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Consular Officer's Amenability As Witness

Stephen J. Werber*

CONTRARY TO THE EXTENSIVE IMMUNITIES granted to members of the diplomatic service, members of consular posts are given only limited privileges and immunities. The existence and limitation of consular immunities arise by virtue of the office.¹ Thus the consular officer can be called upon to testify in both civil and criminal matters under common law, international law, and treaty provision. In the absence of a treaty, consuls are generally exempt from giving testimony relating to matters acquired within the scope of their official duties or as to material contained in the consular archives.² This principle was succinctly stated in a 1952 decision:

While a consular officer is not exempt from being called as a witness he may not be required to testify concerning the contents of the consular archives nor to divulge information, which has come to him in his official capacity.³

The purpose of this paper is to examine various treaty provisions in an effort to ascertain the manner in which a consular officer's obligation to testify is set forth, the immunities given such officer and some of the problems raised by both the obligation and the immunities.

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[*Author's Note:* The author wishes to express his appreciation to Mr. Charles Sabo of the *Cleveland State Law Review* Board of Editors for his able assistance in the preparation of this article.]

¹ 1 Hyde, *International Law*, § 465 at 795 (1922); Sereni, Angelo, *The Italian Conception of International Law* at 335 (1943); Silva, "The Vienna Conference on Consular Relations," 13 *Intl. & Comp. L. Q.* 1214 at 1224 (1964); *Restatement (2d) Foreign Relations Law of the United States*, § 81 (1965). Comment (a) to § 81 of the *Restatement* provides a short and accurate paragraph distinguishing diplomatic from consular function and immunities:

The extent of consular immunity has historically been much more uncertain than that of diplomatic immunity. Although there is some overlap between diplomatic and consular functions, diplomatic representatives are primarily concerned with the conduct of foreign relations between states, whereas consular representatives are primarily concerned with the interests of nationals of the sending state in the receiving state, the sending state's relations with its own nationals in the receiving state, its relations with local authorities there and, generally, matters relating to the details of commercial intercourse and travel between the two states. The broad personal immunities enjoyed by diplomatic agents have not been found necessary for the reasonably unhampered performance of such functions. . . .

² Lee, *Consular Law and Practice*, Ch. 17 at 263 (1961); U.N. Conference on Consular Relations, *Official Records*, at 38, par. 34, U.S. Doc. A/CONF. 25/16 (1963); Bishop, *International Law*, Ch. 6, at 599-600 (1962); Stewart, *Consular Privilege and Immunities*, Ch. 5 (1926); *Restatement*, *supra* n. 1, § 81 comm. (c); 4 Hackworth, *International Law*, § 437 at 753 *et seq.* (1962).

³ *American League for Free Palestine, Inc. v. Tyre Shipping Co.*, 202 Misc. 831 (N.Y. Co. 1952). Here a member of the Israeli consulate in New York appeared in supplementary proceedings pursuant to a subpoena *duces tecum* and refused to answer certain questions claiming that they concerned matters relating to his official capacity. Objection to the questions were sustained.

Treaties Have Consistently Treated the Question of a Consular Officer's Liability to Give Evidence in Judicial Proceedings

Should a consular officer be compelled to give testimony in matters wherein he is neither plaintiff nor defendant? These problems have traditionally been resolved by treaty provision. Treaty interpretation raises numerous questions including the following:

- 1 What is the distinction between civil and criminal matters;
- 2 Should coercive methods be permitted to compel consular officers to appear and to testify;
- 3 Where shall the testimony be given;
- 4 Who shall determine whether the material sought is privileged, and other subsidiary problems such as,
- 5 what protection should be given the dignity of the consulate;
- 6 Can consular immunity be waived?

The subsidiary problems are frequently resolved by relatively simple treaty provisions such as Articles 40 and 45 of the Vienna Convention on Consular Relations.⁴

Various approaches to the other questions are illustrated by treaty provisions and the discussions which took place at the United Nations Conference on Consular Relations at Vienna in early 1963.⁴

Without exception, the treaties studied permit a consular officer to give testimony at his residence or at the consular post. Frequently this statement is qualified by requiring that the testimony will be allowed only where possible or permissible. Every treaty, except the Havanah Convention, specifically provides that steps shall be taken to prevent interference with consular functions. The Havanah Convention implies such a provision by way of an article concerning preservation and by its consideration of the dignity of the consular office.⁵

Distinction Between Civil and Criminal Matters

With the exception of bilateral treaties such as the Harvard Draft, and the Havanah Convention, none of the treaties studied made any distinction between civil and criminal matters. This may reflect that some nations have a greater unity in their approach to civil and criminal matters than that found in the common law systems. Another factor may be the possibly unique constitutional problem faced by the United States regarding the Sixth Amendment.⁶

In at least five bilateral treaties involving the United States, there is a clear distinction between civil and criminal matters.⁷ A similar distinc-

⁴ U. N. Doc., A/CONF., 25/16/add. 1 (1959).

