

Murder of Jamal Khashoggi: An International Law Perspective

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1. Introduction

Law of Nations or more commonly Public International Law is a vast body of legal rules, standards and norms defining the relationship between sovereign states. Its primary function is to facilitate interstate peace and harmony and for that purpose it derives its body of rules and norms from international treaties, customary law, general principles of law recognised by civilised nations along with judicial decisions laid down by both national and international courts.¹ Since international law works primarily through the consent of the states, it may be possible for a state to choose to be in breach of a treaty or not abide by a judgment decided by the International Court of Justice (ICJ). In such an event, international law possesses effective enforcement mechanisms to ensure compliance of treaties, pre-emptory norms etc. The UN Charter empowers the UN Security Council under Chapter VII to impose trade, diplomatic or military sanctions for the maintenance of international peace and harmony² and also take relevant measures under Article 94 to ensure compliance of the decisions laid down by the ICJ. In addition to international enforcement mechanisms, certain domestic jurisdictions also provide for enforcement mechanisms in order to uphold the principles of international law. Article 1, Section 8 of the US Constitution allows the US Senate to make laws to punish offences against the Law of Nations.³

Through this paper, we aim to analyse multiple facets of the Jamal Khashoggi murder case from the lens of international law, determining various obligations and violations of the states

¹ Charter of the United Nations 1945, art 39.

² *ibid* cc VII.

³ The Constitution of the United States 1789, art 1 ss 8 cl 10.

and individuals associated with the crime. The paper will dwell into immunity entitled to consulars and diplomats under international law and whether the same can be extended to the perpetrators of this crime, the territorial sovereignty of a state and in particular determining whether Saudi Arabia violated the sovereignty of Turkey by eliminating Jamal Khashoggi in the Saudi Consulate in Istanbul. In light of the *Pinochet case*, wherein for the first time a former head of state was prosecuted for committing international crimes,⁴ the paper shall deal with individual criminal responsibility on part of the Crown Prince of Saudi Arabia for the alleged execution of Jamal Khashoggi. Lastly, the conflict of norms that arise due to the overlap of international diplomatic laws and human rights obligations on part of Turkey shall be analysed in detail.

2. Background

Jamal Khashoggi was a prominent Saudi journalist. For decades, he served as an adviser to the Government. In 2017, he fell out of favour and went into exile in the US. While working with the *Washington Post*, he criticised the monarchy rule in Saudi Arabia and its Crown Prince, Mohammed Bin Salman (MBS). On 2nd October, 2018, he visited the Saudi Consulate in Turkey to obtain certain documents for his marriage with Hatice Cengiz. However, he never exited the consulate. In the week following his disappearance Saudi denied reports of Khashoggi's death in the Turkish press and claimed that he had left the consulate building within an hour. However, after a few weeks, when certain audio recordings from inside the consulate were obtained by Turkish intelligence, Saudi Arabia finally admitted that Khashoggi had been murdered. It further stated that the killing was a 'rogue operation' and not authorised by MBS. On 3rd January, 2019, 11 people were put on trial at the Criminal Court of Riyadh in connection with the killing. However, the trial was held behind closed doors. Saudi Arabia has

⁴ *R., ex parte Pinochet v. Bartle and ors, Appeal* [1999] UKHL 17.

confined the identities of these defendants till date.⁵ On 19th June, 2019, the UN Special Rapporteur Agnes Callamard, submitted her report to the UN Human Rights Council blaming Saudi Arabia for the murder of Jamal Khashoggi and individually named MBS behind the commission of the crime.⁶

3. Whether consular immunity can be extended to the perpetrators?

The Vienna Convention on Diplomatic Relations of 1961 (VCDR) is an international treaty between sovereign states which specifies privileges of a diplomatic mission and enables the diplomatic agents to perform their functions free of apprehension and interference from the receiving state. Likewise, the Vienna Convention on Consular Relations of 1963 (VCCR) is a multilateral agreement between sovereign states which codifies consular practices that were originally governed by bilateral agreements and customary international practices.⁷ Even though consular personnel perform several vital functions like promotion of bilateral trade and attending to difficulties of nationals in the receiving state, they do not have the pivotal role of providing communication between the two states.⁸ Apart from the obvious difference of the beneficiary of these treaties, VCDR and VCCR can be distinguished on the level of privileges and immunities they offer which can also be understood as diplomatic immunity vis-à-vis consular immunity.

