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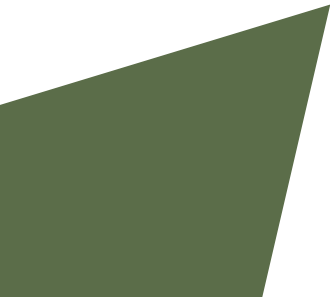
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**Consular Immunity Under International Law: Legality of Arrest of Devyani  
Khobragade by the United States**

**Saumya Bhatt and Sandhya Gaur**

## **ABSTRACT**

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This paper examines the legality of the arrest of Indian Diplomat Devyani Khobragade by the United States while taking in to consideration Vienna Convention on Consular Relations as well as that of Vienna Convention of Diplomatic Relations. After briefly stating the facts of Khobragade's case, this paper analyses different point of views in light of arguments presented by both India and United States. Keeping in mind the realisation that it is the ambiguity of the VCCR which gave rise to debates over certain criminal and civil jurisdictions in matters concerning diplomats, the paper finally proposes a need for creation of a defined criterion between the sending state and the receiving state over the concerned jurisdiction. While proposing aforementioned, we also realise that selecting a criterion would require a careful consideration of the policies behind VCCR and the probable situation that may give rise to criminal charges against consular officers.

## INTRODUCTION

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Devyani Khobragade, as on December 12, 2013 was the Deputy Consulate General of the Consulate General of India in New York City when she was charged and arrested for federal felony charges of visa fraud and false statements<sup>1</sup> relating to the hiring of domestic help, Sangeeta Richard from India under exploitative conditions.

Richards claimed that initially Devyani had promised to pay her \$9.75 per hour in order to employ Richards as her domestic help in U.S for a maximum of 40 hours work per week. This contract was submitted in support of visa application for Richards but and after procuring the visa and before coming to U.S, Devyani made Richards sign another contract which mentioned that her hourly pay in U.S. would be \$3.31 per hour without mentioning the maximum number of working hours per week. As per the US department, Devyani intentionally and knowingly made materially false and fraudulent statements to defraud the US administration in order to procure a visa for Richards. Based on these charges against Devyani, an arrest warrant was issued on her name.

According to the Vienna convention on Consular Relations, Khobragade was entitled to consular immunity for the acts performed by her in the exercise of her official consular functions.<sup>2</sup> As hiring of domestic help was not considered an official act, the US administration claimed that criminal prosecution of Deputy Consulate General of India was not in breach of the VCCR hence did not violate her immunity. On the noon of December 12, 2013 Devyani was escorted to Federal courthouse Downtown Manhattan and transferred in to the custody of US Marshals Services where she was subjected to strip search and cavity search. Later to this she was presented before U.S. Magistrate Judge where Devyani pleaded not-guilty of these offences and was released after signing a recognizance bond of \$250,000. At this instance her passport was also confiscated by the authorities. This case grew out of proportion in the weeks that followed with catastrophic effects on US-India diplomatic relationship. Following this Devyani was moved to permanent Indian Mission to the United Nations granting her full diplomatic immunity and precluding any court proceedings against her.

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<sup>1</sup> United States v. Khobragade, 15 F. Supp. 3d 383 (S.D.N.Y. 2014).

<sup>2</sup> Vienna Convention on Consular Relations



## II

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As per the Indian authorities the arrest of Devyani Khobragade was seen as something contrary to the way in which international relations between states must be conducted. The question that centres this entire discussion is what was India's reaction to this misconduct and whether there was any 'grave' violation of federal law as to subject the diplomat to such procedures.

Paragraph 1 of Article 41 of the Vienna Convention on Consular Relations on Personal inviolability of consular officers states that Consular officers shall not be liable to arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority. The use of the word 'grave' in the first paragraph can be called a poor choice, especially when left ambiguous enough for individual countries to speculate and draw a conclusion upon. This is exactly what has led to the whole set of catastrophic diplomatic events between India and U.S. which we saw in the days that followed Devyani's arrest.

Definition of a 'grave' crime may differ from country to country and also from one's own national subjects to other foreign nationals. In respect of this it is viable to mention that there have been certain instances where diplomats have used their immunity in order to escape charges which would constitute a grave crime as per common understanding. One such case has been of an U.S. Embassy administrative staff member at Romania called VanGoethem who allegedly killed a musician while driving under the influence of alcohol. He was subjected to breath analyser test on the spot but later denied to give a blood sample unless it was to be given to a U.S. official. Soon after this event, he was lifted out of Romania without undergoing any prosecution even after several demands from Romanian government to waive off his immunity.<sup>3</sup> Although the 'grave' crime has not been defined for this case either but homicide whether amounting to murder or not has been regarded as one of the most heinous crimes across all jurisdiction over the world. The question then posed by Indian administration was why Deputy Consulate General of the Consulate General of India was subjected to such harsh measures.?

