consular institution within IR hinders further knowledge of the subject and produces poor understanding of the extant literature on consular institution. The research attempted to address the following objectives:

1. Develop a conceptual framework that can help explain consular services and its relationship to the study of IR.
2. Develop a practical and meaningful conceptual framework to describe the existence and functioning of the consular institution among nations.

A conceptual framework attempts to encompass the various aspects of a phenomenon and its relationship with other phenomenon. In doing so, in this research the conceptual

framework attempts to find a standard meaning for the consular institution explaining its functions within the context of nation-states and international relations, regardless of the nation's size or power in international politics.

The research is significant since it comes at a time when consular institution is expanding to a great extent in many countries spurring new research among scholars of IR over the relevance of the institution in international relations. Unlike the extant research, this research treats the subject on a conceptual level. It is hoped that treating this subject at this level will help develop a robust theoretical framework which can be used in future empirical studies and also clarifies and elucidates areas in the literature that need further research. The research also provides a better insight to the consular institution that can have significant practical implications for foreign policy decisions and organisation of consular work within foreign ministries, especially with relevance to development and training of consular officers. An identification of universally acceptable meaning of consular diplomacy helps provide a common platform for discussion of consular relations among states.

The paper first describes the available literature on the history of the consular institution and its functions (Chapter 2). It then critiques the problems of codifying *legal positions* as opposed to codifying *functions*, in light of the nature of previous attempts that have been made to harmonise the concept of consular functions (Chapter 3). The paper then rationalises and explains the grounded research methodology used to arrive at the conceptual framework through gathering and analysing the consular functions both in the context of VCCR and practices of developed countries (Chapter 4). After that, the paper presents and discusses the results of the research answering what the meaning of consular functions in a contemporary sense (Chapter 5) and the importance of consular affairs to the state (Chapter 6).

Chapter 2: EVOLUTION OF THE CONSULAR INSTITUTION

The study of diplomacy both in the past and present remains mainly a Western phenomenon, a fact which poses some challenges to understanding the consular institution from a different regional or universal perspective (Manojlovic and Thorheim, 2007, p. 37). Even though the institution originated several centuries before its sister service of diplomacy, academic research on the consular institution has been fairly limited. Leira and Neumann (2008) noted two types of earlier research on the consular institution: Firstly, studies of the consular institution of particular countries as part of larger studies of International Relations (Leira and Neumann, 2008; Platt, 1971). Secondly, studies that concentrate on specific states providing sometimes rich accounts of how consuls developed relationships with the host societies and the effects that the consul had on those countries (For example Dickie, 2008; Jones, 2001; Jones-Bos and van Daalen, 2008; Leira and Neumann, 2008; Platt, 1971). Most of this literature focused on how the consular institution diminished in importance after the birth of the Westphalian nation-states and the emergence of diplomats, focussing on issues of how consular tasks remained subordinate to diplomatic tasks within the foreign ministry.³ At most, the literature compared the consular institutions of two countries, giving an account of how mercantile trade was a driving force for the origins of the institution. The relatively recent literature on the topic focuses on the changes diplomacy is undergoing and how consular functions are incorporated into foreign policy through concepts such as ‘consular diplomacy’.

Literature provides various historical accounts explaining how consular tasks came into being and the emergence of the concept of consuls from its ancient form to its evolution to modern sense over time. Generally, the literature depicts a history of the consular institution

³ Thus, earning the common term of ‘Cinderella service’ as Platt (1971) called it.

where it was gradually stripped of each of its historical functions with the emergence of the diplomat. This chapter first describes what the available literature tells us about the history of the consular institution in Europe and the Mediterranean revealing how the different tasks that are now considered ‘consular’ originated. The chapter then analyses the changes to these historical function in light of recent developments in international travel, public sector reform and regional integration.

1. Prostates and proxenos of Ancient Greece to the consuls of Rome

The concept of consul is usually traced back to Ancient Greek city-states where officials named the *prostates* and the *proxenos* emerged before the advent of the states system (Heijmans and Melissen, 2006; Lee, 1991). The *prostates* were people chosen by Greek colonists who lived in cities abroad to act as intermediaries in legal and political relations between Greek colonists and the local authorities who recognised the position of *prostates* (Lee, 1991). For example, starting from the sixth century BC, ancient Egyptians allowed the Greek settlers at Naucratis to appoint *prostates* to administer Greek law among the Greek settlers in Egypt (Lee, 1991). And later, during the first millennium BC, the *proxenos* were appointed in Ancient Greece to represent the interests of Greece in the Greek city-states (Lee, 1991). The appointment of the *proxenos* was similar to the present system of appointing honorary consuls, where a national from the receiving State is selected to represent the interests of the sending State (Lee, 1991). *Proxenos*, however, did not represent commercial interests but their functions were more political in nature, involving assistance to Greek merchants in these ancient city-states both in official matters as well as those of personal affairs (Heijmans and Melissen, 2006; Lee, 1991).

The term ‘consul’ stems from the Roman Republic’s two chief civil and military magistrates created in 242 BC under the *praetor peregrinus* to judge disputes involving foreigners or disputes between foreigners and Roman citizens (Lee, 1991). The Roman Republic tried such

cases under what they called the *jus gentium*, or the law of nations, that integrated both the foreign laws and customary trade practices (Lee, 1991). The Roman consuls were at first elected magistrates but were later nominated by the Emperor (Lee, 1991). After the fall of the Roman Empire in 476 AD, the title of consul was given to special magistrates who exercised jurisdiction over semi-autonomous foreign commercial colonies which had been earlier settled in the Byzantine Empire (Lee, 1991). The phenomenon did not only appear in the West, but it also appeared in ancient China, where the local authorities accepted that merchants from foreign countries should be “superintended by a head man who would take responsibility for his countrymen” (Professor John King Fairbank, cited in Lee, 1991, p. 6). Around the same time, similar institutions can be traced in parts of India (Lee, 1991). Scholarly research on such institutions has been relatively neglected focusing more on the origins of consular representation in non-Western ancient societies, specifically with the birth of trade in the Mediterranean during medieval times (Manojlovic and Thorheim, 2007).

2. ‘The Mercantile consul’

Consuls in the modern sense began to appear in medieval times (Heijmans and Melissen, 2006), when during and after the Crusades there was an increase in trade among those countries surrounding the Mediterranean (Lee, 1991; Platt, 1971). This early consul – sometimes referred to as ‘the Mercantile consul’ – was primarily an initiative of merchants themselves who frequently traded in a foreign country (Platt, 1971). Similar to the birth of Greek and Roman agents who performed consular functions, with expanding trade, there was a need to appoint ‘agents of commerce in a foreign land’ (Gibbon, cited in Platt, 1971, p. 5). For instance, merchants found it useful to elect a representative among themselves in Eastern countries to safeguard their interests in cases of conflict among themselves or with locals, involving their traders and seamen (Heijmans and Melissen, 2006; Platt, 1971), or to supervise their commerce and protect their interests (Lee, 1991, p. 5).

Thus, the emergence of the early consul in Europe was a ‘natural development’ (Platt, 1971, p. 5), as it had been in ancient times, when merchants found a need for *representatation* while living in a foreign land. In the absence of the state, the consul was *primus inter pares*⁴ among a “group of compatriots found in a ‘nation’ of the port”, (Leira and Neumann, 2008, pp. 1-2), serving and fulfilling the practical needs of a collective for internal jurisdiction and rights for self-organisation and representation. The ‘Merchantile consul’ functioned on the basis of the convenience of the system for the merchants as well as its convenience to the local polity (Platt, 1971). From the local authority’s perspective, the foreign merchants had a leader among themselves who was personally responsible for the regulation and good conduct of their nationals (Platt, 1971, p. 5). In terms of judicial autonomy, the system ensured that traders or seamen who broke the laws of the local polity were tried and sentenced by the foreign merchants themselves through their own judicial system. In part, these laws made it possible to override the problems of trying foreigners when confronted with alien systems of law based on ‘primitive’ practices or religious beliefs (Platt, 1971, p. 5).

During this early era (in the sixteenth to the mid seventeenth century) the predominant task of the consul was maritime affairs related to the regulation of seamen and ships at a time when piracy was common practice (Platt, 1971). Generally, the state had no interest or power in appointing the consuls since the consul’s authority to govern and assist the foreign merchants was based on the agreement between the local polity and the merchants themselves. In terms of tasks, this meant that in most cases the mercantile consul’s power to govern and assist extended to “how far the word govern may extend the merchants doubt: for the rest they find it reasonable” (Sir John Coke, British Secretary of State, 1631 quoted in Platt, 1971, p. 6). The power of ‘the Merchantile consul’ was broadened further after the treaties of Capitulations between Christian and Muslim countries as trade expanded in the Mediterranean (Lee, 1991, p. 5). Although their tasks were primarily the same, the treaties codified the laws that European states had over consular institutions to exercise civil and criminal jurisdiction over

⁴ First among equals or peers.

matters pertaining to their nationals in the Byzantine Empire (Platt, 1971). Moreover, in the commercial towns of Italy, Spain, France and other European countries, the newly emerging states began to appoint consuls who were known as 'judges consuls' or 'consuls marchands' (Lee, 1991, p. 5). These developments led to the gradual state centralisation of the consular institution.

3. Modern consul as state official

The emergence of the consul as a state official of a sovereign in the contemporary sense had already begun with the creation of the European State system with the Westphalia Peace Treaty in 1648 (Heijmans and Melissen, 2006). With the emergence of the concept of sovereign states, states began to establish resident embassies appointing envoys to represent the affairs of the state. The mercantile consular functions that existed at that time were gradually brought under the wings of the states-system through bilateral agreements. The new development had far reaching consequences for the consular institution: In most cases, the mandate of the consul gradually broadened to extend to issues of political interests of the state or representation of the state itself (Platt, 1971). The inevitable outcome was that consular appointments began to be made or influenced by the state based on the state's interest in the territory (Leira and Neumann, 2008; Platt, 1971). Consuls gradually started playing the role of public ministers in character and began performing political functions, thereby gaining similar privileges and immunities attached to the function of envoy. Nonetheless, even though 'the Mercantile consuls' performed general representative functions, the predominant services rendered in consular posts was related to trade and maritime affairs (Platt, 1971). This was because generally the state continued to appoint consuls from the merchants present in a particular city. In the majority of cases the consuls remained professional merchants involved in mercantile trade in the city, and this was where their interests lay. Moreover, in most cases, states continued to rely on the financial contributions of the merchants to run the offices of the consuls (Platt, 1971), keeping the institution independent from the state to a great degree.

Although the consuls represented a sovereign, the practical tasks that they performed demanded neutrality that had been attached to the position (Platt, 1971). This meant that in most instances they were under no obligation to act as political agents (Platt, 1971). However, the widening power of the State's diplomatic function resulted in confusion over the lack of clarity between the representative tasks performed by envoys and that of those consuls (Heijmans and Melissen, 2006; Platt, 1971). Furthermore, treating consuls with the same privileges as state officials set the stage for conflicts between the functions of the new state envoys and consuls, since the role of the consul frequently overlapped with that of envoy. The appointment of consuls by the state saw the gradual acceptance that the first duty of the consul was to uphold the commercial and industrial interests of the entire foreign community in the territory in the interest of the state. From this era onwards, whenever consuls found themselves in a conflict of interest between serving the merchants' interest with that of the state, the state's interest was to prevail (Heijmans and Melissen, 2006; Platt, 1971).

The priority for national interests did not, however, help in distinguishing the difference between the tasks performed by diplomats and consuls. Consular positions became a target for political agendas whenever territorial interests were involved. For instance, Leira and Neumann (2008) studied consular representation in Norway in early Europe when the country had not achieved sovereignty. Consuls emerged in Norway upon an act of competitive balancing logic based on political interest over nation building efforts between the emerging nations in Europe (Leira and Neumann, 2008). In addition to this, the rank of the consul (career consuls, honorary consuls and merchant consuls) depended on the political interests of the sending state at particular times: Consuls functioned as reporting agents when regular diplomacy was not possible and they functioned as holders of foreigners' privateering and prize during times of war (Leira and Neumann, 2008). Leira and Neumann argue that war or diplomatic functions dominated over the consular institution whenever it was of interest to the state.

4. Decline of extraterritorial agreements and judicial functions

The consular institution remained one where practical considerations dictated the tasks that they carried out. Depending on the city or country that they found themselves in, consuls performed varying degrees of tasks. For instance, British consuls in Africa took upon the role of exploring and furthering the commercial interests and opportunities through exploration of the continent, sometimes drawing up agreements on behalf of the British Empire (Platt, 1971). Other consuls, such as those in China, continued to play a significant role in trade and maritime affairs. And consuls stationed in Europe, already operating within the jurisdiction of nation-states system, continued to play an important function in trade matters (Dickie, 2008). In this regard, the political role of consuls was extended most by those consuls appointed outside Europe tasked with economic expansion (Heijmans and Melissen, 2006).

However, the functional inconsistencies and controversies between diplomatic and consular professions continued well over the eighteenth century, a controversy that remains in one form or the other to this day (Platt, 1971). The increase in the maintenance of diplomatic missions by states together with the rising sentiments against foreign dominance led to many problems in the consular institution during this time. The setting up of consular posts abroad however was important with the economic expansion of Europe to other regions through trade and colonization (Heijmans and Melissen, 2006). Increasingly, state-appointed consuls were assigned important trading posts by the big European powers of England, France, Prussia and the German Empire (Heijmans and Melissen, 2006) through commercial and consular treaties between these states (Platt, 1971).