⁵ ‘Annex to the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions: Investigation into the unlawful death of Mr. Jamal Khashoggi’ (Human Rights Council, Sess. 45 U.N. Document A/HRC/41/CRP.1, 19 June 2019).

⁶ *ibid.*

⁷ Michael John Garcia, ‘Vienna Convention on Consular Relations: Overview of U.S. Implementation and International Court of Justice (ICJ) Interpretation of Consular Notification Requirements’ (CRS Report for Congress, Congressional Research Service 2004) <<https://fas.org/sgp/crs/row/RL32390.pdf>>.

⁸ Office of Foreign Missions, ‘Diplomatic and Consular Immunity: Guidance for Law Enforcement and Judicial Authorities’ (United States Department of State Office of Foreign Missions) <<https://2009-2017.state.gov/documents/organization/149734.pdf>>.

It is imperative to note that Saudi Arabia and Turkey are both parties to VCDR⁹ and VCCR¹⁰ and the accession of the treaties by these states took place between the years 1976 and 1988. Assassination of Jamal Khashoggi took place at the Consulate of the Kingdom of Saudi Arabia situated in Istanbul and not at the Embassy of the Kingdom of Saudi Arabia in Ankara, which implies that only VCCR is applicable in this scenario. Yet to comprehend the provisions of VCCR and its applicability more effectively, we must analyze these provisions alongside the provisions of VCDR.

Similar to Article 22 of VCDR, Article 31 of VCCR talks about the inviolability of the premises. The authorities of the receiving state cannot enter these consular premises without the consent of the head of the consular post.¹¹ These premises by definition include the residence of the head of the mission¹² or ancillary land used exclusively for the purposes of the consular post.¹³ The same inviolability extends to archives and documents as well.¹⁴ The residence of the Consul General, Mohammad al-Otaibi, was in the same periphery as the consul and both the places became the focus of the investigation. Turkish authorities eventually got the permissions to conduct their search and investigate in both these premises.¹⁵ But no step was taken by the authorities to enter and search these premises before obtaining consent of Saudi Arabia, as that would have been a gross violation of VCCR.

⁹ The Vienna Convention on Diplomatic Relations 1961, United Nations Treaty Collections <https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtmsg_no=iii-3&chapter=3&lang=en>.

¹⁰ The Vienna Convention on Consular Relations 1963, United Nations Treaty Collections <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg_no=III-6&chapter=3>.

¹¹ The Vienna Convention on Consular Relations 1963, art 31(2).

¹² The Vienna Convention on Diplomatic Relations 1961, art 1(i).

¹³ The Vienna Convention on Consular Relations 1963, art 1(j).

¹⁴ The Vienna Convention on Consular Relations 1963, art 33; The Vienna Convention on Diplomatic Relations 1961, art 24.

¹⁵ Kareem Fahim, 'Turkey agrees to Saudi request to jointly investigate Jamal Khashoggi's disappearance' *The Washington Post* (12 October 2018) <https://www.washingtonpost.com/world/middle_east/erdogan-says-saudis-haveadvanced-systems-that-would-have-recorded-jamal-khashoggis-disappearance-/2018/10/11/6cb1c9ce-ccb1-11e8-ad0a-0e01efba3cc1_story.html>.

Consular immunity is incorporated under Article 43 of VCCR which states that consular officers and employees shall not come under the jurisdiction of administrative or judicial authorities for any act performed in the exercise of consular functions. Furthermore, consular officers are not to be arrested except in the cases of grave crime and only pursuant to the decision by a competent judicial authority.¹⁶ Moreover, members of a consular post can be called upon as witnesses under judicial or administrative proceedings and should not decline to give evidence unless the evidence concerned is with respect to a consular function.¹⁷ Still, any decline to give evidence cannot attract a coercive measure or penalty towards the officer. Intentional killing, an act punishable under the Turkish Criminal Code,¹⁸ for any cause cannot be justified under any of the functions of the consulate, which are enumerated elaborately under Article 5 of VCCR. Hence, consular immunity cannot be extended to the Mohammad al-Otaibi or any of the consular officers who may be an accessory in the assassination of the journalist.

