

The Murder of Jamal Khashoggi: Immunities, Inviolability and the Human Right to Life

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ABSTRACT

On 2 October 2018, Jamal Khashoggi, a dissident Saudi journalist residing in the United States, where he was a columnist for the *Washington Post*, was murdered in the Saudi consulate in Istanbul. This article seeks to comprehensively analyze Khashoggi's killing from the standpoint of the human right to life. It sets out the relevant legal framework, addressing inter alia the issue that Saudi Arabia is not a party to what would otherwise be the most relevant human rights treaty, the International Covenant on Civil and Political Rights. It examines not only the obligations of Saudi Arabia, but also those of Turkey and the United States, in protecting Khashoggi's right to life from third parties, and ensuring respect through an effective investigation of his killing and mutual cooperation for the purpose of that investigation. It also looks at the extraterritorial scope of these various obligations. Finally, the article examines possible norm conflicts between state obligations under human rights law and their obligations under diplomatic and consular law, such as the inviolability of diplomatic and consular premises, agents, and means of transportation.

KEYWORDS: right to life, obligation to protect life, duty to warn, duty to investigate, diplomatic and consular immunities, Jamal Khashoggi, Saudi Arabia, Turkey

1. Introduction

On 2 October 2018, Jamal Khashoggi, a dissident Saudi journalist residing in the United States of America (US), where he was a columnist for the *Washington Post*, was murdered in the Saudi consulate in Istanbul. He was visiting the consulate to obtain a certificate of divorce from his former wife, so that he could proceed to marry his Turkish fiancée, Hatice Cengiz, who was waiting for him in a car outside the consulate. According to media reports relying on the findings of the governments of Turkey and the US, Khashoggi was killed by Saudi agents and his body was then dismembered with a bone saw; his remains are yet to be found.¹

Saudi authorities initially rejected reports of Khashoggi's death in the Turkish press, only to be forced by the accumulating weight of evidence, including the existence of an audio

* Professor of Public International Law, University of Nottingham School of Law; Professorial Research Fellow, Deakin Law School. This article was finalized on 26 March 2019; the article's Postscript briefly addresses some subsequent developments). I would like to thank Anne van Aaken, Basak Çali, Monica Hakimi, Alexandra Huneeus, Jacob Katz Cogan, Dominic McGoldrick, Mervat Rishmawi, Sangeeta Shah, Yuval Shany, Sandesh Sivakumaran, Christian Tams and Philippa Webb for their comments.

¹ See, for example, 'Jamal Khashoggi killing: what we know and what will happen next', *The Guardian*, 27 October 2018.

tape of the murder obtained by Turkish intelligence, to acknowledge the killing a few weeks later. The official line of the Saudi government is that Khashoggi's killing was a 'rogue operation' and a 'huge mistake', which was not authorized by the country's crown prince and *de facto* ruler, Mohammed bin Salman.² As part of addressing this 'mistake', the Saudi king dismissed a number of officials, while 11 unnamed individuals are standing trial for Khashoggi's death in Riyadh. Prosecutors are seeking the death penalty for five of the defendants.³ However, US intelligence agencies have concluded that Khashoggi's killing was premeditated and almost certainly carried out on orders from the Crown Prince.⁴ After attending a closed-door briefing by the Director of the Central Intelligence Agency (CIA), Republican Senator Lindsey Graham, stated that there was 'not a smoking gun—there's a smoking saw' connecting the crown prince to the killing, adding that one would have to be 'wilfully blind' not to see this.⁵

It is undeniable that Saudi Arabia has paid an enormous political cost for Khashoggi's killing—a Saudi government official reportedly stated that the reputational damage suffered by Saudi Arabia was '10 times worse than 9/11 [which was carried out largely by Saudi hijackers].'⁶ It is undeniable that the reputational cost that Saudi Arabia paid for this single death is much higher than that for its unconscionable involvement in the war in Yemen, in which it is responsible for the death and suffering of thousands. It is also undeniable that this disproportionality in international outrage is largely due to the compelling individual story of Khashoggi's death, the grisly circumstances of his demise in the consulate, and the fact that he was a well-connected journalist working for the *Washington Post*, with powerful friends in politics and the media. And it is equally undeniable that state reactions to Khashoggi's murder are interwoven with many other political considerations.

But that is not my concern here. What I wish to do in this article is to look at Khashoggi's murder and its consequences from the standpoint of international law, and human rights law in particular. Some legal issues that arise in that regard are trivial, even if they are politically extremely controversial. For example, it is legally irrelevant whether, in fact,

² See 'White House declines to submit report to Congress on Khashoggi killing', *Washington Post*, 8 February 2019 (quoting Adel al-Jubeir, the Saudi Minister of State for Foreign Affairs).

³ Ibid.

⁴ Ibid.

⁵ "'Zero chance" Khashoggi murder happened without crown prince, says US senator – video,' *The Guardian*, 4 December 2018.

⁶ See 'Trumplomacy: Five takeaways from Pompeo trip to Middle East,' *BBC News*, 17 January 2019, available at: www.bbc.co.uk/news/world-us-canada-46908510 [last accessed 25 November 2019].

Mohammed bin Salman ordered Khashoggi's death or not.⁷ Saudi Arabia incurs state responsibility for an internationally wrongful act committed by its organs acting in their official capacity, such as intelligence and state security officials, even if that act was committed *ultra vires*.⁸ Whether the crown prince's underlings exceeded his orders or failed to inform him of the supposedly unauthorized operation—which involved a team of 15 agents, including a forensics expert specializing in rapid dissections, and two private jets⁹—simply does not affect the attribution of, and hence responsibility for, the operation to Saudi Arabia.

It is similarly unquestionable that the Saudi operation against Khashoggi was a violation of Turkey's sovereignty and of its rights under diplomatic and consular law.¹⁰ But while condemning Saudi Arabia for these violations would be both right and without difficulty, for international law to care *only* about the violations of the rights of the state in which he was killed would also profoundly fail to legally capture our sense of moral outrage over Khashoggi's death. In addition to any criminal responsibility that may exist under either Turkish or Saudi domestic law, the most serious violation of international law at stake here is that of Khashoggi's human right to life, and an attempt—ultimately unsuccessful due to the operation's public exposure—to forcibly disappear him. This violation is compounded by that of the freedom of expression, since the reason for Khashoggi's killing was his speech critical of the Saudi regime, and that of the prohibition of cruel, inhuman or degrading treatment regarding Khashoggi's next-of-kin, due to the manner of his killing and the desecration and disappearance of his corpse.¹¹

Officials of several states have used the language of international law to criticize the conduct of the Saudi government, but there have been few explicit references to Khashoggi's human rights in that regard. For example, the US Secretary of State, Mike Pompeo, expressed the view that '[t]he killing, the murder of Jamal Khashoggi in the consulate in Turkey violates

⁷ Which he most probably did. See also 'Year Before Killing, Saudi Prince Told Aide He Would Use 'a Bullet' on Jamal Khashoggi,' *New York Times*, 7 February 2019 (discussing a conversation between the Crown Prince and one of his aides, intercepted by US intelligence agencies, in which a year before Khashoggi's killing the Prince talked about putting him to death if he did not return to Saudi Arabia willingly or forcibly).

⁸ See Article 7 of the International Law Commission's Articles on State Responsibility 2001, (2001) *Yearbook of the International Law Commission Vol II Part Two* ('ILC ASR').

⁹ See 'Jamal Khashoggi: Details of alleged Saudi hit squad emerge', *The Guardian*, 10 October 2018.

¹⁰ See Ratner, 'The Khashoggi Murder: How Mohammed Bin Salman Underestimated International Law', *Lawfare*, Blog, 22 October 2018, available at: www.lawfareblog.com/khashoggi-murder-how-mohammed-bin-salman-underestimated-international-law [last accessed 25 November 2019].

¹¹ See, for example, the judgments of the European Court of Human Rights in *Akkum v Turkey* Application No 21894/93, Merits and Just Satisfaction, 24 March 2005 at paras 252-259; *Akpınar and Altun v Turkey*, Application No 56760/00, Merits and Just Satisfaction, 27 February 2007 at paras 84-87; as well as the Human Rights Committee's views in *Kovalev v Belarus* (2120/2011), Views, CCPR/C/106/D/2120/2011 (2012) at para 11.10.

the norms of international law. That much is very, very clear.’¹² He did not, however, specify what these norms were. Similarly, a joint statement by the foreign ministers of the United Kingdom (UK), France and Germany speaks of these countries’ commitment to the freedom of expression and their respect ‘for the norms and values to which the Saudi authorities and us are jointly committed under international law’.¹³ Again, however, there was no explicit reference to the violation of Khashoggi’s human rights as such.

In that regard, Khashoggi’s murder is reminiscent of another recent state-organized assassination, the March 2018 poisoning of Sergei and Yulia Skripal in the British town of Salisbury, ostensibly at the hands of Russian intelligence officers using a lethal novichok nerve agent. While the Skripals ultimately recovered, Dawn Sturgess, an ordinary British citizen incidentally exposed to the poison, died from it later in the year. Like Saudi Arabia’s, Russia’s conduct was also vigorously criticized using the language of international law. But here, too, that language has generally been used with regard to the rights of the British state, rather than with regard to the human rights of the victims. The then British Prime Minister, Theresa May, thus spoke of a violation of British sovereignty and the prohibition on the use of chemical weapons,¹⁴ as did a joint statement of the leaders of the UK, US, France and Germany.¹⁵ The Prime Minister moreover argued that the operation was a violation of the prohibition on the use of interstate force.¹⁶ Mrs May did not, however, mention the human rights of the actual victims.¹⁷

Somewhat surprisingly, perhaps the most explicit official references to human rights regarding the killing of Khashoggi are those of the US government. Acting pursuant to the Global Magnitsky Human Rights Accountability Act,¹⁸ the US sanctioned 17 Saudi individuals

¹² See US Department of State, ‘Interview With Brian Kilmeade of The Brian Kilmeade Show,’ 31 October 2018, available at: www.state.gov/secretary/remarks/2018/10/287029.htm [last accessed 25 November 2019].

¹³ See Foreign and Commonwealth Office, ‘Jamal Khashoggi’s death: joint statement by UK, France and Germany foreign ministers’, Press Release, 21 October 2018, available at: www.gov.uk/government/news/joint-uk-france-and-germany-statement-on-jamal-khashoggis-death [last accessed 25 November 2019].

¹⁴ See The Rt Hon Theresa May, ‘Oral statement to Parliament: PM Commons Statement on Salisbury incident response’, 14 March 2018, available at: www.gov.uk/government/speeches/pm-commons-statement-on-salisbury-incident-response-14-march-2018 [last accessed 25 November 2019]

¹⁵ See Prime Minister’s Office, 10 Downing Street, ‘Salisbury attack: Joint statement from the leaders of France, Germany, the United States and the United Kingdom’, 15 March 2018, available at: www.gov.uk/government/news/salisbury-attack-joint-statement-from-the-leaders-of-france-germany-the-united-states-and-the-united-kingdom [last accessed 25 November 2019].

¹⁶ May, *supra* n 14. For a discussion, see Akande, ‘The Use of Nerve Agents in Salisbury: Why does it Matter Whether it Amounts to a Use of Force in International Law?’ *EJIL: Talk!*, Blog, 17 March 2018, available at: www.ejiltalk.org/the-use-of-nerve-agents-in-salisbury-why-does-it-matter-whether-it-amounts-to-a-use-of-force-in-international-law/ [last accessed 25 November 2019].

¹⁷ See Milanovic, ‘The Salisbury Attack: Don’t Forget Human Rights’, *EJIL: Talk!*, Blog, 15 March 2018, available at: www.ejiltalk.org/the-salisbury-attack-dont-forget-human-rights/ [last accessed 25 November 2019].

¹⁸ The Global Magnitsky Human Rights Accountability Act S. 284 114th Congress (2015-2016), provides for the imposition of sanctions on individuals ‘responsible for extrajudicial killings, torture, or other gross

‘for serious human rights abuse resulting from their roles in the killing of Jamal Khashoggi’.¹⁹ It similarly labelled Khashoggi’s killing as an ‘arbitrary deprivation of life’ in the State Department’s country report on human rights in Saudi Arabia.²⁰ At the international level, on the other hand, the UN Special Rapporteur for extrajudicial, summary or arbitrary executions, Agnes Callamard, launched an investigation into Khashoggi’s death as part of her mandate; as of the time of writing, she has published a set of preliminary observations and plans to submit a final report to the UN Human Rights Council in June 2019.²¹ Her report, based *inter alia* on a field visit to Turkey, concluded that the evidence

demonstrates a prime facie case that Mr. Khashoggi was the victim of a brutal and premeditated killing, planned and perpetrated by officials of the State of Saudi Arabia and others acting under the direction of these State agents,’ a ‘grave violation’ of the human right to life.²²

That said, the full facts of Khashoggi’s killing, and of the causal chain that lead to his death, are yet to be conclusively established.

This article will seek to comprehensively analyse Khashoggi’s killing from the standpoint of the human right to life. It will set out the relevant legal framework, addressing *inter alia* the issue that Saudi Arabia is not a party to what would otherwise be the most relevant human rights treaty, the International Covenant on Civil and Political Rights (ICCPR)²³. It will examine not only the obligations of Saudi Arabia, but also those of Turkey and the US, in protecting Khashoggi’s right to life from third parties, and ensuring respect through an effective investigation of his killing and mutual cooperation for the purpose of that investigation. It will also look at the extraterritorial scope of these various obligations. We will see in that regard how the reticence of some states in using the language of human rights in respect of Khashoggi’s murder is motivated at least partly by a desire to avoid contradicting their earlier

violations of internationally recognized human rights committed against individuals in any foreign country seeking to expose illegal activity carried out by government officials, or to obtain, exercise, or promote human rights and freedoms.’ See: www.congress.gov/bill/114th-congress/senate-bill/284c [last accessed 25 November 2019].

¹⁹ See US Department of State, ‘Global Magnitsky Sanctions on Individuals Involved in the Killing of Jamal Khashoggi,’ 15 November 2018, available at: www.state.gov/secretary/remarks/2018/11/287376.htm [last accessed 25 November 2019].

²⁰ See at: www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm [last accessed 25 November 2019].

²¹ See Callamard, ‘Preliminary observations of the human rights inquiry into the killing of Mr. Khashoggi following the country visit to Turkey’, available at: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24143&LangID=E. [last accessed 25 November 2019]. See also the Postscript to this article.

²² *Ibid.* at paras 10 and 7. Special Rapporteur Agnes Callamard has also requested an official visit to Saudi Arabia, but the visit had not happened by the time of her preliminary report: see *ibid.* at para 17.

²³ 1966, 999 UNTS 171.

positions regarding the use of lethal force in counter-terrorism operations abroad, in which a standard argument has been that human rights law simply does not apply.

Finally, the article will examine possible norm conflicts between state obligations under human rights law and their obligations under diplomatic and consular law, such as the inviolability of diplomatic and consular premises, agents and means of transportation. International lawyers have devoted much attention to conflicts between human rights and the law of state immunity in situations where the responsibility of a state for human rights violations—often mass atrocities—is being assessed *ex post facto* before the courts of some other state.²⁴ We are similarly used to thinking about conflicts between immunities and human rights in terms of the right of access to a court, as an aspect of the right to a fair trial.²⁵ The Khashoggi killing, however, provides us with an opportunity for a different kind of case study: a normative conflict between diplomatic and consular immunities, on the one hand, and state substantive and procedural obligations under the right to life, on the other, in the context of a real-time violation of that right, rather than its adjudication *ex post facto*.

2. The Legal Framework: Human Rights and Diplomatic and Consular Law

A. Human rights obligations binding on Saudi Arabia, Turkey and the United States

Turkey and the US are both parties to the ICCPR, while Turkey is also a party to the European Convention Human Rights (ECHR).²⁶ However, Saudi Arabia is not a party to the ICCPR or to the International Convention for the Protection of All Persons from Enforced Disappearance,²⁷ but it is a party to the United Nations (UN) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).²⁸ The only human rights treaty that could have directly protected Khashoggi's right to life (and freedom of expression) is a regional convention concluded within the Arab League, the revised 2004 Arab Charter on

²⁴ See, for example, *Jurisdictional Immunities of the State (Germany v Italy, Greece intervening)*, Judgment, ICJ Reports 2012, 99; *Ferrini v Federal Republic of Germany* Judgment No 5044 of 6 November 2003, (2004) 87 *Rivista di diritto internazionale* 539; Fox and Webb, *The Law of State Immunity*, 3rd edn (2015) at 154-5.

²⁵ See, for example, *Al-Adsani v United Kingdom* Application No 35763/97, Merits, 21 November 2001 [Grand Chamber]; *Jones and Others v United Kingdom* Applications Nos 34356/06 and 40528/06, Merits and Just Satisfaction, 14 January 2014; Fox and Webb, *supra* n 243 at 172-3.

²⁶ Convention for the Protection of Human Rights and Fundamental Freedoms 1950, ETS 5.

²⁷ UN GA Res 61/177, 12 January 2007, A/RES/61/177.

²⁸ 1984, 1465 UNTS 85.

Human Rights,²⁹ to which Saudi Arabia has been a party since 2009.³⁰ Article 5 of the Arab Charter reproduces *verbatim* the language of Article 6(1) of the ICCPR: ‘1. Every human being has the inherent right to life. 2. This right shall be protected by law. No one shall be arbitrarily deprived of his life’. Article 32(1) of the Arab Charter ‘guarantees the right to information and to freedom of opinion and expression, as well as the right to seek, receive and impart information and ideas through any medium, regardless of geographical boundaries’.