Until the nineteenth century, the nation-state system existed side by side with the extraterritorial system and the consular laws were primarily based on the assumptions of extraterritoriality (Lee, 1991). This meant that traders and settlers could exercise their own laws in a foreign district. However, the extraterritorial system became fundamentally incompatible with the modern nation-states system because the nation-states system emphasised equality between

sovereign states and territorial jurisdiction (Lee, 1991). Consequently, as the state system became more widely applied in the 19th century, the extraterritorial system declined. In the early 20th century, countries gradually became more independent owing to the decline of the colonial empires after the First World War. For the consular institution, this decline of extraterritoriality meant that the judicial authority that consuls exercised until then, diminished to a representative function of ensuring the protection of their nationals, who are within a foreign country's borders under the jurisdiction of a foreign country's law.

5. Decline of economic functions

The next major change in the consular institution came with the continued collapse of the European colonial empires during the 20th century. As independent states emerged the political and economic functions of the state become more interrelated. Economic affairs between states became primarily a diplomatic task coordinated between the foreign ministry and other agencies of the state (Heijmans and Melissen, 2006). The removal of the commercial and economic functions from the list of work of consuls became more apparent after the Second World War, with expanding international travel. Although the consul's function had been primarily commercial in nature, the integration of political and economic functions was a result of increased travel between citizenry of different nations and also because reform within foreign ministry resulting from these external changes. The consul's core function ultimately evolved into what is commonly associated today as the task of protecting the rights and interests of a state's nationals abroad (Heijmans and Melissen, 2006).

6. Codification of Consular Functions

With the gradual acceptance of the nation-states system, it became important to codify the ancient laws and practices of engagement between peoples and nations, which had been recorded in the form of case laws, treaties and conventions. Codification began gradually, as states began to enter into bilateral agreements defining the nature of immunities and privileges, and types of work that diplomats and consuls could exercise in a state's territorial jurisdiction (Leira and Neumann, 2008; Lee, 1991). A universal codification of diplomatic and consular representation began with the Vienna Convention on Diplomatic Relations (VCDR) in 1961 which restated the principles that were earlier agreed in the Vienna Congress of 1815. Because it had no forerunner Congress, the Vienna Convention on Consular Relations (VCCR) in 1963 has been regarded as a landmark convention compared to VCDR because of the universal agreement it achieved on consular law and practice among new and old States with different ideologies, interests and backgrounds within just seven-weeks (Lee, 1991). Since its inception, the VCCR has become the acceptable norm of consular representation between states under the nation-states system (Lee, 1991). Even by the (few) states who have not yet ratified the VCCR, its provision are regarded as 'weighty authority' on consular law (Lee, 1991). Since the functions, immunities and privileges accorded to the consul under the VCCR has theoretical significance to the research questions, literature on this aspect of the VCCR shall be reviewed in the next chapter after we describe the factors that have affected the evolution of the consular institution since the VCCR's inception.

7. Factors Affecting Change in Consular Functions

After the VCCR came into force in 1963, the consular institution has faced several significant changes that have affected the way consular functions are performed. The recent literature on the subject discusses three broad causal factors affecting these new developments:

increased international travel, public sector reform programs, and increasing regional integration in some parts of world. Once more, the available literature is mostly based on European contexts, but many aspects of the phenomenon are relevant and applicable worldwide. The following sections discuss what the literature says about each of these three factors.

7.1. Increase in international travel

Factors affecting increase in international travel and migration have been widely covered under topics such as globalisation, and debate over the relative stability of different regions of the world after the Second World War (Dickie, 2008; Heijmans and Melissen, 2006). Due to reduced cost of air travel, cross-border economic differences, and increased economic, social and political integration between states, people now travel more frequently in greater numbers to distant, exotic and sometimes unfamiliar and politically unstable destinations (Jones-Bos and van Daalen, 2008; Dickie, 2008; Heijmans and Melissen, 2006). Unlike previous eras in the history of the consular institution – when nationals on occasion travelled for business reasons – people now travel around the world for many reasons. The volume of consular work increases due to both short- and long-term travel between countries. Moreover, cross-border economic opportunities result in nationals residing abroad for long-term employment.

The increase in international travel has affected the scope and load of consular services in different ways. A large number of non-resident populations translate to additional demand for consular functions such as emergency and documentary services to citizens outside each country (Dickie, 2008; Jones-Bos and van Daalen, 2008). And with more inbound travellers, work related to visa and border control measures expands (Manojlovic and Thorheim, 2007, p. 15). Additionally, matters related to foreigners within the state also increases as borders are opened up and foreigners start to reside in larger numbers (Heijmans and Melissen, 2006). Consular work also increases due to incidences of crime committed against the civilian population by foreigners or *vice versa*, incidences of crime among foreigners (Manojlovic and Thorheim, 2007, pp. 16-17). The nature of consular work dealing with cross border crime has become far more complex with

issues such as drug-trafficking, human trafficking, prostitution, child abduction, arms dealing, terrorism, natural disaster and even sports hooliganism, as the list continues to grow (Dickie, 2008; Jones-Bos and van Daalen, 2008; Manojlovic and Thorheim, 2007). The affects of growing international travel have generally been addressed through border control measures, and seeking bilateral or international cooperation on crime to deal with the problems on a pragmatic level (Stringer, 2004). However, increased internal scrutiny of the work of foreign ministries in many countries has brought more urgency to the question of the role of the consular institution in the equation.

7.2. Scrutiny of the MFAs consular functions

Because of the volume and nature of incidences involving nationals abroad, consular work has caught the attention of media and the public. In many developed countries, this has led to a prioritisation of consular work in foreign ministries and consular incidences are increasingly treated as high-level politics (Heijmans and Melissen, 2006; Manojlovic and Thorheim, 2007). The poor handling of consular work has sometimes even led to the resignation of foreign ministers⁵. Historically, this may not be a new development: nationals facing distress abroad have always captured the public imagination and media attention especially in times of war and conflict (Dickie, 2008). The difference today is the speed with which the media covers such events and the quick public scrutiny and criticism levied against governments that deal with consular issues insensitively (Heijmans and Melissen, 2006). Moreover, non-state actors such as human rights organisations bring concerns related to incarceration, migration and other issues of social and economic inequality to the forefront (Manojlovic and Thorheim, 2007). With increasingly quick and easy communication, consular officers must simultaneously deal critically with delicate situations and manage the way the situation might be shaped, changed and published in the press

⁵ For instance, in 2007 and in 2008, two Romanian foreign ministers resigned over allegations of mishandling cases where nationals were detained overseas (The Diplomat Bucharest, 2008; BBC, 2007).

to wider political and public scrutiny. On the one hand, ease of communication allows consuls to provide their services more efficiently thereby reducing the need for consular presence (for example, see Xinhua, 2009). And on the other hand, rapid communication increases pressure on consular officers to deal with consular cases expeditiously with constant media attention (for example, see AFP, 2009; Gittens, 2009).

The added interest means that in several countries, administrative reforms conducted in MFAs have led to positive changes in consular functions (Dickie, 2008; Heijmans and Melissen, 2006; Hocking and Spence, 2003; Jones-Bos and van Daalen, 2008; Manojlovic and Thorheim, 2007). The trend has changed the functions of the foreign ministries, if not the consular post, to make citizens aware of the issues and run campaigns to inform the public about what they have to consider before travelling abroad (Jones-Bos and van Daalen, 2008). It has partly shifted the function of dealing with services abroad to a function of informing the public of the need to take precautions. For instance, in Netherlands a ‘Travel Smart’ campaign informs the public about safe travelling through road shows, booklets, running educational programs and improving their websites (Jones-Bos and van Daalen, 2008). Similar programs that proactively inform and engage with the public have emerged in many foreign ministries across the world. MFAs are also starting to recognize that better cooperation is required with international institutions, non-governmental organisations, travel agencies, insurance companies, mass media and other state-actors, to increase the capacity of MFAs to provide prompt and quality services to both nationals abroad and foreign citizens in their countries (Manojlovic and Thorheim, 2007). In many countries, foreign ministries have turned to private sector organisations to ‘outsource’ some of the consular activities to meet the growing demand (Heijmans and Melissen, 2006). Others have resorted to active awareness campaigns targeting nationals travelling abroad or foreigner willing to visit their own countries. To deal with distressed nationals innovations, such as call centres within the MFA, have been set up to make the foreign service more responsive to concerns of nationals abroad. However, the expectations of citizens are hard to meet, especially in cases of distress (Heijmans and Melissen, 2006). Nonetheless, the positive trend towards reform means that in

most countries, the favour with which the domestic public views the work of the MFA now depends largely on its ability to deal successfully and effectively with consular issues facing its citizens abroad (Heijmans and Melissen, 2006). As Manojlovic and Thorheim (2007, p. 16) noted “the conduct of consular affairs had ... become society’s window into the world of diplomacy and this had significant consequences for the general image of the MFAs”.

Although the initial MFA response to the political and public interest in consular affairs had been slow, foreign ministries seem to have gradually moved consular matters to the forefront. This interest and attention has largely improved the image and importance of the consular function within foreign ministries in the senior ranks (Heijmans and Melissen, 2006). Foreign ministries have reviewed consular practices and have examined ways to improve these services through more effective means and by engaging more experienced and knowledgeable staff in consular work after treating the issue of consular affairs as a second grade service throughout most of the history of foreign service (Dickie, 2008; Manojlovic and Thorheim, 2007; Platt, 1971).

This change in attitude was not due to an intrinsic vision or a result of long-term planning of MFAs, but it was pushed by public sector reform of government services owing to media and parliamentary attention to poor handling of consular incidences abroad (Heijmans and Melissen, 2006). In most countries, the change came hand-in-hand with much needed reform of the public sector that linked measurable goals to services (Jones-Bos and van Daalen, 2008). Some foreign ministries were forced to reform their activities to give a front seat to consular services because of the demand for transparency and efficiency in dealing with citizen services no matter where they were (Jones-Bos and van Daalen, 2008). However, whilst the senior management of foreign ministries may subscribe to this new development it has not filtered down to the lower ranks in ministries (Heijmans and Melissen, 2006). There is concern that lower levels of MFA officials still regard consular work as outside the realm of diplomacy and international relations (Heijmans and Melissen, 2006).

7.3. Integration of states

Another emergent factor in consular diplomacy has been the debate over regional integration. This is specifically seen in Europe, where increasing integration⁶, leads European Union (EU) member states to surrender sovereignty over consular affairs to other states (Manojlovic and Thorheim, 2007, pp. 17-18). With European citizenship, all EU member countries are required to provide consular protection and assistance to all EU citizens including their own (Manojlovic and Thorheim, 2007). At least from the perspective of Europe, this means that EU member countries no longer have full control over visa regimes through reciprocal agreements with states outside its regional borders. In addition, consular affairs require a higher degree of coordination between the states. On a larger scale, the trend of integration has meant that consular affairs can no longer be based on bilateral and or *ad hoc* measures (Manojlovic and Thorheim, 2007). With increased integration in the region and other regions of the world, MFAs have begun to recognise that there are potential advantages to harmonizing and standardizing consular services across countries. The effects of integration is however not clear and information about how consular institutions work before and after integration processes is relative neglected in the literature.

8. Issues over the applicability of the VCCR today

At least from the historical view of consular relations among Western countries, history thus shows us that the consular function is a precursor to the state envoy, as the negotiation, promotion and development of relations between two groups of people emerged and re-emerged as a consular function. It is important to mention, however, that some scholars do not see the

⁶ With the establishment of the Common Foreign and Security Policy in 1992 and the Constitutional Treaty certain consular functions such as visa and protection have been integrated.

consular institution as a precursor to resident embassies or the functions of diplomacy, arguing that there is no direct evolution from consuls to envoys (Leira and Neumann, 2008, pp. 3-4). This has meant that some historians neglect the consular institution, treating consular activities as part of the foreign service that was integrated into diplomacy at a later stage. Some practitioners who hold this view have gone so far as to label consular work as something that hinders the work of resident embassies (Kennan, 1997), and some others omit the function from the national histories of foreign affairs (Leira and Neumann, 2008, p. 4). In so far as literature treats diplomacy as a function developed after the Westphalian treaty, the literature does not recognise the consular institution as part of pure diplomacy. Leira and Neumann (2008, p. 4) referred to this approach as reading history backwards. This approach established the predominant view in the study of IR that the consul is a “sidekick to the diplomat”.

Regardless of these views, the new developments in international travel have shifted focus on consular work as an integral part of ‘soft’ diplomacy. With these new developments, questions have surfaced over the applicability of the VCCR in this new landscape. Some of the consular functions specified in the VCCR are now widely regarded as diplomatic or commercial functions of the foreign affairs portfolio. The most apparent one is the task of aerial and maritime navigation that allows consuls to perform supervision and investigation functions on own country vessels. The task has become practically obsolete for most countries after states subsequently signed several international aerial and maritime agreements⁷ (Heijmans and Melissen, 2006). Additionally, the promotion of commercial, economic and scientific relation and the reporting and information functions are largely integrated into diplomatic and commercial functions of foreign ministries⁸. The tendency in most states seems to have been towards integrating economic functions of the state with foreign ministry’s commercial portfolio. Consequently, as these more ‘important’ tasks have been removed from the list of consular functions, the task of the consul either in a diplomatic mission or in a consular mission has arguably diminished to an increasingly administrative role. In terms of tasks, consular activities

⁷ Articles 5(k) and 5(l) of the VCCR

⁸ Articles 5(b) and 5(c) of the VCCR

seem to be the residual of all the other tasks carried out in a foreign ministry. More importantly, if consular institutions differ between countries, in many foreign ministries especially in developing countries, there seems to be disagreement on whether these tasks should be prioritized. And even if they agree on the importance of consular work, it is unclear how these tasks of foreign policy should be prioritized in foreign policy decision making.

For newly independent states the problems are manifold: There is no historical understanding of diplomatic practice, and often, even the need for consular functions to begin with. However, for these countries it is still important: Because of the limited power and access to other foreign policy tools, the provision for economic and consular diplomacy theoretically becomes more important subjects in foreign policy determination of new states. Moreover, depending on the risks posed by issues such as climate change, issues such as migration should become more important in the foreign policy of such states. Hence, conceptually, the consular institutions should be given relatively more weight in foreign policy making in those states as well, if there are large numbers of migrants for economic or environmental reasons.

