

# Understanding Diplomatic and Consular Inviolability—Learning from the Jamal Khashoggi Tragedy

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## Abstract

The tragic killing of Jamal Khashoggi in the Saudi Consulate in Turkey has once again exposed the potential for abuse of privileges afforded diplomatic and consular missions. This incident, which involves torture and murder, occurred at a time when there was, and still is, a growing body of international jurisprudence that demands accountability for breaches of international law. These trends have seen a dilution in head-of-state immunity and increased calls for state responsibility in such instances. Understanding and interpreting the 1961 Vienna Conventions on consular and diplomatic inviolability, in light of these trends, will help to retain their relevance, foster growing accountability, and prevent breaches of international law. This is a piece of doctrinal legal research.

**Keywords:** diplomatic and consular privileges; inviolability

## Introduction

On Tuesday 2 October 2018, at 03:13, a privately chartered plane touched down in Istanbul, Turkey. On board were fifteen agents from Saudi Arabia<sup>1</sup> travelling on diplomatic passports, including the bodyguard to the Saudi crown prince, Mohammed Bin Salman. X-rays of their luggage revealed ‘ten telephones; a wireless communications system; two syringes; two electro-shock devices; a signal jammer; staplers; and cutting tools.’<sup>2</sup> The cutting tools were later confirmed to be a bone saw. The luggage was not subject to a manual search, because the agents held diplomatic passports.<sup>3</sup> Before midnight, all fifteen agents, who were said to have been tourists, would re-board two private chartered jets back to Saudi Arabia.

On the same day, at 13:14, Jamal Khashoggi, a Saudi citizen and journalist for the *Washington Post*, entered the Saudi Consulate in Istanbul to meet with the Saudi Consul-General. Two hours later, diplomatic vehicles left the Saudi consulate and travelled two kilometres to the Consul-General’s home. Jamal Khashoggi did not emerge from the Saudi Consulate after his visit.<sup>4</sup>

Kashoggi’s fiancée, Ms Cengiz, raised the alarm with the Turkish officials, stating that Mr Kashoggi had not returned from his visit to the Consulate compound. The Turkish officials were, however, slow to request access to the Consulate compound.<sup>5</sup> For seventeen days the Saudi government denied any knowledge of Jamal Kashoggi’s whereabouts, claiming initially that he had left via the back door.<sup>6</sup>

Eventually, on the night of 19 October 2018, Mohammed Bin Salman admitted on Saudi State television that Jamal Kashoggi had indeed died in the Saudi Consulate, but that it

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1 Ben Hubbard and Charlotta Gall, ‘Saudi King Stands by Crown Prince as Outrage Over Khashoggi Killing Spreads’ *New York Times* (19 November 2018) <<https://www.nytimes.com/2018/11/19/world/middleeast/saudi-arabia-king-salman-khashoggi.html>> accessed 3 November 2020.

2 Borzou Daragahi, ‘Jamal Khashoggi’s Killers Carried Syringes, Electro-shock Devices and Cutting Tools as They Left Istanbul, says Report’ *The Independent* (13 November 2018) <<https://www.independent.co.uk/news/world/middle-east/jamal-khashoggi-murder-saudi-arabia-syringes-cutting-tools-consulate-istanbul-turkey-a8631651.html>> accessed 3 November 2020.

3 Souad Makhennet and Kareem Fahim, ‘Turkey Releases Passport Scans of Men it Says were Involved in Journalist’s Killing’ *Washington Post* (16 October 2018) <[https://www.washingtonpost.com/world/middle\\_east/turkey-releases-passport-scans-of-men-it-says-were-involved-in-journalists-killing/2018/10/16/f425892e-d163-11e8-83d6-291fceed2ab1\\_story.html?utm\\_term=.7048b0eaa5d4](https://www.washingtonpost.com/world/middle_east/turkey-releases-passport-scans-of-men-it-says-were-involved-in-journalists-killing/2018/10/16/f425892e-d163-11e8-83d6-291fceed2ab1_story.html?utm_term=.7048b0eaa5d4)> accessed 3 November 2020.

4 Jonathan Rugman, *The Killing in the Consulate—Investigating the Life and Death of Jamal Khashoggi* (London Simon and Shuster) 17.

5 *ibid* 144.

6 *ibid* 169.

had been an accident and the result of a fist fight in the Consulate compound. His body was, however, still missing.