Thus, while Khashoggi’s killing is a manifest violation of the right to life, it is important to be clear about the sources of Saudi Arabia’s obligation to respect his right to life. That source cannot be the ICCPR, which Saudi Arabia has not consented to; the relevant obligations can, however, stem from the Arab Charter or from customary international law.³¹

The discussion that follows will focus on Khashoggi’s killing as a violation of the right to life; it will not examine in detail other human rights that may have been violated. In particular, I will not examine the attack on Khashoggi as an enforced disappearance or an instance of torture or inhuman or degrading treatment, although it could potentially so qualify. It is possible that, as Saudi Arabia claims, Khashoggi’s killing was the result of a botched capture or abduction operation—Saudi Arabia has conducted a number of such operations in the past several years,³² and any such abduction would in fact satisfy the definition of an enforced disappearance.³³ But as the primary outcome of the operation was Khashoggi’s death, the right to life is simply a better fit for the case than the prohibition of enforced disappearance. Finally, for reasons of space I will not discuss the freedom of expression extensively, nor the violations

²⁹ See the English translation prepared by the United Nations Office of the High Commissioner for Human Rights and printed in (2005) 12 *International Human Rights Reports* 893.

³⁰ For the status of ratifications, see: unipd-centrodrittumani.it/en/spilli/Ratification-and-signature-status-of-the-Arab-Charter-on-Human-Rights-2004/147 [last accessed 25 November 2019]. On the Arab Charter on Human rights, see generally Rishmawi, ‘The Arab Charter on Human Rights and the League of Arab States: An Update’ (2010) 10 *Human Rights Law Review* 169; Rishmawi, ‘Arab Charter on Human Rights (2004)’ *Max Planck Encyclopedia of Public International Law*, available at: opil.ouplaw.com/home/EPIL [last accessed 25 November 2019]. Rishmawi, ‘The League of Arab States and human rights’ in Sheeran and Rodley (eds), *Routledge Handbook of International Human Rights Law* (2013) 483.

³¹ For some of the classical examinations of the topic of customary human rights law, see, e.g., Simma and Alston, ‘The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles’ (1988-1989) 12 *Australian Yearbook of International Law* 82; Symposium on customary international human rights law in (1995-1996) 25 *Georgia Journal of International and Comparative Law* (issues 1 and 2); Dimitrijevic, ‘Customary Law as an Instrument for the Protection of Human Rights,’ (2006) *ISPI Working Paper 7*, available at: https://www.ispionline.it/it/documents/wp_7_2006.pdf.

³² See, for example, ‘Saudi campaign to abduct and silence rivals abroad goes back decades’, *Washington Post*, 4 November 2018.

³³ Cf. Callamard, *supra* n 21, para. 10: ‘The mission could not firmly establish whether the original intention was to abduct Mr. Khashoggi, with his murder planned only in the eventuality of this abduction failing.’

of the rights of Khashoggi's family members due to the nature of his killing and the mental suffering they have had to endure.³⁴

It is at this point also important to recall the jurisdiction clauses of the three human rights treaties relevant to our analysis, which set out their scope of application and the overarching obligations of states parties to respect and protect human rights. Article 1 of the ECHR thus provides that states parties—here Turkey—will ‘secure to everyone within their jurisdiction the rights and freedoms’ in the Convention; Article 2(1) of the ICCPR stipulates that each state party – here the US and Turkey – ‘undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.’ Finally, Article 3(1) of the Arab Charter resembles that of the ICCPR, but is different on two points: each state party ‘undertakes to ensure to all individuals subject to its jurisdiction the right to enjoy the rights and freedoms set forth herein.’ While it does not explicitly mention the obligation to respect, the Charter also omits the ICCPR’s reference to territory,³⁵ which some states parties to the ICCPR, like the US and Israel, have interpreted as a dual requirement that precludes *any* extraterritorial applicability of the treaty.³⁶

I will examine the issue of extraterritorial application in detail below; for now suffice it to say that international human rights courts and treaty bodies have developed a complex, and at times contradictory jurisprudence, which has nonetheless coalesced around two basic approaches to the interpretation of the jurisdiction clauses in the treaties.³⁷ First, the spatial model of state jurisdiction, whereby a person will be within a state’s jurisdiction, and thus have rights *vis-à-vis* the state, if he or she is located in a territory or area under the state’s control.³⁸ Second, the personal model, whereby an individual will be within or subject to a state’s jurisdiction if they are, as a person, under the authority or control of an agent of that state.³⁹ Both approaches have been applied to consulates and embassies or to the conduct of consular

³⁴ See, for example, UN Human Rights Committee, General Comment No 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life’, 30 October 2018, at para 56.

³⁵ I am very grateful to Mervat Rishmawi for her help regarding the authentic Arabic text of the Charter and for confirming the accuracy of the English translation above.

³⁶ See, for example, US second and third periodic reports to the Human Rights Committee, submitted in one document: CCPR/C/USA/3, 28 November 2005, Annex I. See also Dennis, ‘Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation’ (2005) 99 *American Journal of International Law* 119.

³⁷ See generally Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (2011).

³⁸ See, for example, *Loizidou v Turkey* Application No 15318/89, Preliminary Objections, 23 February 1995 at para 62. See more Milanovic, *supra* n 37, at 127 *et seq.*

³⁹ See, for example, *Lopez Burgos v Uruguay* (R.12/52), Views, Supp No 40 (A/36/40) at 176 (1981). See more Milanovic, *supra* n 37, at 173 *et seq.*

and diplomatic agents in the case law.⁴⁰ I will therefore be examining this threshold applicability issue regarding Khashoggi with respect to Saudi Arabia, the US and Turkey.

B. Different obligations stemming from the right to life

Let us now briefly look at the different obligations that states have as a corollary of the right to life. For the purpose of the discussion to follow I will make two basic assumptions. First, that state obligations under the Arab Charter are identical to those under the ICCPR. This is in my view a reasonable assumption to make in light of the fact that the language of Article 5 of the Arab Charter is in fact identical to that of Article 6(1) of the ICCPR, that is, that it was the clear intention of the Charter's states parties to reproduce the terms of the ICCPR, when they could well have chosen some other formulation.⁴¹ Similarly, the final preambular paragraph of the Charter expressly refers to and reaffirms the UDHR and the ICCPR. I am also not aware of any official statements of the states parties interpreting Article 5 of the Charter differently. Obviously there is room for disagreement on how Article 5 of the Charter and Article 6(1) of the ICCPR should be interpreted and applied to specific problems, but again in my view it is reasonable to treat them in the same way.

The second assumption that I will make is more contestable: that the content of the customary right to life binding on Saudi Arabia is also identical to the content of Article 6(1) of the ICCPR. The existence of content of customary human rights is notoriously hard to pin down, especially because it is impossible to divorce state practice constituting such custom (coupled with *opinio juris*) from the practice of applying relevant human rights treaties binding on states.⁴² There is nonetheless widespread agreement that customary law protects human rights, that among these rights is the right to life, and that an extrajudicial execution is a manifest violation of that right.⁴³ In that sense I think it is again reasonable to proceed from the assumption that the content of the customary right to life, including corresponding state obligations, is identical to its treaty incarnations, unless a persuasive argument is made to the contrary.

⁴⁰ See Milanovic, *supra* n 37, at 154 *et seq.*

⁴¹ For example, Article 2 ECHR is formulated very differently from Article 6 ICCPR even though the differences are not material for the analysis that follows, in particular Turkey's obligation to secure or protect the right to life.

⁴² For an extensive and largely sceptical discussion, see Thirlway, 'Human Rights in Customary International Law: An Attempt to Define Some of the Issues' (2015) 28 *Leiden Journal of International Law* 495.

⁴³ See, for example, UN Human Rights Committee, General Comment No 24, Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, 4 November 1994, at para 8; Ratner, *supra* n 10.

As for that content, human rights institutions agree that in this context the right to life entails three basic obligations. First, the negative duty of states to respect the right to life, to refrain from using lethal or potentially lethal force against individuals *arbitrarily*, without a proper, justified reason for doing so. The right to life is qualified, not absolute. Any such use of force has to pursue a legitimate aim (for example, protection of the lives of others) and be strictly necessary and proportionate for the achievement of that aim, an extreme measure of last resort.⁴⁴

The second duty of states is the substantive positive obligation to ensure, secure or protect the right to life even against threats to the life of an individual from third parties, be that from a private person or some other state—this is the essence of the Article 6(1) of the ICCPR/Article 5 of the Arab Charter requirement that the right to life be ‘protected by law’.⁴⁵ While the negative obligation to respect only requires states to refrain from acting in a way that could lead to an unjustified deprivation of life, the positive obligation to protect requires them to take affirmative steps to secure the enjoyment of this right. As the Human Rights Committee explains in its recent General Comment No 36:

States parties are thus under a due diligence obligation to undertake reasonable positive measures, which do not impose on them disproportionate burdens, in response to reasonably foreseeable threats to life originating from private persons and entities, whose conduct is not attributable to the State. Hence, States parties are obliged to take adequate preventive measures in order to protect individuals against reasonably foreseen threats of being murdered or killed by criminals and organized crime or militia groups, including armed or terrorist groups. ... States parties must take appropriate measures to protect individuals against deprivation of life by other States, international organizations and foreign corporations operating within their territory or in other areas subject to their jurisdiction.⁴⁶

This is an obligation of means, not of result; it is one of due diligence, requiring states to do only what is feasible and could reasonably be expected of them.⁴⁷

The third relevant duty of states also stems from the general obligation to secure or ensure the right to life: the positive procedural obligation to effectively investigate any allegation of an unlawful deprivation of life, whether at the hands of state agents or by third

⁴⁴ UN Human Rights Committee, General Comment No 36, *supra* n 34 at para 12. See also *McCann and Others v United Kingdom* Application No 18984/91, Merits and Just Satisfaction, 27 September 1995 [Grand Chamber] at paras 146-150; *Finogenov and Others v Russia* Applications Nos 18299/03 and 27311/03, Merits and Just Satisfaction, 20 December 2011 at paras 206-208. For a general overview of General Comment 36, see Joseph, ‘General Comment 36’ (2019) 19 *Human Rights Law Review* 347.

⁴⁵ See General Comment 36, *supra* n 34 at para 18.

⁴⁶ *Ibid.* at paras 21-22.

⁴⁷ See, for example, *Finogenov v Russia*, *supra* n 44 at para 209; *Velasquez Rodriguez v Honduras* IACtHR Series C 4 (1988) para 172.

parties.⁴⁸ Investigations into allegations of violation of Article 6 must always be independent, impartial, prompt, thorough, effective, credible and transparent, and in the event that a violation is found, full reparation must be provided, including, in view of the particular circumstances of the case, adequate measures of compensation, rehabilitation and satisfaction.⁴⁹

The analysis below will thus look at three sets of issues with regard to the murder of Jamal Khashoggi. First, Saudi Arabia's negative obligation to refrain from using lethal force against individuals without sufficient justification. It is obvious that Saudi Arabia could have no such justification, and it does not offer any, but there is a much more difficult question of the extraterritorial applicability of Saudi Arabia's duty to respect Khashoggi's right to life. Second, the substantive positive obligation to protect Khashoggi's right to life on the part of the US and Turkey in light of the foreseeable threat to his life by Saudi Arabia. Third, the positive procedural obligation to effectively investigate Khashoggi's killing, which potentially applies to all three states, and includes the duty of these states to cooperate with each other in conducting a full and effective investigation.⁵⁰ Finally, I will also address the question of the extraterritorial applicability of both the substantive and the procedural obligations.

C. Relevant diplomatic and consular law

Khashoggi was killed in the Saudi consulate in Istanbul; the relevant treaty is therefore the Vienna Convention on Consular Relations (VCCR).⁵¹ It is useful to contrast consular privileges and immunities to those of diplomats under the Vienna Convention on Diplomatic Relations (VCDR).⁵² The VCCR was drafted two years after the VCDR and generally used the latter as a starting point, with departures from VCDR formulations being deliberate decisions of the states parties to diminish consular privileges and immunities compared to diplomatic ones.⁵³ Saudi Arabia (as the sending state), Turkey (as the receiving state), and the United States (as a third state) are all parties to both the VCCR and the VCDR. My inquiry will generally focus on questions of possible norm conflict between positive obligations of states to protect the right the life and effectively investigate unlawful deaths with their negative

⁴⁸ General Comment 36, supra n 34 para 27.

⁴⁹ Ibid. at para 28.

⁵⁰ See *ibid.* at para 28: 'States should support and cooperate in good faith with international mechanisms of investigation and prosecutions addressing possible violations of article 6'. See also *Finogenov v Russia*, supra n 44 at paras 268-272, for an overview of ECHR case law on the procedural aspect of Article 2 ECHR.

⁵¹ 1963, 596 UNTS 261.

⁵² 1964, 500 UNTS 500 95.

⁵³ See more Foakes and Denza, 'The Appointment and Functions of Consuls' in Roberts (ed), *Satow's Diplomatic Practice* 7th edn (2017) 120 at para 8.31 et seq.

obligations to respect the inviolability and immunities of certain premises, objects and agents. I will now briefly examine the relevant rules of diplomatic and consular law in that regard.⁵⁴

First, the inviolability of consular and diplomatic premises is provided for by Article 31 of the VCCR and Article 22 of the VCDR respectively. The consular privilege is (as is generally the case) a weaker version of the diplomatic one. Thus, under Article 31 of the VCCR:

1. Consular premises shall be inviolable to the extent provided in this article.
2. The authorities of the receiving State shall not enter that part of the consular premises which is used exclusively for the purpose of the work of the consular post except with the consent of the head of the consular post or of his designee or of the head of the diplomatic mission of the sending State. The consent of the head of the consular post may, however, be assumed in case of fire or other disaster requiring prompt protective action.

Under Article 22(1) of the VCDR, however, '[t]he premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission'. The VCDR thus lacks the qualified consular reference to inviolability, the designation of premises used exclusively for work of the post and the presumption of consent for the purpose of entry in case of fire or other disaster.⁵⁵

Second, the VCCR provides for no privileges for the residence of a consular officer or the head of a consular posts.⁵⁶ However, under Article 30(1) of the VCDR '[t]he private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission'.

Third, when it comes to the inviolability of the agents of the receiving state, Article 41(1) of the VCCR provides: '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'. Article 41(2) provides for the committal of a consular officer to imprisonment in cases of a grave crime. On the other hand, under Article 29 of the VCDR: 'The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention'. In short, while the inviolability of a diplomat is absolute—at least as far as the text of the VCDR is concerned—that of the consular officer is limitable in cases of a 'grave crime', a term which is vague and left undefined in the VCCR, but which would clearly include murder under any conceivable view.⁵⁷ Similarly, while Article 44 of the VCCR permits the receiving state to

⁵⁴ For a comprehensive examination of consular law, see Lee and Quigley, *Consular Law and Practice* 3rd edn (2008).

⁵⁵ See also Lee and Quigley, *supra* n 54 at 355 *et seq.*

⁵⁶ See *ibid.* at 360-1.

⁵⁷ See *ibid.* at 433-8.

compel a consular officer to give evidence on matters that are not connected with the exercise of their functions,⁵⁸ Article 31(2) of the VCDR provides that a ‘diplomatic agent is not obliged to give evidence as a witness’.

Fourth, with regard to the inviolability of the consular and diplomatic bag, Article 35 VCCR and Article 27 of the VCDR both provide for the inviolability of official correspondence and that the consular or diplomatic bag shall not be opened or detained. However, Article 35(3) of the VCCR allows the competent authorities of the receiving state to request that the bag be opened if they have serious reason to believe that it contains something other than official correspondence or articles intended for official use; this can only happen, however, if the authorities of the sending state consent to the bag being opened. Otherwise, the consular bag must be returned to its place of origin. The VCDR contains no analogous regime. Both the VCCR and the VCDR protect the inviolability of the consular or diplomatic courier.

Fifth, while Article 22(3) of the VCDR stipulates *inter alia* that ‘the means of transport of the mission shall be immune from search, requisition, attachment or execution’, Article 31(4) of the VCCR immunises the means of transport of the consular post only from requisition for purposes of national defence or public utility. It does not, in other words, protect the consular car or vehicle from search in the way that the diplomatic car is protected.⁵⁹

Sixth, under both Article 55(1) of the VCCR and Article 41(1) of the VCDR: ‘Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State’. Note how any violation of this duty to respect domestic law does not remove the privilege and immunities of consular or diplomatic agents, except as otherwise provided for in the Conventions. Similarly, Article 55(2) of the VCCR and Article 41(3) of the VCDR stipulate that consular and diplomatic premises must not be used in any manner incompatible with the exercise of consular or diplomatic functions (which, obviously, do not include murder).⁶⁰

Finally, it is important to note that while it is manifest that Saudi Arabia violated its obligations towards Turkey under Article 55 of the VCCR by allowing its consular agents to engage in conduct contrary to Turkish domestic law, for example, by assisting the actual assassins, and by allowing its consular premises to be used in a manner incompatible with the exercise of consular functions (murder), so did Turkey most likely violate its obligations towards Saudi Arabia to respect the inviolability of its consular premises, pursuant to Article

⁵⁸ See *ibid.* at 481 *et seq.*

⁵⁹ See also Lee and Quigley, *supra* n 54 at 363.

⁶⁰ See also *ibid.* at 74-77.

31 of the VCCR, by subjecting these premises to some kind of electronic surveillance, at least insofar that surveillance involved the physical planting of any listening devices on the premises of the consulate.⁶¹ It was through this surveillance, of course, that Turkish authorities obtained an audio recording of the moment of Khashoggi's killing. I will address the consequences of these violations of the VCCR below.

3. Before the attack

A. Generally

I will now examine state obligations before the attack on Khashoggi had materialized. The main obligation of Saudi Arabia in that regard is the same as the one during the attack itself, the negative obligation to refrain from arbitrary deprivations of life, and I will therefore address it in the next section. Here, however, I will look at the positive obligation to protect Khashoggi's right to life on the part of the United States and Turkey.