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3 Coon C, "Marine Involved in Crash That Killed Romanian Rock Star Is Back in U.S." (*Stars and Stripes*) <<https://www.stripes.com/news/marine-involved-in-crash-that-killed-romanian-rock-star-is-back-in-u-s-1.271110>> accessed September 23, 2019

The way of arrest and the treatment of the Devyani caused an uproar in India and led to few retaliatory measures back home such as removing safety barricades from the front of US Embassy.<sup>4</sup> The Indian administration's response was in consonance with the rule of Reciprocity, which from the most ancient time has been integral to Diplomatic and consular Relations.<sup>5</sup> On the account of Devyani's case the Indian Embassy initially conveyed its strong concerns.<sup>6</sup>

The U.S. Administration on the other hand has emphasised that the immunity under Article 41 only applies to the cases of official nature and as the act of appointing a domestic help falls outside the purview of acts committed in official capacity, they had the jurisdiction over the matter. The U.S. department has also denied the allegation of subjecting Devyani to cavity search whereas the claim that she was put with other ordinary criminals and drug addicts was countered by saying that it was all a part of standard procedure. Whereas, India has contented that while evaluating the series of events in terms of international law and debating its jurisdiction one should address the facts such as the nationality of these two individuals, the place of signing of the employment agreement and laws governing the said contract. Similar contentions were raised by U.S. by saying that the place where the obligation was to be exercised and payment had to be made was also to be taken into consideration. While U.S. has objected to the reciprocatory measures taken by India, the Indian intelligentsia and other commentators have questioned the power hierarchy which went to play during the whole situation.

### III

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The question that keeps coming back to the conversation is that of why Devyani was subjected to such harsh measures when in most likelihood it is possible that different countries have different procedures and laws to deal with similar offences. The main question still remains over the jurisdiction and over the ambiguity which surrounds the Vienna Convention on Consular Relations over the definition of what should and should not be considered grave. The problem which persists is that of no fixed criterion between the sending state and the receiving state exists which makes it difficult for both to decide over the jurisdiction of certain matters. This has also allowed some diplomats to claim full immunity against grievous criminal offences as earlier discussed in the case of

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<sup>4</sup> Kristina Daugirdas, and Julian Davis Mortenson. "CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW." *The American Journal of International Law*, vol. 108, no. 2, 2014, pp. 321–347. JSTOR, [www.jstor.org/stable/10.5305/amerjintlaw.108.2.0321](http://www.jstor.org/stable/10.5305/amerjintlaw.108.2.0321).

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

VanGoethem. The gap that exists in delivery of justice because of such incidents can only be answered with a defined criterion or set of rules other than those already prevailing in form of VCCR.

The course of action which India applied in order to free Devyani from any criminal liability is extremely concerning because it robs the Vienna Convention on Consular Relations of its significance and disrupts the balancing of interests of the sending state and the receiving state that is inherent to the structure of consular immunity under the Consular Convention.<sup>7</sup> The vast differences between the functions of consular posts and diplomatic missions have given rise to different policies leading to the separate consolidation of Vienna Convention on Consular Relations and that of Diplomatic Relations. The broader form of immunity from the criminal jurisdiction of the receiving state, even for personal acts in the Convention on Diplomatic Relations, is a product of the desire to preserve “the sovereign equality of the sending and receiving states and the important related notion of reciprocity.”<sup>8</sup>

The tension which exists in such cases between immunity and accountability can be resolved only by setting up a defined criterion to deal with matters concerning criminal jurisdiction of states over the acts committed by the consular officers.

We maintain that consular officers are only immune to the acts committed during the exercise of their consular functions but the question of what offences fall in to grave category is still in the grey area. Whereas, the course chosen by India is also of great concern and a permanent solution is required to address such issues in international arena.

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<sup>7</sup> Bleustein, Irina, Achieving the Coexistence of Accountability and Immunity: The Prosecution of Devyani Khobragade and the Role of Consular Immunity in Criminal Cases (March 17, 2015). American Criminal Law Review, Vol. 52, Spring Issue, 2015. Available at SSRN: <https://ssrn.com/abstract=2579969>

<sup>8</sup> Ibid.