

Killing Khashoggi Under International Law

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WRITER'S COMMENT: I remember Jamal Khashoggi dominated headlines in October 2018 because of the circumstances surrounding his death. Each day new details emerged about who may have been involved and how the act was carried out—it was like something straight out of a spy movie. Then, after a few weeks, the news moved on, but I was left to continue wondering how such a brutal attack could take place with seemingly no tangible consequences for those involved. The final essay assignment for POL 122 was the perfect opportunity to revisit this topic from a legal point of view and to answer my lingering questions about the attack. The assignment challenged me as a writer to structure my essay in a way that would be logical to the reader but would still keep track of the many different aspects of this case. Ultimately, it gave me an opportunity to put what I learned from class into practice and to examine and unpack the various components of international law as they applied to the killing of Jamal Khashoggi.

INSTRUCTOR'S COMMENT: The final essay assignment for POL 122 asks students to explain how international law applies to a recent global event. Despite this simple prompt, students quickly discover that many political events—and especially the important events—involve a variety of competing legal standards. Kaitlin's essay on the highly controversial killing of Jamal Khashoggi untangles these standards in a clear, analytical fashion. She cleverly distinguishes between laws that protect the victim and those that might protect the perpetrators. This setup allows her to contrast the body of treaty and customary law on torture with long-established principles of diplomatic immunity. The essay further observes, rightly, that even when legal standards are clear, the available mechanisms for enforcing compliance with international law are fragmentary and unreliable. By combining extensive

background research with careful attention to detail and a strong grasp of the relevant concepts, Kaitlin has authored an essay that renders this highly complex topic accessible even to those with little knowledge of international law.

—Brandon J Kinne, *Department of Political Science*

On October 2, 2018 a Saudi Arabian citizen, Jamal Khashoggi, was murdered in the Saudi Arabian consulate in Turkey. Khashoggi was born in Saudi Arabia and had a successful career as a journalist. He was the Editor-in-Chief of *Al-Watan*, a liberal paper in Saudi Arabia, and he utilized that platform to express his criticisms of the Saudi Crown Prince, Mohammad bin Salman. Part of bin Salman's strategy to consolidate power is to have a zero-tolerance policy towards dissent, so his regime ran a campaign to silence critics. As a critic of the regime, Khashoggi was in danger in Saudi Arabia, so he self-exiled to the United States and continued to write against the crown prince as a columnist for *The Washington Post* (Helal 37-40).

On the day of his murder, Khashoggi was visiting the Saudi Arabian consulate in Turkey to obtain documentation needed for his coming wedding. Khashoggi entered the consulate; he never left. After many hours, his concerned fiancée contacted the Turkish authorities, but there was little they or anyone could do because the incident took place in a Saudi Arabian consulate. Even now, it is not completely known what happened to Khashoggi inside the consulate, but leading reports speculate he was met by a group of Saudi Arabians, strangled, and dismembered, after which his remains were transported back to Saudi Arabia on a private jet (Helal 37-40).

In what follows, I will break down the case of Jamal Khashoggi by using the Convention Against Torture and Vienna Convention on Consular Relations. Then, I will discuss the jurisdictional challenges of the case and competing claims of the relevant actors. Finally, I will consider the opportunities for enforcement.

Part I: Relevant Sources of Law

This case has two main applicable treaties: the Convention Against Torture (which applies to the victim) and the Vienna Convention on Consular Relations (which applies to the accused).

To begin, the act of killing Jamal Khashoggi violates the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). This treaty, entered into force in June of 1987, has 83 signatories and 169 parties. All three key actors—the United States, Turkey, and Saudi Arabia—have agreed to this treaty, although to different degrees. The United States signed it in 1988, soon after it was entered into force, and ratified it in October 1994. Turkey also signed in 1988 but ratified it almost immediately, also in 1988. Saudi Arabia has not signed the treaty but did accede it in 1997 (UN General Assembly). Each state has a few declarations and reservations, but none that interfere with the main component of the treaty, which is to define and prohibit torture under international law.

Typically, humanitarian laws are considered soft law because they are written broadly to attract many signatories, and although the CAT does provide a specific and direct definition of torture, it fails to “provide texts that specify international judicial points of reference for the prosecution of persons who exercise torture, which causes the perpetrators to escape punishment” (al-Kasasibah 144). Rather than provide delegation of authority on how to enforce the ban on torture, it instead focuses on defining and condemning it.

The murder of Khashoggi also violates customary international law in addition to violating the specific CAT treaty because torture is also considered a *jus cogens*—a norm that is inexcusable to break (Grosholz 1033, Plachta and Psilakis 258). Even if the states were not all parties to the CAT, they would still be condemned for using torture under the principle of customary law. Rather than conflict with each other, in this case, the sources of treaty and customary law concur.