Three basic questions need to be answered with regard to the positive obligation to protect an individual. First, at what point does it arise, that is, what is its scope of application. Second, once that threshold is crossed, what is the standard of conduct expected of the protecting state. Third, whether on the facts the state acted accordingly. Human rights bodies have extensively dealt with these questions in their case law.⁶² The threshold and the standard of conduct issues both require that a balance be struck between, on the one hand, the need for states to act affirmatively to protect the life of individuals from third parties, and, on the other hand, the need to avoid imposing unrealistic and excessive burdens on states.

In the European context, the leading case remains *Osman v United Kingdom*.⁶³ According to the Court, there is

in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. ... [B]earing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the

⁶¹ For an extended discussion of surveillance and consular and diplomatic missions, see Lee and Quigley, *supra* n 54 at 346-8.

⁶² See *supra* nn 45-47 and accompanying text.

⁶³ Application No 23452/94, Merits, 28 October 1998 [Grand Chamber].

authorities a Convention requirement to take operational measures to prevent that risk from materialising.⁶⁴

The Court thus held that the positive obligation will apply if ‘the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party’.⁶⁵ The applicant does not need to demonstrate that the state’s failure to perceive the risk to their life was a result of gross negligence or wilful disregard of the duty to protect life.⁶⁶

Once the risk threshold is crossed, the state authorities will be responsible if ‘they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk’, that is, ‘did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case’.⁶⁷ As we have already seen, the Human Rights Committee’s approach is very similar, if somewhat more loosely framed, with state parties being ‘under a due diligence obligation to undertake reasonable positive measures, which do not impose on them disproportionate burdens, in response to reasonably foreseeable threats to life’.⁶⁸

B. Threshold inquiry: foreseeability of the threat

On the facts of Khashoggi’s killing, therefore, the first question is whether either the US or Turkey knew, or ought to have known, of a real and immediate risk to Khashoggi’s life at the hands of the government of Saudi Arabia. Was, in other words, the threat to Khashoggi’s life ‘reasonably foreseeable’ to either state? The threshold standard does not require actual knowledge or certainty of such a threat; it is an assessment of risk. The Committee’s standard of reasonable foreseeability does not require that the threat was actually foreseen, but that it could and should have been foreseen, just like the European Court’s ‘ought to have known’ standard. This assessment will necessarily be contextual, and will always depend on (1) the information the state actually had in its possession at the relevant time and (2) information that

⁶⁴ Ibid. paras 15-16.

⁶⁵ Ibid. para 116.

⁶⁶ Ibid.

⁶⁷ Ibid. See also subsequent cases affirming and developing the Court’s approach, for example, *Mastromatteo v Italy*, Application No 37703/97, Merits [Grand Chamber], paras 67-99; *Tagayeva and Others v Russia*, Application No 26562/07, Merits, 13 April 2017, paras 481-493.

⁶⁸ General Comment 36, supra n 34, at para 21.

it did not possess but could have obtained as a reasonable follow-up from the information it did actually already have.⁶⁹

The issue, therefore, is what the US and Turkey knew about the Saudi threat against Khashoggi's life, and when they obtained such information. Obviously, any appraisal of what these governments actually knew can at this moment only be tentative and incomplete, in the absence of some kind of investigatory process, whether internal or external, in that regard. Moreover, while the US executive branch is exposed to various internal pressures that could lead it disclose information contrary its narrow interests, whether for example through the reporting of independent media or through Congressional oversight, the same cannot be said of the increasingly authoritarian Erdogan regime, which has carefully managed the unfolding narrative of the Khashoggi affair.⁷⁰

That said, as far as we are able to understand this today, what did the two governments actually know? First, they were fully aware of the wider context—an increasingly repressive regime in Saudi Arabia, which has aggressively suppressed dissent within its borders and had conducted various operations outside its borders, including abductions, targeting prominent Saudi critics of the regime. Similarly, they were aware that Khashoggi was a prominent voice opposing the regime and had a unique platform as a journalist working for the *Washington Post*, which would inevitably cause the Saudi regime to see him in a hostile light. Second, the US and Turkey have extensive intelligence capabilities, both generally and *vis-à-vis* Saudi Arabia specifically. In particular they had access to human intelligence (sources within the Saudi government), signals intelligence (through various methods of electronic interception of communications), and possibly surveillance of key facilities, such as the Saudi consulate in Istanbul in which the murder eventually took place.

Third, in that regard, we know that a year before the killing, the US intelligence agencies intercepted a conversation between the Saudi Crown Prince, Mohammed bin Salman, and a top aide, in which the Prince told that aide that he would 'use a bullet' on Khashoggi if he did not return to Saudi Arabia and end his criticism of the government.⁷¹ In a different intercepted conversation a few days before, with another senior courtier, Saud al-Qahtani—

⁶⁹ Compare, for example, the European Court's finding in *Finogenov* that Russia had no specific information of a terrorist plot to take hostages in the Dubrovka theatre in Moscow, to its finding in *Tagayeva*, supra n 67 at para 491, regarding the Beslan school hostage taking that Russia had sufficiently specific information about a planned terrorist attack.

⁷⁰ Cf. Callamard, supra n 21 at para 19.

⁷¹ See supra n 7.

allegedly the supervisor of the 15-man team which later killed Khashoggi⁷²—the Prince stated that Khashoggi had grown too influential, that his criticism was tarnishing the Prince’s image, that Saudi Arabia should not care about international reaction to how it handles its own citizens and that he ‘did not like half-measures—he never liked them and did not believe in them’.⁷³ Apparently, however, while the US was in the possession of the recordings of these conversations, which were intercepted electronically, the conversations were not transcribed and analysed until after Khashoggi’s death, with analysts poring over years of the prince’s voice and text communication that was routinely collected by the US National Security Agency.⁷⁴ In other words, the US had this information in its possession but it was not processed in such a way that its implications could be understood at the relevant time.⁷⁵

Fourth, according to intelligence reports described to the Washington Post, the US also intercepted—and apparently processed and analysed—Saudi conversations which pointed to a plan to detain and abduct Khashoggi.⁷⁶ Fifth, in a similar vein, an *Observer* journalist reported:

At least a day before Khashoggi appeared at the Saudi consulate in Istanbul, an NSA [National Security Agency] official told [the journalist], the agency had Top Secret information that Riyadh was planning something nefarious—though exactly what was not clear from the intercepts. This was deemed important because Khashoggi is a legal resident of the United States, and is therefore entitled to protection. According to the NSA official, this threat warning was communicated to the White House through official intelligence channels.⁷⁷

Sixth, while little is known about Turkish signals intelligence acquisitions regarding Khashoggi, one can reasonably assume that at least some relevant information was in Turkey’s

⁷² See ‘How the man behind Khashoggi murder ran the killing via Skype’, *Reuters*, 22 October 2018, available at: www.reuters.com/article/us-saudi-khashoggi-adviser-insight/how-the-man-behind-khashoggi-murder-ran-the-killing-via-skype-idUSKCN1MW2HA [last accessed 25 November 2019]. Qahtani has been in charge of the Crown Prince’s extensive efforts to control social media; he has also been involved in Saudi electronic surveillance programmes (with some of the interception tools having purchased from an Israeli company), which may have intercepted some of Khashoggi’s messages and increased the regime’s perception of him as a threat: see ‘How a chilling Saudi cyberwar ensnared Jamal Khashoggi,’ *Washington Post*, 7 December 2018; dos Santos and Kaplan, ‘Jamal Khashoggi’s private WhatsApp messages may offer new clues to killing,’ *CNN*, 4 December 2018, available at: edition.cnn.com/2018/12/02/middleeast/jamal-khashoggi-whatsapp-messages-intl/index.html [last accessed 25 November 2019].

⁷³ *Supra* n 71.

⁷⁴ *Ibid.*

⁷⁵ The United States is also in possession of 11 encrypted messages between the crown prince and al-Qahtani, exchanged in the hours before and after Khashoggi’s death, but does not know their contents: see ‘CIA Intercepts Underpin Assessment Saudi Crown Prince Targeted Khashoggi’, *Wall Street Journal*, 1 December 2018.

⁷⁶ See ‘Crown prince sought to lure Khashoggi back to Saudi Arabia and detain him, U.S. intercepts show’, *Washington Post*, 10 October 2018.

⁷⁷ See ‘NSA: White House Knew Jamal Khashoggi Was In Danger. Why Didn’t They Protect Him?’, *The Observer*, 10 October 2018.

possession. In particular, Turkey had extensive surveillance capabilities as to the premises of the consulate itself, which Turkey has itself disclosed when it made public the existence of a recording of the moment and aftermath of Khashoggi's killing.

In that regard, the timeline of the killing is of great relevance, in particular the fact Khashoggi went to the Saudi consulate in Istanbul twice. First, he went to the consulate unannounced on 28 September 2018 to inquire about the issuance of a divorce certificate; he was apparently well received and was later told to return for the certificate on 2 October. On 29 September Khashoggi travelled to London to speak at a conference, returning to Istanbul on 1 October.⁷⁸ His second (and fatal) visit to the consulate then happened around 1pm on 2 October; a few hours later his fiancée reported him missing by calling the police and Yasin Aktay, an advisor to President Erdogan.⁷⁹

The decision of Saudi authorities to launch the specific operation that resulted in Khashoggi's death thus must have been made quickly after his first consulate visit on 29 September. Arrangements also had to be made to prepare the premises of the consulate for the operation, and these also had to be made in the narrow window between 29 September and 1 October – for example, it has been reported that consulate staff were given a day off for 2 October,⁸⁰ and that CCTV in the building was disabled.⁸¹ Some discussion of the planned operation thus had to take place on the premises of the consulate before 2 October, and we know that Turkish authorities had these premises and staff under some kind of surveillance. It is thus entirely possible that Turkey was in possession of some information indicating a threat to Khashoggi's life before the killing.

Moreover, in the early hours of 2 October, around 3 am, a private plane carrying members of the Saudi team that killed Khashoggi landed at Ataturk Airport; others arrived during the day via commercial flights.⁸² It is likely that the arrival of 15 Saudi agents did not go unnoticed by Turkish intelligence services. The agents left Turkey on two private jets later in the evening of 2 October.⁸³

⁷⁸ See 'Key moments surrounding the killing of Jamal Khashoggi', *Associated Press*, 22 October 2018, available at: www.apnews.com/874760d515fa4ce0b6f2fa9e28d5f49a [last accessed 25 November 2019].

⁷⁹ See 'Aus diesem Grund ging Khashoggi beim zweiten Mal unbesorgt in das Konsulat', *Die Welt*, 26 October 2018, available at: www.welt.de/politik/deutschland/article182794750/Seine-Verlobte-im-Interview-Aus-diesem-Grund-ging-Khashoggi-beim-zweiten-Mal-unbesorgt-in-das-Konsulat.html [last accessed 25 November 2019].

⁸⁰ See 'Jamal Khashoggi: murder in the consulate,' *The Guardian*, 21 October 2018.

⁸¹ See 'Turkey's Erdogan says there's strong evidence to show that the Khashoggi killing was planned', *CNBC*, 23 October 2018, available at: www.cnn.com/2018/10/23/turkey-khashoggi-statement-by-erdogan.html [last accessed 25 November 2019].

⁸² *Associated Press*, supra n 78.

⁸³ *Ibid.*

In sum, based on the evidence publicly available today we cannot say that it is conclusively established that either the US or Turkey *knew* of a real and immediate risk to Khashoggi's life at the hands of the Saudi state. This is the case even if, as reported, the US had intercepted some conversations of the Crown Prince which indicated such a threat, since these conversations were simply collected, but not transcribed and analysed.⁸⁴ In an era of automated acquisition of intelligence in huge quantities it would be unreasonable to consider a state as 'knowing' such information before it is processed in some way and subjected to human analysis, nor can a state reasonably be expected to analyse all signals intelligence it acquires in real time. But the relevant threshold standard, recall, is not strictly that the relevant states *knew* of a specific threat to Khashoggi's life, but that they *ought to have known* of such a threat or that it was reasonably foreseeable to them. And here there are many indications that, upon further factual inquiry, this somewhat looser standard could have been satisfied. It is of course impossible to ascertain whether such was the case without independent scrutiny of information currently exclusively in the possession of the two governments.

Finally, if the risk threshold was crossed, it is also difficult, without further inquiry, to pinpoint the exact time at which it was crossed for either the US or Turkey. This could have happened in very close proximity to the killing, or weeks or months earlier. In particular, recall that an intelligence report that Riyadh was planning something nefarious was communicated to the White House a day before Khashoggi's killing,⁸⁵ and the discussion above regarding Turkey's surveillance of the consulate in the critical period from 28 September to 2 October and the admission into Turkish territory of the Saudi agents in the morning of 2 October. The exact time at which the risk threshold was crossed is, as we shall see, relevant also for the issue of the extraterritorial applicability of the duty to protect Khashoggi's life.

C. Due diligence

Let us assume that the risk or foreseeability of threat threshold was crossed for both the US and Turkey, so that their duty to protect Khashoggi's right to life was engaged. The issue then becomes what these states could reasonably have been expected to do to protect his life. This is an obligation of due diligence, which, as we have seen in *Osman*, must not impose a disproportionate burden on the state. In ordinary policing circumstances, this context-dependent duty could, for example, require the state to protect persons placed at particular risk

⁸⁴ *Supra* n 71.

⁸⁵ *Supra* n 77.

because of specific threats, such as journalists or public figures, through measures such as the assignment of around-the-clock police protection.⁸⁶

In Khashoggi's case, the barest minimum of special measures of protection would have been for the two states to inform Khashoggi of the existence of the threat against him. That warning alone would have likely dissuaded Khashoggi, who was already familiar with the increasingly aggressive tactics of the Saudi regime against those who criticized it publicly,⁸⁷ from going to the Istanbul consulate. At the very least he would have lived to see another day.

A possible objection to the duty to warn could be that a warning might potentially compromise intelligence-gathering sources and methods, and therefore impose a disproportionate burden on the state. However, that objection is not persuasive. A warning could easily have been framed in such a way that Khashoggi would not have known anything about the methods used to obtain the relevant information (for example, electronic surveillance), so that there was no risk that the methods in question could be compromised or publicly exposed.⁸⁸ Similarly, it is immaterial whether any of the relevant information was obtained by either Turkey or the US unlawfully. For example, the Turkish surveillance of the Istanbul consulate was arguably a violation of the inviolability guaranteed to the consulate under Article 31 of the VCCR, at least if it involved the physical planting of any listening devices.⁸⁹ Some of the US intelligence could also have been obtained in violation of Saudi sovereignty, but that is immaterial for the operation of the protective obligation under the right to life. Whatever the illegality in the acquisition of the information may have been (if any), it had already happened, and the relevant states had already chosen to act unlawfully. Once they have obtained the information that reliably indicated that the life of a human being was at risk, they could not simply ignore it on the basis that the acquisition of the information was unlawful.⁹⁰

⁸⁶ See General Comment No 36, supra n 34 at para 23.

⁸⁷ Cf. Khashoggi's last column written for the *Washington Post*, published posthumously: see Khashoggi, 'What the Arab world needs most is free expression', *Washington Post*, 17 October 2018.

⁸⁸ Consider, as just one example, the case of a Rwandan dissident living in Belgium, Faustin Twagiramungu, who was warned by Belgian security services of an apparent plot by the Rwandan government to assassinate him (Rwanda has a long record of such activity). According to a report, 'Twagiramungu said Belgian authorities did not explain the nature of these threats. "They only told me that they were informed about the threat by a third country," he said. "They talked emotionally. They said this was very serious. I started fearing what could happen to me. I have to be very careful."' See Rever, 'Rwandan dissident in Belgium warned of suspected targeted attack', *The Globe and Mail*, 14 May 2014, available at: www.theglobeandmail.com [last accessed 25 November 2019].

⁸⁹ See supra n 61 and accompanying text.

⁹⁰ Cf. *A and Others v Home Secretary (No 2)* [2005] UKHL 71, [2006] 2 AC 221, at paras 47, 68, 92 (House of Lords holding that evidence obtained through torture would be inadmissible in any legal proceedings, but that the police should act on information obtained through torture to protect life, for example if it disclosed the existence of a bomb).

Finally, it is important to note that US domestic policy already expressly acknowledges the existence of a duty to warn, demonstrating that there is nothing inherently impractical in such an obligation. Under Intelligence Community Directive 191 (ICD 191), adopted by the Director of National Intelligence pursuant to the National Security Act:

An IC element that collects or acquires credible and specific information indicating an impending threat of intentional killing, serious bodily injury, or kidnapping directed at a person or group of people (hereafter referred to as intended victim) shall have a duty to warn the intended victim or those responsible for protecting the intended victim, as appropriate. This includes threats where the target is an institution, place of business, structure, or location. The term intended victim includes both U.S. persons, as defined in EO 12333, Section 3.5(k), and non-U.S. persons.⁹¹

Note how this duty would extend to Khashoggi even if the intelligence that the US had was that the Saudi government planned ‘only’ to forcibly kidnap him, rather than kill him, and that the duty would apply regardless of Khashoggi’s citizenship or location. A number of exceptions or waivers to this duty are set out in ICD 191 – for example, if warning the individual would unduly endanger US government personnel, sources, methods, intelligence operations, or defence operations.⁹² But none of them appear to be even plausibly relevant to Khashoggi’s situation, and again, Khashoggi could easily have been warned without compromising intelligence sources and methods.⁹³ As of the time of writing, it remains unclear why the US intelligence agencies failed to inform Khashoggi of threats to his life and liberty.⁹⁴

Turkey, as the state in which the killing took place, could have done at least one more thing to protect Khashoggi’s right to life: it could have refused entry of the Saudi agents onto its territory. Again, it is very possible that Turkish intelligence services knew or suspected that the 15 men arriving in Istanbul on 2 October were agents of the Saudi government. And it is similarly possible that Turkish intelligence services knew or suspected that these individuals could be involved in a threat to Khashoggi’s life. Turkey was under no obligation to allow them in. Had they been refused entry, the killing would obviously not have taken place, at least not

⁹¹ Section E.1 ICD 191, 21 July 2015.