A diplomatic agent, on the contrary, enjoys complete immunity from the criminal jurisdiction of the receiving state.¹⁹ He or she even enjoys immunity from the administrative and civil jurisdiction, barring few circumstances as listed under Article 31(1) of VCDR. Additionally, the agent is not obliged to give evidence as a witness.²⁰ The agent is even inviolable i.e. not liable to any form of detention or arrest by the authorities of the receiving state.²¹ The family members of any diplomatic agent, forming part of his household in the receiving state, enjoy the same immunities and privileges as the agent, on the premise that they are not nationals of the receiving state.²² The inviolability and protection offered to the premises of the mission and its correspondence is extended equally to the private residence of the agent and his or her

¹⁶ The Vienna Convention on Consular Relations 1963, art 41(1).

¹⁷ *ibid* art 44.

¹⁸ The Turkish Criminal Code 2004, art 81.

¹⁹ The Vienna Convention on Diplomatic Relations 1961, art 31(1).

²⁰ *ibid* art 31(2).

²¹ *ibid* art 29.

²² *ibid* art 37(1).

personal property.²³ A significantly important provision, in midst of all these privileges, is Article 41 which states that the premises of the mission must not be used in a manner incompatible with the functions of the mission. It goes on to state that all those enjoying the privileges and immunities must respect the law and regulations of the receiving state. Barring this provision, diplomatic immunity is absolute and, in every way, more comprehensive than consular immunity. If Jamal Khashoggi was murdered inside the diplomatic premises in Ankara, then any and all diplomatic agents involved would have complete immunity from being tried in Turkey. These agents would neither be liable to any arrest nor obliged to give any evidence to the authorities of Turkey. Furthermore, their families and properties would have enjoyed the same immunity.

This does not mean a diplomat can do as he pleases in the receiving state with no fear of punishment or retribution. The receiving state has the power to declare a member of the mission as *persona non grata* without explaining its decision, following which the sending state is bound to either terminate his functions or recall the person.²⁴ Also, the immunity from jurisdiction can be waived by the sending state which implies that any legal action can be pursued against such an individual in the receiving state.²⁵ This is precisely what happened when Georgia waived a diplomat's immunity from criminal prosecution in Washington D.C. in 1977.²⁶ The diplomat, Gueorgui Makharadze, in a case of drunk driving and over speeding caused a multi car collision and killed a young girl and injured four others. Georgian

²³ *ibid* art 30.

²⁴ *ibid* art 9(1).

²⁵ *ibid* art 32.

²⁶ Michael Janofsky, 'Georgian Diplomat Pleads Guilty in Death of Teen-Age Girl' *The New York Times* (9 October 1997) <<https://www.nytimes.com/1997/10/09/us/georgian-diplomat-pleads-guilty-in-death-of-teen-age-girl.html>>.

Government waived his immunity which led him to be charged with involuntary manslaughter and later be imprisoned.²⁷

Boleslaw Adam Boczek in *International Law: A Dictionary* defines functional immunity or *immunity ratione materiae* as a form of immunity from the jurisdiction of the receiving state but only with regards to acts performed in the exercise of consular functions.²⁸ This form of immunity is vastly different from personal immunity or *immunity ratione personae*, which is granted to diplomats. The article *Immunities of State Officials, International Crimes, and Foreign Domestic Courts* goes on to further state that since *immunity ratione materiae* does not depend on the status of the official but rather on the official act, it can be claimed by all those who have acted on behalf of the state such as consular officers and employees as long as their acts are in accordance with their official duties.²⁹ Moreover, the article establishes that the rationale behind conferment of *immunity ratione materiae*, or in particular consular immunity, is twofold. Firstly, it diverts the responsibility of the act from the individual i.e. consular official to the state. These individuals cannot be held legally responsible for an action which is coherently that of a state's. The officials are mere instruments of the state and they cannot incur penalties or sanctions for acts which are not private.³⁰ Secondly, the immunity of state officials from jurisdiction in courts of receiving states ensures prevention of courts from indirectly exercising control over acts of foreign states, through initiation of legal proceedings against officials carrying out state duties. Thus, this immunity functions as a procedural and jurisdictional bar too. The article *Vienna Conference on Consular Relations*, which covers all the negotiations and discussions of VCCR, too agrees with this rationale and mentions that

²⁷ Sean D Murphy, 'Contemporary Practice of the United States Relating to International Law' (1999) 93 no. 2 AJIL 470, 485-487 <<https://www.jstor.org/stable/2998003?seq=1>>.

²⁸ Boleslaw A Boczek, *International Law: A Dictionary*, (Scarecrow Press 2005) 41-42.

²⁹ Dapo Akande, Sangeeta Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2010) 21 no. 4 The European Journal of International Law 815, 825-828 <<https://academic.oup.com/ejil/article/21/4/815/418198>>.