The next chapter elucidates the debate in the literature about the *legal position* of the consular institution within the framework of international law, and problems of defining and integrating consular functions within foreign policy decision-making. The issue is of particular interest since defining consular work and prioritizing that work is dependent on the international law make those functions possible in practice.

Chapter 3: DEFINING THE CONSULAR FUNCTION

If there is consistency at all in the history of the tasks performed by consuls, it is in the demonstration that the activities that consuls performed were based on social as well as political factors prevalent at a given time and place. Given the myriad of tasks that consuls perform, defining and codifying consular functions has been a challenging task. As we have seen in the previous chapter, history is testimony to the fact that the consular institution has always remained an evolving institution between societies and later in the international states system. Consular functions changed over time as forces that affect the society changed. The effort to clearly define consular functions is compounded by the fact that the scope and variety of consular functions are unique to each situation. Moreover, the importance given to specific consular tasks is different between states and even across a state's own network of embassies and consulates. This chapter first examines the question of whether the legal framework outlined in the VCCR adequately addresses the question of defining consular functions. Then the chapter reviews the implications the problems of definition can have on developing consular function within the context of bilateral and multilateral relations.

1. A problem of definition

Whilst considering the new developments that have led to change in the consular institution, Ana Mar Fernández (2006) defined the consular function as follows:

[The] capacity of action attributed to the administration of the state in the areas mentioned [in the VCCR] in order to protect the persons and interests of the individuals that form part of the state when in a foreign country. (p. 3)

Fernández's definition is a good attempt at defining consular functions. Most scholars have avoided discussing the definitional questions altogether, treating the topic of defining consular functions as a passing remark while discussing some specific consular task or issue facing a particular country or a region in light of some emergent issues. Fernández's definition recognises the tasks that consular institutions perform in the administration of a nation-state outside its borders. Fernández's definition also recognises and moves towards incorporating all aspects of state administration as a 'capacity of action', implying the administrative and bureaucratic nature of most of the consular services as opposed to the traditional notion of diplomacy as an art form. Nonetheless, the definition takes a view that the consular function is an objective in itself based on achieving national interests of the state in protecting its citizens. Thus, the definition does not cover some important areas of the consular function such as issuance of visas or documentary services, which does not strictly aim to 'protect' individuals or always serve national interests, given that the function encompasses people-to-people relations. Nor does the definition clearly link us to the promotion and representation of state in consular affairs through what is now commonly known as 'consular diplomacy'. This is partly because of the relationship that the definition places with VCCR, leading to an inherent assumption that a broader definition of consular affairs has already been addressed in the VCCR. Although the definitional question might not in itself appeal to scholars, the question of definition does present some dilemma for practitioners since terms such as 'consular services' or 'consular diplomacy' become fairly abstract without clear meaning in practice. Heijmans and Melissen (2006) point out this problem as follows:

[The] simplicity of the dominant definition of modern consular affairs does not conceal a complex subject. Inside MFAs any discussion of consular work triggers seemingly obvious but delicate questions such as: 'What is assistance?', 'How can distress be described?', and 'Who is a citizen and who is not?'. (p. 6)

2. Attempts to define consular functions

Lee (1991, pp. 115-123) points out that during the discussions that led up to the VCCR a disagreement surfaced regarding the inclusion of *general* versus *specific* definitions of consular functions in the Convention. Some states wanted to clearly define what a consul can and cannot do, while others debated around the obvious practicality of open and less specific definitions. The debate ended when a compromise was reached by way of adopting a “non-exhaustive enumeration of the most important consular functions” by way of example as proposed by the International Law Commission (ILC) which had drafted the Convention (Lee, 1991, pp. 118-9). The agreed enumerations of these functions were defined in Articles 5 (a) to (l) and they included providing assistance to nationals and protection of their rights and interests, notary civil registrar and other administrative functions, and authorities over vessels and aircraft of the sending State. Thus, scholars tend to generally describe consular activities with some reference to the list of consular functions provided in Article 5 (a) to (l) of the VCCR. However, there was still a problem in defining any *other* functions that might appear given different circumstances and over time, after VCCR came into effect. This problem was partly resolved by including Article 5(m) in VCCR which placed a legal limit on what consular work can be. Article 5(m) reads as follows:

performing *any other functions* entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State. [emphasis added].

The inclusion of a legal limitation to consular work did not, however, cease the need for more specific and clearer definitions of consular functions. Subsequent to the VCCR, consular functions have been defined at bilateral and regional levels through agreements that codified consular instructions and regulations on a bilateral or regional level. The most comprehensive regional agreement of these was the ‘European Convention of Consular Functions’ of 1967 which attempted to compile an exhaustive and elaborate list of consular functions codifying instructions and regulations among member countries (Lee, 1991, pp. 120-1). Although the European Convention started off with an aim to fulfil a practical need to clearly define what

consular functions can be performed among EU member countries, it was not successful since it was only ratified by a few member states. The outcome of the exercise was another circular redefinition of ‘consular functions’, through legal limits provided under Article 44(1) of the Convention. The article reads:

to exercise *any other consular functions* entrusted to him [sic] by the sending State which are not prohibited by the law of the receiving State or to which no objection is taken by the State [emphasis added]

Hence, the European Convention too ended up only redefining the principle of legal limits of consular work that already existed in VCCR’s Article 5(m) mentioned above. Both the exercises to arrive at definitions of consular functions show that when it comes to lawmaking exercises, defining an official’s tasks that have evolving characteristics is problematic, if not impossible, unless the function is framed through some form of generally acceptable legal limits.

In spite of these drawbacks, as Lee (1991) also notes, the European Convention provided a useful guideline for newly independent nations (following Western European practices in diplomacy) on the type and nature of consular work, especially since it was produced by countries with the largest number of diplomatic and consular offices across the world at that time. Saying that following general guidelines is useful, subscribes to prevalent view that when a state decides on the consular functions it should perform, the boundary is only the legal limitation contained in Article 5(m) of the VCCR: i.e., the rule of thumb is that the provision to perform any consular function is dependent on whether such functions do not contravene the receiving State laws and regulations and is acceptable to the state. Moreover, the legal limitation offers the flexibility of performing consular functions beyond the functions listed⁹, as and when circumstance necessitates (Jones-Bos and van Daalen, 2008). Thus, the legal limit in the VCCR supports the acceptable view among legal practitioners that “rather than a complex legal framework, it is daily consular practice that is a guideline for the development of consular affairs” (Heijmans and Melissen, 2006, p. 6).

⁹ These functions are listed through Articles 5 (a) to (l) of the VCCR.

3. Problems with following guidelines

Most foreign service personnel follow this advice: That trial and error together with some additional help from extant literature might be the best way to determine and develop consular functions. For the foreign service practitioner the materials available for decision-making on consular matters come from three major sources: Firstly, as discussed above, the VCCR and the European Convention which outlines the consular functions, together with its predecessor convention, Vienna Convention on Diplomatic Relations (VCDR)¹⁰; secondly, if available, consular training and manuals of the practitioner's foreign ministry, and if not, the foreign service manuals of more advanced countries that are accessible¹¹; and finally, few academic works in the field of consular law¹². These sources offer useful guidelines for consuls of any country to address issues that they face in performing daily consular tasks. The prevalent thinking is similar to the old notion that performing consular functions is similar to any other 'diplomatic art' as the consul function is "one *sui generis*, and perfection in it is to be obtained by practical experience alone" (Vines to Clarendon, 15 November 1856 cited in Platt, 1963, p. 494). In more contemporary language this translates to a perception that "consular affairs constitutes a field in diplomatic activity where trial and error and pragmatic improvement rule" (Heijmans and Melissen, 2006, p. 6).

In other words, the remedy that is prescribed is to understand past consular cases and when faced with a situation, and apply those principles learned from the earlier case. On the contrary, lists and guidelines do not necessarily assist in formulating foreign policy on consular affairs that is unique to each state. Nor do legal limits help formulate policy that is dictated more by ground reality which is specific to context and situation. Put another way, regardless of the

¹⁰ VCDR provides a general idea of the subtle differences between the diplomatic and consular functions

¹¹ Through the bilateral arrangements or those available in the public domain, the most comprehensive publicly available manual being the *U.S. Foreign Affairs Manual 7*.

¹² The most prominent and widely used of which is Luke T. Lee's (1991) *Consular Law and Practice* that discusses consular law including the differences of the practice of consular law among many different countries. It was first published in 1961 and now in its third publication.

fact that the VCCR codified and established the *legal position* of consular practises under customary law, it has been hard to fit consular *activities* clearly into a national policy for most countries or IR framework (Leira and Neumann, 2008). As seen in the previous chapter, and also the questions faced in defining the functions in international law exercises which has been discussed in this chapter. These questions are not only raised in foreign ministries of relatively new sovereign states it has been a problem in highly developed foreign ministries.

4. Why a definition is avoided

Lee (1991, pp. 642-3) emphasised that the question of a general versus specific treatment of consular functions in consular law has always been a difficult issue to resolve. Lee noted that the question of categorising and classifying consular functions “also posed a dilemma” for him when writing his seminal work, *Consular Law and Practice* (Lee, 1991, pp. 118-119). Despite this view, Lee concluded that the “standardisation of consular instructions and regulations has obviated the need for... detailed analysis” of past consular instructions and regulations since both the VCCR and European Convention offer the necessary guidelines. Considering the issue from a legal position Lee’s argument for avoiding specific definitions may be sound on the basis that VCCR set the legal framework. In other words, as far as the limitation principle in VCCR establishes the principles of appointing consuls and performing their functions, as long as there is no interference in internal affairs of another state (as required by VCCR and VCCR), IR theory and practice have (somewhat prematurely) concluded that the matter is closed. Nonetheless, whilst VCCR may have set the boundary of the limits of consular work, it does not necessarily mean that the consular institution works in a standardized way across all countries.

However, owing to the fact that the question of definition has not been resolved, the old question what ‘consular diplomacy’ really means keeps resurfacing in foreign ministries and their embassies. Stringer (2007) details the four main debates about the consular institution,

(which has also been discussed in more detail in Chapter 2). Firstly, the issue of relevance of consular work in modern times since it has lost its historical functions to other institutions over time. Secondly, the proliferation of ‘new diplomacies’ such as commercial, economic, public and others, and how this dilutes the definition of consular institution and its craft. Thirdly, the question over why consular work is treated as a second class work at foreign ministries in modern diplomatic corps. And finally, in the Westphalian system where state primacy and national interests dominate, the questions over whether the consular institution is a pure state-to-state relationship at all (Stringer, 2007). These four debates can in fact be summarised into two areas: Firstly, questions over *what functions constitute consular work* in a contemporary sense, and secondly questions over *how consular functions become relatively more important* compared to other tools of foreign policy in state diplomacy. Since the existing literature does not provide clear answers to these questions most decision makers in foreign ministries may find it difficult to be cognizant of how far they *can* stretch their consular services since may not be clear of what the definition of consular work is, and they may also be unclear on how far they *should* stretch consular work as they are may not be really cognizant of how to integrate consular diplomacy into the foreign policy equation (Heijmans and Melissen, 2006, p. 6).

5. Available answers to questions of definition

Generally, the answers to the above questions are relatively clearer for countries that have traditions of consular institution. As history and contemporary literature illustrates, most of those countries with established traditions resolve this issue over time as internal conditions are attuned to external environment (whether voluntarily or involuntarily). For instance, recent factors that affected change in foreign ministries in many developed countries seem to have brought about changes in the consular institution in countries like United Kingdom, New Zealand, Canada, Australia and most developed countries in Europe. They have moved consular

affairs to the forefront as a priority work of the foreign ministry, arguably because those states give relatively more weight to the protection of individual citizens abroad¹³.

But the answers are less simple to apply to developing country contexts where there is no apparent history or tradition of diplomatic or consular institution. Although developing country nationals too travel abroad in large numbers, consular work seems to be relatively less important work in their foreign ministries. For instance, even though countries like Bangladesh, Sri Lanka or Philippines have large migrant populations abroad, consular work is relatively less important in these countries. Applying realism, the relative lack of interest in developing those functions is explained as a consequence of that those functions do not serve their national interests of these states. Or it can be argued that it is because of their lack of resources or lack of interest in individual rights. But answering this question in that manner ignores the deeper questions of how to explain these mismatches on a theoretical level.

It has to be noted that the developed countries mentioned above too did not identify the importance of consular work until recently. The literature cannot clearly explain the factors that make consular functions relatively more important for a state, or an explanation as to the lack of uniformity between the diplomatic and consular representation among states in the diplomatic sphere. Insofar as a state resolves the question of importance of consular work, there still remains the unclear issue of determining the relative priorities given to political, commercial and economic, and consular functions in foreign policy decision making. Consequently, it is a question of relative resource allocation between these functions both in foreign ministries and through their network of resident embassies and consulates. The prevalent idea is that consular representation is an important and useful tool of diplomacy (Mohamed, 2002), but literature lacks detailed explanation as to exactly how it becomes important to a state.

¹³ This is evidenced by the change of focus on the countries' website which flag consular issues as the most important part of their work for citizens.

6. Implications of not addressing definitions

This returns us to the topic of the rift between diplomats versus consuls, mentioned in the previous chapter, that constitutes a large part of the old internal debate in foreign services; discussed at length by authors such as Platt (1971): The questions of *privilege* and of *immunity*: Namely, the question of which individuals require *immunity* because of the nature of the *service* that they perform for the state, and which officials require *privileges* because of the national symbolism that their *representation* entails.