⁹² Section F ICD 191.

⁹³ See also Goodman, ‘Did the U.S. Fail Its “Duty to Warn” Jamal Khashoggi? How U.S. Directive 191 Applies to Kidnapping Threats’, *Just Security*, Blog, 10 October 2018, at www.justsecurity.org/61001/united-states-fail-duty-warn-jamal-khashoggi-intelligence-directive-191-applies/ [last accessed 25 November 2019].

⁹⁴ More information might become available soon through leaks to the press or Congressional oversight. A lawsuit has also been filed by the Knight First Amendment Institute at Columbia University, pursuant to the Freedom of Information Act, asking for a judicial order compelling the relevant agencies to disclose records in their possession regarding Saudi threats to Khashoggi and their failure to warn him thereof. See ‘U.S. spy agencies sued for records on whether they warned Khashoggi of impending threat of harm,’ *Washington Post*, 20 November 2018. See also Knight First Amendment Institute at Columbia University, ‘Knight Institute and Committee to Protect Journalists v. CIA’, available at: knightcolumbia.org/content/knight-institute-and-committee-protect-journalists-v-cia-foia-suit-records-governments-duty [last accessed 25 November 2019].

as and when it actually happened.⁹⁵ Clearly, all of this would depend on what specific intelligence, if any, Turkey actually had about the threat to Khashoggi, and about the identity and purpose of the 15 Saudi agents, something we do not yet know, and might never know, with a reasonable degree of certainty.

D. Extraterritorial application

This brings us to the question of the extraterritorial application of the obligation to protect Khashoggi's life. This is not an issue of direct relevance to Turkey, since Khashoggi was killed in its territory. If Turkey knew or ought to have known about the risk to Khashoggi's life, this foreseeability threshold must have been crossed while he was on Turkish soil. The issue is more complex, however, with regard to the US. If the US government knew or ought to have known about the threat to Khashoggi's life while Khashoggi was present on its territory, which as a US resident he was for extended periods of time, the duty to protect under Article 6 of the ICCPR clearly applied – that the threat would have materialized outside US territory is irrelevant. If, however, the risk threshold was crossed *vis-à-vis* the US while Khashoggi was outside the US (for example, if the US government only acquired the necessary information when Khashoggi was already in Istanbul), the issue then is whether the protective duty applied when he was outside US territory.

The question of principle, in other words, is whether the positive obligation to protect life extends to an individual located outside a state's territory, if a specific threat to that individual's life is foreseeable to the state. This question has no obvious answer. As explained above, the jurisprudence of human rights bodies has coalesced around two basic approaches to the extraterritorial applicability of human rights treaties, which revolve around the interpretation of the notion of state jurisdiction in these treaties. First, that they will apply to individuals located outside a state's territory, but within a territory or area under the state's control. Second, that they will apply if the individual is outside the state's territory, but is under the authority or control of a state agent.⁹⁶ Recall also that the official position of the US government is that it does not accept that the ICCPR applies extraterritorially under any

⁹⁵ The decision of the Turkish authorities to allow the assassins entry is to some extent comparable with that of the British authorities in *McCann* to allow the entry of three Irish Republican Army terrorists into Gibraltar, which set the stage for their subsequent fatal encounter with British special forces: see *McCann and Others v United Kingdom*, supra n 44 at para 205.

⁹⁶ See supra ns 36-40 and accompanying text.

circumstances,⁹⁷ although it might be more willing to accept that customary international human rights law applies extraterritorially.⁹⁸ Note in that regard that the official view of the US government that Khashoggi's killing was an arbitrary deprivation of life and a human rights violation necessarily assumes *some* theory of extraterritorial applicability of treaty or customary international human rights law, as otherwise there could be no human rights violation.⁹⁹

That said, let us proceed on the basis that the US territorially restrictive view on the extraterritorial application of the ICCPR is mistaken (as it is).¹⁰⁰ The basic problem is still that the scenario in which the US learns of threats to Khashoggi's life only when he is already outside US territory is not a good fit with either the spatial or personal models of jurisdiction in human rights treaties. When in Istanbul, Khashoggi would not be in any area or territory controlled by the US government, nor would he in any sense be under the authority or control of a US state agent. The US would simply be in possession of information about him or about threats to his life, which it did not acquire from him but by intercepting the communications of third parties. In my prior work, I have advocated for a model of extraterritorial application whereby state negative obligations would apply without any territorial limitation, while substantive positive obligations, like the duty to protect life, would require a jurisdictional link.¹⁰¹ Even on that generally expansive view the ICCPR would not apply extraterritorially to protect Khashoggi since he would not be under the control of a US state agent or in US-controlled territory.

⁹⁷ The US position regarding the extraterritorial application of the ICCPR is unlikely to change in the near term, and is of course tied up with higher-order questions of the applicability of human rights law to US counterterrorism operations abroad or in armed conflict. A window of opportunity existed during the Obama administration to change this view, with the then State Department Legal Adviser, Harold Koh, advocating within the government that its position was untenable and had to be changed. This effort failed due to the lack of agreement from other major agencies within the US government. Koh's memorandum on the extraterritorial application of the ICCPR was then leaked to the *New York Times* a few days before the consideration of the US fourth period report by the Human Rights Committee. See more 'U.S. Seems Unlikely to Accept That Rights Treaty Applies to Its Actions Abroad,' *New York Times*, 6 March 2014; Goodman, 'The Koh Memo's Impact on the Current US Position (A Reply, in part, to Ben Wittes)', *Just Security*, Blog, 11 March 2014, available at: www.justsecurity.org/8124/koh-memos-impact-current-position-a-reply-part-ben-wittes/ [last accessed 25 November 2019].

⁹⁸ See Goodman, 'Human Rights Law and U.S. Military Operations in Foreign Countries: The Prohibition on Arbitrary Deprivation of Life', *Just Security*, Blog, 19 February 2019, available at: www.justsecurity.org/62630/international-human-rights-law-u-s-military-operations-foreign-countries-prohibition-arbitrary-deprivation-life/ [last accessed 25 November 2019].

⁹⁹ See supra nn 18-20 and accompanying text.

¹⁰⁰ I will not discuss this point more for reasons of space, but also because it has been extensively covered in the literature. See more Van Schaack, 'The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change' (2014) 90 *International Law Studies* 20; Milanovic, supra n 37, at 222-7.

¹⁰¹ See Milanovic, supra n 37, at 209-222.

But, in its recent General Comment No 36, the Human Rights Committee endorsed an even more expansive theory of extraterritoriality, stating that

a State party has an obligation to respect and to ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control.¹⁰²

The Committee thus shifted the focus of the jurisdictional inquiry from that of power or control over territory or over the person, to that of power or control *over the enjoyment of the right to life*.¹⁰³ In doing so, the Committee effectively endorsed the functional theory of the extraterritorial application of human rights treaties, which has academically long been advocated for by Yuval Shany, now the chairperson of the Human Rights Committee and together with the late Sir Nigel Rodley, the principal drafter of General Comment No 36.¹⁰⁴ Under the functional approach, the scope of state obligations, including positive obligations, would depend on their capacity to fulfil them.¹⁰⁵

While neither the Human Rights Committee's jurisprudence, nor that of any other human rights body, has yet addressed a scenario in which a state possesses information about the threat to the life of a person located outside its territory, the functional theory the Committee endorsed could capture such a scenario. On the assumption that it had specific information about a lethal threat to Khashoggi, which if disclosed could have saved his life, the US exercised control over Khashoggi's enjoyment of his right to life. It had the capacity to protect that right, and thus the duty to protect it, regardless of his location or his status as a US resident. It should also be reiterated that the due diligence expectation of the state in a scenario like this one is a very modest one—the upshot is simply the duty to warn the individual. That said, the problem with the Committee's approach is that it is essentially limitless—whenever the state would be capable of doing something it would have the obligation to do so, and for better or worse no threshold jurisdictional inquiry would really apply.

¹⁰² General Comment 36, supra n 34 at para 63.

¹⁰³ Cf. also *ibid.* at para. 22 (discussing states' positive obligation to regulate activities in areas or places subject to their jurisdiction that have a direct and reasonably foreseeable impact on the right to life of individuals outside their territory).

¹⁰⁴ See Shany, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law' (2013) 7 *The Law & Ethics of Human Rights* 47.

¹⁰⁵ A good point of comparison here would be the approach of the International Court of Justice (ICJ) to the positive obligation of states to prevent genocide under Article 1 of the Genocide Convention, in the *Bosnian Genocide* case. The Court held that the duty to prevent applied to all states, regardless of where a genocide might be committed, but that the extent of the duty varies with the state's capacity: see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* Judgment, ICJ Reports 2007, 43 at para 183.

F. Conclusion

In sum, it is very possible that the US or Turkey knew, or ought to have known, of a real and immediate risk to Jamal Khashoggi's life posed by agents of the Saudi state, that is, that this risk was reasonably foreseeable to them. This is certainly what media reporting on US signals intelligence regarding Khashoggi would seem to indicate, although no definitive conclusions can be made in this respect without further inquiry. If the duty to protect life was triggered, then either state arguably failed to fulfil it by not warning Khashoggi of the existence of the risk, and in Turkey's case by admitting Saudi agents onto its territory. The extraterritorial applicability of the ICCPR is a complicating factor with regard to the United States, but not insurmountably so.

Other states could easily have been in a similar position. For example, it has been reported that the British signals intelligence agency, the Government Communications Headquarters (GCHQ), intercepted Saudi communications indicating that 'members of the royal circle' had ordered Khashoggi's abduction. According to one newspaper report, which has not been confirmed by other press outlets:

[A] highly-placed [intelligence] source confirms that MI6 had warned his Saudi Arabian counterparts to cancel the mission-though this request was ignored. "On October 1 we became aware of the movement of a group, which included members of Ri'āsāt Al-Istikhbārāt Al-Āmah (GID) to Istanbul, and it was pretty clear what their aim was. "Through channels we warned that this was not a good idea. Subsequent events show that our warning was ignored." Asked why MI6 had not alerted its Five Eye intelligence partner, the US (Khashoggi was a US resident) the source said only: "A decision was taken that we'd done what we could."¹⁰⁶

Again, this report and its sourcing have not been confirmed by other outlets; the British Foreign Secretary denied that he personally knew of the threat to Khashoggi, but refused to comment (and deny) the original press report as such.¹⁰⁷ It is thus entirely possible that the UK intelligence agencies knew of the threat to Khashoggi's life but failed to warn him. Recall in that regard that Khashoggi was actually in London from 29 September to 1 October 2018, the day before his killing.¹⁰⁸ That visit alone would likely have obviated any possible extraterritoriality issue under the ECHR *vis-à-vis* the UK. If, in other words, on 1 October the

¹⁰⁶ See 'Khashoggi BOMBSHELL: Britain 'KNEW' of kidnap plot and BEGGED Saudi Arabia to abort plans,' *The Express*, 29 October 2018.

¹⁰⁷ See 'Foreign Secretary tells MPs he had no prior knowledge of Khashoggi murder plan', *Mail Online*, 30 October 2018, at www.dailymail.co.uk [last accessed 25 November 2019].

¹⁰⁸ See *supra* n 78.

UK knew or ought to have known of a real risk to Khashoggi's life, the protective duty was triggered and the UK manifestly failed to do anything about it.

Let us now move to the moment of the murder itself.

4. During the attack

A. Generally

Reports on Khashoggi's final moments are conflicting, even if most of them are ultimately sourced to the Turkish government. Khashoggi entered the consulate after 1pm on 2 October. Shortly after 3 pm, surveillance footage shows vehicles with diplomatic license plates leaving the Saudi consulate for the consul-general's home some 2 kilometres away. Around 3.30 pm Khashoggi's fiancée reported him missing to the Turkish authorities. At 7 pm a Saudi private jet took six members of the Saudi hit team to Cairo, and then onwards to Riyadh. At 11 pm a second private jet took seven other assassins first to Dubai, and then to Riyadh; two others left on commercial flights.¹⁰⁹

As for the manner of the execution, some reports indicated that Khashoggi was tortured before he was killed, or that he was being dismembered while still alive.¹¹⁰ The current official Saudi version is that Khashoggi died in a fistfight which went out of control with agents whose plan was to capture him.¹¹¹ Other reports mention him being given an injection with a lethal dose of a sedative.¹¹² Finally, more recent reports say that Khashoggi was strangled or suffocated, either with a rope or a plastic bag.¹¹³

The final act of Khashoggi's killing probably did not take more than a few minutes. He could have been interrogated for some time before that, but the killing most likely took place

¹⁰⁹ See supra n 78.

¹¹⁰ See 'Jamal Khashoggi's killing took seven minutes, Turkish source tells MEE', *Middle East Eye*, 16 October 2018, available at: www.middleeasteye.net/news/jamal-khashoggis-killing-took-seven-minutes-turkish-source-tells-mee [last accessed 25 November 2019]; 'Jamal Khashoggi Tortured In Front Of Top Saudi Diplomat: Reports', *Huffington Post*, 17 October 2018, available at: https://www.huffingtonpost.co.uk/entry/jamal-khashoggi-tortured-saudi-diplomat-reports_us_5bc736d8e4b0d38b5873dc98 [last accessed 25 November 2019].

¹¹¹ See 'Saudi Arabia fires 5 top officials, arrests 18 Saudis, saying Khashoggi was killed in fight at consulate,' *Washington Post*, 19 October 2018.

¹¹² See 'Jamal Khashoggi's final months as an exile in the long shadow of Saudi Arabia', *Washington Post*, 22 December 2018.

¹¹³ See "'I can't breathe.'" Jamal Khashoggi's last words disclosed in transcript, source says', *CNN*, 10 December 2018, available at: edition.cnn.com/2018/12/09/middleeast/jamal-khashoggi-last-words-intl/index.html [last accessed 25 November 2019]; 'I'm suffocating': Khashoggi's last words, says Turkish reporter,' *Al Jazeera*, 11 November 2018, available at: www.aljazeera.com/news/2018/11/suffocating-khashoggi-words-turkish-reporter-181111085534099.html [last accessed 25 November 2019].

within no more than an hour of him entering the consulate. The exact timeline is of course yet to be reliably reconstructed. In this section I will examine Saudi Arabia's negative obligation to respect Khashoggi's right to life and Turkey's positive obligation to protect him. I will in particular look at possible normative conflicts between Turkey's human rights obligations and its duty to respect the inviolability of the consulate under the VCCR.

B. Saudi Arabia's negative obligation to respect Khashoggi's right to life and its extraterritorial application

As noted above, Saudi Arabia's violation of its obligation not to deprive individuals arbitrarily of their life under Article 5 of the Arab Charter and customary international human rights law is manifest, in the sense that Saudi Arabia could not offer any kind of justification for Khashoggi's killing that could be regarded as even potentially legitimate from the standpoint of the right to life. What is not obvious, however, is whether the Charter and the relevant customary rule even applied to Khashoggi, that is, that they protected him while he was located outside Saudi territory.

This is again a question of extraterritorial application, but this time of the negative obligation to refrain from using lethal force without justification. And this is a question that is in no way unique to the Khashoggi killing. We have confronted it repeatedly in the past couple of decades, whether in the context of the use of lethal force in armed conflict or in plain or not-so-plain state-sponsored assassinations. From drone strikes in the war on terror, to the killing of Osama bin Laden in Pakistan by US special forces, to the assassination of Alexander Litvinenko and the attempted assassination of Sergei and Yulia Skripal by Russian secret agents, to the killing of Kim Jong-nam in Malaysia on the orders of his half-brother, the North Korean dictator Kim Jong-un – all of these cases raise the fundamental threshold question of whether the target of the use of force is protected by human rights law at all. As a general matter, powerful states have been reluctant to accept that human rights treaties would apply to kinetic uses of force outside their territory, especially in areas not within their control, because they tend to see international human rights law as an excessive constraint on their freedom of action.

There have been important cases on this set of issues before human rights courts and treaty bodies. The most notorious of these is of course *Bankovic*, in which the European Court of Human Rights held that an individual would not be within a state's jurisdiction in the sense of Article 1 of the ECHR solely on the basis that the state dropped a bomb on him from the

air.¹¹⁴ Other cases followed, some of which partially overruled *Bankovic*, most notably *Al-Skeini*,¹¹⁵ but the Court has nonetheless remained reluctant to extend the reach of the Convention to purely kinetic uses of force abroad, as it is morally and logically compelled to do.¹¹⁶ This is particularly the case with the personal conception of jurisdiction as the exercise of authority or control over the victim by a state agent, the issue here being whether the factual power to kill a person qualifies as such authority or control. In my view it surely does; the personal model of jurisdiction is prone to collapse as it cannot be limited non-arbitrarily, which is why I have argued that negative obligations should be territorially unlimited.¹¹⁷ The European Court has not said so, however, and is yet to properly confront a case post *Al-Skeini* which deals with the use of lethal force against an individual in an area not under the state's control.¹¹⁸ It has, however, acknowledged that the use of physical force against an individual by a state agent can constitute the exercise of authority or control over that individual, and thus state jurisdiction, at least in some circumstances. It has also acknowledged that when a state exercises such authority and control over an individual it only needs to secure those rights of that individual that are relevant to his or her situation, so that rights under the ECHR can be divided and tailored.¹¹⁹

Other human rights bodies have never been as restrictive as the European Court on matters of extraterritorial application. There is no doubt, for example, that the Human Rights Committee would find a person in a situation like Khashoggi's to be protected by the ICCPR, whether pursuant to its more general approach to issues of extraterritorial application as set out in General Comment No 31,¹²⁰ or to its new, even more, expansive functional approach in

¹¹⁴ *Banković and Others v Belgium and Others* Application No 52207/99, Admissibility Decision, 12 December 2001 [Grand Chamber].

