

## Devyani Khobragade Incident : A Legal Analysis in the Light of International Law

Md. Shibly Islam  
Lecturer, Department of Law, University of Rajshahi

### Introduction:

Devyani Khobragade is serving as an officer in the Indian Foreign Service. She joined the Indian Foreign Service in 1999.<sup>1</sup> She has been also posted in Germany, Italy and Pakistan.<sup>2</sup>

In 2012, she was posted as Deputy Consul General to the Consulate General of India in New York. She handled women's affairs as well as political and economic issues. While she was serving as an Indian Deputy Consul General in New York, she was arrested by US law enforcement agencies for making false statements on a visa application for her housekeeper. The question that led to a major diplomatic standoff between India and the United States whether according to international law especially Vienna Convention on Diplomatic Relation of 1961, she should have got the immunities from the judicial proceedings or not that was brought against her.<sup>3</sup>

After a long Diplomatic battle between India and US government on January 20, 2014 she was taken back to India and posted to New Delhi as director of the Development Partnership Administration (DPA), an agency formed in 2013 at the Ministry of External Affairs to handle India's projects overseas.<sup>4</sup>

### Concept of Diplomatic and consular immunity under international law:

The Special privileges and immunities accorded foreign diplomatic and consular representatives reflect rules developed among the nations of the world regarding the manner in which civilized international relations must be conducted. The underlying concept is that foreign representatives can carry out their duties effectively only if they are accorded a certain degree of insulation from the application of standard law enforcement practices of the host country. While customary international law continues to refine the concepts of diplomatic and consular immunity, the basic rules are currently embodied in international treaties.

One explanation for these immunities and privileges, though it's not largely accepted now, was that the diplomatic agent and the mission premises were 'extraterritorial', legally assimilated to the territorial jurisdiction of the sending state.<sup>5</sup> But the existence of this theory was very short and the law does not rest on any such premise. Indeed it rests on no particular theory or combination of theories, though the system is generally compatible with both the representative theory, which emphasizes the diplomat's role as agent of a state, and the functional theory,<sup>6</sup> resting on practical necessity.<sup>7</sup>

According to the functional model, the immunity is first a statement recognizing the sovereign and independent status of the sending state, as well as the public nature of a diplomat's acts and his or her consequent immunity from the receiving state's jurisdiction. Secondly, the immunity exists to protect the diplomatic mission and staff

<sup>1</sup> Gowen, Annie (20 December 2013). "Who is Devyani Khobragade, the Indian diplomat at the center of the firestorm?". *The Washington Post*. Retrieved 7 January 2014. [http://www.washingtonpost.com/world/asia\\_pacific/indias-devyani-khobragade-advocated-for-womens-rights-but-underpaid-her-nanny/2013/12/20/13e23688-69a2-11e3-8b5b-a77187b716a3\\_story.html](http://www.washingtonpost.com/world/asia_pacific/indias-devyani-khobragade-advocated-for-womens-rights-but-underpaid-her-nanny/2013/12/20/13e23688-69a2-11e3-8b5b-a77187b716a3_story.html)

<sup>2</sup> "10 things about IFS officer Devyani Khobragade: Her family, passion and favourite Hollywood actor". *babus of india*. December 14, 2013. Retrieved 7 January 2014. <http://www.babusofindia.com/2013/12/10-things-about-ifs-officer-devyani.html>

<sup>3</sup> <http://timesofindia.indiatimes.com/india/Who-is-Devyani-Khobragade/articleshow/27659238.cms?referral=PM>, Last accessed on 29.06.2014

<sup>4</sup> Roy, Shubhjit (January 20, 2014). "Devyani likely to head MEA's overseas projects department". *Indian Express*. Retrieved January 20, 2014. <http://indianexpress.com/article/india/india-others/devyani-likely-to-head-meas-overseas-projects-department/>

<sup>5</sup> E.g. Grotius, *De Iure Belli ac Pacis* (1695, ed Tuck2005) II.xviii.IV.5: 'yet that An exception should be made in favour of ambassadors, who, as they are, by a sort of fiction, taken for the very persons whom the represent...so may they be by the same kind of Fiction be imagined to be out of the Territories of the potentate, to whom they are sent'.