⁵ U. S. Doc. A/CONF. 25/16 (1959).

⁶ Art. 15, Pan American Convention on Consular Relations, 47 Stat. 1976 (1928).

⁷ U. S. CONST., Amend. 6.

tion is found in Article 15 of the Havanah Convention. It should be noted that these treaties were signed in the period of 1881-1942. More recent bilateral treaties entered into by the United States, during the period 1950-1964, do not make the distinction.⁸ Furthermore, the Vienna Convention does not make any distinction between civil and criminal matters. This may be one reason why the United States has refused to ratify this treaty while many other nations have ratified it. Some of the comments made by delegates to the Vienna Conference support the writer's position regarding ratification.⁹

Research has failed to disclose any case law which would lead the United States government to change previously existing treaty policy. Nevertheless, the change has occurred to some extent and the government now enters into treaties which do not distinguish between civil and criminal matters. There may be several reasons for the change. The majority of nations are not in accord with the old United States position and may simply refuse to accept it in written form. Another possible reason may be the fact that other super powers exist in today's world and their influence cannot be underestimated. Finally, the United States has been included in treaty negotiations with the Soviet Union, whose influence demands compromise if relations are to improve. American State Department policy may reflect any or all of these factors or other factors.

An example of the language which makes the distinction is found in Article 2, paragraphs (2) and (3), of the Convention between the United States and Mexico which was ratified in 1943.¹⁰

2. . . . In criminal cases the attendance at court by a consular officer as a witness may be demanded by the plaintiff. * * * The demand shall be made with all possible regard for the consular dignity and the duties of the office; * * *
3. . . . In civil, contentious-administrative and labor cases, consular officers shall be subject to the jurisdiction of the courts of * * *

⁸ Consular Convention between the United States of America and the United Mexican States, Art. 2, 57 Stat. 800 (1945); Treaty of Friendship, Commerce and Consular Rights between the United States of America and The Republic of Finland, Art. 20, 49 Stat. 2659 (1934); Treaty of Friendship, Commerce and Consular Rights between the United States and the Republic of Austria, Art. 14, 47 Stat. 1876 (1928); Consular Convention between the Republic of Cuba and the United States of America, Art. 5 (1926), as cited in Supplement to the Volume on Laws and Regulations Regarding Diplomatic and Consular Privileges and Immunities, United Nations (1963), hereinafter referred to as Supplement; Consular Convention between the United States of America and Romania, Art. 4 (1881), Supplement.

⁹ Consular Convention between the United States of America and the Union of Soviet Socialist Republics, Art. 20, T.I.A.S. No. 1304 (1964); Consular Convention between the United States of America and Japan, Art. 5, T.I.A.S. No. 5602 (1962); The U.S.-U.K. Consular Convention, Art. 11 (1959), as cited in Lee, *supra* n. 2; Consular Convention between the United States of America and Ireland, Art. 11 (1950), Supplement.

¹⁰ *Supra* n. 5.

When the testimony of a consular officer * * * of the State which appoints him and is taken in civil cases, it shall be taken orally or in writing at his residence or office and with due regard for his convenience * * *

This can be compared to Article 20, paragraph (1) of the recent Convention between the United States and the Soviet Union which provides:

1. Consular officers and employees of the consular establishment, on the invitation of a court of the receiving state, shall appear in court for witness testimony.

The United States-Soviet Union provision states that consular officers shall appear as witnesses in court, but that no attempt to compel their testimony is permissible. Furthermore, the officer can give testimony at his residence or at the consular premises, for any number of reasons, rather than appear in court. There is little doubt that the officer will testify only when and where he wishes. One wonders whether such provisions are not going beyond the practical approach to consular immunity and becoming strikingly similar to diplomatic immunity.

The United States-Soviet Union provision contrasts greatly with the United States-Mexico provision. There is some similarity in civil matters but even here the duty to testify in court contained in the Convention with Mexico is couched in far more obligatory language. The major difference between the two provisions consists of the complete separation between civil and criminal matters. In criminal matters the appearance of the consular officer can be demanded, not simply requested, by an interested party and the officer *shall* comply with the demand, according to provisions of the Convention with Mexico. The only qualification is that the demand shall be made with due regard to consular dignity and the duties of the office. Although there may be no substantial enforcement methods from a practical standpoint, the Convention with Mexico leaves no doubt that in criminal matters the consular officer is compelled to testify in court without the necessity of receiving orders and instructions through diplomatic channels.