¹¹⁵ *Al-Skeini and others v United Kingdom* Application No 55721/07, Merits, 7 July 2011 [Grand Chamber].

¹¹⁶ See generally Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg,' (2012) 23 *European Journal of International Law* 121 at 127-33.

¹¹⁷ See Milanovic, *supra* n 37 at 209-22.

¹¹⁸ British courts have notably done so in *Al-Saadoon*, where in the High Court Leggatt J considered that per *Al-Skeini* the personal conception of Article 1 jurisdiction as authority and control over an individual exercised by a state agent necessarily captures the use of lethal force against that individual, while in the Court of Appeal Lloyd Jones LJ held that he did not think that the European Court intended the principles articulated in *Al-Skeini* to go so far, and that it should be for the European Court to extend them if it wanted to do so. See *Al-Saadoon & Ors v Secretary of State for Defence* [2015] EWHC 715 (Admin), at paras 95-100; *Al-Saadoon & Ors v Secretary of State for Defence* [2016] EWCA Civ 811, at paras 69-73.

¹¹⁹ *Al-Skeini*, at paras 136-137.

¹²⁰ UN Human Rights Committee, General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13 (2004), at para 10: '[A] State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.' See also *Lopez Burgos v Uruguay*, *supra* n 39 at para 12.3: '[I]t would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory'.

General Comment No 36.¹²¹ Even the European Court would be likely to find a person like Khashoggi protected by the ECHR, if not under the personal model of jurisdiction, then on the basis that Khashoggi was killed on the premises of a consulate or while under the authority of consular agents and thus within the sending state's jurisdiction.¹²²

In sum, Saudi Arabia was under an obligation to respect Khashoggi's right to life under the Arab Charter and customary international human rights law when its agents killed him in the Istanbul consulate. This position could be reached on several different grounds: (1) that the negative obligation to respect the right to life and refrain from lethal force applies without any territorial limitation; (2) that killing an individual constitutes an exercise of authority or control, and thus jurisdiction, over that individual; (3) that Khashoggi's killing took place in a Saudi consulate. And if the Arab Charter and customary international human rights law applied to Khashoggi's killing, as they did, the violation of the right to life is manifest. That said, I would reiterate that the reluctance of some states to explicitly use human rights language in their criticism of Saudi Arabia stems at least in part from a desire to avoid contradictions with their own prior positions. In other words, it is not easy for the US and UK governments to criticize Saudi Arabia for violating Khashoggi's right to life when under their own theories, developed and argued by their own lawyers, they would not have had to respect human rights law if they wished to use lethal force against an individual outside their borders, at least absent territorial control.

C. Turkey's positive obligation to protect Khashoggi's right to life

1. Applicability

Moving now to Turkey, let us examine its obligation to protect Khashoggi's right to life from third parties, triggered from the moment it knew or ought to have known of a real and immediate risk to his life. Turkey's overarching obligation to ensure or secure Khashoggi's right to life continued applying after his entry into the Saudi consulate in Istanbul. Khashoggi remained within Turkey's jurisdiction for the purposes of the applicability of the ICCPR and

¹²¹ See supra n 102 and accompanying text.

¹²² See *Bankovic*, at para 73: 'Additionally, the Court notes that other recognised instances of the extra-territorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State. In these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant State.' See also Milanovic, supra n 37, at 154-160.

the ECHR, even if he was also concurrently within Saudi jurisdiction.¹²³ The area of the consulate remained Turkish territory and under Turkish control, even if Turkey had consented to the presence of the consulate and assumed international obligations with regard to its inviolability. There is no reason of principle why the notion of jurisdiction could not cover such concurrent scenarios.¹²⁴

As explained above, Khashoggi was likely killed very shortly upon entering the consulate, at the most within an hour.¹²⁵ We know that Turkey has audio recordings of his last moments and of some of the things said and done to him. It is not entirely clear by which methods exactly Turkey obtained these recordings. Reports differ on whether Turkey had listening devices on the premises of the consulate, surveilled the consulate through the use of a powerful directional microphone, tapped the communications of the Saudi hit team or had combined some of the methods above.¹²⁶

2. Apparent conflict of norms

Now, imagine if, through whatever method, Turkish intelligence services were listening to the goings-on in the consulate in real time, that is, had a good idea of what was happening to Khashoggi as it was occurring, rather than collecting this information through automated processes and analysing it only after the fact. Imagine also if the Turkish police had constables or other security forces available in the vicinity of the consulate, who could be there reasonably quickly. Both of these assumptions are in the realm of possibility, although they were likely not borne out on the facts because of the very short time window within which Khashoggi was killed. But again, it is perfectly possible that Turkish intelligence services knew what was going on. If they did, the positive obligation to protect Khashoggi's life could clearly no longer be

¹²³ Cf. *Ilaşcu et al v Moldova and Russia* Application No 48787/99, Merits, 8 July 2004 [Grand Chamber]; *Catan and Others v Moldova and Russia* Application Nos 43370/04, 8252/05 and 18454/06, Merits, 19 October 2012 [Grand Chamber] (concurrent jurisdiction of Russia and Moldova over Transnistria).

¹²⁴ See Milanovic, supra n 37, at 147-51, 153-4, 159-60.

¹²⁵ See supra n 113 and accompanying text.

¹²⁶ See the reports in supra n 112: 'What happened inside might never have emerged were it not for listening devices planted in the Saudi Consulate by Turkish intelligence. The recordings span several days and capture operatives discussing in advance of Khashoggi's arrival their plans to subdue and kill him, according to Western intelligence officials'; and supra n 80: 'Scenarios range from a bug placed in the consulate itself to a directional microphone focused on the building from outside – both technically within the realms of Turkey's capabilities. Another possibility, being discussed in Turkey and elsewhere, is that some members of the hit squad recorded the abduction on their phones for trophy purposes, or to reveal back home. And that those recordings were either intercepted in real time or retrieved from at least one of the killers' phones.'

met simply by warning him – it was far too late for that. In this scenario, Turkey would have had to intervene directly to prevent the murder, by force if necessary.

In such a scenario, Turkey would have faced an apparent conflict of norms. On the one hand, its positive obligations under the ICCPR and the ECHR would be telling it to send its police forces or other security services into the consulate, to prevent the killing from taking place. On the other hand, if it did so, it would be in *prima facie* violation of its obligation to respect the inviolability of the consulate under Article 31 of the VCCR, which specifically prohibits agents of the receiving state from entering consular premises without the consent of the head of the consular post – that same Saudi consul-general who was, at the time, witnessing the brutal assault on Khashoggi.¹²⁷ What, then, should Turkey have done in such a situation?

3. Norm conflict avoidance and resolution

Norm conflicts are nothing terribly extraordinary in either domestic or international law.¹²⁸ In international law they are an aspect of the wider phenomenon of fragmentation, which is a consequence both of its relative success and expansion and of its decentralization and lack of coherence.¹²⁹ Specifically, international law lacks some of the tools that domestic legal systems possess in addressing norm conflicts, a problem which becomes particularly acute when human rights norms potentially conflict with other rules of international law.¹³⁰

In that regard, the standard approach to apparent or potential normative conflicts in both domestic and international law is to try to *avoid* the conflict, if possible. Avoidance is normally done through various techniques of harmonious interpretation. Such interpretative techniques can, depending on the system and on the context, be more or less consistent with the text and purposes of both norms, or can verge on forcible rewriting or amendment. A genuine norm conflict arises only if such avoidance is impossible.¹³¹ The limits of the possible are fluid. Generally speaking, harmonious interpretation may require that one of the apparently

¹²⁷ See ‘Jamal Khashoggi: Turkish police search Saudi consul's residence’, *BBC News*, 17 October 2018, available at: www.bbc.co.uk/news/world-middle-east-45887556 [last accessed 25 November 2019].

¹²⁸ For a leading treatment of the subject, see J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (2003). For a classical study, see Jenks, ‘Conflict of Law-Making Treaties’, (1953) 30 *British Yearbook of International Law* 401.

¹²⁹ See generally ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, A/CN.4/L.682 (2006), finalized by Martti Koskenniemi (‘ILC Fragmentation Study’).

¹³⁰ See generally Milanovic, ‘Norm Conflict in International Law: Whither Human Rights?’, (2009) 20 *Duke Journal of Comparative & International Law* 69.

¹³¹ See, for example, Pauwelyn, *supra* n 128 at 272.

conflicting norms be ‘read down’ or that exceptions from the rule it lays down are ‘read in’ in order to avoid the conflict.

If a conflict cannot be avoided through interpretation, it might be resolved. The resolution of norm conflicts is different from their avoidance in that there is an express reliance on some kind of rule which will prioritize one norm over the other. In domestic systems this is generally done through hierarchy (for example, a constitutional rule will trump a conflicting statutory one) or rules such as *lex posterior* (a later in time statute will prevail).¹³² The difficulty with international law in that regard is that its hierarchies are rudimentary, and that its law-making processes are diffuse and decentralized.¹³³ It is rarely feasible to think of relationship between specialized branches of international law, be it international human rights law, the law of armed conflict, trade law, or diplomatic and consular law, in terms of hierarchy.

This is why *jus cogens*, hierarchy-based arguments against state immunity have so often failed,¹³⁴ as for example, in *Germany v Italy* before the ICJ.¹³⁵ Nor is it obvious to say, for example, that the right to life is *in all its relevant aspects* a rule of *jus cogens*, riddled as it is with exceptions and caveats. It is simply inconsistent with the nature of the international legal system to argue that the right to life somehow *ipso facto* overrides all other rules of international law that may conflict with it, as if it simply sat at the apex of a normative hierarchy.

That international law is not organized as a pyramid of rules in hierarchical layers and that it does not have a centralized legislator can therefore lead to uncomfortable consequences: there are some norm conflicts which are genuine, in the sense that they cannot be avoided through interpretation, but are also unresolvable, in the sense that no meta-rule exists which can allow us to prioritize one conflicting norm over the other.¹³⁶ Some antinomies are simply there to stay. Just like in domestic law, where a person can conclude contracts which contain contradictory commitments (for example, selling the same house to two different people, or committing to teaching at two different universities at the same time), so can states assume contradictory obligations in international law. When faced with such a situation of unresolvable

¹³² See, for example, Milanovic, supra n 130, at 73-75. See also ILC Fragmentation Study, supra n 129 at para 34: ‘There is no single legislative will behind international law. Treaties and custom come about as a result of conflicting motives and objectives - they are “bargains” and “package-deals” and often result from spontaneous reactions to events in the environment.’

¹³³ See generally Weil, ‘Towards Relative Normativity in International Law?’ (1983) 77 *American Journal of International Law* 413.

¹³⁴ See, for example, Bianchi, ‘Human Rights and the Magic of *Jus Cogens*’ (2008) 19 *European Journal of International Law* 491; Milanovic, supra n 130, at 71-72.

¹³⁵ See supra n 24, paras 92-97 (the Court holding that there was no conflict between the customary rules of state immunity and *jus cogens* rules prohibiting murder of civilians in armed conflict, since the former operated purely on a procedural plane). See also Fox and Webb, supra n 24, at 324-5.

¹³⁶ See Pauwelyn, supra n 128, at 418 et seq.

norm conflict, the state will have to make an essentially political choice: which norm to respect, and which to violate, and be prepared to suffer the consequences of its violation.¹³⁷

With this in mind, let us go back to the conflict of obligations that Turkey was potentially faced with, between international human rights law on the one hand and diplomatic and consular law on the other.

4. Reading down international human rights law or diplomatic and consular law?

As we have seen, it first needs to be established whether the apparent norm conflict between international human rights law and diplomatic and consular law can be avoided through interpretation, so that one of the conflicting norms gives way to the other. First, in that regard, can Turkey's positive obligation to protect the right to life be read down in such a way as to accommodate its obligation to respect the inviolability of consular premises? As a formal matter, the answer to that question is a clear yes. Recall that the duty to protect life is one of due diligence. It only requires a state to do all that it can reasonably expected to do under the circumstances, which can easily be said to encompass the need to respect other applicable rules of international law. One could refer in that regard to the aspect of the rule of interpretation in Article 31(3)(c) of the Vienna Convention on the Law of Treaties,¹³⁸ under which the interpretation of a treaty shall take into account 'any relevant rules of international law applicable in the relations between the parties', or to the frequent references of human rights bodies, and the European Court in particular, to the fact that human rights law forms part of international law and cannot be interpreted in a vacuum.¹³⁹

In other words, the positive obligation is so inherently flexible that it could easily be interpreted more narrowly to avoid conflicts with other rules of international law, such as those regarding diplomatic and consular privileges and immunities. The problem with this approach is not that it is formally implausible, but that it is normatively entirely unappealing.¹⁴⁰ The duty to protect life would essentially be rendered into a nullity, despite the pressing, urgent need to save Khashoggi's life from state agents abusing the privileges and immunities of the consular post. It seems much more preferable to see whether flexibility could come from the other end, that of diplomatic and consular law.

¹³⁷ See Milanovic, *supra* n 130, at 117-19, 128-31.

¹³⁸ 1969, 1155 UNTS 331.

¹³⁹ See, for example, *Behrami and Behrami v France, Saramati v France, Germany, and Norway* Application Nos 71412/01, 78166/01, Admissibility Decision, 2 May 2007, at para 122.

¹⁴⁰ I openly admit to a rights-protective bias in this regard.

Second, in that regard, it is crystal clear that diplomatic and consular premises do not lose their status and inviolability simply because such status is being abused.¹⁴¹ The real issue, therefore, is not whether the Saudi consulate in Istanbul lost its entitlement to inviolability because it was being used in a manner incompatible with diplomatic and consular functions, but whether there is a relevant exception to the inviolability rule.

Crucially in that respect, we should recall that the inviolability provision in Article 31 VCCR is drafted in far less absolute terms than its equivalent in Article 22(1) of the VCDR, which seems to contain a categorical protection of inviolability and a total ban on entry by the agents of the receiving state without the consent of the head of mission. But even this absolute VCDR prohibition has been questioned. No less an authority on diplomatic law than Denza has remarked: ‘In the last resort, however, it cannot be excluded that entry [into a diplomatic mission] without the consent of the sending State may be justified in international law by the need to protect human life.’¹⁴² According to van Alebeek:

The drafting history of the Convention shows that there was not sufficient support to create an exception to the inviolability of mission premises for cases of ‘extreme emergency’. Most members of the ILC did assume that in customary international law some exceptions existed but it was generally thought unwise to codify these exceptions Most commentators agree that in case of extreme emergency, for example when necessary to protect human life, mission premises may be entered by the receiving State even against the express will of the sending State.¹⁴³

In a similar vein, in the *Tehran Hostages* case the ICJ was prepared to, *in extremis*, read down the equally categorical protection of the inviolability of diplomats:

Naturally, the observance of this principle [of inviolability] does not mean—and this the Applicant Government expressly acknowledges—that a diplomatic agent caught in the act of committing an assault or other offence may not, on occasion, be briefly arrested by the police of the receiving State in order to prevent the commission of the particular crime.¹⁴⁴

¹⁴¹ See, for example, Akande, ‘The Julian Assange Affair: May the UK Terminate the Diplomatic Status of Ecuador’s Embassy?’ *EJIL: Talk!*, Blog, 17 August 2012, available at: www.ejiltalk.org/may-the-uk-terminate-the-diplomatic-status-of-ecuadors-embassy/ (discussing the issue of whether the status of the premises of the Ecuadorian embassy in London could be terminated due to an unlawful grant of asylum to Julian Assange).

¹⁴² Denza, *Diplomatic Law* 4th ed (2016) 123.

¹⁴³ Van Alebeek, ‘Diplomatic Immunity’ *Max Planck Encyclopedia of Public International Law*, at para 8, available at: opil.ouplaw.com [last accessed 25 November 2019] (citing inter alia Denza); Brown ‘Diplomatic Immunity: State Practice under the Vienna Convention on Diplomatic Relations’ (1988) 37 *International and Comparative Law Quarterly* 53, 86-7; Herdegen ‘The Abuse of Diplomatic Privileges and Countermeasures not Covered by the Vienna Convention on Diplomatic Relations’ (1986) 46 *ZaöRV* 734.

¹⁴⁴ *United States Diplomatic and Consular Staff in Tehran (United States v Iran)*, Judgment, ICJ Reports 1980, 3, at 40, para 86.

Another useful analogy would be to the categorical inviolability of the diplomatic bag, which has historically been the subject of much controversy since it is easily amenable to abuse, for example through smuggling prohibited items. A particularly helpful example is the 1984 attempted kidnapping of Umaru Dikko by Nigerian agents in London. After being kidnapped, Dikko was sedated and put in a large shipping crate bearing the addresses of origin (the Nigerian High Commission in London) and destination (the Nigerian Foreign Ministry in Lagos). The crate was however *not* properly labelled as a diplomatic bag, and was subsequently found and opened by British police, who rescued Dikko. However in his testimony to the House of Commons Foreign Affairs Committee, the Foreign Secretary confirmed that, even if the crate was a diplomatic bag, his advice would have been that it would have been necessary to '[take] fully into account the overriding duty to preserve and protect human life'. The Committee subsequently welcomed 'this acceptance that the inviolability of the bag cannot take precedence over human life'.¹⁴⁵

Until the killing of Khashoggi, perhaps the most notorious example of the use of diplomatic or consular premises for lethal purposes was the 1984 shooting incident outside the Libyan embassy in London. On 17 April 1984, during an anti-Gaddafi protest outside the embassy, two gunmen from within the embassy opened automatic fire at the crowd. Many of the protesters were wounded, and a 25-year-old police constable, Yvonne Fletcher, was killed. In response UK authorities laid siege to the embassy at St. James's Square, but did not enter it by force. The siege lasted for 11 days, at which point the UK severed diplomatic relations with Libya, requiring (and allowing) all those in the embassy to leave the country.