Juxtaposing consular work with other diplomatic functions becomes especially problematic when the debate falls within consular immunity versus diplomatic immunity: Based on the Westphalia system, it is understood that foreign service officials require immunity depending on the nature and importance of the function that they perform for the *state*. Both VCDR and VCCR meticulously explain how such immunities will be accorded depending on the function performed. Clearly, there was an explicit divorce between immunities accorded to the diplomat and to the consul: This is reflected in the way that the codification process separated the diplomatic and consular functions; the VCDR of 1961 codified the customary practices of diplomatic relations between the nation-states, and the VCCR which came out later provides relatively less immunity to consular functions.

Lee (1991) argues how removal of a state's diplomatic representation function from consul's duties is seen in the VCCR's meticulous attention to the title of consul. The VCCR uses the term 'consular officer' rather than 'consular representative' or 'consul'. The change was partly brought about since the use of the term 'representative' denotes the functions of representing the state which (strictly speaking) is under the domain of *diplomatic* representation (Lee, 1991). The term 'officer' is more generic, allowing the term to be applied to any officer in a consular post or diplomatic mission who is 'entrusted ... with the exercise of consular functions' (Lee, 1991). Consequently, the contemporary usage of terms such as 'consular diplomacy' would seem, in essence, contradictory to the legal principle that consular immunities and privileges differ from

that of ‘diplomacy’: Implicitly asserting that those who performed the consular function require immunity from the laws of the foreign territory presumes that extraterritorial immunities are required when performing consular work in a foreign territory. Yet it is not clearly explained why they remain separate when for all practical purposes, consuls can perform the same duties of diplomats, *vice versa*: The VCDR allows diplomats to perform consular functions and the VCCR allows consuls to perform representative work except to ‘negotiate’ on behalf of the states, again, unless as the limitation clause allows, both states agree that consuls can negotiate on behalf of the state.

From an IR perspective, insofar as consular activities can be agreed upon between the states that are concerned, the main challenge has been to explain the level of immunity a state official requires (in theory and practice) when they conduct official business in a foreign territory. This is because the question has implications on the issue of state-building: Consular immunities can be misused by a nation through their consular institutions to enhance state-building efforts in another sovereign state (Leira and Neumann, 2008; OECD, 2006). Reaching agreement over what consular functions are assumes that all states can standardise the immunities accorded to the appointed official based on the work that each of them perform. Disagreements over these issues sometimes resurface as issues of correspondence between the receiving state agencies and the resident embassies or consulates under VCDR. The official ‘diplomatic’ channel of communication is the foreign ministry. The VCCR however gives consuls wider authority to engage with local authorities¹⁴. When diplomats engage directly with agencies other than the foreign ministry, the receiving state can perceive this as interference. However, given the increasingly integrated nature of the diplomatic and consular work in a diplomatic mission, when roles overlap it is difficult to define who does what and what level of immunity is required for a particular official.

¹⁴ Article 38 of the VCCR and Article 41(2) of the VCDR

This question is an important one since in most developing countries, foreign service seems to be overly preoccupied with the problems over prioritising immunity and privileges for diplomatic and consular cadre. Most of the literature argues for the importance of resident embassies and consulates for representation (Mohamed, 2002). Once such representation is established, they add to government expenditure of those states and the effectiveness of those resident embassies or consulates are difficult to measure. For instance, many developing countries have large populations that reside overseas for employment reasons. The way consular issues are prioritized in these countries can greatly differ and there are possibly varieties of the context than what the current literature suggests. Thus, it is difficult to explain the circumstances that warrant the expansion of resident embassies and consulates. In most cases, the expansion comes at a price to the state when concepts of privilege of individuals precede the relevance of those privileges to immunities required to perform state functions.

There are many implications of the debate over immunity and privileges for weaker states, since weaker states are likely to have fewer powers and less tools of foreign policy. In such states, most of foreign service work involves economic and consular work through their resident embassies and consulates (Mohamed, 2002). Thus we would expect the level of immunity required to perform these functions to be minimal. Whilst equal immunity is understood as the principle of equality given to all states under the existing international states system, there is little understanding as to what level of immunity is really required for such functions on a national level. The problem affects foreign policy decision making in developing countries on different levels. Higher levels of immunity suggest higher privileges in the foreign service cadre because of the functions entailed in state-to-state diplomacy. Thus, the issue has ramifications on how foreign service cadre in such countries perceive their functions under the international system and the actual functions performed which entails only infrequent and limited state-to-state negotiations over issues such as security. This in turn has ramifications on the applicability of training and development of which is focused on diplomacy as an art form of larger states when the majority of bilateral and multilateral diplomacy involves economic (including food security,

environmental security issues) and consular functions. It also has ramification on the concept of privileges and efficiency of the representative power of the foreign service. Since theoretically there is little real necessity for immunity, in practice the foreign service can become an avenue through which the state rewards individuals not only from its own resources, but also using the privileges accorded by receiving states regardless of whether there is a need for the state to exercise those functions. The lack of clear theoretical frameworks to answer these seemingly mundane questions is not only costly for foreign ministries in weaker states, but it is costly for foreign ministries across the world. The cost comes as scrutiny of the foreign ministry and its diplomatic and consular representation abroad over its effectiveness of representation. The cost of inefficient representation is far greater for developing countries where limited state resources cannot really sustain an expansion of diplomatic representation.

7. Research Gaps

In summary, whilst the literature addresses the historical problems and various factors that have changed the consular institution, research in the field has primarily focused on discussions of how the consular institution has evolved over time. Increased interest in the consular institution has offered some new research which provides useful insights into how the consular institution has worked in the past and how it is changing at present. The effort of new research is driven by a need to understand consular diplomacy in specific countries as they move towards integration, or to understand the institution in specific contexts given wider phenomenon such as international crime and migration issues. The result is that the current body of literature provides equally legitimate views of the phenomenon. Nonetheless there are two issues that the extant literature does not clearly address.

Firstly, there have been no recent attempts to clearly define what are consular functions. Nor has there been any attempt previously to define the consular functions on a more universal

basis. It can be argued from a pure legal perspective that the codification of the customary laws of the consular institution in the VCCR created the foundation on which the consular institution can be developed in every country since the legal position of the consular institution was agreed among nations. However, what *consular functions* are in practice is different from its *legal position*: the VCCR provided the rules of the institution but cannot tell each country what functions are applicable to different contexts. Most of the current literature identifies this question as a problem of relevance of the consular functions in modern diplomacy but does not move beyond that. Each research on the consular institution provides the external changes that contributes to the growing interest in the consular institution and argues the reasons why it is an important function of the state. However, the definitions used are narrow definitions which do not encompass the different roles that the consul plays besides assistance and protection of nationals abroad.

The second issue relates to the importance of the consular function in foreign policy with respect to other forms of diplomacy such as economic and political diplomacy. Literature discusses wide disagreements over relative importance of the consular function as a pure state-to-state relationship and over the relative neglect of the consular institution in diplomacy throughout history. The fundamental issue seems to be a problem of immunity and privileges accorded to the two positions based on the assumption that because the diplomat represents the state in its purest form a diplomat requires more immunities and privileges than the consul. The issue again is specific to contexts yet since the phenomenon appears in the states system the issue become one of the problems in representation of the state outside its borders.

Therefore, the current interest in the topic needs to surpass from its discursive form so that consular diplomacy can be explained in a way that is meaningful to all states. Questions of the importance of effective delivery of consular services cannot be answered without addressing the deeper underlying definitional questions in the literature over *what consular functions are in a contemporary world* and *how does a state determine the functions that are important* to that particular state.

Chapter 4: METHODOLOGY

From a theoretical point of view, the study of the consular institution has so far predominantly taken a Realist view of international politics, meaning that the literature is based on the assumption that in the international states system, states make rational decisions that truly reflect their national interests. The premise is however not entirely accepted by recent IR theorists as the discipline moves increasingly towards understanding phenomenon (in both history and international relations) as social constructions that evolve over time (Huntington, 1998; Wendt, 1999; Diamond, 1998). Such approaches would place relatively more importance on understanding and explaining a phenomenon such as the consular institution through how it was built on social and cultural factors that pre-existed before the nation state system gained prominence since 1648.

As we have seen, the early consular institution evolved as a function that fulfils a role through the social interaction between different groups and social actors. In the practice of diplomacy, taking a social sciences view is particularly important since all social institutions are formed to service some social needs. This does not imply that the nation states system has no place in the consular institution; however, it means that while Realist views might be able to explain the decision making process that assume rational national interests, we need to step back from this premise to understand how the institution can exist without the social constructs assumed in the rationalist approach to nation states. The approach is needed because the consular institution is based on roles that the consuls perform in a given context. To identify the functions that are necessary for a consular institution of a given state, we have to identify the roles that consuls perform in the international community and see how the institution works *before* we can fit the institution into a decision making framework based on a realist perspective.

Thus, an attempt to understand the present consular function in a holistic sense regardless of national borders is needed to answer the research question. For methodological purposes, an approach taking a social sciences perspective allows us to park the assumptions made in realist views. The current body of literature and future discussions on the subject needs a framework that can link and make new studies meaningful through combining the previous research and identifying the areas that need to be researched further. In this regard, the question requires a method that can help theorise or conceptualise the phenomenon clearly within the international relations framework. Because of these reasons, the research used a grounded theory approach to conceptualise the phenomenon. A grounded theory method helps conceptualise latent patterns of a phenomenon. In other words, the approach helps extract common threads from the various existing studies in order to create a general framework which reveals the commonalities and differences in consular practices that exist around the world using formalised procedures (Eriksson and Kovalainen, 2008, pp. 154-172).

1. Research method

The grounded theory approach offers specific procedures to formulate a conceptual framework from empirical data. A conceptual framework is a theoretical construct of some phenomenon that brings together broader theories. According to the approach, ‘theory evolves during actual research and it does this through continuous interplay between analysis and data collection’ (Strauss and Corbin, 1988, p. 158, as cited in Eriksson and Kovalainen, 2008, p. 155). In this research the consular institution is part of what we regard as international states system and fits broadly into theories of international relations and politics (Eriksson and Kovalainen, 2008). Specific procedures of the grounded theory method are used to come up with the conceptual framework as part of the research process, and the researcher is not limited to commitments to specific kinds of data or specific theoretical interest during the research process (Eriksson and Kovalainen, 2008). The method requires that the researcher maintain a balance between objectivity and sensitivity while using the current body of extant literature (Eriksson and

Kovalainen, 2008). Objectivity is required for the research question to ensure that the researcher's findings are a reasonable, impartial representation of the topic under study. The use of sensitivity in grounded theory approach refers to the principle that the researcher can immerse in the analysis using personal and professional experience, and at the same time being aware of the problems of blocking or directing interpretations in a certain way. Extant literature is consulted to conduct an 'iterative and continuing process of data collection, simultaneous analysis and emergent interpretation', to enlighten and inform the researcher and is meant to direct the empirical material gathering and analysis. The process is followed until what is called a 'theoretical saturation' point is reached, meaning that the resulting conceptual framework that is conceptually dense, solid and grounded in the data (Eriksson and Kovalainen, 2008).

2. Research procedures

The research used the following procedure for discovering, verifying and formulating the conceptual framework following the method described in Eriksson and Kovalainen (2008, pp. 163-167).

2.1. Sampling and Data Gathering

The approach requires *theoretical sampling*. This involved the identifying an initial sample and then sampling of additional activities and events as the theoretical constructs evolve through the data analysis process. The following texts were used as primary documents for coding and analysis.

1. Consular functions identified in the VCCR
2. Consular functions identified in websites of foreign ministries or embassies of developed countries; United Kingdom¹⁵, Australia¹⁶ and New Zealand¹⁷.

¹⁵ British Foreign and Commonwealth Office: Travel and Living Abroad Section found on <http://www.fco.gov.uk/en/travel-and-living-abroad>

¹⁶ Australian Department of Foreign Affairs and Trade: Smart Traveler Sections found on <http://www.smarttraveller.gov.au/>

2.2. Data Analysis

The data analysis stage consisted of three steps of categorising (open coding), comparing (axial coding) and selecting primary framework (selective coding).

Step 1: Categorising data (Open coding)

This step involved uncovering, naming and developing concepts and categories by analysing the roles of consuls. The aim of this process was to produce concepts (or categories) that seem to fit the roles by finding *key words, phrases* or *sentences*. The event, processes or incidences that form part of the consul's duties and responsibility were labelled and grouped together. This was done through constant comparison and re-comparison of the roles with the aim of formulating the categories and properties of the functions. The findings of this stage are presented in Chapter 5 under the heading "Contemporary Consular Functions".

Step 2: Comparing data (Axial coding)

This step requires a higher level of abstraction called *constant comparative method* where the researcher finds incidents and events that are related to each other in non-apparent ways. The step was carried out through comparing the data on types of incidents and events that consuls faces with present or historical data sets. The process involved linking the categories discovered in Step 1 together so that *explanatory categories* can be found so as to develop the conceptual framework. These categories are higher order concepts that have wider explanatory power of the institution and combine the concepts in the data. This exercise attempted to reveal the latent patterns (factors and interrelationships) in the categories, the expressions and words that were analysed in Step 1 to discover conceptualisations and interrelationships. Comparisons were made to understand whether the theoretical constructs explain the phenomenon adequately and additional empirical indicators (such as journalistic literature) were used until a 'theoretical

¹⁷ New Zealand Ministry of Foreign Affairs and Trade: Safe Travel Sections found on <http://www.safetravel.govt.nz/>

saturation' was reached. The results of this process are presented partly in Chapter 5, but mainly in Chapter 6 under the heading "Importance of Consular Affairs to the State".

Step 3: Primary Framework (Selective coding)

This final step integrated and refined the researcher's analysis in Steps 1 and 2 combining the framework to reveal a larger conceptual scheme of the consular institution. The researcher selected the primary category that forms the basis of the conceptual framework that explained the analysis and decision making constructs of the consular institution. These findings are described through the theoretical framework and its relationship with the data in the latter part of Chapter 6.

