

Consular privileges and immunities

5 December 2018

Contents

1. Concept of consular privileges and immunities;
2. Immunities and privileges of consular posts;

1. Concept of consular privileges and immunities (1)

- **Consular privileges and immunities** –exemptions, advantages, rights and priorities that are granted to foreign consular posts and their members as provided in the international treaties, customary law and the national law of receiving state.

1. Concept of consular privileges and immunities (2)

- ▶ Consular posts and their personnel enjoy less immunities than diplomatic missions and the personnel of the diplomatic missions because the former do not maintain the *political* interstate relations
- ▶ Consular P&I are granted for the effective functioning of consular posts (theory of *functional necessity*, see the Preamble to the VCCR)
- ▶ A State taking countermeasures is not relieved from fulfilling its obligations to respect the inviolability of diplomatic or consular agents, premises, archives and documents (see para. 2 (b) of Art 50 of the ILC Draft Articles, Responsibility of States for Internationally Wrongful Acts, 2001)
- ▶ Consular P&I not only in the VCCR, but also in the bilateral agreement between the sending and receiving states (contrary to diplomatic privileges and immunities)

2.P&I of consular post

- 2.1. Right to use state flag and emblem;
- 2.3 Inviolability of consular premises and property;
- 2.4 Beginning and end of inviolability of consular premises;
- 2.5 Exemption from taxation;
- 2.6 Inviolability of consular archives and documents;
- 2.7 Freedom of movement;
- 2.8 Freedom of communication;
- 2.9 Information in case of death, guardianship or trusteeship, wrecks or air accidents;
- 2.10 Right to levy duties.

2.1. Right to use state flag and emblem

- The sending State has the right to fly the national flag of the sending State and its coat-of-arms on the building occupied by the consular post and at the entrance door thereof, on the residence of the head of the consular post and on his means of transport when used on official business.
- Regard shall be had to the laws, practice of the receiving State (see paras. 2, 3 of Art 29 of the VCCR)

2.3 Consular premises (I)

- VCCR Art. 31.1:

“Consular premises shall be inviolable to the extent provided in this article.”

- VCCR Art 1.1(j): “*consular premises*” means the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used *exclusively for the purposes of the consular post*”

- VCDR Art 1(i): “The “*premises of the mission*” are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission *including the residence of the head of the mission*”.

2.3 Consular premises (2)

- There can be offices of other institutions or agencies being installed in part of the building in which the consular premises are situated, provided they are separate from the premises used by the consular post. The said offices shall not, for the purposes of the VCCR, be considered to form part of the consular premises (see para. 3 of Art. 55 of the VCCR);
- No limitations for the size of consular premises (limitations can be included in the bilateral agreements) – size must be appropriate for the effective functioning;

2.3 Consular premises (3)

Passive obligation of receiving state to abstain from acts which can violate the inviolability of the consular premises: (VCCR Art. 31.2):

*“The authorities of the receiving State **shall not enter** that part of the consular premises which is used exclusively for the purpose of the work of the consular post **except with the consent** of the head of the consular post or of his designee or of the head of the diplomatic mission of the sending State. The consent of the head of the consular post may, however, be **assumed in case of fire or other disaster** requiring prompt protective action”*

As the residence of the head of the consular post as well as of other consular officers is not considered to be consular premises, no inviolability is guaranteed to it under the VCCR

2.3 Consular premises (3)

- **Fire clause** – only if the danger is emergent and the entry is for the interests of the consulate;
- *Why possible?*
 - another level of importance - in the diplomatic missions more important political documents than in the consular posts;
 - the premises of the diplomatic mission are usually in the separate buildings, thus no danger for the nearby buildings, whereas consular premises, on the contrary, are usually in the part of building, thus danger to non-consular premises.

2.3 Consular premises (4)

- The VCCR does **not give the right** to the authorities of receiving state **without the consent to enter** the consular premises in order **to stop the criminal acts or other acts** which are dangerous to the society.

2.3 Consular premises (5)

- Para 3 of Art. 22 of the VCDR: “The premises of the diplomatic mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.”
- No immunity of the consular premises from search, attachment or confiscation under the VCCR:
- *Reasons*:
 1. if it is possible to enter under certain circumstances, then it is possible to make search (except consular archives and documents whose inviolability is absolute, see Art. 33 of the VCCR);

2.3 Consular premises (6)

- *VCCR 30.3 : “the receiving State is under a special duty to take all appropriate steps to **protect the consular premises** against any intrusion or damage and to prevent any disturbance of the peace of the consular post or impairment of its dignity”*

2.3 Consular premises (10)

- Court documents, e.g. summons and other procedural documents that require personal delivery services cannot be a valid reason to enter the premises as the inviolability of the consular premises can be violated (best alternative is to send by post)
- Diplomatic asylum: most states are of the view that such asylum is unlawful in the consular posts (see also para. 2 of Art 55 of the VCCR);
- Even if the consular premises are used in a manner incompatible with the exercise of consular functions, the inviolability cannot be violated (see *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, ICJ, 1980, para. 83)

2.3 Consular premises (10)

- There can be bilateral agreements between states concerning other cases when the consent of the head to enter the consular premises is assumed (not only in case of fire or other disaster requiring prompt protective action as is in the VCCR)

2.4 Beginning and end of inviolability of premises

- *In doctrine:*

- **Beginning** from the moment when the receiving state is notified about the premises obtained exclusively for the consular functions;
- **End** from the moment when the receiving state is notified about the discontinuation to use the premises for the consular functions (even in case there is no notification, inviolability ends after the reasonable time passes after discontinuation to use the premises for the consular functions). Domestic law of the receiving State can regulate such issues.