³⁰ *Prosecutor v Blaškić* (1997) IT-95-14-AR108 (International Criminal Tribunal for the Former Yugoslavia).

consular immunity is a must to ensure that immunity of states is not infringed by judicial or other authorities in the receiving state through proceedings against official acts of consular employees.³¹ But in our specific case, the Consul General and any other employee involved cannot claim functional immunity as he or she has gone beyond the duties of the state i.e. the consular functions and is in such a situation not immune from the jurisdiction of Turkey. Such incidents are prime reasons for the discourse against immunity and question the very existence of the privilege itself.

In such conflicts, it is always beneficial to have recourse through rules of international law between states but in the absence of communication under VCCR, there can be misunderstandings and further rise of conflicts. For instance, the absence could have led to Turkish authorities barging into the consul and rounding up all the staff and even making some arrests.

After studying in detail about the rationale of immunity and its privileges, we can safely conclude that consular immunity through VCCR cannot be extended to these perpetrators since they were not consular officers to begin with but some hired guns. But even if they were such officers and carried out this crime, they could not be safeguarded under the said treaty because of all the reasons explained above.

4. Whether the territorial sovereignty of Turkey was violated?

Territorial sovereignty is a cardinal concept in international law and is often defined in terms of existence of rights over a territory. It can be understood as a state's right to exercise its jurisdiction over a territory and subjecting persons and objects in this territory to domestic

³¹ G. E. do Nascimento e Silva, 'The Vienna Conference on Consular Relations' (1964) 13 no. 4 The International and Comparative Law Quarterly 1214, 1227 <www.jstor.org/stable/756923>.

legislations and rules, subject to rules of international law.³² As it has been held in the *Palmas* case by Judge Huber, territorial sovereignty involves the exclusive right to display the functions and activities of the state. Furthermore, it also includes the state's obligation to protect within its territory the rights of other states.³³

In the present case, the murder took place inside the Saudi Arabian consulate in Istanbul, Turkey. It is often a common misconception that diplomatic and consular missions are considered to be extraterritorial and hence, exempted from the local laws of the host state. However, embassies and consulates are actually a part of the sovereign territory of the receiving state, and not of the sending state.³⁴ VCCR provides for the inviolability of the consular premises,³⁵ which only means that the receiving state requires permission of the head of the sending State to enter the same. Therefore, the inviolability of consular premises must not be confused with extraterritoriality because such premises do not constitute a part of the territory of the sending state.³⁶

Jordan J. Paust in *Non-Extraterritoriality of 'Special Territorial Jurisdiction' of the United States: Forgotten History and Errors of Erdos*, highlights that often even Municipal courts of various states have confused the inviolability of diplomatic and consular premises with extraterritoriality. Such was the case in *United States v Erdos*,³⁷ wherein it was held that a US consulate in a foreign territory would be considered a part of the territory of the United States of America. The decision in the *Erdos* case was eventually departed from, and it was well recognized then that a US consulate or diplomatic mission building in a foreign territory is part

³² Malcolm N Shaw, *International Law* (6th edn, CUP 2008) 489.

³³ *Island of Palmas (or Miangas) (United States v The Netherlands)* [1928] II RIAA 829 (Permanent Court of Arbitration).

³⁴ *Persinger v Islamic Republic of Iran* 729 F.2d 835 (1984, DC Circuit).

³⁵ The Vienna Convention on Consular Relations 1963, art 31.

³⁶ Shaw (n 32) 758.

³⁷ *United States of America v Alfred Erdos* 474 F.2d 157 (1973, 4th Circuit).

of the sovereign territory of the foreign state and hence, it is the foreign state that has territorial jurisdiction over acts occurring on such properties. The mission is required to observe the local law of the receiving state and as it is subject to the jurisdiction of the receiving state to prescribe, enforce or adjudicate law except in cases where an exercise of jurisdiction would violate the premises or interfere with their designated purposes. Although, under the nationality principle in international law a State has the competence to formulate rules attempting to regulate the conduct of its nationals in other states.³⁸

Furthermore, the case of *S.S. Lotus* between France and Turkey laid down many important international law principles relating to territory and jurisdiction of the state. One of those principles that apply to the current case is that a state cannot exercise its jurisdiction outside its territory except when permitted by an international treaty or custom. It was held by the Permanent Court of Justice,

The first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.³⁹

Therefore, Saudi Arabia at large violated the sovereign territory of Turkey by ordering for the killing on Turkey's territory. As stated above, Saudi Arabia can prescribe rules to regulate the conduct of its own nationals abroad under the well-recognized nationality principle in international law, but it cannot enforce its own laws or policies on foreign territory. Moreover,

³⁸ Jordan J Paust, 'Non-Extraterritoriality of "Special Territorial Jurisdiction" of the United States: Forgotten History and Errors of Erdos' (1999) 24 Yale Journal of International Law 305, 310.