This entire question came under close scrutiny when the Harvard Draft was prepared. Article 22 of the Draft makes the distinction and reads as follows:

A receiving state shall exempt a consul from attendance as a witness at the trial of a civil case; it may require the consul to give testimony orally or in writing at his residence or office and to attend as a witness at the trial of a criminal case, but such requirements shall be enforced with due regard for the dignity of the consul and his convenience in the exercise of his functions.

In the opinion of its authors the Harvard Draft exempts a consul from attendance as a witness in civil cases and assures that consideration will be given for his dignity and convenience in his attendance as a

witness in criminal trials. No general exemption is set forth which would prevent the consul from giving testimony. The only limitation contained in the Harvard Draft is found in Article 29 regarding archives and official information. This is in accord, say the authors, with international law. Finally, the authors contend that the proposed article is supported by many recent [*sic.*, 1932] treaties and lists several such treaties. It is accurately pointed out that such a distinction arose from difficulties met by the United States in connection with the *Dillon* case.¹¹ This case will be treated in more detail when the question of compulsory attendance of witnesses is discussed.

In the writer's opinion it would be theoretically best to require consular officers to testify in all matters, civil and criminal, whenever the court believed their testimony would be material. The recognized immunity regarding archives and official acts should be maintained. The pressures of time and the possible interference with consular functions make it improper to require consuls to give in court testimony in connection with civil matters. This is somewhat upsetting as the reading of a deposition into evidence compares very unfavorably with live testimony. The obligation placed upon the consular officer should be greater than that contained in either Article 20 of the United States-Soviet Union Convention, Article 44 of the Vienna Convention or similar treaty provisions and should be more in accord with Article 22 of the Harvard Draft, Article 2(3) of the United States Convention with Mexico and similar provisions. A greater obligation is not meant to imply a mandatory obligation.

In regard to criminal matters the better position appears to be that of the United States and a minority position, *viz.*, a requirement that consular officers should be compelled to provide testimony in all criminal matters. A possible qualification would be to make such an appearance mandatory when needed as part of the defense and discretionary when sought by the prosecution. Such a distinction would be without adequate value as it is as important to society to convict the guilty as to protect the innocent.

As pointed out by one of the American representatives to the Vienna Conference, many nations have laws that permit criminal defendants to call witnesses on their own behalf.¹² This is an essential part of a criminal defense and its importance should not be minimized nor should the privilege be jeopardized. The demeanor of a witness on the stand, his tone of voice and very character can be judged by the jury and the

¹¹ *In re Dillon*, 7 Fed. Cas. 710, See also, Draft Convention: "The Legal Position and Functions of Consuls," Harvard Law School, Research in International Law, 25 A.J.I.L. 193 (Supp. Val., 1932).

¹² U. N. Doc. A/CONF. 25/16, statement of Mr. Blankinship at 378, paragraph 10 (1963).

court. This is not possible if the deposition is read into evidence. Though primarily one can accept the weakness of utilizing a deposition in a civil matter where only economic factors are at stake, one should not abide by this method where incarceration is the issue. A consular officer should be willing to testify in criminal matters in spite of any real or fancied danger he foresees and without regard to any interference with his function. Since such a willingness may too often be absent there should be compulsory language in consular treaties.

All of the treaties studied permit, in either civil or criminal matters or both, the consular officer to testify at his residence or the consular post. This right raises questions concerning the admissibility of such testimony. Although this problem may well arise in many nations, this paper shall use as an example the federal rules of both civil and criminal procedure. The treatment of the compulsory process issue in treaties and case law will also be discussed.

Admissibility of Evidence

Provided there is ample opportunity for full cross-examination and attendance by all parties in interest, there is no great problem in utilizing depositions or written interrogatories in civil matters. Deposing witnesses is a common practice in most judicial proceedings in the United States whether they be in federal or state courts.

The Deposition and Discovery section of the Federal Rules of Civil Procedure¹³ is extremely liberal in permitting discovery.¹⁴ Rule 26(a) provides that any party may take the deposition of any person. This rule encompasses witnesses, whose attendance can be compelled by use of a subpoena under Rule 45. Rule 26(d) permits a party to use the deposition of a witness if (1) the witness is dead, (2) the witness is more than 100 miles from the place of trial or outside the United States, (3) the witness is unable to attend due to age, sickness or infirmity, (4) the party offering the deposition has been unable to procure attendance of the witness by subpoena or (5) under certain exceptional circumstances.