There is a key difference between this case and Khashoggi's. The embassy was the source of the lethal threat, but the individuals whose life was in danger were outside it, and could move out of the vicinity. In other words, after the shooting there was no ongoing threat to the life of any specific person, which would have necessitated British authorities entering the embassy without Libya's permission.¹⁴⁶ In Khashoggi's case, however, the threat to life was to a person present on the premises of the consulate, and was posed by other persons on those premises.

¹⁴⁵ Denza, *supra* n 142, at 203.

¹⁴⁶ The UK government, in dialogue with the House of Commons Foreign Affairs Committee, contemplated the availability of self-defence as the basis for entry into an embassy without consent. Both the government and the Committee agreed that on the facts of the London shooting the requirements for self-defence were not met, as there was no continued shooting emanating from the embassy: see Denza, *supra* n 142 at 121-2. See also Higgins 'UK Foreign Affairs Committee Report on the Abuse of Diplomatic Immunities and Privileges: Government Response and Report,' (1986) 80 *American Journal of International Law* 135.

In sum, even in the case of categorical diplomatic protections for inviolability there are arguably implicit exceptions in situations in which there is an immediate threat to human life. Even so, Khashoggi was not killed on the premises of an embassy, but on those of a consulate. The protection for the inviolability of such premises is lower. Under Article 31(2) of the VCCR:

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

Two points could usefully be made here. First, that in murdering Khashoggi on the premises these were no longer ‘used exclusively for the purpose of the work of the consular post’, resulting in a loss of protected status. This does not, however, seem to be the intention of this language. Again, the principle that abuse does not result in loss of inviolability is fundamental in diplomatic and consular law. It would make little sense to say that in the space of an hour the premises of the consulate stopped being used exclusively for consular work and thus *ipso facto* lost protection. The idea here is rather than consulates are in practice frequently combined with other establishments, and that in such cases inviolability extends only to those parts of the premises used exclusively for consular purposes.¹⁴⁷ Second, unlike the VCDR, the VCCR explicitly creates an *assumed consent* exception to inviolability ‘in case of fire or other disaster requiring prompt protective action.’ The reference to a fire or other disaster would indicate that the primary purpose of this provision was to cover sudden events threatening life, such as fires, floods, earthquakes and the like. However, labelling the premeditated assault on Khashoggi as such a disaster is probably not too great of a stretch. The fact that the urgency was created by the agents of the sending state seems immaterial, as after all they could have caused a fire themselves as well, and Khashoggi’s situation certainly required prompt protective action.¹⁴⁸ In other words, the disaster need not be *natural* – we would likely all agree

¹⁴⁷ See d’Aspremont, ‘Premises of Diplomatic Missions’, *Max Planck Encyclopedia of Public International Law*, at para 32, available at: opil.ouplaw.com [last accessed 25 November 2019]; Lee and Quigley, *supra* n 54 at 359.

¹⁴⁸ The inclusion of the assumed consent for disasters exception in the VCCR was quite deliberate, as was the omission of such an exception in the VCDR: see Denza, *supra* n 142, at 118-19. In fact, the ILC Draft Articles on Consular Relations, which formed the basis for the negotiation of the VCCR, did not have an assumed consent exception, even though they expressly considered such a scenario; the exception was included in state negotiations on the ILC draft. See ILC Draft Articles on Consular Relations, with commentaries, (1961) 2 *Yearbook of the ILC* 92 at 110.

that the assumed consent exception in Article 31(2) of the VCCR applied if the consular staff inside the post were say being attacked by a terrorist group, and the receiving state sent its police inside the consulate to stop the attack without waiting for permission from the head of the assailed consular post. There is no reason why the result should be any different in a reverse scenario. As Lee and Quigley have noted:

There may be room for argument that reasonable cause to believe that a crime of violence has been, is being, or is about to be committed could be regarded as a ‘disaster requiring prompt protective action’. This argument would be easier to make in the event of violence against a person, rather than against property.¹⁴⁹

In sum, entry by Turkish authorities into the consulate during the attack on Khashoggi would arguably not have violated Article 31 of the VCCR, either because of the assumed consent exception in Article 31(2) or because of an implicit exception for entry without consent justified by the urgent need to protect human life.

5. Distress as a circumstance precluding wrongfulness

Alternatively, even if the entry into the consulate would have been wrongful, that wrongfulness could have been precluded by distress. Under the rule codified in Article 24(1) of the Articles on State Responsibility:

The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author’s life or the lives of other persons entrusted to the author’s care.

All of the requirements of this rule would have been met on the facts of Khashoggi’s case, had Turkish authorities entered the Saudi consulate without consent: (1) Khashoggi’s life was clearly in danger; (2) his life was entrusted to Turkey’s care, specifically Turkish security services, as he was present on Turkish territory, Turkey had an obligation under international human rights law to protect his right to life, and that obligation was triggered (on the facts assumed above) since the Turkish security services knew of a specific threat to his life; and (3) there was no other reasonable way of saving his life. Therefore, even if Turkey’s decision to enter the consulate to save Khashoggi’s life would have been wrongful under Article 31 of the

¹⁴⁹ Lee and Quigley, *supra* n 54, at 358.

VCCR—and, as we have seen above, it arguably would not have been—that wrongfulness would have been precluded by distress.¹⁵⁰

While the operation of distress in these circumstances appears fairly straightforward, a possible objection could be made that distress cannot operate with regard to violations of consular or diplomatic privileges and immunities. In that regard, in *Tehran Hostages* the ICJ remarked:

The rules of diplomatic law ... constitute a self-contained régime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse.¹⁵¹

The existence and nature of self-contained regimes in international law have attracted much scholarly attention.¹⁵² For our purpose, the issue is whether the self-contained nature of diplomatic and consular law, such as it is, categorically excludes reliance on secondary rules regarding circumstances precluding wrongfulness such as distress.

In my view, the answer to that question is clearly in the negative. It is one thing to say, as the Court did in *Tehran Hostages*, that countermeasures against diplomats and diplomatic premises are excluded by special rules of international law. The policy rationale for this exclusion is the avoidance of a tit-for-tat escalation that countermeasures frequently lead to and the need to keep diplomatic channels open at all times. But it simply does not follow from that position that *all* of the secondary rules of state responsibility are displaced by diplomatic law – they quite clearly are not.¹⁵³ Nor does it follow that none of circumstances precluding wrongfulness could ever be invoked with regard to violations of diplomatic and consular law. The ILC certainly does not say so in its ASR commentaries, in which it discusses the inadmissibility of resort to countermeasures in violation of the obligation to respect the inviolability of diplomatic or consular agents, premises, archives and documents, per Article

¹⁵⁰ Additionally, the requirements of necessity as a circumstance precluding wrongfulness, per Article 25 ASR, would also arguably be met on the facts of this scenario: the forcible entry to the consulate would be the only way for Turkey to ‘safeguard an essential interest against a grave and imminent peril’; the limited purpose, scope and time of the infringement of the inviolability of the consulate would not ‘seriously impair an essential interest’ of Saudi Arabia; and the relevant inviolability rules do not categorically preclude reliance on necessity.

¹⁵¹ *Tehran Hostages*, supra n 144 at para 86.

¹⁵² See, for example, ILC Fragmentation Study, supra n 129 at paras 123-190.

¹⁵³ For an extensive argument and more background in this regard, see Simma and Pulkowski, ‘Of Planets and the Universe: Self-contained Regimes in International Law’ (2006) 17 *European Journal of International Law* 483, at 491-4, 512-16.

50(2)(b) of the ASR.¹⁵⁴ Like the Court in *Tehran Hostages*, the Commission only refers to countermeasures and not any of the other circumstances precluding wrongfulness, noting:

If diplomatic or consular personnel could be targeted by way of countermeasures, they would in effect constitute resident hostages against perceived wrongs of the sending State, undermining the institution of diplomatic and consular relations. The exclusion of any countermeasures infringing diplomatic and consular inviolability is thus justified on functional grounds.¹⁵⁵

Again, no such rationale exists for distress as a circumstance precluding wrongfulness – for reliance on that rule to be excluded one would have to find a *lex specialis* rule displacing it, and such a rule simply does not exist.¹⁵⁶

D. Conclusion

This section has shown how Saudi Arabia's obligations under the Arab Charter and customary international human rights law extended to the conduct of its agents in its consulate in Istanbul, and how accordingly Saudi Arabia is responsible for violating the negative aspect of the right to life. Again, it is irrelevant whether the Saudi agents acted on the orders of Mohammed bin Salman or against them; Saudi Arabia is nonetheless responsible for the *ultra vires* conduct of its organs acting in their official capacity.¹⁵⁷

Similarly, Turkey's positive obligation to protect Khashoggi's life continued even after his entry into the consulate. It was engaged if Turkey knew, or ought to have known, of the risk to Khashoggi's life. On the facts as we currently know them, it is not conclusively established that Turkey was aware of the lethal threat to Khashoggi, but it is quite possible that it was. And if the obligation was triggered, Turkey could have fulfilled it by sending its police or other agents into the Saudi consulate, if need be without consent. Had Turkey done so, it would not have breached the inviolability of the consulate under the VCCR and, even if it did, that wrongfulness would have been precluded by distress. It is only if Turkey had some other feasible alternative to rescue Khashoggi that the analysis above would have been different. For example, it is possible that Turkish authorities could have contacted Saudi authorities or agents

¹⁵⁴ ILC ASR Commentary, supra n 8 at 339, para 14.

¹⁵⁵ Ibid. at 340, para. 15.

¹⁵⁶ Cf. Article 55 ASR and commentary. See also Crawford, *State Responsibility: The General Part* (2013) 697 (arguing that the ILC excluded only a narrow core of obligations under diplomatic and consular law from the remit of legitimate countermeasures, and that countermeasures not affecting that core would be permissible).

¹⁵⁷ See Article 7 ILC ASR.

on the ground to tell them that they knew of the threat to Khashoggi's life, which they should desist from immediately. Obviously, it is entirely dependent on the facts, which again are yet to be firmly established, whether such a warning or indeed a forcible entry into the consulate could actually have been effective.

5. After the attack

A. Generally

After Khashoggi's death, the substantive negative and positive obligations were extinguished, but the positive procedural obligation to investigate his death was triggered for both Saudi Arabia and Turkey. Like the substantive positive obligation to protect life, the procedural obligation to investigate is also one of due diligence, that is, it does not require the state to do the impossible, but only what could reasonably be expected of it in the circumstances. In other words, it is inherently flexible.¹⁵⁸ Investigations into allegations of violation of the right to life must always be independent, impartial, prompt, thorough, effective, credible and transparent, and in the event that a violation is found, full reparation must be provided.¹⁵⁹ I will now examine the obligations of Saudi Arabia and Turkey in this regard, as well as the obligation of these two states, and also the US, to cooperate in effectively investigating Khashoggi's death.

B. Saudi Arabia's obligation to investigate

It is manifest that Saudi Arabia is in violation of its procedural obligation to investigate Khashoggi's death, on multiple grounds. Its agents covered up the evidence of the murder and actively obstructed Turkish investigative efforts. Its own internal investigation has lacked any transparency. It is obvious that Saudi law enforcement authorities have no real independence from the executive, the conduct of which they are supposed to be investigating, particularly with regard to the question whether the Crown Prince ordered Khashoggi's killing or knew that the operation would take place. It is equally obvious that the outcome of the Saudi trial of 11

¹⁵⁸ See, for example, *Al-Skeini*, supra n 115 at paras 161-177, especially para 168: '[T]he Court considers that in circumstances such as these the procedural duty under Article 2 must be applied realistically, to take account of specific problems faced by investigators'.

¹⁵⁹ General Comment No 36, supra n 34 at para 28.

unnamed individuals charged with Khashoggi's death, which is shrouded in secrecy, is going to be determined by whatever the Saudi royals want the judges to say rather than by any kind of genuine pursuit for the truth. As the Special Rapporteur noted in her preliminary observations:

The Turkish authorities [were] deliberately denied the access and in-depth technical examination needed to discover, preserve and analyse evidence on the killing. ... It is unconscionable that the Saudi Arabia authorities continue to fail to disclose the whereabouts of Mr Khashoggi's remains, after having admitted that he met his death within their custody in their consular premises.

It is my assessment that woefully inadequate time and access was granted to Turkish investigators to conduct a professional and effective crime-scene examination and search. Crime-scene protection and meticulous examination are key to every criminal investigation the world over, especially when it comes to the most serious crimes. Every minute that passes between the commission of a crime and the examination of the crime scene is a diminished opportunity to discover crucial evidence. Every minute that passes without protecting the integrity of the crime scene makes the collection of evidence more problematic with adverse consequences as to its admissibility. Mr. Khashoggi was murdered on 2nd October. However, Turkish investigators, accompanied by Saudi investigators, only had access to the Consulate on the 15th October and to the Consulate residence on 17th October.

The evidence made available to us thus far indicates that prior to 15th October, up to four attempts were made to eliminate forensic evidence from the scene. We were also told that some re-painting had taken place during that period. In spite of these efforts, given sufficient time, skilled and well-equipped crime-scene investigators would still expect to find 'trace-evidence' of the commission of a murder such as that of Mr. Khashoggi. However, premises the size of the Consulate and the residence would take many days to examine thoroughly, especially if 'clean-ups' had taken place.

Delayed and limited access imposed by the authorities of Saudi Arabia to the criminal forensic investigation, severely limited its potential to produce telling evidence and was deeply regrettable.¹⁶⁰

In short, there is simply no doubt that Saudi Arabia is in violation of the procedural limb of the right to life.¹⁶¹

C. Turkey's obligation to investigate

The position of Turkey is, of course, very different. As a general matter Turkish authorities have demonstrated willingness to effectively investigate Khashoggi's death, and

¹⁶⁰ Callamard, supra n 21 at paras 10-14.

¹⁶¹ See also *ibid.* at para 17.

indeed much of what we know of his killing is directly the product of their investigative efforts. Had Turkey wanted to be complicit in the Saudi cover-up of the murder, it easily could have been, but it chose differently. As the Special Rapporteur explains:

In spite of the circumstances, the Turkish police did undertake extensive investigation work, including by reviewing thousands of hours of CCTV to piece together the movements of various members of the Saudi teams dispatched at the Consulate, investigating the routes they followed, the hotels rooms they occupied, etc.¹⁶²

That said, the work of the Turkish investigators has also been subject to considerations of high politics. In particular, it has been limited, and will be limited, by whatever political goals President Erdogan – no huge champion of the freedom of the press or human rights more generally – wishes to achieve in his management of the Khashoggi affair. And there are a number of specific decisions made by Turkish authorities that are at the very least arguably inconsistent with Turkey’s obligation under the ECHR and the ICCPR to effectively investigate Khashoggi’s death: (1) allowing the members of the Saudi hit-team to leave Turkey; (2) allowing the Saudi consul-general to leave Turkey; (3) delaying the search of the premises of the consulate; (4) delaying the search of the residence of the consul-general; and (5) possible issues with searches of the consulate’s vehicles.

I will now address each of these in turn. As with the scenario of the positive obligation to protect Khashoggi’s life during the attack, which we have looked at above, some of these points raise issues about possible norm conflicts between the international human rights law obligation to effectively investigate and consular privileges and immunities. In that regard, the key difference with the previous scenario is that the urgency to protect the right to life is no longer there, since Khashoggi was already dead. There is accordingly less of an imperative to interpret diplomatic and consular law flexibly so as to accommodate international human rights law. Similarly, distress as a circumstance precluding wrongfulness could not be relied on after Khashoggi’s death, as its applicability is strictly limited to situations which actively pose a threat to human life. As I will show, however, when properly interpreted consular privileges and immunities did not, in fact, pose a legal obstacle to a prompt and effective investigation with regard to all but one of the points above.

1. Allowing the Saudi agents to leave

¹⁶² Ibid. at para 15.

The first, and most consequential, decision of the Turkish authorities that is open to question is that of allowing the Saudi agents to leave Istanbul on two private jets at 7 pm and 11 pm on 2 October 2018.¹⁶³ Obviously, if Turkey had no idea who any of these people were, it could hardly be faulted for allowing them to leave. But if it *did* know who they were and what their purpose was, or harboured suspicions in that regard, then at the very least it could have prevented their departure. It did not need to arrest or detain them, at least not immediately – all it had to do was prohibit them from leaving.

Again, it seems quite possible that Turkish security services knew or should have known that they were dealing with Saudi agents. Notwithstanding whatever surveillance they had in the consulate and whether the information collected was being processed in real time, Turkish authorities were alerted to Khashoggi's disappearance after 3 pm that day, almost four and eight hours respectively, before the Saudi private jets departed. Moreover, all luggage is X-rayed immediately upon entry into the terminal building of Ataturk Airport; according to reports and still photos published in the Turkish press the airport authorities could see that the luggage of the Saudi contained '10 telephones and a wireless communications system, as well as two syringes, two electro-shock devices, a signal jammer, staplers and cutting tools,'¹⁶⁴ enough, at the minimum, to trigger suspicion and question them.

The same reports claim that the Saudi agents carried diplomatic passports, which is why their bags were not subjected to manual inspection.¹⁶⁵ But that a person is a holder of a diplomatic passport, the issuance of which lies solely within the discretion of the issuing state, says nothing about their entitlement to any privileges and immunities under international law.¹⁶⁶ The Saudi agents had no such entitlement, as they were neither members of the diplomatic mission in Ankara, nor officers of the consular post in Istanbul, nor had special mission immunity.

2. Allowing the Saudi Consul-General to leave

¹⁶³ See supra n 109 and accompanying text.