In response, the Turkish security sources revealed that they had an eleven-minute audio file and video proof drawn from listening devices planted in the Saudi Consulate. This illustrated that Jamal Khashoggi was tortured, murdered and dismembered with an electric saw by the fifteen-member hit team, close to the Saudi Royal household.<sup>7</sup> More damning were claims by Turkish security that they had proof of Skype calls directly to Mohammed Bin Salman, suggesting that he had watched the murder in real time from Saudi Arabia.<sup>8</sup> In response, Mohammed Bin Salman fired five high ranking officials and restructured his intelligence agency.

Turkey immediately sought the extradition of eighteen Saudi suspects, whom they believed were implicated in the crime. The Central Intelligence Agency (CIA) Director, Gina Haspel, held a seven-hour briefing with her Turkish counterpart, as Jamal Khashoggi was, at the time of his death, a permanent United States resident. Meanwhile, Angela Merkel announced on 24 October 2018 that Germany would terminate arms deals with Saudi Arabia. The United Kingdom (UK) Foreign Secretary also announced, on 23 October 2018, the UK's intention to revoke any UK visas issued to the eighteen suspects. In late November 2018, Denmark, Finland and Norway decided to halt arms sales to Saudi Arabia in the wake of the publicity surrounding Khashoggi's death.

In response, the Saudi Prosecutor's office detained eighteen individuals, but refused to hand them over to Turkish officials for prosecution in Turkey. Since then, eleven unnamed individuals have been tried in Riyadh for the crime committed, reportedly while acting outside the scope of their authority. Even before the outcome, there were concerns about whether the secret trial had been conducted in accordance with the standards of international law. At the time, it was noted that 'it is equally obvious that the outcome of the Saudi trial ... 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.'<sup>9</sup>

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7 Agnes Callamard, 'Special Rapporteur's Detailed Factual and Legal Findings with Regard to the Murder of Jamal Khashoggi' (19 June 2019) UN Doc A/HRC/41/CRP 1. The report conceded that the 'Turkish intelligence services were not monitoring and analysing these intercepts in real time' paras 102–107.

8 Reuters staff, 'How the Man Behind Khashoggi Murder Ran the Killing via Skype' *Reuters* (22 October 2018) <<https://uk.reuters.com/article/uk-saudi-khashoggi-adviser-insight/how-the-man-behind-khashoggi-murder-ran-the-killing-via-skype-idUKKCN1MW2H4>> accessed 3 November 2020.

9 Marko Milanovic, 'The Murder of Jamal Khashoggi: Immunities, Inviolability and the Human Right to Life' 26 March 2019 HRLRev (forthcoming) <SSRN: <https://ssrn.com/abstract=3360647> or <http://dx.doi.org/10.2139/ssrn.3360647>> accessed 3 November 2020.

In January 2019, United Nations (UN) Special Rapporteur for Extrajudicial Executions, Agnes Callamard, initiated her own investigation, given the lack of a UN-initiated criminal investigation. Callamard visited Turkey to investigate the case, and on 19 June 2019 presented her report on the incident to the UN Human Rights Council.<sup>10</sup> In her initial report she praised the Turkish officials for their investigation, although she noted that the Turkish authorities' investigation had been hampered in terms of gaining immediate and adequate access to the scene of the crime.<sup>11</sup> The report is silent on why the Turkish authorities permitted the Consul-General to leave Istanbul, after investigations had begun into the suspected death of Jamal Khashoggi.<sup>12</sup> The report states that the murder of Khashoggi on 2 October 2018 appeared to be premeditated by the Saudi State, and invokes 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.'<sup>13</sup> Callamard called on the international community to respond to Saudi officials' use of consular inviolability to facilitate the torture and murder of Jamal Khashoggi, and asked the UN Secretary General, the Human Rights Council, and the Security Council, to establish a panel of criminal investigators, after having found credible evidence of the 'potential responsibility of the Saudi Crown Prince, Mohammed bin Salman, and his agent, Saud al-Qahtani.'<sup>14</sup>

The Turkish President, Recep Erdoğan, spoke publicly of what the investigators had revealed and indicated that the time had come to revisit the Vienna Conventions and the inviolability with which consular compounds are viewed. Meanwhile, pressure from civil society is mounting as it continues to seek answers from the Saudi state on the whereabouts of Khashoggi's remains. Some states like Argentina are using universal jurisdiction to make it difficult for the Crown Prince to travel. While this is not the first time that diplomatic and consular privileges and immunities have been abused, this case is striking in that it 'is not normally done in so spectacular a fashion'.<sup>15</sup> This incident has sparked a debate around consular and diplomatic inviolability in the face of international legal trends favouring greater accountability for breaches of international

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10 Callamard (n 8). The report itself comprises a formal report to the Human Rights Council (for the 41st regular session—UN Doc A/HRC/41/36) and an annex to that report which contains the Special Rapporteur's detailed factual and legal findings with regard to the murder of Jamal Khashoggi—UN Doc A/HRC/41/CRP 1.