It is evident that Rule 26(d) could apply to a consular officer. The consular officer can disregard a subpoena with impunity in many cases. A consular officer may often be more than 100 miles from the place of trial. In addition to the specific Federal Rules provisions it must be noted that many treaties provide for noninterference with consular functions and this could be held to constitute the necessary exceptional circumstances.

Typical treaty provisions are found in the Vienna Convention, Article 44(2), which states:

¹³ 28 U.S.C. Rules 26-37.

¹⁴ *Id.*

The authority requiring the evidence of a consular officer shall avoid interference with the performance of his functions. It may, when possible, take such evidence at his residence or at the consular post or accept a statement from him in writing.

the United States-United Kingdom Convention which states in Article 11(3):

A consular officer or employee may be required to give testimony in either a civil or a criminal case, except as provided in paragraph (4) of Article 10. The authorities and court requiring his testimony shall take all reasonable steps to avoid interference with the performance of his official duties. The court requiring the testimony of a consular officer shall, wherever possible or permissible, arrange for the taking of such testimony, orally or in writing, at his residence or office.

and Article 20(3) of the Treaty between the United States and Finland which states:

Consular officers shall be subject to the jurisdictions of the courts in the state which receives them in civil cases, subject to the proviso, however, that when the officer is a national of the state which appoints him and is engaged in no private occupation for gain, his testimony shall be taken orally or in writing at his residence or office and with due regard for his convenience. The officer should, however, voluntarily give his testimony at the trial whenever it is possible to do so without serious interference with his official duties.

Note also that Rule 31 permits depositions of witnesses to be taken upon written interrogatories. Thus treaty provisions which permit the taking of testimony outside of the trial are fully in accord with the rules of evidence and such testimony would be admissible if the "use" provisions are followed. Of course, the testimony must also be proper under other rules of evidence or it will be subject to the same objections as evidence solicited at trial.

As do the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure permit the use of depositions and written interrogatories in certain circumstances.¹⁵ However, the utilization of depositions and interrogatories is more limited in criminal proceedings than it is in civil proceedings.

Rule 15(a) of the Federal Rules of Criminal Procedure provides that if a prospective witness may be unable to attend or is prevented from attending a trial and his testimony is material as well as necessary to prevent a failure of justice, the Court may, upon motion of the defendant, order that the deposition of the witness be taken and that any books, documents, etc., which are not privileged must be produced at the same time and place as the deposition.

¹⁵ 18 U.S.C. Rule 15.

A major difference between civil and criminal proceedings is that in a criminal proceeding only the defendant can utilize the deposition process.¹⁶ Under such rules a defendant would not be greatly prejudiced if a consular officer refused to testify in court because the defendant could obtain the benefit of his testimony by deposition. Either party might be prejudiced to some extent by the physical absence of the witness. The rule thus provides not only a safeguard to the defendant but offers compliance with constitutional demands of the Sixth Amendment. The consular officer is also protected as the court will not permit the deposition to be taken until the defendant convinces the court that the information sought will be material.

Rules 15(e) and 15(f) govern the use of depositions and proper objections to admissibility of such testimony. Rule 15(e) provides that a part or all of a deposition is admissible, though still subject to the rules of evidence, where a witness is dead, out of the U. S., infirm or ill, or where the party, offering the deposition cannot subpoena the witness. The deposition can be used to impeach the testimony of the deponent as a witness and any party may require all testimony where only part of the deposition has been offered. It is not admissible if the party offering the deposition has procured the absence of the witness. 15(f) provides that all objections to admissibility in evidence of the deposition are made as in civil actions.

In practice it seems that a consular officer would most prefer to testify by answering written interrogatories. Such a practice would substantially lessen the amount of time expended by the officer and permit a thorough analysis of the questions before a formal reply is made. Another important consideration is that the officer will have an opportunity to have the materials reviewed by either his post's legal advisor or his personal attorney. The advantages in the use of written interrogatories, insofar as the consular officer is concerned, are substantial. His position may well demand this procedure. On the other hand, adversary counsel may frown upon this approach as it enables the witness to carefully consider and phrase his answers. The adversary much prefers an oral deposition and will do all in his power to obtain it.

As indicated above, rules of procedure such as these are in accord with the provisions of virtually every treaty studied. Even in systems totally outside the American framework, such a procedure is permitted. This view is supported by Article 12 of the Sino-Soviet Consular Agreement which provides:

¹⁶ Although there is no constitutional prohibition against permitting the government to utilize the deposition process and some 22 states do permit this, the U.S. Supreme Court, in 1966, rejected an amendment to Rule 15 that would have permitted this. See, 34 F.R.D. 420 (1969); Orfield, *Criminal Procedure Under the Federal Rules* (L. Co-op., 1966), § 15.10 (1966). The apparent ambiguity of Rule (15)b which refers to "parties" is resolved against the Government.