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2448420>.

³⁹ *The Case of the SS "Lotus" (France v Turkey)* [1927] PCIJ Series A no 10.

Saudi Arabia has violated Article 2(4) of the UN Charter which prohibits the use of force by Member States.⁴⁰ Khashoggi's murder on Turkish soil has also violated core rules of consular law, that is consular premises must be used for official purposes only.⁴¹ Furthermore, the consular officials are under an obligation to respect the domestic laws and regulations of the host state.⁴² In the present case, all these international laws were violated by Saudi Arabia along with violating the sovereign territory of Turkey.

5. Whether Turkey was faced with a conflict of norms?

The constant evolution of international law has led to a growth in the complexities and problems associated with it. The conflict of norms has been an issue of both international and domestic law; however, the complexity of an inter-systemic conflict far exceeds that of an intra-systemic conflict. Unlike intra-systemic conflict, there doesn't exist a single legislator under international law due to which it becomes infeasible to arrange the different branches of international law in terms of hierarchy. Further, the issue of which norm is to be respected and which norm is to be read down in cases where harmonious interpretation is not possible arises. In other words, international law is a law of cooperation and not subordination.⁴³ However, not all conflicts can be avoided by cooperation or through harmonious interpretation and it is in these situations of a genuine norm conflict, a norm must be read down or prioritized over the other in order to reach a resolution.

In the book *Conflict of Norms in Public International Law - How WTO Law Relates to other Rules of International Law*, J. Pauwelyn talks about the existence of the concept of *jus cogens*, i.e. a set of norms that form part of the basic structure of international law which are accepted

⁴⁰ Charter of the United Nations 1945, art 2(4).

⁴¹ The Vienna Convention on Consular Relations 1963, art 55.

⁴² The Vienna Convention on Consular Relations 1963, art 55.

⁴³ Charles Rousseau, 'De la Compatibilité des Normes Juridiques Contradictoires dans l'Ordre International' (1932) 150 39 RGDIP 133.

by all the states of the international community, pointing towards the fact that some norms are placed higher in the hierarchy of norms. Article 4(1) of the International Covenant on Civil and Political Rights (ICCPR) allows the state to deviate from obligations laid down by the ICCPR in times of public emergency that *threatens the life of the nation*.⁴⁴ Despite this, certain norms that form part of *jus cogens* such as the right to life, the right to freedom from genocide, torture, cannot be derogated from in any circumstance.⁴⁵ The international community has nowhere explicitly mentioned any list of derogable or non-derogable norms and so the priority of the latter is not accepted unless the same forms a part of *jus cogens*.⁴⁶ These rules are especially important in resolving norms conflicts.

In the present case, assuming that Turkey possessed sufficient knowledge that there was a threat to Jamal Khashoggi's life while he was inside the Saudi consulate, Turkey would have had to enter the mission premises in order to protect his life. However, in this particular situation, they faced an apparent conflict of norms; apparent since it may be possible to harmoniously interpret the said norms in order to avoid such a conflict. Firstly, Turkey would be under a positive obligation under the ICCPR to protect the life of Mr. Khashoggi which would only be possible by entering the Saudi Consulate.⁴⁷ However, this would result in a clear violation of the VCCR that states the inviolability of the consular premises⁴⁸. Based on the article, *Conflict of Norms or Conflict of Laws: Different Techniques in the Fragmentation of Public International Law*, R. Michaels and J. Pauwelyn argue that all international states are bound by the general practice of law i.e. norms laid down under *jus cogens*. Even though Saudi Arabia has not ratified the ICCPR, implying that it shall not be bound by the provisions of the said treaty, certain

⁴⁴ International Covenant on Civil and Political Rights 1966, art 4(1).

⁴⁵ Joost Pauwelyn, *Conflict of Norms in Public International Law - How WTO Law Relates to other Rules of International Law* (1st edn CUP 2003) 98.