3. Limitations of the method

Grounded theory has been the target of some criticism because of the qualitative and inductive principles that it entails but it is to a large extent accepted as a theory development method in social research (Eriksson and Kovalainen, 2008). Grounded theory method is sometimes criticised for issues of validity, reliability and vigour. Such criticism is however, not directly applicable to quantitative inquiries such as grounded theory since they do not attempt to test any particular hypothesis (Eriksson and Kovalainen, 2008). This research therefore prescribes the method that is used so that it is possible to replicate the study. Hence, the strength and applicability of the research is based on whether a theoretical saturation point is reached, i.e. when the conceptual framework reaches a level where it integrates and universalizes all the data that is currently available, and can be generalised across different contexts.

A delimitation of the research was that the data were collected from three developed countries with similar characteristics only due to the research timeframe and accessibility. For instance, the journalistic sources let us know that the consular institution is undergoing changes

in countries such as India and China. Additionally, the researcher was aware of information about consular practice but the documents providing details as to the nature of these changes were not accessible. Thus, the research only uses publicly available information in forming the conceptual framework but uses subjective analysis to incorporate the data. The shortcoming had only indirect bearing on the method since higher levels of abstraction of the phenomenon were potentially hindered, which possibly affected theoretical saturation required when conducting this method. Nonetheless, these subjective principles were accommodated as it is part of the grounded theory approach.

CHAPTER 5: CONTEMPORARY CONSULAR FUNCTIONS

This chapter presents the findings to the question of what ‘consular functions’ are in a contemporary foreign ministry. The consular functions listed on the websites of Australia, New Zealand and United Kingdom were examined. The data showed two clusters of direct and indirect functions that consuls were involved in:

1. **Consular services involving the administration of nationals overseas:** This cluster can be categorised into two functional areas of *Assistance and Protection Functions* and *Documentary and Judicial Functions*.
2. **Consular services involving the managing the outflow and inflow of travellers:** This cluster can be categorised into *Outbound Flow of Nationals (or Outbound Travel)* and *Inbound Flow of Foreigners (or Inbound Travel)* across a state’s territorial borders.

Table 5.1 summaries the findings of the functions that were identified in the survey. For each of these categories the table shows:

- (1) the types of events that trigger demand for the consul’s duties;
- (2) the types of stakeholders that were directly and indirectly involved in delivering the service at various stages; and
- (3) the roles or functions that consuls perform in delivering the service.

The categorisations shown in the table are nominal categories, meaning that when categorising the data, functions did not appear as strict essential categories since the cases and types of consular issues described were frequently multifaceted in nature. The categories were

Table 5.1: Administration of nationals overseas: Events, Stakeholders and Roles

(1) Events	(2) Stakeholders	(3) Roles
<i>Assistance and protection functions</i>		
Incidents of personal nature: <i>Financial difficulties, travelling in emergencies, loss of possessions, missing, accidents, forced marriages</i>	Civil registrar: <i>Department of National Registration, Registrar, Registrar of Companies</i>	Advise and inform: <i>Travel advice and warnings; Lists of lawyers, funeral directors, local support groups; Information on money transfer, prison transfers, cost of burial or cremation, repatriation of body, police and legal system; encourage, support, polite, patient, sensitive, non-judgmental, privacy</i>
Victim of crimes: <i>Theft, assault, rape/sexual assault, abduction, kidnapping for ransom, piracy, death</i>	Enforcement: <i>Police, Immigration</i> Judiciary: <i>Courts, Lower Courts, Upper Courts</i>	Arrange communication, help and support: <i>Arrange contact with family, relatives, friends, doctors; Visits prison, hospitals; Establish communication with sending country welfare authorities; Provide loans, buy prison 'comforts' with family financing</i>
Accused or convicted of crimes <i>Arrested, detained, in custody, trial, imprisonment, investigated</i>	Penitentiary: <i>Prison authorities</i> Social welfare: <i>Social welfare system</i>	Arrange representation: <i>Provide list of lawyers</i>
Victim of natural events: <i>Natural disaster, endemic diseases, accidents</i>	Disaster management: <i>Disaster response systems</i>	Take provisional measures: <i>Bring matters to attention of authorities; take up complaints of ill treatment, personal safety and discrimination, investigations</i>
Victim of political events: <i>Political unrest, terrorism, hostage taking</i>	Defense: <i>Defense forces, civil defense forces</i>	Represent: <i>On behalf for special victims (rape, child abduction)</i> Arrange evacuation
<i>Documentary and judiciary functions</i>		
General life events: <i>Birth, identity, citizenship, place of domicile, marriage, divorce, surrogacy, death</i>	Civil registrar: <i>Department of National Registration, Registrar, Registrar of Companies</i>	Civil registrar: <i>Issue, translate</i> Notary: <i>Certify documents or acts: authenticate, witness, legalize signatures, take acknowledgement, examine witnesses, administer oaths, take statements, take dispositions.</i>
Property claims: <i>Estates, personal possessions</i>	Enforcement: <i>Police, Immigration</i>	Judicial: <i>Transmit judicial and extrajudicial documents, execute rogatory, execute commissions to take evidence</i>
Custody claims: <i>Child custody, child abduction</i>	Judiciary: <i>Courts, Lower Courts, Upper Courts</i>	
Enforcement issues: <i>Cross border crime, child sex tourism, drugs, environmental protection, extradition proceedings</i>	Penitentiary: <i>Prison authorities</i>	
Other administrative matters: <i>Investigations, voting</i>		

uncovered by clustering the roles, events and stakeholders during the categorisation state (open coding¹⁸). The primary basis to differentiate the functions along the four main areas was based on the events that can trigger a responsibility for the foreign ministry to act and how the ministry identified what the duties were in the process. All the roles were then compared to each other until clusters emerged, and then they were categorised around the events that can happen while the individual is in a ‘consular district’ and those involving inbound and outbound travel of individuals. Here, we refer to consular districts as defined in Article 1(b) of the VCCR; as an “area assigned to a consular post for the exercise of consular functions”. Although different cultural, economic and political factors may exist in consular district, the discussion generally assumes that a consular district has a homogenous population. The first section of the chapter discusses the consular functions of administration of nationals overseas and the second section discusses those relating to managing the borders.

1. Administration of Nationals Abroad

Most of the contemporary consular functions handled by the foreign ministries examined involved administrative matters related to citizens overseas. As expected, the consular functions involving ‘protection’ and ‘documentary’ functions as different types of work. The work was interrelated but policy attitudes towards each of the service were different: For ‘protection’ services the foreign ministry’s purpose was to reduce risk situations in the first instance and ‘when things go wrong’¹⁹, making the domestic public aware of the limitations of the consuls role. There was little information about the details of ‘documentary’ functions, some of these functions are directly provided by the foreign ministry and its network of missions, and for others, foreign ministry routed those services from and to the relevant agencies. Details of the two separate functions are discussed below.

¹⁸ see Chapter 4, Section 2.2 for details of method

¹⁹ United Kingdom

1.1. Assistance and Protection Function

The need for Assistance and Protection Functions arise from *risk events* (or incidents) that happen to nationals abroad. Generally, the MFA or consular post becomes aware of incidences when the national who is affected reports the incident, or a third party, such as local authorities, friends or family of the affected national, reports the incident on behalf of the individual. A risk event causes some temporary difficulties (or emergencies) or longer term difficulties for the national resulting in a situation where a national may demand or expect assistance and/or protection from the sending State. As a result of the incident, the national may be harmed physically, incapacitated, or financially distressed. There was no standard classification structure for the types of risk events partly because the amount and nature of involvement was specific to the case and can involve a combination of these difficulties with various degrees of seriousness. Risk events also involve incidences that trigger a demand for other types of consular functions. For instance, an individual who is a victim of crime may need services such as the reissuance of a document that was stolen.

Nonetheless, risk events are characterized along the lines of the seriousness of the risk posed to nationals. The difference can be along the lines of natural and unnatural events: Natural events being incidents that are caused by natural circumstances that are outside the control of the national and, unnatural events being incidents where a third party caused the event. The five categories of risk events shown in table 5.1 take into account these characteristics and further categorises the events to differentiate between incidences of personal nature, and those involving crime against and crimes committed by individuals, and on the basis of natural and political events.

When *risk events* occur consuls are charged with varying degrees of responsibility to assist and protect the rights and interests of nationals depending on the type of case. A state's interest in general and specific cases depends on the laws, regulations and government policies of that state at the time of the incident. And a state's limitations to act are governed by the consular

district's laws, regulations and practices, and the international laws. In practice, the level of a state's welfare for its citizens outside its borders is limited and in the countries that were examined, the state attempts to ensure that individuals are aware and advised about their own safety so that the state can prevent or reduce the likelihood of risk events.

The role of the consul remains broad in the sense that it can range from anything between simple advice and help to arranging the evacuation of individual or groups when the risk is deemed imminent by staying in the consular district. The extent of state interest is reflected in the extent to which the consul is responsible to act in these different roles. The foreign ministries attempted to make the public aware of the various types of risk situations that may cause them harm. The types of incidences vary and particular emphasis was given to ensure that the nationals take health and travel insurance to cover the expenses related to such a situation. For example, the Australian Foreign and Trade Ministry reported cases where consular assistance and protection was required when insurance was not taken. Generally, as expected the assistance required and provided was less when the national is able, but more when national is a victim of crime or faces an emergency.

United Kingdom and Australia had call centres at home to handle requests for assistance while abroad. Thus, in the countries examined the state interest seems to be high in serving citizens in emergencies. The foreign ministries monitor global events such as severe weather conditions or political unrest so that adequate warning is available to their nationals to avoid or choose their travel destinations with full understanding of the risks posed. The state's main focus was to make nationals aware of potential risk events, provide general safety advice and 'tips' to avoid 'risk situations' and issue warnings when the threat is dire. The foreign ministries then focussed attention on making travellers fully aware of the limits of consular assistance and protection that the state can provide given the limitations of international law.

1.2. Documentary and Judicial Function

The need for Documentary and Judicial Functions arise from *life events* that occur while nationals are living or travelling abroad. A life event can be described as events that create a demand for different types of legal or judicial services. Unlike risk events, events that trigger documentary or judicial matters are routine in nature. Similar to risk events, there is no standard classification or term used for these types of events although sometimes these events are linked to documentary functions such as authenticating documents.

Both own country nationals and foreigners in the consular district, or at home, may request for these services. The request for the service either comes from an individual or through various authorities at home and in the consular district. Individuals request some services such as issuance of own country birth certificates from a home authority which they are unable to reach. On the other hand, home country authorities such as enforcement and judicial agencies may seek the whereabouts of nationals in the consular district. At most basic level, the functions are necessary due to documentation of normal life events such as registration of birth or marriage, generally referred to in the literature as documentary or Town Hall functions. Other functions involve legal and judicial issues such as estate issues and cross border crime or custody issues. Because of these factors, the primary focus of the efforts were to serve on the needs of citizens who live overseas for a long term for engage or get involved in legal issues outside the state.

Documentary and judicial functions extends some aspects of the sending state's bureaucratic arm to the consular district. On the one hand, the function enables nationals to have routine but necessary links to their home's legal and judicial institutions when they are abroad, and on the other hand, when needed, the function opens the possibility of the receiving state agencies (or others concerned) to access or know the whereabouts of the nationals when they are abroad. Sometimes, life events require the consul to manage, enable and enforce the sending

States' laws and regulations on nationals abroad. (For example preventing travel or returning a parent who travels with their children when there is a pending child custody issue).

The roles of the consul can be viewed as a function requiring increasing levels of care; i.e. judicial work requires relatively more attention and duty of care than notary services, which in turn requires more attention and duty of care than civil registrar functions. The basis for classifying this separately from assistance and protection is that the nature of the work is different from 'protecting' in the sense that the rights and interests are not protected, but assistance is given in documenting normal and more routine life events. Moreover, it is difficult to group documentary and judicial activities separately as it encompasses interconnected legal and judicial aspects.

The function is simply classified as documentation in most of the literature. However, the legal and judicial aspects of this function are extensive and seem to be growing rapidly. For instance, New Zealand identified international surrogacy cases involving multiple parents with different nationalities which surfaces questions both on determining citizenship of a child and issues of dealing with parenting. Such cases involve various legal issues requiring assistance and advice from the consul involved monitoring the way laws are enforced (even if consuls are not strictly required to 'enforce' them). Nonetheless, in some of the countries, the level of attention and responsibility of the state to extend advice on such matters were greater than what we would expect in other countries. Consuls provide general advice for child abduction cases, adoption, or international surrogacy cases which is quite complex involving different laws and different stakeholders. Thus continuing to regard the function simply as documentary or Town Hall services does not truly capture the increasingly broad scope of this function in the contemporary sense (for instance see, Saul, 2009).

A pattern that emerged was the decreasing level of consul's role in documentation functions and an increasing role in judicial services. With increased access and ability of home country authorities themselves to access and communicate with nationals overseas directly some

of the documentary services do not necessarily require consul's direct attention. Nationals are able to apply for services such as identification cards or marriage certificates without the direct intervention of the consul depending on the consular district they are in. This could mean that eventually some of these functions may become obsolete. This could shift attention also towards determining the problems created by inconsistencies between judicial systems around the world. Nonetheless, any decrease that are experienced in providing 'documentary' services seems to have been compensated with an the increased judicial work with more complex international legal framework requiring coordination between legal and justice systems between multiple countries.

2. Managing Inflow and Outflow of Travellers

In the countries examined, managing the inflow and outflow of travellers was under the mandate of the home ministry and immigration authorities. However, the consul assumes some indirect roles in these state functions which are outlined in Table 5.2 and discussed below.