The prohibition of torture is covered by both formal and material sources. The CAT and the fact that torture is inexcusable under customary law are both formal sources of law; this means that they are the principal sources from which laws are created. In addition to those, the International Criminal Court (ICC) made a judgement regarding international humanitarian law and the four Geneva Conventions, or treaties—the third of which comments on torture—and ruled, “‘the rules set forth in joint Article 3 of the four Geneva treaties shall constitute’ the minimum standards that ‘apply to international and non-international armed conflicts.’” Which essentially assures that the ban on torture is applicable to all states, again making it customary law (al-Kasasibah

151). This is an example of an auxiliary source of law, because the ICC is an interpreting body which adds clarification and meaning to the formal sources of law.

Undoubtedly Jamal Khashoggi's death is condemnable under international law because it violated his right to life and his right against torture, but there are still questions surrounding the rights of the perpetrators. Since the act took place in a Saudi Arabian consulate in Turkey, in order to address the question, it is important to examine another treaty: the Vienna Convention on Consular Relations.

The Vienna Convention on Consular Relations (VCCR) was entered into force in 1967 and remains in force. It has 48 signatories and 180 parties. The United States signed it in 1963 and ratified it in 1969, Turkey acceded it in 1976, and Saudi Arabia acceded it in 1988—so all relevant actors are bound by this treaty (United Nations). The treaty is considered to be codification of customary law because it is essentially a collection of rules previously outlined in bilateral treaties (Lee 41). Although *opinio juris* (international law) is one common way of explaining the reason states follow customary law, in this case it seems more likely that the obvious prospect of retaliation is what keeps states in line. If an instigating state does not honor the VCCR in its interaction with a target state's consulate, the target state can respond by itself, thereby hurting the instigating state's consulate. Considering the treaty lists specific rights and obligations and there is an opportunity for enforcement through retaliation, it is evident that the VCCR is a harder law than the aforementioned CAT.

The VCCR is designed to have a number of protections to defend the consulate and the consulate staff. But these benefits are liable to be abused by the visiting country, which seems to be the case in this example.

First of all, the VCCR is to outline diplomatic immunity which allows consular staff to be exempt from some laws in the host country. However, there are several limitations to this portion of the treaty applying to the case (United Nations). First, only three of the 18 suspects are believed to be consular officials, so the treaty would not be applicable to all those involved. In addition, "consular officials don't have absolute immunity under the Vienna conventions and may be put on trial by host country courts if they are suspected of serious crimes" (Ritter 1). In this case the accused would lose their immunity because torture is considered *jus cogens*—a serious crime.

A second aspect of the VCCR is to characterize consulates as “inviolable” (United Nations). This means that the host country cannot enter the consulate without the consent from the sending country and is the primary reason why it took two weeks before Turkey was allowed into the consulate (Helal 40). Saudi Arabia was able to use this rule for their own gain and remove evidence before any other country could inspect the crime scene. Although there is the option for the sending country to waive these diplomatic immunities within the framework of VCCR, “[l]egal experts say it’s unlikely that countries would accept changes to diplomatic immunity, a principle that is universally accepted and rarely breached; the 1979 seizure of the U.S. Embassy in Iran was a notable exception” (Ritter 2). Due to the fact Saudi Arabia has the ability to waive diplomatic immunity for the accused, but did not utilize that ability, and Turkey did not push the issue, this may be an example of tradition, or customary law, being stricter than the VCCR itself.

Part II: Relevant Actors

In the case of Khashoggi’s murder, there are a number of relevant actors. The obvious actors in this case are Turkey and Saudi Arabia because the event took place in Turkey in a Saudi Arabian consulate and involved Saudi Arabian citizens. The United States is another relevant actor for a few reasons which will be discussed below, the main one being Khashoggi was a legal resident of the United States. Aside from these states, the entire international community could also be considered to have personality because of how the United Nations responded to the event and the chance for states to claim universal jurisdiction. (Personality in international law refers to actors who have capacity—i.e., the ability to exercise a combination of rights and duties; states are the only actors that have original personality in international law.) Finally, the 18 Saudi perpetrators could gain personality due to the nature of the crime.

Turkey can claim territorial jurisdiction because the crime took place on their soil. Territorial jurisdiction takes precedence over all other forms of jurisdiction in international law. Although Turkey can claim this jurisdiction, they cannot exercise it unless the accused are still on their soil. Even though the crime took place in the Saudi Arabian consulate, the consulate stands on Turkish soil, so therefore under VCCR, Turkey has territorial jurisdiction (United Nations). In this case, Turkey has

claimed territorial jurisdiction and has asked Saudi Arabia to extradite the accused—to return them to Turkish authorities—so that they may exercise their jurisdiction. The Saudi Arabian Foreign Minister has denied Turkey’s request, saying Saudi Arabia will prosecute the accused themselves (Zagaris 537). Saudi Arabia has claimed jurisdiction on the basis of nationality because all those involved were Saudi Arabian citizens. They are able to exercise that jurisdiction because the accused are currently located on Saudi Arabian soil.