⁴⁶ Theodor Meron, 'On a Hierarchy of International Human Rights' (1986) 80 AJIL 1, 4.
<<https://www.jstor.org/stable/2202481?origin=crossref>>.

⁴⁷ International Covenant on Civil and Political Rights 1966, art 6.

⁴⁸ The Vienna Convention on Consular Relations 1963, art 31.

provisions such as the right to life,⁴⁹ prohibition of torture,⁵⁰ and the prohibition from slavery,⁵¹ have been widely recognized and even attained the status of customary international law. International custom has been defined as evidence of a general practice accepted as law.⁵² However, in the absence of a clear hierarchy of norms in international law, it cannot be argued that the right to life would be prioritized over all other norms pertaining to international law.⁵³

Article 31(2) of the VCCR carves out an exception in cases of an emergency i.e. *in case of a fire or other disaster requiring prompt protective action* wherein the receiving state is allowed to enter the mission premises without the consent of the consulate head.⁵⁴ The rationale behind carving out such an exception was to essentially protect human life from any threat/harm. The fact that the Consul General would himself be part of the conspiracy to kill Mr. Khashoggi,⁵⁵ it would not have made sense for Turkey to have contacted him in such a situation. Therefore, Turkey's last resort was to forcefully enter the consulate respecting the right to protection of life enshrined in the ICCPR and the European Convention on Human Rights (ECHR) and this would not have amounted to a violation of the consular law. Eileen Denza in her book, *Diplomatic Law -Commentary on the Vienna Convention on Diplomatic Relations* states that in the last resort, entry into a mission premises without the consent of the consulate head may be justified if there arises a need to protect the life of individuals there.⁵⁶ Interpreting the words of Article 31(2) of VCCR, *other disaster requiring prompt protective action*, does not restrict

⁴⁹ Pauwelyn (n 45) 98.

⁵⁰ International Covenant on Civil and Political Rights 1966, art 7.

⁵¹ *ibid* art 8.

⁵² Jumoke Adegbonmire, 'The Death of Jamal Khashoggi: Issues of Human Rights Violations and International Law' (2018) 4 No.1 Review of Human Rights 50, 52; Statute of the International Court of Justice, art 38.

⁵³ Ralf Michaels, Joost Pauwelyn, 'Conflict of Norms or Conflict of Laws: Different Techniques in the Fragmentation of Public International Law' (2012) 22 Duke Journal of Comparative & International Law, 349 – 376.

⁵⁴ The Vienna Convention on Consular Relations 1963, art 31(2).

⁵⁵ 'Annex to the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions: Investigation into the unlawful death of Mr. Jamal Khashoggi' (Human Rights Council, Sess. 45 U.N. Document A/HRC/41/CRP.1, 19 June 2019).

⁵⁶ Eileen Denza, *Diplomatic Law; Commentary on the Vienna Convention on Diplomatic Relations* (4th edn OUP 2016) 123.

it to a natural calamity, rather it could include any such incident wherein the life of an individual requires protection. Therefore, the authorities of the receiving state may be justified to enter the consulate premises of the sending state. It is a classic example of an apparent conflict wherein the conflicting norms maybe interpreted harmoniously in order to create a rule-exception relationship⁵⁷ in order to avoid the conflict itself. It is true that if the conflict was an unresolvable conflict due to the lack of a coherent codified hierarchy of norms, Turkey would have to have made a political decision and suffered the consequences of violation of a norm, but in the present scenario, the apparent conflict of norms could have been avoided.

6. Whether there was an individual criminal responsibility borne by the head of the state of Saudi Arabia?

In the past, it was only the state which bore the liability for a violation of an international obligation. This was because it was the only entity which possessed rights and duties in the international sphere. However, with the evolution of international law and development of rules in the sphere of personal criminal responsibility, both states and individuals fell within the ambit of international obligation and both could be prosecuted for any violation. States' responsibility and individual responsibility are no longer mutually exclusive.⁵⁸

Gerhard Werle, in *Individual Criminal Responsibility in Article 25 ICC Statute*, has specified that a crime committed at the international level generally involves a large group of persons. However, there is always a need to determine individual criminal responsibility considering the fact that specific individuals are involved in determining victims, organising and implementing the plan of action etc.⁵⁹ For example, the mass genocide of Jews was a collective

⁵⁷ Pauwelyn (n 45) 187.

⁵⁸ Adegbonmire (n 52) 50.