Table 5.2: Managing the outflow and inflow of travelers: Events, Stakeholders and Roles

(1) Events	(2) Stakeholders	(3) Roles
<i>Outbound travel functions</i>		
Passport application: <i>Passport or travel document</i>	Civil registrar: <i>Department of National Registration, Registrar, Registrar of Companies</i>	Enable outbound travel: <i>Issue passports, travel documents, visa agreements</i>
Restrict travel: <i>Withhold passport, exit visa regimes</i>	Enforcement: <i>Police, Immigration</i>	Restrict outbound travel: <i>Withhold passports, travel documents, issue travel advice, exit visas</i>
Travel ban: <i>Ban of travel to certain countries based on diplomatic relations</i>	Judiciary: <i>Courts, Lower Courts, Upper Courts</i> Penitentiary: <i>Prison authorities</i>	
<i>Inbound travel functions</i>		
Visa application: <i>Foreigners apply for visa</i>	Civil registrar: <i>Department of National Registration, Registrar, Registrar of Companies</i>	Enable inbound travel: <i>Visa applications, visa agreements</i>
Restrict travel: <i>Deportation of a foreigner for immigration violation, rejection of visas</i>	Enforcement: <i>Police, Immigration</i> Judiciary: <i>Courts, Lower Courts, Upper Courts</i>	Restrict inbound travel: <i>Placing travel bans, visa sanctions, deportation of a foreigners</i>
Travel ban: <i>Travel bans from specific countries, travel bans on particular groups (politicians, etc)</i>	Penitentiary: <i>Prison authorities</i>	

2.1. Control of Outbound Travel

The demand for functions relating to the control of outbound travel primarily arises from measures taken by states to control the outflow of its own citizens. On a practical level, this demand can be measured by the volume of passport applications and the outflow of travellers from the country. The issue is relevant to the foreign ministry to the extent that it is involved in the inflow/outflow process of travellers. In the countries examined there were few or no restrictions (by the foreign minister or any other agency) for nationals to travel outside but historically, and still in several countries, outbound travel is restricted through three measures of passport issuance policies, exit visa regimes and through foreign currency restrictions.

In general, the countries studied do not restrict travel through exit visas. The bulk of the responsibility of the state for screening those who cannot support themselves while aboard is indirectly transferred to the border control functions of the receiving state. The level of control is exercised through awareness programmes and issuance of travel alerts for particular destinations to discourage nationals from travelling to countries where the risks are high. In Australia and New Zealand, restrictions are placed on travel for individuals who cannot support themselves while they are abroad. And in some circumstances, the government exercises its authority to withhold the passport of a national in situations where the individual becomes indebted to the state or a court order prevents them from travelling.

Where travel is not restricted the consul's role in fact actively enables nationals to travel. The few limitations placed on issuing travel documents are mostly to reduce the misuse of the system. For instance, in the United Kingdom, measures were introduced to do more thorough checks when issuing passports (for adults), which began to take up to six weeks to approve them. Also, for nationals who lose their passports or damage them, a consul can issue travel documents to continue their journey. It is in this way, the function links to the Assistance and Protection

function. For the purpose of the study, however, it was important to classify the passport functions as separate from documentary services or protection services because the service has strong link to the state's ability to control the outflow of citizens overseas. Whilst this control is not common to the developed countries examined, passport and other forms of control such as foreign currency limitations are factors that enable or restrict nationals to travel overseas in the interest of the state's security or economy.

2.2. Control of Inbound Travel

Similar to outbound travel, the demand for consular functions relating to the control of inbound travel primarily arises from measures taken by the state to control the inflow of foreigners. The demand can be measured by the volume of visa applications and the inflow of foreigners into the country, either for the short-term or long-term. Restrictions are placed through visa regimes. In an open visa regime, the consul's roles are limited to informing and advising foreigners about the visa regime and the direct control measures are left for the enforcement officers on the border. The work shifts to the domain of consuls in the presence of a visa regime. If the consul is directly involved in the process, the consul (or immigration officer) screens foreigners for entry through enforcing the visa regime of the state. The visa regime determines how the consuls' work is organised in processing applications for visas. Individuals travel from one country to the other for different purposes. In the countries examined, there were various classification used but most were based on the duration of travel. Restrictions were placed based on the country of origin. Table 5.3 summarises the various purposes that were identified in the study. Inversely applied, the purposes listed here are equally applicable and relevant to purposes for which nationals travel overseas.

Table 5.3: Purposes for Inbound and Outbound Travel

<i>Purpose and Duration</i>	
Visit	<i>Visiting temporarily: General visitor, business and special visitors, medical treatment, child visitor (academic), sports visitor, entertainment visitor, private medical treatment, for marriage, parent of child being educated overseas, transit visitor, student visitor, prospective student, film crew, academic visitor, professionals taking tests.</i>
Student visitor	<i>Visiting temporarily for education: Adult students, child students</i>
Refugees/Asylum	<i>Seeking refuge or asylum</i>
Working	<i>Residing temporarily for gaining employment: Highly skilled workers, investors and entrepreneurs; sponsored skilled workers; temporary workers; regional working schemes;</i>
Residency	<i>Residing permanent for employment or personal reasons</i>
Citizenship/Dual National	<i>Residing permanently by obtaining citizenship (either retaining or not retaining dual nationality status)</i>

3. Significance and Implications

In summary, the consular function was generally found to be that of a coordinator and facilitator of the mandate of stakeholders both in the sending State and the receiving State. In performing consular functions, the consul's role on the one hand, was as a facilitator providing administrative access and communication between stakeholders and individuals, and on the other hand, coordinating the functions of bureaucracies and judiciaries between the two States. The coordinating role between agencies does not necessarily involve matchmaking stakeholders in the two states, but it was noted that the function also involved enabling coordination between stakeholders in any one country. For instance, in cases of accidents, consuls play a role in enabling communication between enforcement authorities and healthcare professionals in the consular district in the interest of the national concerned. Moreover, the nature of the work also involves help enforcing laws outside the country's territorial borders. In cases where a national commits an offense such as engage in child sex tourism, the consul's role is to also help bring the perpetrators to justice. This involves some conflicting roles, however, where serious crimes are

committed, the consul's role is not to 'protect' but to enforce the law upon its citizens regardless of the territory they are in.

The consular institution also plays a role in enforcing the immigration and border control regime (in countries where this function comes under the purview of the foreign policy portfolio). Issues involving border control have wider implications on policy decisions concerning migration. To the extent that the foreign ministry is involved in border control measures, the ministry attends to enabling or restricting travel through visa regimes for foreigners and issuance of passports for its nationals. This function is quite similar to 'documentary and judicial services'. However, the task differs considerably because it relates to migration policies and to control of movement of individuals, which is the source of the demand for consular services itself and concerns national security as well. The provision for inbound and outbound travel should be differentiated from other services, since it is the measure of control over border and it has different consequences for the bilateral relations between the countries. Sometimes, the nature of the work might entail aspects of assisting and documenting, such as issuing a lost passport, however, from the state's policy perspective the act itself enables or restricts the national to travel.

Because of these trends there are some policy implications for outbound travel, which is a factor that is relatively ignored in the literature as nationals of most developed countries now have few or no restrictions. However, re-intervention of the state to indirectly control outbound travel or at least advise nationals on their movements shows that the state has a concern in the flow of outbound traffic both because of the practical issues that nationals face and because of the importance it can have on diplomacy with other countries. The significance for some developing countries may be that although the state places no restrictions on outbound travel an increasing number of nationals abroad may have increasing expectations from the state to assist them overseas.

CHAPTER 6: IMPORTANCE OF CONSULAR AFFAIRS TO THE STATE

This chapter discusses the finding on the second question attempted in the research with regard to the importance of consular functions to the state. The importance given to consular services in a particular consular district depends on several interrelated variables. These variables can be grouped together into four main areas of (1) the number of people travelling to and from the consular district; (2) the demographic profile of nationals staying in the consular district; (3) the legal structure in the consular district; and, (4) the responsiveness of (both receiving state and sending state) agencies in the consular district. Table 6.1 introduces these factors and the underlying variables. Each of these factors is then discussed in more detail with regard to how the state might assign relative weight for each of them in determining the level of presence required in a consular district.

1. Number of people travelling and staying

The need for a state to provide consular services can only arise when there are individuals travelling to and from a particular consular district. The need for all consular functions of assistance and protection, documentary and judicial, and controlling inbound and outbound travel is thus dependent on the volume and frequency of individuals travelling to and from the consular district. Thus, we would expect the state's responsibility to provide consular functions to increase as the number of individuals residing in a particular consular district increases. The concept is an elementary principle that has implications on other types of representation functions. Strictly speaking, excluding the possibility of instances where there are no nationals clears the argument that in effect the state can only consider consular functions

important (in a contemporary sense outlined in chapter 1) depending on the significance it places on the volume and frequency of the people staying in the district and travelling to and from the district. In other words, the consular functions are only necessary where there is a significant volume of individuals, and consular functions are not required where there are no circumstances for exchange of nationals across borders. If there is no exchange of individuals the state-to-state representation functions, would only be functions related to strategic and economic interests of the state.

Table 6.1: Factors affecting importance of consular work

<i>Factors</i>	<i>Description</i>
<i>Number of nationals</i>	
Volume	<i>The volume of travelers in the consular district at a given time.</i>
Frequency	<i>The frequency with which nationals travel to the consular district</i>
<i>Demographic profile</i>	
Temporary vs. Permanent	<i>Duration of stay determined by the purpose of staying in the consular district</i>
Nationals vs. naturalized	<i>Purpose of stay determined by the level to which the nationals are socially integrated into the consular districts society.</i>
<i>Legal structure</i>	
Existence of law	<i>Existence of law covering the particular incident</i>
Political Ideology	<i>Individual rights Vs Community rights: The respect for individual rights versus the respect for community rights</i>
Religious beliefs	<i>Theocratic Law Vs Secular Law; The enforcement of religious laws as opposed to secular laws</i>
International/Bilateral conformity	<i>The degree to which the laws conform to customary norms and standards of regional or international law</i>
Practice of Law	<i>Customary practices in implementing the law, such as Common Law Vs Case Law: Common law countries require more documentary evidence than case law countries</i>
<i>Institutional responsiveness</i>	
Capacity	<i>Physical resources: The level of technological and infrastructure resources available for the institution</i> <i>Human resources: The level of educational and experience of human resources available</i>
Proximity or reach	<i>Geographical proximity: The ease of reach to the consular district from the borders of the state</i> <i>Virtual proximity: The degree of use of the internet to provides services to citizens outside the borders</i>
Coordination	<i>Within-system coordination: The degree of bureaucratic coordination within the agencies of the institutional system</i> <i>Inter-system coordination: The degree of bureaucratic coordination between the institutional systems</i>

Determining the number of travellers is the level at which border control measures become important as the functions enable or restrict the movement of nationals and foreigners across borders. Insofar as the state determines that the visa regime can effectively control the flow of foreigners from a particular district is important to the state, the state may decide on consular (or immigration) presence to screen visa applications to enable or restrict this flow. In terms of functions other than the control of inbound travellers, those functions mostly cater for own nationals who are overseas. Once nationals leave their home and stay in a foreign country, the importance of providing consular functions depends on the frequency with which risk events and life events occur in the consular district. The volume and frequency of such events is dependent on the next set of factors explained below.

2. Demographic profile

The demographic profile of nationals has a direct bearing on the types of consular functions required in a particular consular district. There are several variables affecting the demographic profile, and the most important of those from a decision making perspective are the duration of the stay of the nationals and the level to which individual nationals are socially integrated or naturalised into the consular district's way of life. These two variables can be interrelated as citizens who stay longer are likely to be more integrated into the society (however, the relationship is not necessary causal).

Thus, we can expect the level of responsibility of a state to provide consular services to its nationals abroad to be related to the duration and level of naturalisation of the nationals. The level to which the integration is allowed is dependent on the receiving State's visa regimes. To illustrate, temporary visitors may not have health insurance cover for their stay in the consular district, but (based on the regulations of the district) permanent residents are likely to get health

benefits. To the extent that the home country's policies give importance to issues of welfare of its national aboard in incidences that affect their health, the sending state's expected responsibility for the welfare is more for the temporary visitor than the permanent resident. Similarly, in the case of documentary services, if the life of the national is integrated into the society in the consular district, we would expect the state to take less responsibility, while they would need to provide day to day documentary or judicial services to those who are less integrated. Thus consular presence becomes more important when the population consists of a demographic profile that is less integrated (and stays for relatively shorter durations). This relationship is illustrated in figure 5.1.

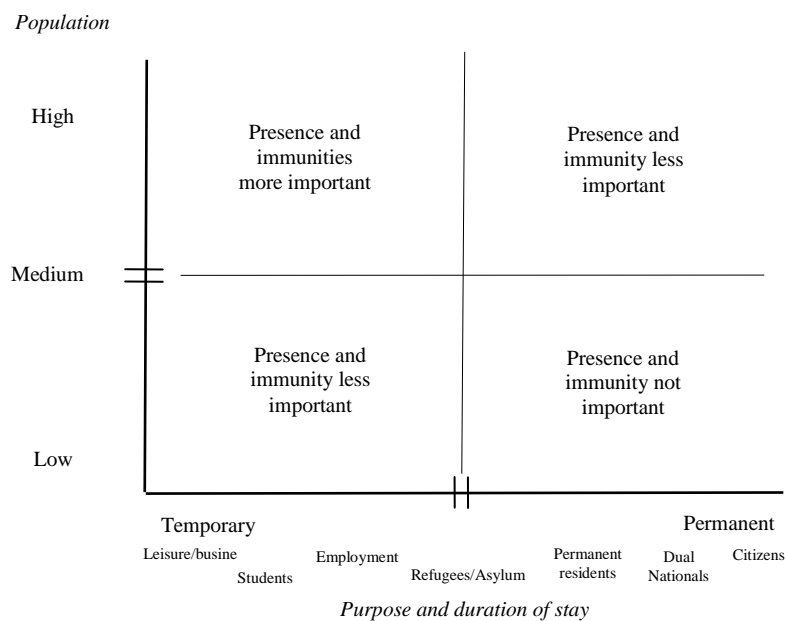


Figure 6.1: Interrelationship between population, and purpose & duration of stay

3. Legal structure

The legal structure refers to the laws, regulations and policies in the consular district relevant to foreigners travelling or staying in the territory. In the absence of extraterritorial arrangements, a country's laws and regulations govern the affairs of foreigners living in the district. The level to which consular functions are required depends on how well those laws and regulations serve the purposes of the nationals abroad. However, the legal structure in a particular district does not in itself create a demand for consular functions: The demand arises from inherent differences between the legal structures of the sending state and the consular district. The state is expected to provide any particular service depending on its own legal structure. For Assistance and Protection function this means that if the level of protection accorded to individuals in the consular district is weaker than that of the home state, the state would give more importance to protecting nationals, and therefore consular presence. For example, if ideologies on individual freedoms are different between the two contexts we would expect more consular issues to emerge. On the other hand, if the legal structures are similar (such as judicial institutions, handling estate matters) we would expect Documentary and Judicial functions to be relatively less important since both states recognise the same principles in conducting law and judicial matters. Thus, holding other things equal, if the consular districts legal structures are seen to be weak in comparison to that of the sending state, for any particular consular function the state's expected level of importance is higher. Vice versa, if the consular districts legal structure is perceived as strong, the state will give less importance to consular presence.