11 *ibid* paras 10–14.

12 Callamard (n 8) para 142.

13 'Saudi Arabia bears responsibility for the conduct of its organs and agents, done in their official capacity, even if it was committed *ultra vires* and for obstructing the investigation and abusing its consular privileges' (*ibid* para 219).

14 Callamard (n 8) para 176.

15 Marko Milanovic, 'The Murder of Jamal Khashoggi: Immunities, Inviolability and the Human Right to Life—Part V: Conclusion' (*EJIL: Talk!*, 18 April 2019) <<https://www.ejiltalk.org/the-murder-of-jamal-khashoggi-immunities-inviolability-and-the-human-right-to-life-part-v-conclusion/>> accessed 3 November 2020.

law. There might be support for the argument that a new customary law approach to inviolability is evolving, which places accountability ahead of the sovereign claims to consular inviolability.

The above incident is interesting from an international law perspective for several reasons. The manner in which Turkey handled the incident attests to several misunderstandings around the nature of consular privileges (versus diplomatic privileges). It raised several questions about the obligation of receiving states when consular privileges had been abused. It also raised questions about whether developments in international law towards accountability for breaches of international law impact on the way we interpret the consular and diplomatic inviolability provisions drafted in the 1960s. In this article I strive to illustrate that, given the confluence of several trends towards greater accountability for breaches of international law, there is a case to be made for reworking the traditional understanding of consular and diplomatic privileges, in line with this.

## Part 1: The Purpose and Content of the Vienna Conventions on Diplomatic and Consular Immunities

Every nation state enjoys jurisdiction over individuals and acts carried out within its territory.<sup>16</sup> This inherent territorial jurisdiction is, however, limited by agreement based on longstanding principles of international law, in the interest of friendly international relations between states.<sup>17</sup> There is little dispute about the content of the rules, and the International Law Commission (ILC) was tasked with codifying these accepted practices in two multilateral treaties called the Vienna Convention on Diplomatic Relations (VCDR) of 1961 and the Vienna Convention on Consular Relations (VCCR) of 1963.<sup>18</sup> As a general rule, the privileges afforded diplomats and their missions are more extensive than those extended to consulates and their missions, and the drafters of the latter Convention took the 1961 Vienna Convention on Diplomatic Relations as their starting point, and then diluted its privileges in accordance with customary practices afforded consulates and their staff.<sup>19</sup>

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16 John Dugard and others, *Dugard's International Law: A South African Perspective* (5th edn, Juta 2019) 210.

17 *ibid* 3.

18 VCDR 500 UNTS 95; VCCR 596 UNTS 261. For more on the two conventions see Joanna Foakes and Eileen Denza, 'The Appointment and Functions of Consuls,' in Ivor Roberts (ed), *Satow's Diplomatic Practice* (7th edn, OUP 2017) 120, para 8.31ff.

19 See Luke Lee and John Quigley, *Consular Law and Practice* (3rd edn, OUP 2008) 360–361. This is an especially significant point in the Kashoggi case, because he was killed and his body appears to have been moved from the consulate mission to the Consul's residence, where the protection for the inviolability of such premises is lower than the case that would have to be made before breaching the inviolability of the diplomatic mission.

So, for diplomatic missions, as per Article 22(1) of the VCDR: ‘the 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.’ Read with Article 1(i): ‘The “premises of the mission” are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission.’ As for the diplomatic staff who inhabit those missions and residences, per Article 29, ‘the person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.’ Moreover, according to Article 31(2): ‘[a] diplomatic agent is not obliged to give evidence as a witness.’ As for the diplomatic bag, Article 27 of the VCDR provides for the ‘inviolability of official correspondence and the diplomatic bag.’<sup>20</sup> However, as Article 27(4) makes clear, the diplomatic bag ‘may contain only diplomatic documents or Articles intended for official use.’ Diplomatic transport is protected by Article 22(3), which stipulates that ‘the means of transport of the mission shall be immune from search, requisition, attachment or execution.’ Diplomatic passports are issued at the discretion of the issuing State, and the holder of a diplomatic passport is not automatically entitled to ‘any privileges and immunities under international law’.<sup>21</sup> In order to enjoy the benefits set out in the VCDR, the individuals need to be ‘members of the diplomatic mission’ or enjoy ‘special mission immunity’.<sup>22</sup>