⁵⁹ Gerhard Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute' (2007) 5 *Journal of International Criminal Justice* 953, 955 <<https://doi.org/10.1093/jicj/mqm059>>.

action undertaken by the Nazis. However, it was orchestrated by one man, Adolf Hitler. Individual criminal responsibility came into existence with the birth of the Nuremberg Tribunal, the first ever international criminal tribunal and the starting point for international criminal law. The tribunal specifically stated that ‘crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.’⁶⁰ Hence emphasis was on individual rather than state responsibility. In 1945, post World War II, the International Military Tribunal laid down the Nuremberg Charter. Article 6(c) of the Charter included *crimes against humanity*.⁶¹ However, this was confined only to acts done before and during the war. Individual criminal responsibility was yet to find firm ground under international law.⁶² As a result, in 1998, at a diplomatic conference which took place in Rome, a treaty was signed (The Rome Statute) which established the International Criminal Court (ICC) and Article 25 of the Statute became the governing provision for individual criminal responsibility. The Rome Statute, which came into effect in 2002, recognises four core international crimes which fall under the jurisdiction of the ICC namely genocide, crimes against humanity, war crimes, and the crime of aggression.⁶³ Article 7, the provision for crimes against humanity, read together with Article 25 lays emphasis on the fact that murder can be subject to individual criminal responsibility. This is particularly important in the present case if any individual criminal responsibility is to be established with connections to the Crown Prince of Saudi Arabia, MBS. In June 2019, Agnes Callamard, a special rapporteur of the UN published a detailed report on the analysis of the unlawful death of Khashoggi. The report laid down a detailed analysis into

⁶⁰ Shaw (n 32) 399.

⁶¹ *ibid* 400.

⁶² Werle (n 58) 955.

⁶³ International Criminal Court Statute 2002, art 5.

the individual criminal responsibility of MBS.⁶⁴ MBS came into power in 2017. The report specifies that the Prince has an extremely high level of control over the management of the country's political, security and economic affairs. As a dissident journalist, Khashoggi was disliked by the Saudi Arabian Government. Several journalists and human rights defenders have been arbitrarily detained over the years.⁶⁵ No action was taken by MBS to prevent such atrocities and punish those responsible and it can be inferred that he indeed condoned such unlawful acts. Whether MBS directly ordered the killing is irrelevant here. An important point is the fact that the 15-person mission required significant Government coordination, resources and finances. The report states that such a large operation was impossible to implement without the Crown Prince being aware. The Central Investigation Agency (CIA) had also reached a similar conclusion and stated that the killing would not have taken place without the approval of MBS.⁶⁶

As shown in this report and as concluded by the CIA, there is credible evidence pointing towards the guilt of MBS. In September 2019, he came as close as claiming responsibility for the murder and said that 'it happened under my watch' but continued to deny any involvement. To this day, he refuses to accept these reports.⁶⁷ The fact that he is able to openly deny such credible evidence shows the power he holds in the world. Several countries have not raised their concerns against this abuse of power in the fear that it could lead to a disruption in ties with the largest exporter of oil in the world. Considering the existence of such credible

⁶⁴ 'Annex to the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions: Investigation into the unlawful death of Mr. Jamal Khashoggi' (Human Rights Council, Sess. 45 U.N. Document A/HRC/41/CRP.1, 19 June 2019).

⁶⁵ 'Mandates of the Working Group on Arbitrary Detention' (Human Rights Council, UA SAU 9/2018, 26 July 2019). <<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=23967>>.

⁶⁶ Julian E Barnes, 'C.I.A. Concludes That Saudi Crown Prince Ordered Khashoggi Killed' *The New York Times* (16 November 2018) <<https://www.nytimes.com/2018/11/16/us/politics/cia-saudi-crown-prince-khashoggi.html>>.

⁶⁷ Gerry Doyle, William Maclean, 'Khashoggi murder 'happened under my watch,' Saudi crown prince tells PBS' *Reuters* (26 September 2019) <<https://www.reuters.com/article/us-saudi-khashoggi/khashoggi-murder-happened-under-my-watch-saudi-crown-prince-tells-pbs-idUSKBN1WB0HV>>.

evidence, further investigation must take place in order to come to a final conclusion regarding the individual criminal responsibility of MBS. However, while a case against MBS can be made, it is unlikely that he will fall under the provisions of the Rome Statute. The shortcoming of this statute is the fact it only involves the most serious types of crimes. A murder of a journalist, although a heinous crime, is unlikely to be considered as a crime against humanity. Further, Saudi Arabia has neither signed nor acceded to this statute.