¹⁶⁴ See 'Jamal Khashoggi's killers carried syringes, electro-shock devices and cutting tools as they left Istanbul, says report', *The Independent*, 13 November 2018. See also 'İnfaz timinin X-Ray'e takılan cinayet aletleri: Telsiz, telefon, şırınga, şok cihazı...', *Sabah*, 13 November 2018, available at: www.sabah.com.tr/gundem/2018/11/13/infaz-timinin-x-raye-takilan-cinayet-aletleri-telsiz-telefon-siringa-sok-cihazı-1542100973 [last accessed 25 November 2019].

¹⁶⁵ Ibid. See also 'Turkey releases passport scans of men it says were involved in journalist's killing,' *Washington Post*, 16 October 2018.

¹⁶⁶ See, for example, US Department of State, 'Diplomatic and Consular Immunity: Guidance for Law Enforcement and Judicial Authorities' June 2015, at 17-18.

The second questionable decision of the Turkish authorities was that they allowed the Saudi Consul-General in Istanbul, Mohammad al-Otaibi, to leave the country on 16 October, the day before his residence was to be searched by Turkish authorities.¹⁶⁷ At this point Turkey definitely knew enough about Khashoggi's killing, and knew that the consul was involved in the operation or was at the very least a witness to it. One recording obtained by Turkish security services allegedly has the consul addressing the members of the hit-team as they were assaulting Khashoggi, telling them: 'Do this outside. You're going to get me in trouble.'¹⁶⁸ On 6 October, four days after the murder, al-Otaibi led *Reuters* reporters on a macabre tour of the consulate, opening cupboards and filing cabinets to show them that Khashoggi was not there, denying any knowledge of his abduction and dismissing allegations of the involvement of his mission in Khashoggi's disappearance as 'disgusting'.¹⁶⁹

Again, at a minimum, al-Otaibi was a material witness regarding Khashoggi's murder, yet he was nonetheless allowed to leave. Unlike the members of the Saudi hit-team, however, al-Otaibi *was* entitled to privileges and immunities, since he was the head of the consular post in Istanbul. But these immunities are not unqualified.¹⁷⁰ While the protection of the inviolability of a member of a diplomatic mission under Article 29 of the VCDR is categorical, and they are exempted from any obligation to give evidence as a witness under Article 31(2) of the VCDR, the same is not true for consular officers. Article 41(1) of the VCCR permits the arrest or detention of a consular officer for a 'grave crime', while Article 44 of the VCCR permits the receiving state to compel a consular officer to give evidence on matters not connected with the exercise of their functions, as murder obviously is not.¹⁷¹

There was, in short, nothing in consular law that would have prevented Turkey from arresting al-Otaibi or at least questioning him as a witness and prohibiting him from leaving the country, as any reasonable line of inquiry would have required for an investigation to be effective. He was simply not a diplomat. The immunities he was entitled to were of a lesser

¹⁶⁷ See 'Saudi consul general leaves Turkey for Riyadh: Turkish broadcasters', *Reuters*, 16 October 2018, available at: www.reuters.com/article/us-saudi-politics-dissident-consul/saudi-consul-general-leaves-turkey-for-riyadh-turkish-broadcasters-idUSKCN1MQ23T [last accessed 25 November 2019]; 'Senior Saudi diplomat in Istanbul when Khashoggi was killed drops out of sight', *Washington Post*, 12 November 2018.

¹⁶⁸ See 'Jamal Khashoggi: Turkish police search Saudi consul's residence', *BBC News*, 17 October 2018, available at: www.bbc.co.uk/news/world-middle-east-45887556 [last accessed 25 November 2019].

¹⁶⁹ See 'Saudi Arabia opens up consulate after journalist vanishes', *Reuters*, 6 October 2018, available at: www.reuters.com/article/us-saudi-politics-dissident-consulate/saudi-arabia-opens-up-consulate-after-journalist-vanishes-idUSKCN1MG0RC [last accessed 25 November 2019].

¹⁷⁰ See also Lee and Quigley, *supra* n 41 at 435-36.

¹⁷¹ See also *ibid.* at 487-8.

and more qualified kind. The same goes for any other staff of the consulate who may have had information about the murder.¹⁷²

3. Delay in searching the consulate

This brings us to the most difficult issue in the interaction between Turkey's obligation to investigate under international human rights law and its duties under consular law – the delayed search of the premises of the consulate, which only took place on 15 October and was limited in scope. Since almost two weeks had passed, Saudi authorities had ample opportunity to tamper with the crime scene.¹⁷³ The delay was caused by Turkey waiting for Saudi consent to enter the premises, and deliberate Saudi obstruction in that regard.

Here, however, Turkey was legally impeded from entering the consulate, unlike in the scenario of entry for the purpose of saving Khashoggi's life which we have looked at above. While the threat to Khashoggi's life could be treated as a disaster requiring prompt protective action, which could have triggered distress or the assumed consent exception to inviolability per Article 31(2) of the VCCR, this is not the case when it becomes known that Khashoggi is already dead. Investigating Khashoggi's death is, in other words, not as compelling a reason for an exception from inviolability as saving his life would have been.

The issue, then, is whether Turkey could have done anything more than it already did by putting public pressure on Saudi Arabia to provide its consent for entry, especially as a prompt search of the crime scene would under ordinary circumstances have been an indispensable requirement for Turkey's compliance to effectively investigate the killing. Turkey did have one such option. It could have notified Saudi Arabia that it should provide consent for the search immediately, and that if it refused to do so Turkey would have no choice but to sever consular relations between the two states. Severance could take immediate effect, and would have had two main legal consequences. First, it would have terminated the consular functions of all members of the consular post, whom Turkey would have been obliged to give necessary time to prepare their departure and leave the country, per Article 26 of the VCCR. But that inviolability of the consular officers would have been no greater than the one that they

¹⁷² One such individual was an intelligence officer and the deputy head of the Saudi consulate, Ahmad Abdullah al-Muzaini. Muzaini made a quick trip to Riyadh after Khashoggi first visited the consulate on 28 September. He returned to Istanbul the day before the killing and was photographed passing through Ataturk Airport with heavy luggage. He left the country again at 9.35 pm on the evening of Khashoggi's killing; see 'Saudi King Stands by Crown Prince as Outrage Over Khashoggi Killing Spreads,' *New York Times*, 19 November 2018.

¹⁷³ *Supra* n 160.

would have enjoyed otherwise, that is, they would still be liable for arrest for grave crimes and could be compelled to testify.

Second, per Article 27(1)(a) of the VCCR, '[i]n the event of the severance of consular relations between two States ... the receiving State shall, even in case of armed conflict, respect and protect the consular premises, together with the property of the consular post and the consular archives.' In the case of severance of consular relations, the receiving state's duty to respect the inviolability of consular premises transforms into the duty to respect and protect the consular premises. This duty is of a lesser order than the one to respect inviolability; that position is the same under diplomatic law.¹⁷⁴ In particular, the duty to respect and protect consular premises does *not* prohibit the law enforcement agents of the receiving state from searching those premises as the scene of a crime. This is, in fact, precisely what the UK government did with regard to the 1984 shooting incident at the Libyan embassy in London, which resulted in the death of Yvonne Fletcher—it severed diplomatic relations, allowed the embassy staff to leave the country, and then searched the embassy after a deadline that it had set had passed.¹⁷⁵

Had it either obtained consent or severed consular relations and searched the consulate without consent upon severance, Turkey would have been in a much better position to comply with its international human rights law obligation to effectively investigate Khashoggi's death. Doing so would, however, have come at a cost. While Turkey would have been perfectly within its rights to sever consular relations, this would inevitably have deeply aggravated its relations with Saudi Arabia. It is genuinely difficult to say that human rights law could reasonably expect a state to pay such a price, that is, that the expected political fallout, including possible Saudi retaliation (however unjustified) is worth nothing in the balance and that Turkey's authorities should be owed little or no deference in making this kind of judgement.

4. Delay in searching the consul's residence

No such difficulty exists, however, when it comes to the delay in searching the consul-general's residence. Here, too, Turkey was waiting for Saudi consent, which it obtained only on 17 October.¹⁷⁶ The delay and restricted access given likely severely compromised the information that could usefully be obtained from the residence, which could have been

¹⁷⁴ See Denza, *supra* n 142 at 147, 396-402.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Supra* n 160.

particularly helpful in establishing what ultimately happened to Khashoggi's body. Shortly after 3 pm on 2 October, surveillance footage showed vehicles with diplomatic license plates leaving the Saudi consulate for the consul-general's residence.¹⁷⁷ It is very possible that Khashoggi's remains were in those vehicles, and that they were somehow later disposed of on the premises of the residence. Some reports have alleged that Khashoggi's dismembered body was dissolved in acid in the consul's residence, and that there was some 'biological evidence' to that effect in the residence garden.¹⁷⁸ More recent reports allege that Khashoggi's body was likely incinerated in a large outdoor furnace in the residence garden over a period of three days.¹⁷⁹

Legally, the key point here is that the residence of a consul enjoys no inviolability whatsoever.¹⁸⁰ Only the residence of a *diplomatic* agent does, per Article 30(1) of the VCDR. No equivalent provision exists in the VCCR.¹⁸¹ 'Neither the consul's residence nor property has any inviolability.'¹⁸² There was and there exists no need at all—at least not legally—to obtain Saudi consent to search those premises, or accept any limits on how and to what extent the search is to be conducted. Again, in waiting for consent Turkey was likely trying not to excessively antagonize the Saudi government, but it is on much shakier ground here than with regard to the search of the consulate itself when it comes to its compliance with international human rights law.

5. Search of consular vehicles

The same goes for the search of any consulate vehicles. The Saudi hit-team appears to have used at least seven different cars before and after the killing. A number of press reports have suggested that Turkish authorities could not search some of these cars, or other cars belonging to the consulate, due to consular immunity.¹⁸³ But again, unlike a diplomatic car, a

¹⁷⁷ See *supra* n 78.

¹⁷⁸ See McKernan, 'Jamal Khashoggi's body was "dissolved", says Erdoğan adviser', *The Guardian*, 2 November 2018.

¹⁷⁹ See 'Jamal Khashoggi's body likely burned in large oven at Saudi home,' *Al-Jazeera*, 4 March 2019, available at: <https://www.aljazeera.com/news/2019/03/jamal-khashoggi-body-burned-large-oven-saudi-home-190304011823218.html> [last accessed 25 November 2019].

¹⁸⁰ See Lee and Quigley, *supra* n 54 at 360-1.

¹⁸¹ This is deliberate: see ILC Draft Articles on Consular Relations, with commentaries, *supra* n 148 at 110, para 9 (noting that only a very few bilateral conventions and municipal systems recognized the inviolability of a consular residence).

¹⁸² Foakes and Denza, *supra* n 53 at para 8.39.

¹⁸³ See, for example, 'Jamal Khashoggi: Saudi consulate car found abandoned in Istanbul, Turkish police say,' *The Independent*, 22 October 2018; 'Turkish police find clothes in suitcases locked in abandoned Saudi consular

consular vehicle enjoys no immunity or inviolability. While Article 22(3) of the VCDR stipulates that ‘the means of transport of the mission shall be immune from search, requisition, attachment or execution,’ Article 31(4) of the VCCR immunizes the means of transport of the consular post only from *requisition* for purposes of national defence or public utility, and does not protect them from *search*.¹⁸⁴

6. Conclusion

In short, Turkish authorities have demonstrated a genuine desire to find out what happened to Khashoggi,¹⁸⁵ although that desire is inevitably tempered by political considerations. That said, some decisions made by Turkish authorities were not required by the need to respect consular privileges and immunities and were, at least arguably, in violation of their duty to effectively investigate the killing. Turkey’s responsibility on some of these grounds would, of course, depend on a conclusive and reliable determination of the relevant facts.

D. Obligation to cooperate, including on the part of the United States of America

The final aspect of the positive procedural obligation that I will examine is the duty of states to cooperate in effectively investigating Khashoggi’s death. In a situation in which the evidence required to put together a full picture of a person’s unlawful death is located in two or more different states, generally the only way of assembling that picture is for these states to cooperate. Traditionally this has been done through often difficult and time-consuming processes such as mutual legal assistance or extradition requests, which tend not to work efficiently even in cases which are politically insignificant. Clearly these are hardly going to work in Khashoggi’s case. On the one hand, Saudi Arabia has put a number of individuals on trial and point-blank refused Turkish requests to extradite the suspects. On the other, the forensic evidence of the killing, such as it is, is located in Turkey, where the murder actually happened.

car’, *Hurriyet*, 23 October 2018, available at: www.hurriyetdailynews.com/three-suspicious-luggages-locked-in-saudi-consular-car-abandoned-in-istanbul-parking-lot-138174 [last accessed 25 November 2019].

¹⁸⁴ This is again a deliberate choice of the drafters of the VCCR. The original proposal of the ILC was to give consular vehicles the same inviolability as the consular premises, reproducing *mutatis mutandis* the text of Article 22 VCDR: see ILC Draft Articles on Consular Relations, with commentaries, *supra* n 148 at 109.

¹⁸⁵ See also Callamard, *supra* n 21 at paras 16 and 19.

Transnational investigations have attracted comparatively little attention from the standpoint of the procedural limb of the right to life. Cases in which a crime crosses state borders, or evidence of the crime does so, are hardly rare. But they have generally not been litigated before human rights bodies on grounds that the procedural limb has been violated because the states involved did not cooperate sufficiently. The one exception is the European Court of Human Rights. In fact, the Grand Chamber of the Court very recently decided the case of *Güzelyurtlu and Others v Cyprus and Turkey*,¹⁸⁶ in which it systematized and developed its approach to the duty to cooperate. The facts of the case were as follows. In January 2005, a Turkish Cypriot businessman, who used to live and work in the separatist and unrecognized Turkish Republic of Northern Cyprus (TRNC) but moved to southern Cyprus after the collapse of his business, was brutally murdered, together with his wife and daughter, in the Cypriot government-controlled part of Cyprus. The murder suspects all fled to the TRNC. The case concerned alleged failures on the part of Cyprus and Turkey, which is in control of the TRNC, to cooperate to adequately investigate the murders.

One issue in the case was the extraterritorial scope of the procedural obligation to investigate. The Court found unanimously that Turkey was under an obligation to cooperate in investigating the murders, even though they did not take place on its territory or even on the territory controlled by the TRNC. The obligation to cooperate was engaged because the TRNC authorities had initiated a domestic investigation, in accordance with their own legal rules, and because nebulously-defined ‘special features’ existed which created a jurisdictional link between Turkey and the victims, primarily the fact that the suspects were present in a territory controlled by Turkey.¹⁸⁷ This is an approach that is hard to square with either the spatial or personal models of jurisdiction, which focus on the location of or state control over the *victim*, not the location of the perpetrator, although the Court’s bottom line would fit well with the Human Rights Committee’s functional approach in General Comment No 36.¹⁸⁸ Nor does the Court’s approach require that the deprivation of life was allegedly done by a state agent. All that is required is either the initiation of a domestic investigation or the presence of the suspects on the state’s territory, of which the state is aware.

¹⁸⁶ *Güzelyurtlu and Others v. Cyprus and Turkey* Application No 36925/07, Merits, 29 January 2019 [Grand Chamber].

¹⁸⁷ *Ibid.* at paras 191-197.

¹⁸⁸ See *supra* ns 102-105 and accompanying text.

On the merits of the case the Court found no issues with the conduct of the parallel investigations in Cyprus and the TRNC; what was at stake was solely the duty to cooperate.¹⁸⁹ In that regard, the Court held that:

In cases where an effective investigation into an unlawful killing which occurred within the jurisdiction of one Contracting State requires the involvement of more than one Contracting State, the Court finds that the Convention's special character as a collective enforcement treaty entails in principle an obligation on the part of the States concerned to cooperate effectively with each other in order to elucidate the circumstances of the killing and to bring the perpetrators to justice.

The Court accordingly takes the view that Article 2 may require from both States a two-way obligation to cooperate with each other, implying at the same time an obligation to seek assistance and an obligation to afford assistance. The nature and scope of these obligations will inevitably depend on the circumstances of each particular case, for instance whether the main items of evidence are located on the territory of the Contracting State concerned or whether the suspects have fled there.

Such a duty is in keeping with the effective protection of the right to life as guaranteed by Article 2. Indeed, to find otherwise would sit ill with the State's obligation under Article 2 to protect the right to life, read in conjunction with the State's general duty under Article 1 to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", since it would hamper investigations into unlawful killings and necessarily lead to impunity for those responsible. Such a result could frustrate the purpose of the protection under Article 2 and render illusory the guarantees in respect of an individual's right to life. The object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective.¹⁹⁰

The Court thus grounded the duty to cooperate in the Convention's 'special character' and in its object and purpose. It then further emphasized that the duty to cooperate was one of means, not one of result, and that it only requires states to take reasonable steps, acting in good faith and consistently with other rules of international law, avoiding possible issues of norm conflict.¹⁹¹

On the merits the Court concluded that Turkey failed to comply with its duty to cooperate with Cyprus, but that Cyprus did not fail in its duty to cooperate with Turkey. In particular, the Court held that the submission of an extradition request from Cyprus to Turkey via informal channels was appropriate in the absence of diplomatic relations between the two states. It also found that the refusal by Cyprus to submit its whole investigation file to TRNC authorities was not unreasonable, since it would under the circumstances be tantamount to a

¹⁸⁹ *Güzelyurtlu*, supra n 186 at para 221.

¹⁹⁰ *Ibid.* at paras 232-234.