By comparison, ‘consular premises’<sup>23</sup> shall be inviolable to the extent provided in Article 31(1) of the VCCR, and refers to ‘the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used exclusively for the purposes of the consular post.’<sup>24</sup> Clearly excluded is the consular residence. The ‘exclusive use’ clause in Article 31(2) recognises that ‘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.’<sup>25</sup> As for the consular staff, Article 41(1) states that ‘consular officers shall not be liable to arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority.’ While the term ‘grave crime’ is not defined in the Convention, it would include murder ‘under any conceivable view’.<sup>26</sup> Moreover, consular staff can, in terms of Article 44, be compelled by the receiving State to give ‘evidence on matters that are

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20 Milanovic (n 10).

21 United States (US) Department of State, ‘Diplomatic and Consular Immunity: Guidance for Law Enforcement and Judicial Authorities’ (Office of the Foreign Missions) <<https://2009-2017.state.gov/documents/organization/150546.pdf>> 17–18.

22 In accordance UNGA Convention on Special Missions (8 December 1969) 1400 UNTS231.

23 A state will maintain only one diplomatic mission in a country, but it may maintain several consular offices in a state.

24 VCCR Art 1(j).

25 Milanovic (n 10).

26 Lee and Quigley (n 20) 433–438.

not connected with the exercise of their functions.<sup>27</sup> While Article 35 enshrines the inviolability of the consular bag, it does permit the receiving State to request the consent of the sending State for the consular bag to be opened, ‘if they have serious reason to believe that it contains something other than official correspondence or Articles intended for official use.’<sup>28</sup> As for consular vehicles, according to Article 31(4), consular transport cannot be a ‘requisition for purposes of national defence or public utility’, but it is not immune from being searched by the receiving State.<sup>29</sup>

States party to these two multilateral treaties (VCCR and VCDR) have agreed to limit the exercise of their inherent and sovereign territorial jurisdiction over foreign sovereigns and their diplomatic and consular agents, and diplomatic and consular missions, and their diplomatic baggage. The extent of these limitations depends on whether they derive from diplomatic or consular privileges.<sup>30</sup> Not only the premises, but also the furnishings, archives,<sup>31</sup> official correspondence<sup>32</sup> and means of transport, are all immune from ‘search, requisition, attachment or execution’.<sup>33</sup> These privileges are not based, in any way, on claims that the territory on which the mission is located is in some way an extension of the sending State’s territory.<sup>34</sup> It is generally agreed that the purpose of inviolability of a mission is centred around functional necessity; that such inviolability is needed to enable the mission and its agents to perform their functions properly without improper interference.<sup>35</sup>

However, irrespective of their classification and ‘without prejudice to their privileges and immunities’,<sup>36</sup> both diplomatic and consular staff members are obliged to ‘respect the laws and regulations of the receiving State.’<sup>37</sup> They also have ‘a duty not to interfere in the internal affairs of the territorial State’,<sup>38</sup> and the premises may not be used for any purpose which is at odds with the proper exercising of consular or diplomatic functions.<sup>39</sup> In short, the privileges are far-reaching, but always constrained by what is universally considered to be the legitimate function of a diplomatic or consulate official.

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27 *ibid* 481 ff.

28 Article 35 (3).

29 Lee and Quigley (n 20) 363.

30 Although such persons or property are not exempt from legal liability or immune from the observance of the local law, international law exempts them from the exercise of territorial jurisdiction [Dugard (n 17) 2].

31 VCDR Art 24; VCCR Art 33.

32 VCDR Art 27(2); VCCR Art 35.

33 VCDR Art 22; VCCR Art 31.

34 ‘Diplomatic premises are not extraterritorial; acts occurring there are regarded as taking place on the territory of the receiving state, not on that of the sending state’ [Dugard (n 17) 213].

35 *ibid* 210.

36 VCCR Art 55(1) and VCDR Art 41(1).

37 *ibid*.

38 *ibid*.