Consuls shall be required to attend as witnesses before the judicial organs of the receiving country in proceedings not connected with their official duties. Where a consul is prevented by the exigencies of his service or by illness from attending as a witness before a judicial organ, he may make a deposition at his office or residence, or may send a deposition in writing.

Whenever court rules permit, the consular officer will be able to testify outside of the courtroom.¹⁷ In civil matters there is, at best, amelioratory language such as that contained in Article 2 (3) of the United States-Mexico Convention.¹⁸ In both civil and criminal matters, the consular officer is in a position to argue that under treaty provisions regarding noninterference with his functions and the dignity of his office, his testimony should be taken at his residence or his consular post.

May Consular Officers Be Compelled to Testify

The use of a subpoena *ad testimonium* or *duces tecum* with a penalty provision is virtually impossible even if not specifically prohibited by treaty provision. Traditional concepts of international practice have strongly mitigated the use of such a device. Therefore, the only effective way to compel a consular officer to testify is by obtaining a waiver of immunity, threatening the withdrawal of the officer's exequatur, or other diplomatic pressures. Other than through diplomatic channels there is no way to compel a consular officer to testify, regardless of treaty obligations. This is, of course, a problem common to many aspects of public international law.¹⁹

Compulsory attendance of a consular officer as a witness is a problem common to all nations. In the United States it is further complicated by the mandate of the Sixth Amendment to the Constitution.²⁰

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence. [Emphasis added.]

Examples of the problems encountered could be listed extensively, a few should serve to illustrate the dilemma.

¹⁷ The problem is, perhaps, more complicated than indicated above. See, Lee, *supra* n. 2, at 262-263. See also: *Lipscomb v. Groves*, 187 F. 2d 40 (3rd Cir. 1951) which is concerned with the admissibility of answers to written interrogatories where answers to cross-interrogatories were not served in accordance with court rules. The interrogatories were not addressed to a consular officer.

¹⁸ Consular Convention between the U.S. of America and the United Mexican States, *supra* n. 8.

¹⁹ 1 Hyde, *supra* n. 1, at 807.

²⁰ *Supra* n. 7.

In April, 1924, the Polish Consul General had been subpoenaed to appear in the New York Supreme Court to produce certain documents. The subpoena was withdrawn by the court when the court was advised that its issuance was in violation of international law. Subsequently the Polish Legation wrote to the United States Department of State and requested that the Department indicate its concurrence with "the custom accepted by international law of exempting consuls from the obligation to appear as witnesses," and asked that this doctrine be applied to Polish officers. The Department of State refused and said in reply:

A consular officer is not, in the absence of applicable treaty provision, believed to be exempt from the giving of testimony with respect to matters not pertaining to his official consular business.

The Department of State agreed that international law did extend those privileges and immunities necessary to discharge duties of the office and indicated that the consular archives were inviolable.²¹

In December, 1935, a consular officer in Canada informed the Department of State that a clerk in the consulate had been summoned to appear and testify regarding conversations with a visa applicant. The Legation at Ottawa was instructed to bring the matter to the attention of the appropriate authorities. The purpose was to have the court advised of the immunity of consular personnel in regard to the giving of testimony based upon knowledge obtained in the performance of official functions. The result was that the clerk was excused from testifying.²²

The United States practice in this area is noted for its reluctance to permit consuls to testify before foreign courts without prior authorization from the Department of State.²³

Case law also illustrates the practical problems. In *Samad v. The Etivabank*²⁴ a Pakistani citizen brought suit against a British flag vessel, its owner and operator for injuries sustained on board while the vessel was in the Port of Norfolk. Respondents served a subpoena upon the British Consul and Vice-Consul. The Consul, Mr. Cook, was present in the courtroom but when called refused to be recognized. The court then ordered Mr. Cook into the custody of a United States Marshal. A conference ensued, and the court examined the contents of the 1951 United States-United Kingdom Convention. Shortly thereafter, Mr. Cook agreed to be recognized. Mr. Cook duly appeared, but upon being called he refused to answer questions relating to wages, visits to the hospital, etc. A motion was made to hold Mr. Cook in contempt of court which motion was denied. The court held that Mr. Cook, as a consul, was im-

²¹ 4 Hackworth, *supra* n. 2 at 754.

²² *Id.* at 766.