2.5 Exemption from taxation

- VCCR 32.1:

“Consular premises and the residence of the career head <...> shall be exempt from all national, regional or municipal dues and taxes whatsoever, other than such as represent payment for specific services rendered.”

2.5 Inviolability of archives and documents (1)

- VCCR Art. 33: “*The consular archives and documents shall be **inviolable at all times and wherever they may be.***”
- Absolute immunity, cannot be violated on the grounds of *force majeure* or on the consent to enter the premises;
- Consular archives and documents must be separated from other documents (analogy with Art. 61 of the VCCR)

2.5 Inviolability of archives and documents (2)

Art 1.1(k) of the VCCR: “consular archives” includes all the papers, documents, correspondence, books, films, tapes and registers of the consular post, together with the ciphers and codes, the card-indexes and any article of furniture intended for their protection or safe keeping.

Documents - include various drafts, etc.

The concept does not include documents that are issued to the citizens (certificates etc.)

2.6 Freedom of movement

- VCCR Art.34 – *mutatis mutandis* VCDR Art. 26
- Art. 34 of the VCCR: “Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State shall ensure **freedom of movement and travel in its territory to all members of the consular post**”
- Area – includes all the territory not just the consular district
- For all members of the consular post

2.7 Freedom of communication: General remarks

- The consular posts are granted the same freedom of communication as diplomatic missions (compare Art 35, the VCCR and Art 27, the VCDR);
- Official correspondence, understood as all correspondence related to consular post and its functions, is inviolable.
- The provision on the consular bag in the VCCR adds the right to „suspect and return“ the consular bag (compare para. 3 of Art. 27 of the VCDR and para. 3 of Art. 35 of the VCCR)

Communication with the citizens of sending state

► VCCR Art. 36.1. a:

*“consular officers shall be **free to communicate with nationals** of the sending State and to have access to them. **Nationals of the sending State shall have the same freedom** with respect to communication with and access to consular officers of the sending State;”*

Communication with nationals that are arrested, detained etc.

VCCR 36.1.b of the VCCR, three elements:

- the right of the individual to be informed *without delay* of his rights under Article 36, paragraph 1 (b);
- the right of the consular post to be notified *without delay* of the individual's detention, if the detained person so requests;
- and the obligation of the receiving State to forward *without delay* any communication addressed to the consular post by the detained person.

Communication with nationals that are arrested, detained etc.

“without delay”

According to the ICJ, “the duty upon the detaining authorities to give the Article 36, paragraph 1 (b), information to the individual arises once it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national. Precisely when this may occur will vary with circumstances.” “Neither the aims of the Convention as normally understood, nor its object and purpose, suggest that “without delay” is to be understood as “immediately upon arrest and before interrogation” (see *Case Concerning Avena and Other Mexican Nationals*, ICJ, 2004, <<http://www.icj-cij.org/docket/files/128/8188.pdf>>

Rights and obligations of consular officers

- to **visit** a national of the sending State who is in prison, custody or detention,
- to **converse** and **correspond** with him;
- to **arrange** for his legal representation;
- to **visit** any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment.
- **Abstain** from taking action on behalf of a national who <..> expressly opposes
- Exercise rights **in conformity** with national laws

See ICJ Breard and LaGrand cases

Freedom of communication with the nationals of receiving and third states

- The right of communication with the nationals of receiving and third states is not established directly in the VCCR, but such right can be implied (see in general freedom of communication in Art. 35 of the VCCR) and is related to the official consular functions (e.g. issuance of visas, registering divorce, marriage);
- Other communication is governed by the bilateral, multilateral agreements to which both the sending and receiving state are parties or when such communication is not prohibited by national law;
- The scope of such communication depends on the regime in the receiving state (democratic, friendly relation – permit; totalitarian regimes – restrict)

Freedom of communication with the authorities of the receiving state

● VCCR Art. 38:

In the exercise of their functions, consular officers may address:

- (a) the competent **local authorities** of their consular district;*
- (b) the competent **central authorities** of the receiving State if and to the extent that this is allowed by the laws, regulations and usages of the receiving State or by the relevant international agreements.*

Right to levy fees and charges

VCCR Art. 39:

● *Consular fees and charges*

*“1.The consular post **may levy** in the territory of the receiving State the fees and charges provided by the laws and regulations of the sending State for consular acts.*

*2.The sums collected in the form of the fees and charges referred to in paragraph 1 of this article, and the receipts for such fees and charges, shall be **exempt from all dues and taxes in the receiving State.**”*