39 VCCR Art 55(2); VCDR Art 41(3).

There is no rational justification that would extend diplomatic or consular inviolability to cover acts of torture and murder perpetrated on diplomatic or consular premises.

## Part 2: When Diplomatic or Consular Privileges are Abused

Historically, there was swift and widespread condemnation of the offending States when these privileges had been violated by the territorial States, as was the case in Tehran in 1979, when Iranian students stormed the United States embassy, and held sixty Americans hostages for 444 days.<sup>40</sup> Another incident which comes to mind took place on 17 April 1984, outside the Libyan embassy in London, when ‘two gunmen from within the embassy opened automatic fire at the crowd’ wounding anti-Gadaffi protestors and killing a police constable, Yvonne Fletcher.<sup>41</sup> There has also been condemnation in instances of abuse of diplomatic privileges. Some of the more infamous accounts include the incident when the British government discovered several firearms in the scanned diplomatic bags of the Libyan mission in London in 1984, and, the Dikko affair in the same year, when an attempt was made to smuggle Nigerian political exiles out of London in diplomatic baggage.<sup>42</sup> In all three instances the receiving State terminated diplomatic relations and expelled the diplomats implicated on the grounds of abuses of diplomatic privileges.<sup>43</sup>

The International Court of Justice (ICJ), in the *Tehran Hostages* case, was prepared in extreme circumstances to curtail the inviolable protection afforded diplomats and to conclude that ‘a diplomatic agent caught in the act of committing an assault or other offence may, on occasion, be briefly arrested by the police of the receiving State in order to prevent the commission of the particular crime.’<sup>44</sup>

There are also instances where the actions of individuals seeking asylum in inviolable embassy buildings, have placed consular and diplomatic officials in political hot water with the territorial State.<sup>45</sup> However, since there is no right under international law to

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40 ‘The failure of the government of Iran to observe these fundamental principles of diplomatic law in 1979, when it endorsed the seizure of the United States embassy in Tehran by militants, was strongly condemned by the International Court of Justice’ [Dugard (n 17) 201].

41 Claire Jones, ‘Yvonne Fletcher: The 35-year-old Vow to a Dying Friend’ *BBC News* (11 November 2019) <<https://www.bbc.com/news/uk-50334287>> accessed 13 March 2021.

42 Adeoye Akinsanya, ‘The Dikko Affair and Anglo-Nigerian Relations’ (1985) 34(3) *The Intl and Comp LQ* 602–609 <<http://www.jstor.org/stable/759313>> accessed 18 March 2021.

43 Jonathan Brown, ‘Diplomatic Immunity: State Practice under the Vienna Convention on Diplomatic Relations’ (1988) 37(1) *The Intl and Comp LQ* 53–88 <<http://www.jstor.org/stable/760230>> accessed 18 March 2021.

44 *United States Diplomatic and Consular Staff in Tehran (United States v Iran)* Judgment [1980] ICJ Rep para 86, 3 at 40.

45 Dugard (n 17) 385.

safe passage out of the country of refuge, these asylum seekers can end up trapped in the embassy building indefinitely, as was the case with Julian Assange.<sup>46</sup>

There is also a body of functional jurisprudence emerging from the Human Rights Committee that obliges States to ensure the extra territorial application of human rights ‘of all persons ... over whose enjoyment of the right to life it exercises power or effective control.’<sup>47</sup> This is a subtle change in the status quo, which previously suggested that the obligation only existed when a State had ‘power or control over territory or over the person’,<sup>48</sup> and suggests that even when an individual is within a diplomatic or consular mission in the receiving State, there is nevertheless a positive obligation to protect the right to life should the territorial State have intelligence at its disposal to suggest that rights are being violated. Consequently, under both Article 2 of the European Convention on Human Rights and Article 6 of the International Covenant on Civil and Political Rights (ICCPR), Turkey would have been obligated to forcibly enter the consulate to protect Jamal Khashoggi’s right to life, once they ‘knew, or ought to have known, of the threat to Khashoggi’s life in the premises of the Saudi consulate in Istanbul.’<sup>49</sup>

### Part 3: Exceptions to the Inviolability of Diplomatic and Consular Premises

At such time as the ILC was drafting the VCDR, there was insufficient support to include a provision allowing for the violation of a mission’s premises without the consent of the sending State, except in cases of extreme emergency.<sup>50</sup> Some members of the ILC conceded that there might be instances of such exceptions under customary international law, and that extreme emergencies and the protection of human life were plausible examples, they nevertheless chose not to codify those instances in the final version of the VCDR.<sup>51</sup> The ILC did, however, include several clause limitations on the actions of agents of the sending State that cover non-consular functions and the waiver of diplomatic protection.