4. Institutional responsiveness

Responsiveness is the degree to which all agencies, both sending state and receiving state can, in practice, respond to matters involving citizens abroad or foreigners in the district. The factor is similar in principle to the legal structure in that institutional responsiveness is also a comparative relationship. The responsiveness in the consular district is measured relative to the state's own responsiveness. Responsiveness is determined by the capacity, proximity of reach and coordination: Capacity being the physical and human resource capabilities among the stakeholders, and coordination being the within-system and inter-system coordination between the stakeholders in the consular district as well as the state. Proximity or reach is the geographical and virtual reach of any given stakeholder to reach outside the state's territory. For instance, if the consular districts responsiveness is slow to natural disasters compared to the sending state, we would expect consular functions to be given more importance when the nationals are outside the state borders.

On the other hand, if the state judicial structures are unable to reach the citizens overseas, consular functions related to judicial matters become more important to the state. The service depends on the how well home country institution can (responsiveness) and need (legal structure) to reach the nationals abroad. In some instances, enforcement liaison officers are present in the diplomatic mission allowing physical reach for these arms of government. In other instances, the reach is enabled through technology such as the internet that links the institutions directly to citizens overseas without direct presence.

The result is that virtual proximity decreases the need for direct presence for many of the documentary services such as renewing passports. Alternatively, if the administrative practices in a consular district are lax there will be an expectation in the home country to widen the role that the consul plays in achieving solutions to consular problems that nationals face.

Expectations such as direct involvement in resolving issues such as inconsistencies between the judicial and prison authorities become important to the public as well as the foreign ministry. Thus, holding other things equal, if the consular district's institutions respond effectively in comparison to that of the sending state the expected level of importance given to any particular function from the state is higher. Vice versa, in the consular district's institutions responsiveness is ineffective in comparison to the sending states, we would expect the sending state to give more importance to any given consular function.

This relationship between responsiveness and demand for consular functions, and the relationship between demand and legal structure, discussed earlier, is illustrated in figure 5.2 below. In the figure, we would expect the middle point to be an area was there is total cultural and social integration between the two states. The principle is only applicable to one particular function at a time.

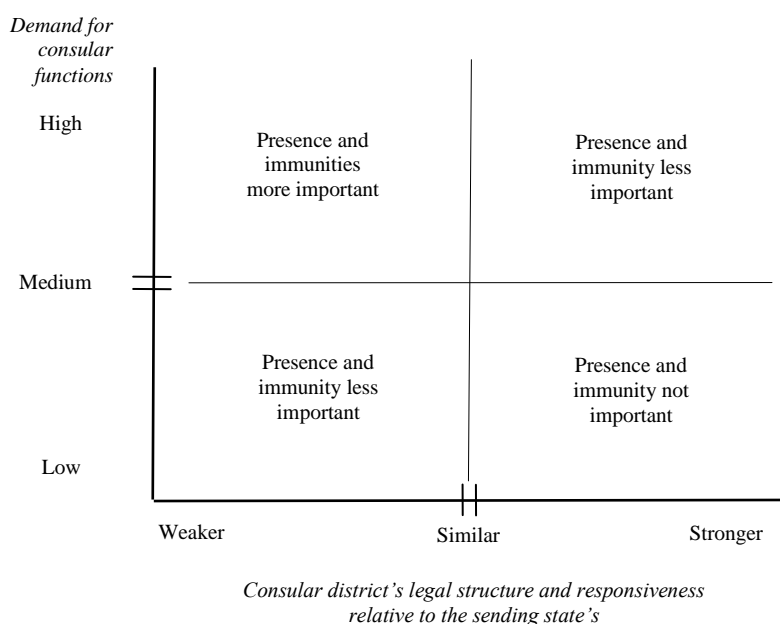


Figure 6.2: Interrelationship between consular district's relative legal structure and responsiveness and demand for consular functions

5. Significance and Implications

The relationship between the factors can be complex. However, it can be illustrated through an example. For instance, if the home country's human rights record and treatment of prisoners are comparatively better than the consular district's records, there is an expectation (from the public and the government) to intervene. If a national is arrested, the extent to which the consul has authority to protect the interests depends on the receiving State laws, regulations and practices (as defined by bilateral agreements between the states and international treaties including the VCCR). However, the extent to which financial assistance and moral support can be provided to the individual depends on the framework within which such assistance and support is provided to nationals abroad. The public policy is partly driven by issues such as the capacity for the state to provide consular assistance and protection. It is also determined by issues such as domestic sentiments through parliament and other institutions that translate to public policy (responsiveness). And moreover, prior to any action, the laws in the country determines how far the state is responsible for the individual and collective welfare of nationals to natural and unnatural incidences when they are outside the country.

Framing the issue of volume and frequency explicitly brings out the relevant aspects that differentiate the contemporary consular functions from other types of functions such as economic and political functions performed by the foreign ministry. Although the consular functions that were listed earlier follow clear definitional guidelines, on a conceptual level, consular functions cannot exist completely separate from other functions of the contemporary foreign ministry. Given the historical and current representative patterns between states, it can be argued that the sending state has national interests manifested in three types of interests over territories outside its borders: Firstly, the territorial jurisdictions that are of strategic interest to a nation-state. Secondly, economic districts in which the state attempts to exercise interest over

some form of physical economic resource. And thirdly, consular districts to which nationals travel or in which nationals reside in.

A 'pure' form of consular function or service can only exist when there are civilians present in a foreign territory without any political or economic interests of the state. However, in practice these three territorial interests overlap and because of this, so do the political, economic and consular functions. Territories in which a state has strategic interest is likely to have some economic benefits, and territories in which economic interests exists are likely to have travelling and residing individuals benefiting from those interests. Moreover, even without the presence of political interests, economic interests are difficult to separate from consular interests since in most cases civilians derive economic benefits. Thus, on a conceptual level, 'pure' forms of territorial interests rarely exist in contemporary international relations. The interests are based on state-to-state relations rather than on pure people-to-people relationships that existed before the Westphalia system.

The implication is that from a state's perspective, the primary aim of performing consular services is to exercise some administrative rights or control over its nationals that live outside its borders. Historically the control existed through extraterritorial arrangements. Because of this, judicial functions were wider since the state was extensively administering issues related to its nationals within the borders of another state. However, since the abolition of extraterritoriality and recognition of sovereignty within territorial borders, control over national's affairs while abroad diminished to the roles of the consular function as there were no jurisdictional rights. The state cannot exercise rights over its nations to the degree to which it had been exercised before during colonial times, thus the state can now only respond to events that require the state to extend its outreach to its nationals overseas. The level of consular presence is dependent on how much a national's way of life is integrated into the foreign society. Where there are a large number of temporary visitors, the state would give relatively more importance to providing consular services, than in districts where the nationals are permanent residents. This is

because the economic and social structures in the district would provide the services and there is less expectation for the consular functions to reach such individuals. On the other hand, when there are fewer temporary visitors we would expect the consular institution to have lower importance to the state. The level of presence would likely have a positive relationship with the importance given to the consular functions by the state. If there are larger numbers of temporary visitors, there is more likelihood of events that affect the population adversely. The demand for assistance and protection would likely be higher leading to requirements for consular immunities to ensure protection of the nationals.

A second relationship can be derived from the legal structure and responsiveness of the authorities in the consular district. Theoretically, this relationship is a comparative relationship to the sending state's own legal structure and responsiveness. Where the legal structure and responsiveness to events that affect the national is weak, the state may give relatively more importance for consular presence, than for consular districts that have stronger legal structures and responsiveness. Presence is less important when the numbers or demand is low and the legal structure is perceived to be stronger than the home country. This relationship exists with respect to consular representation between developed and developing countries. For instance, in most developed countries, the health care facilities can be comparatively stronger requiring less importance for consular presence. When pandemics (such as swine flu or SARs) occurred, (arguably) controls were stricter from countries where health care facilities are poorer. The relationship translates in different forms especially with relevance to the use of internet (or e-governance) outside the countries borders. In fact, presence becomes less important when proximity with nationals is achieved through providing advise and services through internet making it less important for consular presence. The relationships thus has complex characteristics depending purely on the specific function that the state wants to perform.

Closely related to the above two themes is another significant theme that emerged in the analysis: The question of how the consular tasks are related to *consular representation*. From a realist

perspective the nation state’s diplomatic and consular representation is a manifestation of national interests. As we have mentioned earlier, there are several types of interest in a particular territory: strategic, economic and consular (or cultural) interests. This interest may have been inherited from cultural ties between the two states, or out of strategic and economic interests in the territory. The degree to which the nation-state wants to enhance the relationship between the two states (or groups of people in two states) depends on the government’s foreign policy objectives at a given time. If the foreign policy objectives places importance to a district, it is expected that the state would give more weight to consular representative functions. This is to say that if the nation is interested in increasing the cultural, economic and political ties with the consular district, consular representation is important to the state, and vice versa. Consular representation in this sense is different from representing individual interests. Consular representation can be defined by some tasks that the consul performs to represent the collective interests of the state. Articles 5(a) through 5(c) of the VCCR outlines these roles as ascertaining, reporting, representing and promoting these interests for the state. Examples of these tasks are shown in Table 6.2.

Table 6.2: Consular representation tasks

Task	<i>Examples of work</i>
Ascertaining	<i>Gathering knowledge about the local conditions and developments, and status of relations between the two countries</i>
Reporting/Informing	<i>Reporting to the government, the public, interested people about the conditions and developments in the consular district</i> <i>Creating more awareness about the conditions and developments in the consular district for the domestic public and the government</i>
Representing	<i>Representing the state’s interest in protecting its citizens in the consular district</i>
Promoting, Further developing	<i>Actions to limit barriers on consular functions in the interest of the state and individuals</i>

In reality, there are inherent conflicts in representing the state’s interest and representing an individual’s interest. Going back to the consular functions identified earlier, assistance and protection services and documentary and judicial services mainly focus on resolving individual issues but they also have elements of conflict when laws have to be enforced against the

national's interest. The conflict is less clearly evident in the border control functions where the function is performed with interests of the state being assumed paramount.

The conflict arises more evidently where the interests of citizens and interests of state seem to collide the most: It becomes mainly an internal conflict manifested in the level of immunity deemed important in carrying out the functions of representing the state versus functions of representing individuals. Theoretically, one set of functions that should be performed by the diplomat (national-interest) and another set of functions performed by consuls (individual interest).

When representing these conflicting interests, the ideal level of representation should match the level of immunities and privileges required for performing the consular functions. As mentioned earlier, under the international system developed under the VCDR and VCCR, the diplomatic and consular representation is separated along these lines of immunity. Without retorting to the complex issue of diplomatic and consular rankings a simple distinction can be made between three levels of immunities: diplomat, consul and honorary consul. International laws are built on the premise that the diplomat requires the highest level of protection and immunity because he/she represents the national interests of that state. The consul requires less immunity than diplomats because the official represents interest of the state in its own nationals outside the state's territory. And finally, the honorary consul who is not a national of the sending state representing interests of individuals requires no or little immunities in performing the functions.

Immunities are only required where there is a presence. And if the official is not present in the territory the forms of representation that are possible are non-resident representation models such as special envoys, and non-resident ambassadors. Thus, we can postulate that with increasing number of consular functions we would expect that the level of immunity required will decrease too. Therefore, if we consider the level of immunity we would expect the functions performed to match the level of immunity as illustrated in figure 5.3 below.

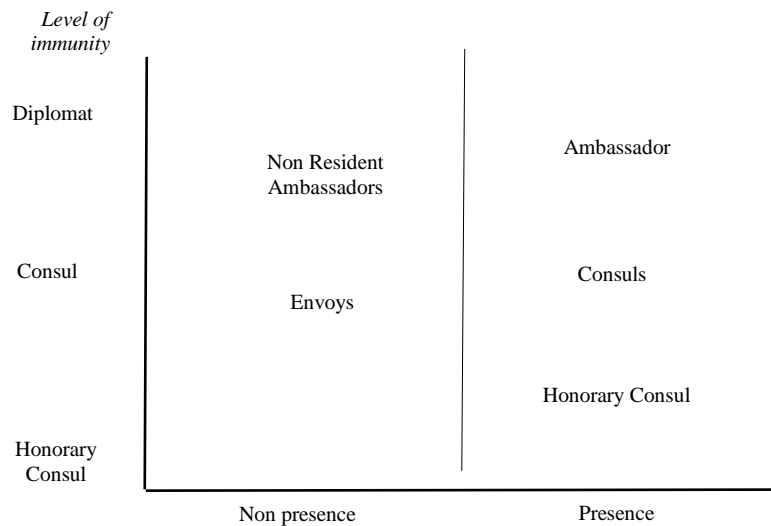


Figure 6.3: Level of Immunity versus presence/non-presence

In a decision making setting, the state decides to establish a representative outpost either because of sentimental attachment that the state has to the consular district or because of some functions that have to be performed. The decision making process given each one of those approaches is shown in table 6.3 below. Taking a top-down approach we would expect the consular posts functions to match the sentimental attachment that the sending State attaches to the consular district rather than purely serving specific functions for individuals. On the other hand if a bottom-up approach is taken, the function matches the type of representation required. Although a representative office serves many different functions of the state, understanding the functions of representation performed at represented offices and the level of officials representing the state also may help us understand that significance that the each state attaches to a specific territory in the foreign policy undertakings.