The United States may also have a stake in the Khashoggi case based on a one-lined domestic law from 1789: The Alien Tort Statute (ATS). The statute declares that “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States” (Grosholz 1010). Based on a series of Supreme Court rulings, the ATS is thought to apply in cases when there is a “distinct American interest” and “violation of a norm of customary international law” (Grosholz 1033). There are two main arguments for Khashoggi’s killing to be connected to American interests. First, Khashoggi himself was connected to the United States because he had three adult children who were United States citizens, and Khashoggi was a resident who held an “O” visa and was in the process of applying for permanent residency through the green card program. Beyond this direct connection between Khashoggi and the United States, Khashoggi was a journalist standing up to an oppressive regime, and his death symbolizes a suppression of free speech and therefore is categorically within American interests. And as previously discussed, the murder is a violation of customary international law under the Convention Against Torture (Grosholz 1033). So, based on this statute, the United States could also claim jurisdiction and try the perpetrators in their own courts, except that they too would have to ask Saudi Arabia to extradite the perpetrators in order to exercise that jurisdiction.

A case could also be made for universal jurisdiction. The principle of universal jurisdiction gives any state the ability to claim jurisdiction in large crimes that are seen as a threat to the global community. Since the Convention Against Torture is customary international law and jus cogens, its violation as such gives any state the grounds to prosecute the perpetrators (Plachta and Psilakis 258). In cases of extreme human rights violations, individuals can be given legal personality so that states can try them. So, in theory, any state could claim universal jurisdiction

over this case on the grounds that the crime was a threat to international norms with the intent to try the 18 Saudi Arabian perpetrators, but since Saudi Arabia holds territoriality, the state would have to request their extradition, which Saudi Arabia will not grant.

In addition to the states discussed above and their personality in this case, the United Nations also has personality because it is an organization made of states. The United Nations has limited capacity to act, but they can pass judgements, so they published a detailed report of the case and urged states to act by imposing strict sanctions on the individuals involved as well as on Saudi Arabia itself. The report also called for the European Union to put into effect an arms embargo against Saudi Arabia (Plachta and Psilakis 258). This leads into the next section on enforcement.

Part III: Enforcement and Compliance

The ideal aftermath of the case would include the individuals responsible for killing Khashoggi to be brought to trial and for Saudi Arabia to be punished for their violation of customary international law. This outcome seems straightforward but proves to be more difficult in practice.

First of all, in order for the perpetrators to face real consequences, a country other than Saudi Arabia would have to conduct the trial. Turkish President Erdogan has argued that “the Saudi rulers have a conflict of interests in managing any trial because the Saudi government ordered and directed the killing for political reasons” (Zagaris 538). The Saudi government has in fact arrested the perpetrators after facing significant backlash in the international community, but it is unknown what the charges are, and the trials are not transparent because observers must sign a non-disclosure agreement (Zagaris 538). For these reasons, it is thought that the perpetrators would face more just charges and consequences if tried in a different state’s court. However, in order for this to happen, as previously discussed, Saudi Arabia would have to accept a state’s extradition request, and Saudi Arabia will not do that because they have an incentive to protect those individuals.

The other option for enforcement is to put pressure on Saudi Arabia in order to punish them for their violation, in order to compel them to comply. One method of doing this is by publicly condemning the crime—as the United Nations did in their report, although this is not a

terribly consequential action (Plachta and Psilakis 256). A more material way of going about pressuring a state is by imposing sanctions, which is what the UN report called for. The United States did respond with sanctions under the Magnitsky Act which are intended to punish the 18 individuals responsible for Khashoggi's death (Digest of United States Practice in International Law 607). Although the order to kill Khashoggi came from high up within the Saudi Arabian government, perhaps from Mohammad bin Salman himself, the sanctions not do not affect Saudi Arabia aside from those few individuals (Mazzetti).

Saudi Arabia's noncompliance is difficult to combat due to the treaty design of the Convention Against Torture, and because states—especially the United States—have incentives not to punish Saudi Arabia. The CAT is soft law and has no delegation of authority, meaning there is no body responsible for enforcement (UN General Assembly). Consequently, it is up to other states to hold the violating actor accountable, but often politics get in the way of this. In this case, it is in the United States' direct interest to keep relations with Saudi Arabia friendly because they are the United States' strongest ally in the Middle East and, especially, because of a billion-dollar arms deal the United States has with Saudi Arabia (Ballhaus and Salama). While Congress did call for action and enacted the Magnitsky Act, it only applies to 18 individuals, and allows Mohammad bin Salman and Saudi Arabia to escape consequences (Helal 45-46). There are opportunities for states to be stricter in their enforcement, but because of other political considerations, they chose to be lenient. For this reason, it is unlikely that compliance will be improved unless a state has its own interests that would be accomplished by taking the extra step of enforcement.

Conclusion

Khashoggi's murder shocked the international community primarily because of its brutality and obvious violations of international law. Journalists in particular were shocked that the United States could quietly stand aside as Saudi Arabia so visibly targeted free speech. Although international law does outline protections and limitations for the international community, it is largely up to the states themselves to choose how they justify their actions and bend international law to suit their interests and accomplish their goals.

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