#### Non-consular Functions

It is undisputed that the staff of consular and diplomatic missions may not be subject to arrest or detention, and remain immune from the jurisdiction of territorial courts for

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46 In 2012, Julian Assange (founder of WikiLeaks) sought and was granted asylum in the Ecuadorian embassy in London, where he remained for seven years.

47 General Comment 36, para 63.

48 *ibid* para 22.

49 Milanovic (n 10).

50 Eileen Denza, ‘Vienna Convention on Diplomatic Relations’ (United Nations Audiovisual Library of International Law 2009) <<https://legal.un.org/avl/pdf/ha/vcdr/vcdr>> accessed 18 March 2021.

51 Rosanne Van Alebeek, ‘Diplomatic Immunity’ in *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2009) <<http://opil.ouplaw.com>> para. 8.

‘acts performed in the exercise of consular functions’.<sup>52</sup> It is also uncontested that non-consular or non-diplomatic functions do not enjoy the same immunity from territorial sovereignty. In fact, the VCDR<sup>53</sup> and the VCCR<sup>54</sup> expressly state that use of the mission ‘in any manner incompatible with the functions of the mission’ is prohibited. Moreover, diplomatic and consular staff are to refrain from acts (such as grave crimes) that hamper the domestic affairs of the territorial State,<sup>55</sup> and that in such cases immunity from the jurisdiction of territorial courts for purposes of arrest or detention is forfeited.<sup>56</sup>

### **Waiver by the Head of Mission or Sending State**

The persons of the consular and diplomatic mission may not be subject to arrest or detention and remain immune from the jurisdiction of territorial courts, unless that immunity is waived by the sending State. Instances of waiver are rare.

Only the head of a mission can consent to a request from the receiving (territorial) State to enter the mission’s premises.<sup>57</sup> The VCCR<sup>58</sup> is couched in less absolute terms than the similar provision of the VCDR,<sup>59</sup> which is far more ‘categorical’ in its description of the inviolability, insisting on the consent of the mission head before violating the inviolability of the mission.<sup>60</sup> Importantly, immunity should *not* prohibit the territorial law enforcement agencies of the receiving State from investigating any crime, as by definition such actions are not consular functions and any immunity should be forfeited. Such consent can be assumed in ‘case of fire or other disaster requiring prompt protective action.’<sup>61</sup> Lee and Quigley support the argument that an imminent act of violence to any person on the mission premises would rise to the level of a ‘disaster requiring prompt protective action’ by the territorial State.<sup>62</sup> Admittedly, once the act has elements of premeditation it is more difficult to sustain the argument that there is an unforeseen emergency upon which consent to enter the premises rests.

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52 VCCR Art 28.

53 Article 41(3).

54 Article 55(2).

55 Dugard (n 17) 242.

56 *ibid* 229.

57 Denza (n 50).

58 Article 31.

59 Article 22(1).

60 Eileen Denza, *Diplomatic Law* (4th edn, OUP 2016) 123.

61 That would include not only natural disasters, but, as Milanovic illustrates, would also apply in the instance where the consular staff were under terrorist attack inside their consulate 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’ (Milanovic (n 10).

62 Lee and Quigley (n 20) 358.

When normative conflicts arise between laws of inviolability and human rights, international law is often hamstrung.<sup>63</sup> This occurs because international law is not dictated by a ‘centralised legislator’ and is not arranged in a hierarchical way which indicates which rights take preference when consular or human rights law are in conflict.<sup>64</sup> It becomes very difficult, if not impossible, to resolve conflicting obligations. ‘When faced with such a situation of unresolvable 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,’<sup>65</sup> especially since it is clear that consular premises ‘do not lose their status and inviolability simply because such status is being abused.’<sup>66</sup>

#### Part 4: Applying the Vienna Conventions to the Kashoggi Incident

##### **The Territorial Status of the Saudi Consulate in Istanbul and the International Obligations Turkey bears under the ECHR and the ICCPR to Protect the Right to Life and Investigate Such Violations**

It is worth restating that international law pertaining to jurisdiction can allow for territorial control and consular inviolability to exist in parallel, and at all times the Saudi consulate and surrounding premises 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.’<sup>67</sup>