Table 6.3: Decision making approaches

Decision Level	Top-down approach	Bottom-up approach
Level 1	<u><i>Sentimental attachment</i></u> Determine political interest Determine economic interest Determine cultural interest	<u><i>Number of nationals</i></u> Determine the number of nationals Determine the nature of travelers
Level 2	<u><i>Legal structure and responsiveness</i></u> Determine whether the consular district's legal structure matches Determine whether the level of responsiveness is acceptable	<u><i>Legal structure and responsiveness</i></u> Determine whether the consular district's legal structure matches Determine whether the level of responsiveness is acceptable
Level 3	<u><i>Number of nationals</i></u> Determine the number of nationals Determine the nature of travelers	<u><i>Sentimental attachment</i></u> Determine political interest Determine economic interest Determine cultural interest
Level 4	Level of representation matches sentimental attachment	Level of representation matches number of nationals, and legal structure and responsiveness

CHAPTER 7: CONCLUSION AND AREAS FOR FUTURE RESEARCH

The history of the consular institution depicts the role of consuls as an evolving function depending on the circumstances. After nation-states emerged, the consular institution has coexisted with state-to-state diplomacy, although at times the underlying goals of the two functions seem to have conflicted: The diplomats' function was based on state-to-state diplomacy that seem to have been born out of the need to avoid conflicts between nations over physical borders, and the consuls' function born out of a need to regulate people-to-people contact within two societies living inside a national border. Thus, the purpose of separating the consular function from the diplomatic function rests on a premise that in times of war, sovereign governments may not maintain diplomatic relations, yet peoples of different societies need to engage with one another regardless of physical borders between states. Because of this, even when diplomatic relations are severed it is customary for states to agree that consular relations continue, at a minimum, by allowing third country representatives to perform consular work. Thus it would be most prudent to say that generally the consular institution has largely functioned as a means of enhancing people-to-people relationship rather than strictly in terms of relationships between sovereign states.

A contention in the literature has been the way to define consular institution and how consular work clearly fits into diplomacy on a functional level. So far the literature has neglected the study of consular functions on a conceptual level. Literature is not clear about what consular functions are in a contemporary sense and how the importance of each function can be determined on a conceptual level. The paper argued that given the lack of clarity in the extant literature about these questions, the two questions should be clarified before consular work can be measured in the context of any particular state. This research addressed this gap in the current

literature by examining the practice of consular services and consular diplomacy of three developed countries and, based on that, developing a conceptual framework for analysis and decision making about questions related to the consular institution.

1. Main Conclusions

This research sheds light into internal workings of how the consular institution functions within the nation-state framework. Firstly, the study shows that there might be deficiencies in branding consular services as just a task of ‘protecting and assisting’ nationals. Recent research has focused its attention mainly on defining consular work within the sphere of assisting individuals who face difficulties while overseas. The categories that emerged in the research show that there are fundamental differences in how the demand for consular services arises. Thus, we would expect that the government and public expectations will differ for each type of consular function: In functions involving the protection of individuals or judicial functions, the assumption is that the consul serves the interest of the individual first before the state. In consular work related to border control there is an inherent assumption that the state’s interest should prevail over the interest of the individual. However, all of these functions in fact require the consul to delicately balance both the interests of the state and the individual. Depending on the specific type of work and case, the consular officer’s role seems to be one that inherently involves changing hats. The research thus supports the view that consular work is an extremely complex field by its very nature, but negates the view that consular work can only be determined through trial and error. From a foreign policy point of view, leaving consuls to sort out these conflicts by trial and error might be more costly. Clear policy guidelines and instructions together with proper training may be indispensable in ensuring that the state’s interest or the individual’s interest is not compromised in different circumstances. This is especially relevant to situations where officers have to jointly perform both diplomatic and consular functions.

Secondly, the categorisation provided in the research shows that if individual interests are prioritised, consular diplomacy should involve engaging in diplomatic efforts to reduce the likelihood of consular incidences and events. Previous literature and current trends subscribe to this view that consular representation attempts to decrease the likelihood of events that affect nationals. Thus, the research suggests that purely expanding consular work is not an end in itself, but consular diplomacy serves a fundamental requirement of diplomacy to find ways and negotiate at all levels to decrease the likelihood of such events in the interest of nationals and the state. Moreover, from a functional perspective, technological advancements (especially the advent of internet in providing government services) reduces the need for consular functions, which in turn reduces the need for consular presence. Typical services can be performed (and most of the time more efficiently) using the internet. (Where documents have to be exchanged they can be couriered: the reality is that many 'non-core' parts of the protection services can be outsourced without direct presence; to lawyers or advocates, or other local parties, and officials can always fly in if the case warrants such needs. Moreover countries with similar interests can also consider pooling such functions to reduce costs. Because of the availability of technology, it can be suggested that presence is only important because of the physical sense of nationhood that it brings. In this sense, consular work becomes particularly important for states that find it important to project this image in a borderless world.

The consul function runs into a conflict of interest between these sometimes competing interests: Narrowing the likelihood of events inherently leads to narrow levels of interaction with nationals abroad, leading to less means of projecting the importance of a country's national identity *through* its own citizens in the consular district, or more importantly, *to* its own nationals at home. Thus, in the modern context, consular work seems to have become a means through which nation-states compete over the relative importance of its national identity. To this extent competition between states to show relative importance of their consular functions depicts competing or rival perceptions of national identity. This research thus supports the conclusions made by Leira and Neumann (2008) about the competitive nature of the work performed by the

consular institution. But contrary to their findings, the consul's work might not be a precursor to war: Within the nation-state framework, the consular function inherently assumes a competitive function. Hence, it might be more correct to state that a phenomenal increase in consular diplomacy may help us predict the possibility of conflict between national identities, since the relative importance that a state gives to specific consular functions can indicate the level to which the state wants to strengthen its national identity.

Thirdly, from a social theory perspective, consular functions arise from a mismatch in different forms of social practises between two peoples competing for resources in one area. Essentially, over history consular functions became institutionalised when two societies agreed that in the interest of peace different legal systems can and should coexist. This concept of extraterritoriality became less acceptable in the new international system based on nation states within borders. In modern times, extraterritorial laws only apply to diplomats and consuls through immunities given under the current international laws. Nonetheless, this research shows that the perceptions of extraterritoriality can still exist through the consular institution. Subtler realities of these perceptions may exist where migrant groups attempt to practice cultural or religious practices or segregate themselves from local customs and practices to ensure identity. Manifestations of these perceptions remain through formations of foreign society associations and clubs, or formation of cultural or religious groups.

Viewing the consular institution through a prism of such mismatch between two groups or societies, it can be seen that on a fundamental level, the importance given to consular functions arise from perceptions that one set of norms dominate over the other. There is practical relevance in refocusing the attention of our research efforts on consular affairs from this social theory perspective. On one hand, it explains the difference between consular functions between states and among different posts more clearly. On the other hand, it enables officers involved in consular work to be aware of the likelihood of emergence of new types of consular issues, as seen in the example provided by the international surrogacy case. When we

conceptually look at these issues new trends in people-to-people contact the issues appear more clearly so that decision makers are able to make practical adjustments in consular functions where necessary and proactively act on emerging situations.

Fourthly, this research arrives at a hypothesis that the conflicts between actual functions performed by diplomats and consuls and the level of immunity that is sought to perform these functions can provide us a better glimpse of the level and the changes observed in relations between two states and the foreign policy resource allocation in any particular state. The difference between diplomatic and consular immunity offers us the yardstick: Theoretically, if the actual functions that are performed by a consular post can be determined we can draw two conclusions: On the one hand, when the immunity sought exceeds the functions required this move signals a developing interest in strategic or bilateral relations. On the other hand if immunity sought is equal or below the functions required, it indicates a stabilizing or lower strategic interests in the relations between the two countries.

Fifthly, although in practice the relationship between immunity and functions is difficult to determine, there are interesting lessons that can be drawn from that interrelationship, especially with relevance to the analysis of historical instances where representation models was not consistent with 'actual' consular functions. Thus, Leira and Neumann's (2008) suggestion that the increase in consular presence in the lead up to a war, may not necessarily indicate that consular institution works in that manner. Re-examining historical events might show that with the advent of state-to-state diplomacy, the state can manifest its strategic interests through the functions of a consulate too, when the state deems it necessary to use consular immunity for tactical dispositions in war or diplomacy. Studies in international relations can draw better insights into the working of war and peace if such studies did not solely concentrate on diplomatic negotiation as the only foreign policy tool.

Sixthly, the relationship between immunity sought and actual functions performed also provides an insight into foreign policy resource allocation measures in particular states or regions.

The finding has relevance to regions that become more and more integrated. When state systems are fully integrated, as in European Union, hypothetically consular functions should not exist. Nonetheless in the context of the European Union, the member states maintain different consular posts and expect all states to provide equal level of service regardless of national citizenship which duplicates the function in consular districts. This may signal the desire for some forms of autonomy within the regional system specially with respect to maintaining national identities.. This concept can also be extrapolated to the problems faced by many developing countries in efficiently allocation of foreign policy resources. On the one hand, mismatches may indicate weakness in foreign policy objectives of the state. And on the other hand, it may indicate misuse of the diplomatic immunities to offer privileges to individuals not only from its own state resources, but also through the resources of the receiving state. This finding has particular relevance to the development of foreign service institutions and setting foreign policy goals in developing nations. The phenomenon is especially prevalent in new states where foreign policy and foreign service has not matured and has no history of foreign policy institutions. In such countries, both foreign service and foreign policy are intermingled traditions of diplomatic bureaucracy that have been adopted from old states. Hence, we find countries that have no significant powers attempting to conform to norms of larger and more powerful states, ignoring or attaching no clear meaning to the power of institutions such as the consular institution in ‘soft’ diplomacy. There is no clear understanding of the consular institutional of such states and this aspect has to be researched further.

Finally, and probably the most important dimension of this research is that the research sheds additional light on the concept of nation-hood: In a nation-state system, the consular institution exists primarily as a means of administrating the concept of nation-state outside its physical borders. Therefore, the function still shows remnants of the concepts of extraterritoriality. The relative importance given to protecting nationals outside the borders shows us that many states still desire to extend the principles of nationhood as far as possible in a borderless world. Specifically, it was found that on a theoretical level states with ‘stronger’

identities may wish to exercise more discretion in administering their citizens abroad than nations with comparatively 'weaker' identities. The importance that a country gives to enhancing and broadening the consular functions is indicative of the value it places on its own nationals, and thereby its sovereignty. The result is that in a nation-state system, extending consular work is a way of projecting the principle of a country's own nationhood to the rest of the world, especially to those nations that have rival or conflicting identities and principles. Thus, if a country's citizens do not travel or migrate widely or if the state does not give importance to projecting its nationhood through its citizens, the state is less likely to recognize the importance of extending its consular reach in a formal way. This aspect of the research needs further investigation to determine if there is a relationship between perceptions of 'nation-hood' and consular protection and assistance.

2. Reflections on consular diplomacy of microstates

Initially, this research began as an attempt to answer the question of what consular diplomacy and consular functions mean to the diplomacy of microstates. Microstates face a special case because of their small size and limited foreign policy resources. Previous research has shown that diplomacy in microstates involve mostly economic and consular work with limited political functions (Mohamed, 2002). The research later did not attempt to address this question upon finding that there are fundamental conceptual gaps in the literature that need to be addressed first before any research can focus specifically on consular diplomacy of microstates. Nor was direct application of the models entirely possible partly due to limitations in obtaining the relevant material. The research finds that as history and contemporary literature would suggest, the questions over placing consular diplomacy is not a question unique to microstates. The question of understanding and explaining consular functions is still unresolved and remains a recurring issue among scholars and practitioners even when addressing consular issues of more established states, since the functions of consul has not been conceptually placed in foreign

policy. Thus, the findings of this research may assist in further inquiry on consular diplomacy that is specific to states or groups of states, such as microstates, with different needs for consular diplomacy.

3. Limitations and further research areas

One of the limitations of the research was the unavailability of data to make a comparative analysis of countries other than the ones that were examined in the research. However, as we have argued, the relative neglect in the literature on theoretical aspects made it important to address the conceptual questions first because comparisons can be made through benchmarks that can be applied universally. In addition, the conceptual framework offers a theoretical position that has to be tested by empirical findings. Furthermore, since the research was based on publicly available data, consular duties related to foreigners in the own country did not clearly emerge in the analysis, although it is known that this is also an increasingly important function if the receiving state has large numbers of foreigners such as migrant workers and travellers.

Nonetheless, the model integrates these factors and extrapolation of the model might provide new insights into those functions. The factors that were developed were by no means exhaustive. Several domestic factors were simplified in the interest of getting a broader perspective of how consular functions fit in to the state's diplomatic function. The effort of this research was simplified to the essential elements partly because of the complexity of consular work. To gauge a better understanding of how functions are fully integrated into the foreign policy resource structure in a contemporary context, similar conceptual frameworks have to be developed for economic, diplomatic and military aspects of foreign policy thereby gaining a complete understanding of how each of the functions coexist and are interrelated.

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