<sup>6</sup> Based on the maxim *ne impediatur legatio*: Fox (2<sup>nd</sup> edn, 2008) 701.) The functional theory is not a late-comer, having been well articulated by Vattel, *Le Droit des gens* (1758, tr Anon 1797) IV.vii.92: 'Now, ambassadors and other public ministers are necessary instruments for the maintainance of that general society, of that mutual correspondence between nations. But their ministry can not effect the intended purpose unless it be invested with all the prerogatives which are capable of ensuring its legitimate success, and of enabling the minister freely and faithfully to discharge his duty in perfect security.'

<sup>7</sup> ILC ybk 1958/II, 94; *Tietz v People's Republic of Bulgaria* (1959) 28 ILR 369; *Yugoslav Military Mission* (1969) 65 ILR 108; *Parking Privileges* (1971) 70 ILR 396; *Smith v Office National de l'Emploi* (1971) 69 ILR 276; *Private Servent* (1971) 71 ILR 546; *Dorf* (1973) 71 ILR 552; *767 Third Avenue Associates v Permanent Mission of Zaire to the UN*, 988 F.2d 295 (2<sup>nd</sup> Cir, 1993); *Aziz v Aziz*; *HM The Sultan of Brunei intervening* [2008] 2 All ER 501. The preamble to the VCDR refers to both considerations.

and to ensure the efficient performance of functions designed to preserve international order and maintain communication between states.<sup>1</sup>

In the final analysis, the question must be related to the dual aspect of diplomatic representation: the state immunity (immunity *ratione materiae*) attaching to official acts of foreign states, and the overlying, yet more conditional, elements of 'functional' privileges and immunities of the diplomatic staff and the premises.<sup>2</sup>

#### **Case study of Devyani Khobragade incident:**

On December 11, 2013, while Khobragade was serving as an Indian Deputy Consul General in New York, she was charged with visa fraud. The charges allege that she committed visa fraud willfully and under penalty of perjury under Title 28, United States Code, Section 1746. It further alleges that Khobragade submitted an employment contract to the U.S. Department of State, in support of a visa application filed by Khobragade for another individual, which she knew were false and fraudulent statements.<sup>3</sup> The visa fraud charge carries a maximum sentence of 10 years in prison and the false statements charge carries a maximum sentence of five years.<sup>4</sup>

The United States Magistrate Judge Debra Freeman issued an arrest warrant against Khobragade, based on the charges filed by a special agent with the US Department of State, Bureau of Diplomatic Security. After that Khobragade was arrested by US Department of State's Diplomatic Security Service on December 12, 2013 around 9:30 am after dropping off her daughters at school on West 97th Street in Manhattan.<sup>5</sup> Then, Khobragade was escorted to the federal courthouse in downtown Manhattan, where she was transferred into the custody of the U.S. Marshals Service and strip searched by a female Deputy Marshal in a private setting.<sup>6</sup> She was presented before a U.S. magistrate judge and pleaded not guilty to the charges. She was released at 4 p.m. the same day on a \$250,000 recognizance bond. She also surrendered her passport.<sup>7</sup> After her release, Khobragade wrote an email to her colleagues in the Indian Foreign Service where she claimed that she "broke down many times," owing to "the indignities of repeated handcuffing, stripping, and cavity searches, swabbing," and to being held "with common criminals and drug addicts."<sup>8</sup> The very next day, Indian media sources echoed her claims that after her arrest she was handcuffed, strip searched, DNA swabbed and subjected to a cavity search.<sup>9</sup>

In defense on December 18, 2013, Nikki Credic-Barrett, a spokeswoman for the U.S. Marshals Service, stated that Khobragade was strip searched but not subjected to a cavity search. Per agency regulations, a strip search can include a "visual inspection" of body cavities. She also stated that anyone taken to holding cells of the New York federal courthouse is automatically subjected to a strip search if they are placed among other prisoners.<sup>10</sup> Regarding DNA swabbing, her statement was that the responsibility for collection of a DNA sample was that of the arresting agency, US Department of State, Bureau of Diplomatic Security.<sup>11</sup>

According to Preet Bharara, U.S. Attorney for the Southern District of New York, Khobragade was accorded courtesies well beyond what other defendants, most of whom are American citizens, are accorded as with about

<sup>1</sup> Satow (6<sup>th</sup> edn, 2009) 98; Fox (2<sup>nd</sup> edn, 2008) 701.