7. Whether Turkey failed to fulfil its obligations as host state?

As already stated, Turkey could not have entered the premises without the consent of Saudi Arabia. However, as ascertained from the provisions laid down under the ICCPR and ECHR, Turkey had the positive obligation to protect the right to human life and in this case, the life of Jamal Khashoggi.⁶⁸ Several circumstances came into light, through which Turkey was in a position to ascertain the possibility of danger to life. Saudi Arabia's constant suppression towards dissident journalists, although a small factor, could have put Turkey in a position where it was possible to foresee danger to life. Also, a year before the murder took place, US intelligence intercepted a conversation between MBS and a top aide which showed a threat to Khashoggi's life.⁶⁹ The problem that arises here is the sheer negligence portrayed by the intelligence agencies. At the very least, Turkey and the US, both possessing intel of the threat to Khashoggi's life, should have warned him of the same.

As on 25th March, 2020, the Turkish officials announced the indictments of twenty Saudi nationals on charges of murder and incitement to murder in the killing of Jamal Khashoggi.⁷⁰

⁶⁸ International Covenant on Civil and Political Rights 1966, art 6; European Convention on Human Rights 1953, art 2.

⁶⁹ Mark Mazzetti, 'Year Before Killing, Saudi Prince Told Aide He Would Use 'a Bullet' on Jamal Khashoggi' *The New York Times* (7 February 2020) <<https://www.nytimes.com/2019/02/07/us/politics/khashoggi-mohammed-bin-salman.html>>.

⁷⁰ Carlotta Gall, 'Turkey Indicts 20 Saudis in Jamal Khashoggi's Killing' *The New York Times* (25 March 2020) <<https://www.nytimes.com/2020/03/25/world/europe/turkey-jamal-khashoggi-saudis.html>>.

Requests have been made to hand over those who are indicted to Turkish authorities. The reason for such requests is for the purpose of commencing trial in Turkey which would otherwise be impossible as Turkish law requires the presence of the defendants for a trial. However, such a request is not likely to be followed, especially by Saudi Arabia, without the help of external forces and other countries. Therefore, the possibility of a trial happening in Turkey is minimal. Having had the power to investigate and arrest consular officers, the irony remains that Turkey, as the host state, is and was unable to do anything in its power to bring justice to Khashoggi.

8. Conclusion

Investigations relating to Khashoggi's murder have been running since day one in Turkey. The Turkish Government went as far as issuing *red notices*, which are detention requests to the world's Governments, issued by Interpol.⁷¹ The trial which commenced in Saudi Arabia in January 2019 was kept under secrecy and on December 2019, five individuals were sentenced to death.⁷² On 7th September, 2020, the Riyadh Criminal Court commuted the death sentences of these five individuals to twenty-year jail terms after the Khashoggi family pardoned them to spare the death sentence. The court also sentenced another individual to a ten-year jail term and two others to seven years each.⁷³ However, the verdicts have no legal or moral legitimacy. In both the above verdicts, top Government officials were given the green light and were not part of the trial.⁷⁴ The names of those convicted were unknown throughout the trial in 2019 and with the court now ordering closure of the trial, their names are yet to be disclosed.

⁷¹ *ibid.*

⁷² Ben Hubbard, 'Saudi Death Sentences in Khashoggi Killing Fail to Dispel Questions' *The New York Times* (23 December 2019) <https://www.nytimes.com/2019/12/23/world/middleeast/jamal-khashoggi-murder-sentence.html>>.

⁷³ Niyati Singh, 'Saudi hands jail terms to 8 in final Jamal Khashoggi verdict' *Hindustan Times* (7 September 2020) <<https://www.hindustantimes.com/world-news/saudi-hands-jail-terms-to-8-in-final-jamal-khashoggi-verdict/story-5AAjPCAcLSP3O07Erp25oO.html>>.

⁷⁴ Hubbard (n 72); Singh (n 73).

The international community has failed at condemning such blatant violations by a country wherein consular premises and immunity are being used for commission of grave crimes. The laws relating to diplomatic and consular immunity were drafted for the smooth functioning of foreign relations, however, there are many cases such as Khashoggi's killing wherein these international laws have been taken advantage of by both individuals and Governments. It is the need of the hour that the international community and bodies take cognizance of such violations at large, and the perpetrators are brought to justice.