¹⁹¹ *Ibid.* at paras 235-236.

waiver of Cyprus' jurisdiction over a crime committed on its territory to the authorities of an unrecognized entity established on its territory.¹⁹² Turkey, on the other hand, was faulted for not making a minimum effort to cooperate by refusing to even consider the Cypriot request for the extradition of the suspects.¹⁹³ The Court was unanimous on the issue of the extraterritorial scope of the duty to cooperate and on Turkey's failure to comply with it, while the decision that Cyprus was not responsible was made by 15 votes to 2.¹⁹⁴

The analogy with Khashoggi's case is reasonably straightforward. Both Turkey and Saudi Arabia have initiated domestic investigations, and the suspects are present in Saudi territory (and were additionally the state's own agents). The duty to cooperate would thus be triggered, notwithstanding any other potential issues regarding the two states' parallel investigations. And while Turkey was reasonably accommodating to various Saudi requests in how the investigation was to be conducted, for example with regard to the search of the consulate and the consul-general's residence, Saudi Arabia point-blank refused to even consider extraditing the suspects to Turkey, where the murder took place, and has hardly been forthcoming in sharing whatever evidence it has at its disposal. It seems reasonably clear, therefore, that Saudi Arabia is in violation of its duty to cooperate.

The key question here is of course to what extent should the European Court's approach to the duty to cooperate under the procedural limb of Article 2 of the ECHR be generalizable to other human rights treaties, such as the ICCPR or the Arab Charter, or for that matter to state obligations under customary international human rights law. In its General Comment No 36 the Human Rights Committee expressed its view that 'States should support and cooperate in good faith with international mechanisms of investigation and prosecutions addressing possible violations of article 6'.¹⁹⁵ The most natural way of reading this sentence would be that the duty to cooperate extends to investigatory mechanisms established at the international level, such as a UN tribunal, commission or special mandate, but not necessarily as referring to a duty of states to cooperate with each other.¹⁹⁶

It is also unclear whether the duty to cooperate should extend to states who had no involvement of their own agents in an individual's death and do not have the suspects on their territory, but only possess *evidence* which may be relevant to an investigation. Such is, of

¹⁹² Ibid. at paras 241-255.

¹⁹³ Ibid. at paras 258-266.

¹⁹⁴ Ibid.

¹⁹⁵ General Comment 36, supra n 34 at para 28.

¹⁹⁶ In fact footnote 136, which the Committee uses to support this sentence, refers to its 2012 concluding observations on Kenya, in which it commented on Kenya's obligation to cooperate with the International Criminal Court.

course, the position of the United States (and perhaps also the United Kingdom and some other governments) with regard to Khashoggi. These third states may have in their possession crucial items of evidence, particularly in the form of intercepted communications or other types of signals intelligence.¹⁹⁷ Obviously even if a duty to cooperate existed and was triggered it would not be absolute, but would be limitable by reference to other legitimate goals, such as the need to avoid compromising intelligence-gathering sources and methods.

6. Conclusion

The murder of Jamal Khashoggi is in many respects a truly extraordinary case. But it is by no means unique – authoritarian states assassinate journalists and political dissidents with some frequency. The use of consular premises as the scene of the killing is, of course, one special feature of this affair. While diplomatic and consular privileges and immunities are abused all the time, this is not normally done in so spectacular a fashion.

What makes Khashoggi's killing so fascinating from the standpoint of an international legal analysis is the interplay between the human right to life and the rules of diplomatic and consular law. The fundamentals of the operation of the right to life in its various aspects are reasonably clear. Before the killing, the positive duty to protect Khashoggi's life was triggered if Turkey and the United States knew, or ought to have known, of a real and immediate risk to Khashoggi's life. It seems possible, if not likely, that these two states, and potentially others as well, did in fact possess such information so that the threat to Khashoggi's life was reasonably foreseeable to them. If that was the case—something that is yet to be dependably determined – at the very minimum these states had the duty to warn Khashoggi of the threat, which they did not do.

As I have explained above, the duty to warn does not impose unreasonable burdens on states engaged in intelligence-gathering activities. First, it is subject to a jurisdictional threshold, which may be looser, per the Human Rights Committee's new functional approach to the extraterritorial application of the right to life, or stricter, per the more traditional spatial or personal conceptions of jurisdiction. Opinions will clearly differ in this regard as to which approach should prevail. The key point here, however, is that a state lacking the *capacity* to fulfil the duty to warn will *never* be expected to have to do so. Second, the duty will only be engaged if a specific unlawful threat to the life of an individual was reasonably foreseeable to

¹⁹⁷ See supra nn 106-108 and accompanying text. See also 'CIA concludes Saudi crown prince ordered Jamal Khashoggi's assassination', *Washington Post*, 16 November 2018 (discussing US intercepts of conversations mentioning Khashoggi between the Crown Prince and his brother, the Saudi Ambassador to the US).

the state. Third, the duty to warn is one of due diligence, and the state can take a number of relevant considerations into account in deciding on how to fulfil it. It might, for example, choose to convey the substance of the threat in a way that will avoid any risk of compromising intelligence-gathering sources and methods. It might choose to do so through an intermediary, such as a relevant agency of a partner state. In the vast majority of conceivable circumstances the state will be able to convey a warning without compromising its essential interests in any meaningful way. Granted, the state will have to devote *some* resources towards actually complying with the obligation. But such an expectation is not unreasonable, especially bearing in mind that this rather modest burden will usually fall on the wealthiest, most powerful states in possession of an extensive foreign intelligence apparatus, whose ultimate purpose should after all be the safeguarding of human life.

Moving now to the moment of the attack on Khashoggi, there is no doubt that Saudi Arabia was in flagrant violation of the negative obligation to refrain from arbitrary deprivations of life under Article 5 of the Arab Charter and customary international law. As for Turkey, if it knew, or ought to have known, of the threat to Khashoggi's life in the premises of the Saudi consulate in Istanbul (which is yet to be conclusively established), it would have been required by its obligation to protect his life under Article 2 of the ECHR and Article 6 of the ICCPR to forcibly enter the consulate if that was the only way of saving his life. Finally, after Khashoggi's killing the procedural positive obligation to investigate his death was engaged. As we have seen, while these fundamentals are reasonably clear there are also many complex questions of scope and applicability, for example with regard to the duty to cooperate. And there is a significant potential for norm conflicts between human rights on the one hand, and consular privileges and immunities on the other.

Norm conflicts between human rights and immunities are nothing new for international lawyers. We are used to looking at conflicts between state immunity and justice for past mass atrocities committed by state armed forces.¹⁹⁸ We are also used at looking at conflicts between the imperative to fight against impunity and the rules of international law protecting the immunities *ratione personae* and *ratione materiae* of high-ranking state officials.¹⁹⁹ Khashoggi's case, however, allows us to look at a set of possible norm conflicts between immunities and human rights unfolding in real time, as states have to make various operational decisions and prioritize one set of concerns over the other. This is not, in other words, a case

¹⁹⁸ See supra ns 24-25 and accompanying text.

¹⁹⁹ See, for example, *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* Judgment, ICJ Reports 2002, 3.

about *procedural* immunity rules conflicting (or not) *ex post facto* with state substantive obligations, but a conflict between obligations operating on the same substantive plane. This is especially the case for human rights obligations applying before and during the attack on Khashoggi, when the imperative to save his life operated with full force.

In that regard, the analysis above has shown that most of the norm conflicts between immunities and the right to life could have been avoided in Khashoggi's case. This is primarily because Khashoggi was killed on the premises of a consulate and not those of a diplomatic mission, and because consular privileges and immunities are significantly weaker than diplomatic ones. First, had Turkish authorities forcibly entered the Saudi consulate in Istanbul in an attempt to save Khashoggi's life they would have been justified in doing so, either through the operation of exceptions from the inviolability rule regarding consular premises or by invoking distress as a circumstance precluding wrongfulness. Second, many of the decisions that Turkey had made which compromised the effectiveness of the investigation, but which Turkey claimed it had to pursue in order to respect consular privileges and immunities, were in fact not required by consular law. No rule of international law required Turkey to allow the Saudi agents to leave the country, to allow the consul-general and other members of consular staff to leave the country, or to ask Saudi Arabia for consent to search the consul-general's residence or the consulate's vehicles. Only the consular premises were protected by inviolability.

It is therefore unclear why Turkey acted as if international law laid such obstacles in front of it, when in doing so it actually exposed itself to legal liability under international human rights law for failing to effectively investigate Khashoggi's death. There are several possible explanations. First, Turkey could have genuinely misunderstood the legal position, failing to appreciate the attenuated nature of consular immunities. The confusion of consular privileges and immunities with the more expansive diplomatic versions has certainly been pervasive in the coverage of the Khashoggi affair. In fact, in a speech in parliament President Erdogan lamented the fact that the 'Vienna Convention'—he did not specify which—inhibited the investigation through the 'diplomatic immunity'²⁰⁰ it provided for, commenting that it may need to be reviewed or revised.²⁰¹

²⁰⁰ In the Turkish original 'diplomatik dokunulmazlığa' – see 'Kaşıkçı'nın öldürülmesi Viyana Konsolosluk Sözleşmesi'ni tartışmaya açtı', *Hurriyet*, 25 October 2018, at www.hurriyet.com.tr/dunya/kasikcinin-oldurulmesi-viyana-konsolosluk-sozlesmesini-tartismaya-acti-40998026 [last accessed 25 November 2019].

²⁰¹ See 'Turkey's Erdogan says there's strong evidence to show that the Khashoggi killing was planned', *CNBC*, 23 October 2018, available at: www.cnbc.com/2018/10/23/turkey-khashoggi-statement-by-erdogan.html [last accessed 25 November 2019]; 'Erdogan says the Vienna Convention hamstrung Turkey's search for Khashoggi. Here's what that is', *Washington Post*, 23 October 2018.

Second, Turkey could have understood that it would have been legally entitled to take the relevant investigative steps without Saudi consent, but nonetheless chose to ask for such consent. It could have done so in order to avoid antagonizing Saudi authorities and a further deterioration of their bilateral relationship. In particular, it could have been concerned about (unjustified) retaliatory measures by Saudi authorities against Turkish citizens or diplomatic and consular agents in Saudi Arabia. It could also have acted so to avoid any reputational cost internationally from a perceived violation of norms protecting inviolability, even if legally its course of action would have been justified. Or it could have had some other, less principled, political reason.²⁰² Whatever the reason for its conduct may have been, however, Turkey arguably did not do all it could have done in investigating Khashoggi's death.

The legal situation would have been much more difficult had Khashoggi indeed been killed on the premises of a diplomatic mission. In that scenario Turkey would still have been able to enter the premises of the mission without Saudi consent in order to save Khashoggi's life, either on the basis of an implied exception to inviolability in cases of an imminent threat to human life or on the basis of distress, but it could not have performed most of the relevant investigate steps without Saudi consent if it wished to avoid violating the VCDR. In such a scenario the international human rights law procedural positive obligation to investigate, which is inherently flexible, could easily be read down to accommodate the more categorically framed diplomatic privileges and immunities. But that it *could* be read down in such a way does not necessarily mean that it *should* be read down so far as to render it completely ineffective in the circumstances. There is always the possibility—an uncommon one, but not always inherently an undesirable one—that Turkey would have found itself in a situation of unresolvable norm conflict, that is, one in which it could not comply with international human rights law without violating the VCDR, and vice versa. To be clear, I am not arguing here that human rights trump diplomatic immunity or inviolability in any hierarchical sense, for example by virtue of *jus cogens*. These are norms on an equal footing, which may be incongruent. In a situation of unresolvable conflict Turkey would have had a political choice to make as to which norm to respect and which to violate, paying the legal and political cost for whatever choice it made.

²⁰² Cf. Callamard, *supra* n 21 at para 9: 'The Turkish authorities' compliance with these standards [of effective investigation under human rights law] was seriously curtailed and undermined by Saudi Arabia's unwillingness, for some 13 days, to allow Turkish investigators access to the crime scenes. Our interviews suggested to us that the Turkish government's concerns over diplomatic immunity and over the risks of escalation of the political crisis may have been a consideration' and at para. 22: 'We were told that that Turkey initially sought not to escalate the issue [of immunity] further, including for fear of retaliation by the Saudi authorities.'

The harmonious co-existence of different rules of public international law is not some kind of ultimate good towards which we must always strive. It involves a series of inherently choices between competing considerations, choices which are inherently political. In fact, Turkey *already* chose to violate the inviolability of the Saudi consulate, and effectively admitted doing so, by subjecting its premises to surveillance, because it pursued some other goals. It could also have chosen to go against that inviolability in order to conduct an effective murder investigation, and thus comply with its obligations under international human rights law. The price to be exacted for that violation would likely not have been exorbitant, partly because Turkey could reasonably argue that it was taking that step because of Saudi obstruction, and partly because Saudi Arabia does not have the reputation of a state particularly mindful of the sanctity of immunities under international law. We should recall in that regard that in 2017 Saudi Arabia blatantly violated the immunity and inviolability of a visiting head of government, the Lebanese Prime Minister, Saad Hariri, whom it detained, verbally humiliated and physically abused, forced to resign from office and released only after intervention from Western governments. Leading that assault on Hariri was the same man who oversaw Khashoggi's murder, Saud al-Qahtani—by education rather unfortunately a lawyer, but also a consummate princely torturer, poet and propagandist.²⁰³

If the analysis in this article is correct, so that Saudi Arabia, and arguably also Turkey and the US, were in violation of their obligations under international human rights law, the question remains what the consequences of these violations should be. State responsibility for internationally wrongful acts involves the duty of the relevant state to cease the act if it is still continuing and to provide full reparation for any injury caused.²⁰⁴ In particular, Saudi Arabia is obliged to cease any continuing obstruction of any domestic and international investigations into Khashoggi's death. Saudi, US and Turkish authorities are also obliged to cooperate to investigate Khashoggi's killing fully. Saudi Arabia should also monetarily compensate Khashoggi's next-of-kin for the mental suffering that they sustained, both individually and on Khashoggi's behalf. Any US and Turkish responsibility for failing to protect Khashoggi's life depends on a further investigation of the relevant facts; at the very least reparation for such a

²⁰³ See 'How the man behind Khashoggi murder ran the killing via Skype', *Reuters*, 22 October 2018, available at: uk.reuters.com/article/uk-saudi-khashoggi-adviser-insight/how-the-man-behind-khashoggi-murder-ran-the-killing-via-skype-idUKKCN1MW2H4 [last accessed 25 November 2019]; 'Behind Prince Mohammed bin Salman's Rise, Two Loyal Enforcers,' *New York Times*, 14 November 2018; 'Why Saad Hariri Had That Strange Sojourn in Saudi Arabia,' *New York Times*, 24 December 2017.

²⁰⁴ See Articles 30 and 31 ILC ASR.

violation would require satisfaction, for example through a public acknowledgement of responsibility.²⁰⁵

As for the criminal prosecution of the individuals responsible for Khashoggi's death, it is possible that the ongoing trials in Saudi Arabia will provide some measure of justice. But it also seems inevitable that those implicated who are closest to the crown prince will be shielded from responsibility. Because murder of a single individual is not itself a crime under international law, and specifically is not a crime of universal jurisdiction, prosecutions of any persons involved in Khashoggi's death are likely possible only in Turkey or Saudi Arabia. Turkey could, for example, ask Interpol to issue red notices regarding any of the relevant suspects who may travel outside Saudi Arabia, but this will obviously be a matter for the prudential and political judgment of the Turkish authorities. Finally, there is the possibility of a full international investigation, such as the one authorized by the UN Security Council after the assassination of Rafiq Hariri (Saad's father, and former Lebanese Prime Minister). Hariri's killing was also simple murder under domestic law and not an international crime, but it resulted in the establishment of the Special Tribunal for Lebanon. This only happened, however, because there was political will in the Council to establish such a court, which has not actually been able to obtain custody over the most important suspects. Bearing in mind the current political climate, the establishment of such a mechanism seems unlikely here.

That said, whether accountability for Khashoggi's killing is ever fully realized does not change the fact that his right to life was protected by international law, as was the right to life of countless other victims of authoritarian regimes worldwide. The murder was a violation of the rights Khashoggi himself had had under international law, not simply those of the Turkish state. It deserves to be discussed in those terms.

POSTSCRIPT

In June 2019, the UN Special Rapporteur on extrajudicial executions, Agnes Callamard, submitted to the Human Rights Council her full report on the killing of Jamal Khashoggi.²⁰⁶

²⁰⁵ A good comparison point in that regard would be the public apology given by the UK government to Abdel Hakim Belhaj for the UK's role in his rendition to Libya, where he was subsequently imprisoned and tortured: see, for example, 'Britain apologises for 'appalling treatment' of Abdel Hakim Belhaj', *The Guardian*, 10 May 2018.

²⁰⁶ The report itself is comprised of two documents. First, the formal report to the Human Rights Council, submitted for its 41st regular session, A/HRC/41/36, 19 June 2019. Second, a 100 page annex to that report, which contains the Special Rapporteur's detailed factual and legal findings with regard to the murder of Jamal

The report is extensive, detailed and rich in its legal and factual analysis. It concludes that Saudi Arabia bears state responsibility for the extrajudicial killing of Mr Khashoggi, in violation of his human right to life, and that it has similarly violated its positive obligation to effectively investigate his killing. She has *inter alia* called on the UN Secretary-General, the Human Rights Council and the Security Council to establish an independent international criminal investigation into Khashoggi's murder, and has specifically found that credible evidence existed for the potential responsibility of the Saudi Crown Prince, Mohammed bin Salman, and his principal henchman, Saud al-Qahtani. The report's legal analysis largely endorses the arguments presented in this article, for example with regard to the duty to warn as an aspect of the state positive obligation to protect life, and with regard to the interplay between state obligations under international human rights law and their duty to respect consular privileges and immunities.²⁰⁷

Khashoggi, A/HRC/41/CRP.1, 19 June 2019. The former document by and large summarizes the contents of the latter.

²⁰⁷ For a more extensive overview of the report, see Milanovic, 'Callamard Report on the Murder of Jamal Khashoggi: Part I', *EJIL: Talk!* Blog, 25 June 2019, available at: www.ejiltalk.org/callamard-report-on-the-murder-of-jamal-khashoggi-part-i/ [last accessed 25 November 2019].