<sup>2</sup> Courts seeking to develop a restrictive doctrine of state immunity are tempted to emphasize the distinction between state immunity and the more extensive immunity of diplomatic agents: e.g. *Foreign Press Attache* (1962) 38 ILR 160, 162.

<sup>3</sup> Mathur, Aneasha. "Leading to Devyani's arrest, a verbal deal and 'two contracts'".

<sup>4</sup> "Arrest, strip-search of Indian diplomat in New York triggers uproar". *CNN*. December 19, 2013. <http://www.samachar.com/arrest-strip-search-of-indian-diplomat-in-new-york-triggers-uproar-nmsuKwhefje.html>. last accessed on 24.06.2014

<sup>5</sup> "Devyani Khobragade reveals how she 'broke down' after 'stripping and cavity searches' as row between U.S. and India deepens". *National Post*. December 18, 2013. Retrieved December 18, 2013.

<sup>6</sup> Bharara, Preet (December 19, 2013). "Statement Of Manhattan U.S. Attorney Preet Bharara On U.S. v. Devyani Khobragade" (Press release). New York City, New York, USA: The United States Attorneys Office - Southern District of New York. Retrieved December 23, 2013.

<sup>7</sup> "India takes US head on". *The Economic Times*. December 17, 2013. Retrieved December 17, 2013.

<sup>8</sup> Booth, William (December 18, 2013). "Devyani Khobragade letter to her colleagues: The full text". *Washington Post*. Retrieved December 27, 2013.

<sup>9</sup> "Devyani Khobragade put through cavity search because her crime of visa fraud is a felony". *Zee News*. December 18, 2013. Retrieved December 18, 2013. [http://zeenews.india.com/news/nation/devyani-khobragade-put-through-cavity-search-like-criminals-by-us\\_897584.html](http://zeenews.india.com/news/nation/devyani-khobragade-put-through-cavity-search-like-criminals-by-us_897584.html)

<sup>10</sup> "Kerry expresses regret over strip search of arrested Indian diplomat". *CBS News* <http://www.cbsnews.com/news/kerry-expresses-regret-over-strip-search-of-arrested-indian-diplomat/>

<sup>11</sup> "Devyani Khobragade not subjected to cavity search, claim US Marshals". *DNA via Press Trust of India*. December 19, 2013. Retrieved December 19, 2013. <http://www.dnaindia.com/world/report-devyani-khobragade-not-subjected-to-cavity-search-claim-us-marshals-1937895>

two hours after her arrest, she was allowed to make numerous phone calls in order to arrange for child care and sort out personal matters.<sup>1</sup>

The Indian government moved Khobragade to a permanent Indian Mission at the United Nations, New York which may provide her with diplomatic immunity.<sup>2</sup>

There has been a clarification by US State Department that full diplomatic immunity which she might receive in that post would not be retroactive.<sup>3</sup> On December 23, 2013, the United Nations approved a request from India to accredit Khobragade, but at the same time stated that US approval was still be needed. Khobragade was granted an exemption from personally appearing in court for the case.<sup>4</sup>

G-1 visa was granted for Khobragade by the United States Department of State on January 8, 2014, under the terms of Section 15 of the Headquarters Agreement between the United Nations and the United States which gives her full diplomatic immunity and would preclude any court jurisdiction over her.<sup>5</sup>