²³ Lee, *supra* n. 2, at 264 ff.

²⁴ 134 F. Supp. 530 (E.D. Va. 1955). See also: *United States v. Tarcanu*, 10 F. Supp. 445 (S.D. N.Y. 1935).

mune. The consul was obligated to testify in the interests of justice only as long as his own interests were not prejudiced. However, only the consul was permitted to make a determination of whether his interests would be prejudiced.²⁵ There is little doubt that the court was frustrated with the decision it reached. Nevertheless, the decision seems both logical and correct.

The United States constitutional question is exemplified by the leading decision in the *Dillon* case.²⁶ Here the defendant served a subpoena *duces tecum* upon M. Dillon, the French Consul, requiring him to appear in court and produce documents deemed material for the defense of a criminal matter. M. Dillon refused to appear and relied upon his immunity as a consul. Upon defendant's motion, the court issued an attachment which resulted in M. Dillon's presence in court over his objections. M. Dillon disavowed any disrespect to the court but contended that the treaty with France made him immune from service of such process. The court then released M. Dillon and heard argument in connection with the treaty. The question posed was whether the treaty, which declared that consuls should never be compelled to appear in court as witnesses, was in conflict with the Sixth Amendment. The wording of the treaty and the amendment appeared incompatible.²⁷ The court resolved this incompatibility by declaring that if the accused "enjoys rights equal to those of the prosecution, and stands, with respect to witnesses, on the same footing with the government, it would seem that the object of the constitution is accomplished."²⁸

It appears that the court was faced with a diplomatic and political crisis which forced a change in its position. The tortured reasoning of the court seems to result in a position contrary to the wording of the Sixth Amendment. This conflict may account for the fact that the constitutional ruling was not the basis for the holding and was dicta. The

²⁵ *Samad v. The Etivebank*, *supra* n. 26, at 544.

²⁶ *In re Dillon*, 7 Fed. Cas. 710, 7 Sawy. 561 (N.D. Cal. 1854). This case is discussed by many commentators including Hyde, *supra* n. 1, at 808-809 and Stewart, *supra* n. 2, at 142 et seq. Stewart notes that the United States was finally required to issue a formal expression of regret and salute a French merchant vessel.

²⁷ *Id.* at 711. The question then to be determined is: is the treaty stipulation alluded to irreconcilably in conflict with the constitutional provision cited? In approaching the consideration of this question, it is impossible for the court not to be profoundly impressed with a sense of its importance—not merely abstractly, but on account of consequences its decision may involve. On the one hand, it is asked to deny the accused a right claimed to be secured under the fundamental law of the land. On the other, it is urged not merely to hold a law of congress void for unconstitutionality—a duty at all times the most delicate and important an American court of justice is called upon to perform—but to declare a solemn treaty stipulation, entered into between the United States and a foreign country, to the faithful observance of which the honor of the nation is pledged, inoperative and void, because those by whom it was made had no power to enter into such engagements.

²⁸ *Id.*

actual holding was premised upon the defendant's failure to prove that the materials sought were not official papers immune from process.

Having in mind the *Dillon* case, Secretary of State Mercy wrote to the Minister of France on September 11, 1854, that "The Constitution is to prevail over a treaty where the provisions of the one come in conflict with the other. It would be difficult to find a reputable lawyer in this country who would not yield a ready assent to this proposition."²⁹

At least one writer has stated that in criminal cases the attendance of consuls, in court, as witnesses, is mandatory due to constitutional requirements.³⁰ In light of *Dillon* and the Federal Rules of Criminal Procedure, this position must be considered erroneous insofar as the prosecution is concerned and is apparently erroneous even as to defense witnesses.

Treaty Provisions: The Question of Compulsory Process

The problems raised in the *Dillon* and *Samad* decisions are still not settled. Treaties must be considered before any conclusions can be drawn.³¹ None of the treaties reviewed specifically permits the issuance of compulsory process, with penalty clauses, and six³² contain prohibitions against such a procedure. The remaining treaties are silent on the point but generally contain provisions guaranteeing the dignity of the consular office and calling for noninterference with consular functions.

A somewhat unique provision prohibiting the use of penalty clauses is found in the Convention entered into between El Salvador and Spain. This Convention utilizes an entirely different approach to consular immunity and virtually removes consular officials from the court's jurisdiction. Article 4 states:

²⁹ 5 Moore, *International Law* 167 (1906).

³⁰ Note, "Consular Immunity: In Law and In Fact," 47 *Iowa L. Rev.* 679 (1962). See also, 2 Hyde § 476 at 1344.