When she was accredited to the United Nations the U.S. State Department had no choice but to grant Khobragade full diplomatic immunity because she did not pose a national security threat.<sup>6</sup> The US grand jury indicted her on two counts, for visa fraud and making false statements to get a work visa for Sangeeta Richard, her housekeeper in New York on January 9, 2014.<sup>7</sup> The charges against her will remain pending until she can be brought to court to face them, either through a waiver of immunity or her return to the US without immunity status. However hours after indictment of Khobragade for visa fraud, India refused the US request to waive the immunity and transferred her to the Ministry of External Affairs in New Delhi.<sup>8</sup> Khobragade left the United States by plane to India on January 9, 2014.<sup>9</sup>

On February 8, 2014 Khobragade moved for her visa fraud charge to be dismissed, claiming that the country had no authority over her as she was granted diplomatic immunity when the indictment case was filed. The prosecution opposed the motion, reasoning:

*"Having left the U.S. and returned to India, the defendant currently has no diplomatic or consular status in the U.S., and the consular level immunity that she did have at the relevant times does not give her immunity from the charges in this case, crimes arising out of non-official acts."*<sup>10</sup>

All charges against Khobragade was dismissed by Judge Shira Scheindlin on March 12, 2014. Judge Shira Scheindlin on her ruling noted that Khobragade received diplomatic immunity from the United Nations on January 8 and she held that immunity until January 9, on which day she left the United States. Since the indictment was issued on January 9 the court found that "the government may not proceed on an indictment obtained when Khobragade was immune from the jurisdiction of the court." The order did leave open the

<sup>1</sup> Bharara, Preet (December 19, 2013). "Statement Of Manhattan U.S. Attorney Preet Bharara On U.S. v. Devyani Khobragade" (Press release). New York City, New York, USA: The United States Attorneys Office - Southern District of New York. Retrieved December 23, 2013. <http://www.justice.gov/usao/nys/pressreleases/December13/KhobragadeStatement.php>

<sup>2</sup> "Devyani Khobragade transferred to UN mission, can apply for full diplomatic immunity". *NDTV.com*. December 18, 2013. Retrieved December 19, 2013. <http://www.ndtv.com/article/cheat-sheet/devyani-khobragade-transferred-to-un-mission-can-apply-for-full-diplomatic-immunity-460021>

<sup>3</sup> Lakshman, Narayan (December 21, 2013). "No retroactive immunity for Devyani, says U.S". *The Hindu* (Chennai, India). Retrieved December 23, 2013.

<http://www.thehindu.com/news/international/world/no-retroactive-immunity-for-devyani-says-us/article5481901.ece>

<sup>4</sup> "U.N. approves India's request to accredit diplomat charged by U.S.". *Reuters*. December 23, 2013.

<sup>5</sup> "Diplomatic immunity to Dr. Devyani Khobragade". *Mea.gov.in*. Retrieved January 10, 2013. <http://www.mea.gov.in/pressreleases.htm?dtl/22723/Diplomatic+immunity+to+Dr+Devyani+Khobragade>

<sup>6</sup> Jethro Mullen and Harmeet Shah Singh (January 10, 2014). "India asks U.S. to withdraw official from its embassy in New Delhi, source says". *CNN*. Retrieved January 10, 2014. [http://edition.cnn.com/2014/01/10/politics/us-india-diplomacy/index.html?hpt=hp\\_t2](http://edition.cnn.com/2014/01/10/politics/us-india-diplomacy/index.html?hpt=hp_t2)

<sup>7</sup> "Indian diplomat Devyani Khobragade leaves US under immunity". January 10, 2014.

<http://www.theguardian.com/world/2014/jan/10/devyani-khobragade-to-leave-us-under-diplomatic-immunity>

<sup>8</sup> "Tit for tat expulsions: India orders US diplomat to leave country". *The Times of India*. Retrieved January 10, 2014. <http://timesofindia.indiatimes.com/India/Tit-for-tat-expulsions-India-orders-US-diplomat-to-leave-country/articleshow/28649593.cms>

<sup>9</sup> Neumeister, Larry; Lee, Matthew (January 9, 2014). "Strip-Searched Diplomat Indicted on Fraud Charge". *Associated Press* (ABC News). Retrieved January 10, 2014. <http://www.thehindu.com/news/international/world/devyani-seeks-dismissal-of-visa-fraud-case-in-us-court/article5667558.ece?homepage=true>

<sup>10</sup> Lakshman, Narayan (February 8, 2014). "Devyani seeks dismissal of visa fraud case in U.S. court". *IANS* (Chennai, India: The Hindu). Retrieved February 8, 2014. <http://www.thehindu.com/news/international/world/devyanis-immunity-a-fabrication-bharara/article5642263.ece>

possibility that prosecutors could bring a new indictment now that she no longer has immunity after having departed the U.S.A. Immediately after the indictment was dismissed, the prosecution office stated:

*"There is currently no bar to a new indictment against her for her alleged criminal conduct, and we intend to proceed accordingly"*<sup>1</sup>

On March 14, 2014, Khobragade was re-indicted on the same charges.<sup>2</sup> A new warrant for Khobragade's arrest was subsequently issued. [Salman Khurshid](#), Indian Cabinet Minister of the [Ministry of External Affairs](#), said that the re-issuance of an indictment was "extremely irksome".<sup>3</sup>

### **Evaluation of Devyani Khobragade incident under International law:**

If we want to evaluate the Devyani incident the first thing that we should analyze that whether Devyani would have right to get the diplomatic immunities and privileges because according to Vienna Convention on Relation, 1961, the Non-Diplomatic officers are not obliged to get the diplomatic immunities but if he or she is a diplomat or diplomatic staff then he or she is obliged to get the immunity. Generally the Foreign office Prepares and publishes a book known as "Diplomatic List" where the name of the diplomats were enlisted. If the name of a person working on the diplomatic mission does appear on the list then that very person will be considered as diplomatic staff and he will avail diplomatic immunities. The purpose or object of the diplomatic immunities and privileges are not to benefit them personally but to help them to ensure the effective function of the Embassy.

In case of Devyani she was posted to the Consulate General of India in New York in 2012 where she worked as Deputy Consul General and served there until December 18, 2013. She handled women's affairs as well as political and economic issues.<sup>4</sup> There are some differences between the immunities of a consular officer and diplomatic officer as Consular relations are governed by the Vienna convention on consular relation. The Personal inviolability of consular officers are codified in the 1963 Vienna Convention on Consular Relation. The immunities have been enumerated in article 41 of the convention and they include:

- 1. 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.*
- 2. Except in the case of grave crime, consular officers shall not be committed to prison or be liable to any other form of restriction on their personal freedom save in execution of a judicial decision of final effect.*
- 3. If criminal proceedings are instituted against a consular officer, he must appear before the competent authorities. Nevertheless, the proceedings shall be conducted with the respect due to him by reason of his official position, in a manner which will hamper the exercise of consular functions as little as possible. When, the crime is grave and it has become necessary to detain a consular officer, the proceedings against him shall be instituted with the minimum of delay.*

As a result criminal proceeding could be brought against a Consular Officer for a grave crime and at the same time he is he or she is bound to appear before the court. A consular officer can be arrested or detained, according to Article 28 of Vienna convention on consular relation the only duty of the receiving State is to accord full facilities for the performance of the functions of the consular post.

But in the case of grave crime by the consular officer the procedure could culminate in arrest and detention but not without notifying the head of the consulate as Article 42 of VCCR also states that In the event of the arrest or detention, pending trial, of a member of the consular staff, or of criminal proceedings being instituted against him, the receiving State shall promptly notify the head of the consular post. Should the latter be himself the object of any such measure, the receiving State shall notify the sending State through the diplomatic channel.

Here in this case before arresting Devyani no notice been served to head of the consulate or he has not been notified. So arresting Divyani without notifying the consular head is a clear violation of article 42 of the Vienna Convention consular relation by the US authority.

Besides article 41 provided that consular officers may not be arrested or detained except in the case of a grave crime and following a decision by the competent judicial authority. If, however, criminal proceedings are instituted against a consul, he must appear before the competent authorities. The proceedings are to be conducted

<sup>1</sup> Debucquoy-Dodley, Dominique (March 13, 2014). "Indian diplomat Devyani Khobragade indicted again"

<sup>2</sup> "Indian Diplomat Re-Indicted in US Visa Fraud Case". *ABC News*. Associated Press. March 14, 2014. Retrieved March 14, 2014.