³¹ Before turning to an analysis of treaty provisions and the positions taken at the Vienna Conference a short digression is in order. Rule 17 of the Fed. Rules of Crim. Pro. and Rules 26 and 45 of the Fed. Rules of Civ. Pro. should be noted. These rules show that in both civil and criminal matters the clerk is empowered to issue a subpoena under the seal of the court. The subpoena power is broad and only the court can prevent abuse thereof. Thus neither a subpoena duces tecum nor subpoena ad testificandum will be upheld if the witness or information sought is not within the proper scope of discovery or testimony. However, the court will not prevent the issuance of a subpoena and will quash a subpoena only upon motion. Thus a party can obtain and issue a subpoena in almost any matter.

³² Vienna Convention on Consular Relations, U. S. Doc. A/CONF. 25/16, Art. 44(1) (1959).

Convention between the United States and the Union of Soviet Socialist Republics, Art. 20(1), *supra* n. 9;

Convention between the Polish People's Republic and the Union of Soviet Socialist Republics, Art. 12 (1958) Supplement;

Convention between the Polish People's Republic and the German Democratic Republic, Art. 11(3) (1957) Supplement;

Convention between El Salvador and Spain, Art. 4 (1953), Supplement;

Consular Convention between the United Kingdom and France, Art. 16, Supplement.

Career Consuls-General, Consuls and Vice-Consuls may not be obliged to appear as witnesses before the courts of the receiving state. When it is necessary to obtain a statement or information from such officials, such authorities shall request it in writing or go to the residence of the official in question to receive it personally.

More typical language is found in Article 20(1) of the Convention entered into between the United States and the Soviet Union, Article 44(1) of the Vienna Convention; and Article 12(1) of the Convention between Poland and the Soviet Union. The thrust of these Articles is that members of a consular post may be called as witnesses. However, if they fail to appear, no coercive action is available to the courts.

For example, Vienna Convention, Article 44(1) states:

1 Members of a consular post may be called upon to attend as witnesses in the course of judicial or administrative proceedings. A consular employee or a member of the service staff shall not, except in the cases mentioned in paragraph 3 of this article, decline to give evidence. If a consular officer shall decline to do so, no coercive measure or penalty may be applied to him.³³

The arguments for and against a clause permitting compulsory attendance and testimony at trial were fully discussed at the Vienna Conference. At least two plenary meetings and three meetings of the Second Committee considered, in whole or in part, the wording of Article 44 of the Vienna Convention.³⁴

It is evident from various votes on proposed amendments, comments, etc., that the Soviet Bloc was against inclusion of a compulsory process clause whereas the United States favored such a provision. Perhaps for political reasons several of the major arguments against such a clause were made by the Norwegian representative, Mr. Amlie, while the United States position was supported by motions to amend submitted by Finland and Japan. Rather than center on adding language expressly permitting compulsory process the debate was concerned with proposals to omit that portion of Article 44 which reads, ". . . no coercive measure or penalty may be applied * * *."

A substantial argument for compulsory attendance and testimony was presented by Mr. Cameron of the United States. Mr. Cameron's forceful argument centered on apparent injustices that might occur if a consular officer refused to testify and pointed out that the first sentence

³³ It is interesting to note the different positions referred to in each sentence of Article 44(1). The draftsmen change from "Members of a consular post" to "consular employee or member of the service staff" to "consular officer." Just which person is given which immunity thus presents a possible source of conflict.

³⁴ Fifteenth plenary meeting, April 18, 1963; Sixteenth plenary meeting, April 19, 1963; Second Committee; Twenty-fifth meeting, March 21, 1963; twenty-sixth and twenty-seventh meetings, March 22, 1963.

of Article 44 (1) was rendered meaningless by the subsequent sentence of Article 44 (1).³⁵

Other arguments in support of the United States position were put forth by its delegate to the Second committee, Mr. Blankinship. At the twenty-sixth meeting of the committee he argued that:

- 1 There was never an intention to permit consular officers to enjoy complete inviolability;
- 2 Failure of a consul to testify could result in a grave miscarriage of justice;
- 3 The absence of compulsory attendance for consular officers would establish a special category of persons who need not comply with local procedure for the administration of justice;
- 4 The right of an accused to summon witnesses was a time honored principle of national law and the right was so important that some nations would have to lodge reservations if the sentence remained. Such reservations would ". . . of course, defeat the desired aim of a universal convention."
- 5 The fears expressed by opponents, based upon possible danger to the person of the consular officer were unfounded.
- 6 The ends of the convention and justice would best be served by requiring compulsory appearance.³⁶

One of the most intelligent arguments against deletion of the sentence was made by the Czech delegate to the Second Committee, Mr. Spacil, who contended that it was necessary that a consul be the judge of whether he should testify. Otherwise, the receiving state would be in a position of final judge and that would be an "undesirable situation" leading "to bad relations."³⁷

The argument of Mr. Spacil has considerable force. Coupled with the points made by other delegates including Mr. Amile of Norway³⁸ there is much to be said for prohibiting the use of the subpoena power and compulsory process in general. On the other hand, arguments in favor of compulsory process are also valid.