<sup>3</sup> staff writer (March 16, 2014). "Khobragade incident 'extremely irksome', time for closure: Salman Khurshid". *The Times of India*. Retrieved March 16, 2014. <http://timesofindia.indiatimes.com/india/Khobragade-incident-extremely-irksome-time-for-closure-Salman-Khurshid/articleshow/32134828.cms>

in a manner that respects his official position and minimizes the inconvenience to the exercise of consular functions and under Article 43 VCCR their immunity from their jurisdiction is restricted in both criminal and civil matters to acts done in the official exercise of consular functions.

A lot of example could be found where the immunity's been considered for the offence but the problem in devyani's case is that her offence of misrepresentation in visa is not done in official capacity.

In *Koeppel and Koeppel V Federal Republic of Nigeria*,<sup>1</sup> for example, it was held that the provision by refuge by the Nigerian Consul-General to a Nigerian national was an act performed in the exercise of a consular function within the meaning of article 43 and thus attracted consular immunity.

So the Vienna Convention on Consular Relations 1963 provided functional immunity to consular officers with respects to acts performed in the exercise of consular functions. Such immunity does not only derive only from the convention but also is a part customary international law.

The Vienna Convention on Consular Relation, 1963 and Vienna Convention on Deplomate Relation, 1961 have been formally adopted by the United States and are, therefore, pursuant to the US. Constitution, "the supreme law of the land." The U.S. Government is legally bound to ensure that such privileges and immunities are respected by its states and municipalities. US. law regarding diplomatic immunity has its roots in England. The 1978 Act imposed a more precise regime and reduced the degree of immunity enjoyed by many persons at diplomatic missions. On a practical level, failure of performance could lead to harsher treatment of U.S. personnel abroad, since the principle of reciprocity has, from the most ancient times, been integral to diplomatic and consular relations.<sup>2</sup>

### **Conclusion:**

In International law diplomatic immunity is not intended to serve as a license for persons to violate the law and purposely avoid liability for their actions. The purpose of these privileges and immunities is not to benefit individuals but to ensure the efficient and effective performance of their official functions on behalf of the sending state. Committing visa fraud or any other grave crime is not only unexpected but also a disrespect to the dignity and the rule of law of the receiving state. So, it is the duty of Diplomatic and Consular officer to keep that in mind. The Vienna Convention on Consular Relation, 1963 and Vienna Convention on Deplomate Relation, 1961 clearly expresses framework for diplomatic relations and consular relation between independent countries. So, arresting Divyani for grave crime by United states authority without notifying the head of the consulate is absolutely the violation of Vienna convention On Consular relation.

So just allowing courtesies well beyond what other American citizens, such as with about two hours after her arrest, permission to make numerous phone calls in order to arrange for child care and sort out personal matters is simply not enough.<sup>3</sup>

On the other hand there is no clear definition of 'grave crime' or there is no list in the convention that will clearly illustrates which crimes will be regarded as grave crime which sometimes create confusion as there are differences in measurement of graveness in crime between different countries. Besides the time Divyani left USA, she has lost the diplomatic or consular immunity that she used to have, so there is no bar on bringing visa fraud charge on her now.

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<sup>1</sup> 704 F.Supp. 521 (1989); 99 ILR, p.121.

<sup>2</sup> Diplomatic and Consular Immunity, Guidance for Law Enforcement and Judicial Authorities: <http://www.state.gov/documents/organization/150546.pdf>

<sup>3</sup> Bharara, Preet (December 19, 2013). "Statement Of Manhattan U.S. Attorney Preet Bharara On U.S. v. Devyani Khobragade" (Press release). New York City, New York, USA: The United States Attorneys Office - Southern District of New York. Retrieved December 23, 2013. <http://www.justice.gov/usao/nys/pressreleases/December13/KhobragadeStatement.php>

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