In the opinion of this writer compulsory process should be permitted. If the personal safety of the consular officer is guaranteed to the best ability of the receiving state and provision is made to prevent any abuse of process, there is little good argument remaining against such a procedure. Realistically, the receiving state is obliged to protect consular officers regardless of their amenability to suit or compulsory process.

³⁵ Vienna Conference, Fifteenth plenary meeting, U. N. Doc. A/CONF. 25/16 at 57, para. 75 and 77.

³⁶ Vienna Conference, Second Committee, Twenty-sixth meeting, U.N. Doc. A/CONF. 25/16 at 377-378, para. 6-12. Similar arguments have been made by representatives of other nations such as Mr. Percz Chiralogag Venezuela.

³⁷ Vienna Conference, Second Committee, Twenty-fifth meeting at 377, para. 20.

³⁸ Vienna Conference, Sixteenth Plenary meeting, U. N. Doc. A/CONF. 25/16 at 58, para. 2.

Court rules could most certainly be designed to prevent any potential abuse of process. For example, the rules could provide that only a judge could issue a subpoena to a consular officer and that this could be done only after a contested motion or at least an *ex parte* motion. The purpose of the motion would be to determine, and for counsel to prove, that the evidence sought is material and not privileged. Such a procedure would prevent the issuance of subpoenas by attorneys for the parties, a practice permitted in some jurisdictions.

Who Should Determine Whether the Material and Evidence Sought Is Privileged

The problem of who should determine whether the material and evidence sought is privileged was discussed in the *Samad* case³⁹ and by Mr. Spacil. The court in *Samad* obviously felt that the final decision must rest with the consular officer, but that this should be done only after conference with the court and all attorneys. This view is in conflict with that of Mr. Spacil.

Most of the treaties studied are silent or unclear in regard to the problem.⁴⁰ A few, especially those entered into by the United Kingdom, clearly put the decision in the hands of the consular officer.⁴¹ The United States-United Kingdom treaty is representative of several others entered into by the United Kingdom. Article 10 (4) thereof states:

A consular officer . . . shall be entitled to refuse a request from the courts . . . to produce any documents from his archives . . . or to give evidence relating to matters within the scope of his official duties. Such a request shall, however, be complied with in the interests of justice if, in the judgment of the consular officer . . . , it is possible to do so without prejudicing the interests of the sending state.

The best solution seems to be one in which the ultimate decision is made by the court. This is certainly impossible. An alternative, which may serve to meet the demands of justice, would be a treaty provision requiring attendance of the consular officer in judicial chambers. Thus, a conference could take place, such as that envisioned by the court in *Samad*, and the court could render an opinion. If this opinion is adverse to the position of the consul, he could have a veto power and overrule the court. If the decision is in favor of the consul's position, his adver-

³⁹ *Samad v. The Etivebank*, *supra* n. 24.

⁴⁰ For example: Article 20(4) of the Convention between the United States and the Soviet Union simply states: "Consular officers * * * may refuse to give witness testimony on facts relating to their official capacity." Article 44(3) of the Vienna Convention declares: "Members of a consular post are under no obligation to give evidence concerning matters connected with the exercise of their functions nor to produce official correspondence * * *."

⁴¹ Consular Convention between the United Kingdom and France (1951), *supra* n. 32; The U.S.-U.K. Consular Convention (1951), *supra* n. 9.

sary could be given the right to seek an advisory opinion from an appellate court. Furthermore, both the court and the attorney would now be in a better position to seek a remedy through diplomatic channels. Such a procedure would fully protect the dignity of the consular officer and still permit disclosure of sufficient information to enable those concerned to reach an intelligent decision.

Conclusion

Treaties must attempt to balance, reconcile and compromise the often conflicting philosophies, laws and interests of the sending and receiving states. No multilateral treaty, embracing diverse nations and legal systems, can adequately accomplish this goal. Traditional international law, although providing some guidance, also cannot resolve the problems for all nations. Nevertheless, with all their faults bilateral and multilateral treaties, including Article 44 of the Vienna Convention, come significantly close to meeting the needs and demands of many nations.