This raises the question whether Turkey was entitled and possibly compelled by its international law obligations to enter the Saudi consulate in Istanbul to prevent Mr Kashoggi’s murder. Milanovic argues that Turkey, once it became aware of the imminent threat to Mr Kashoggi’s life, was obligated by its adoption of the ICCPR and the European Court of Human Rights (ECHR) to intervene to prevent his murder.<sup>68</sup> Milanovic argues that ‘Turkey would have been permitted by the VCCR to forcibly enter the consulate for the purpose of preventing Khashoggi’s killing, or, alternatively, the wrongfulness of any such conduct would have been precluded by distress.’<sup>69</sup> This view is supported by Ms Callamard in her analysis.<sup>70</sup> Admittedly, in order to substantiate

63 See, generally, Marko Milanovic, ‘Norm Conflict in International Law: Whither Human Rights?’ (2009) 20 *Duke J Comp & Intl L* 69.

64 See, generally, Prosper Weil, ‘Towards Relative Normativity in International Law?’ (1983) 77 *AJIL* 413.

65 Milanovic (n 65) 117–119, 128–131.

66 Dapo Akande, ‘The Julian Assange Affair: May the UK Terminate the Diplomatic Status of Ecuador’s Embassy?’ (*EJIL: Talk!*, 17 August 2012) <<https://www.ejiltalk.org/may-the-uk-terminate-the-diplomatic-status-of-ecuadors-embassy/>> accessed 3 November 2020.

67 Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP, 2011) 147–151, 153–154, 159–160.

68 Milanovic (n 10).

69 *ibid.*

70 Callamard (n 8) para 309–310.

their claim that there was an imminent threat to Mr Khashoggi's life, Turkey would have had to concede that they had come by their information through their use of monitoring devices which would have been politically compromising. Moreover, it appears that the recordings were only accessed after the demise of Mr Khashoggi, risking the destruction of evidence, rather than having any chance of saving him from the imminent threat to his life<sup>71</sup>.

Milanovic argues that the threat to Khashoggi's life could be classified as a 'disaster requiring prompt protective action which could have triggered distress or the assumed consent exception to inviolability per Article 31(2) VCCR.'<sup>72</sup> Milanovic sums the position up as follows: '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.'<sup>73</sup> Unfortunately, as was revealed by Ms Callamard's report, 'Turkish intelligence services were not monitoring and analysing these intercepts in real time.'<sup>74</sup> The Turkish authorities might have been able to rely on 'the assumed consent exception in Article 31(2) or ... an implicit exception for entry without consent justified by the urgent need to protect human life', had they been engaged in real-time monitoring and prepared to admit to surveillance at the time that Khashoggi was subjected to torture within the consulate.<sup>75</sup> Once it was apparent that Mr Khashoggi's life could no longer be spared, the 'compelling reason for an exception from inviolability'<sup>76</sup> based on the need to save his life, fell away.

The issue then became one of access to the Consulate, in order to effectively investigate the scene of the crime and gather evidence, as dictated by Turkey's obligations under international human rights law, specifically the ECHR and ICCPR.<sup>77</sup> The VCCR obliges consular officials to refrain from interfering in the internal affairs of the receiving State.<sup>78</sup> This request was delayed for two weeks by the Consul-General, allowing Saudi officials ample opportunity to thoroughly clean up the scene.<sup>79</sup> By preventing the local State from investigating the crime scene, the Saudi Consul-General failed in its obligation to refrain from interference. Turkey also failed to act on those obligations when it permitted members of the Saudi 'hit-team' and the Consul-General, Mohammad al-Otaibi, to leave Turkey. Knowing that Mohammad al-Otaibi had witnessed Mr

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71 Callamard (n 8) paras 102–107.

72 Milanovic (n 10).

73 *ibid.*

74 Callamard (n 8) paras 102–107.

75 Milanovic (n 10).

76 *ibid.*

77 Callamard (n 8) paras 311.

78 Dugard (n 17) 242.

79 Callamard (n 8) 24.

Kashoggi's murder,<sup>80</sup> the very least Turkey could have done was to prohibit their departure and secure their testimony for possible prosecution. Correctly interpreted, there was no legal obstacle based on any consular privileges or immunities, which should have impacted on the Turkish officials' genuine desire to effectively investigate Kashoggi's disappearance in the Consulate.<sup>81</sup>

### **Misinterpreting the VCCR Regarding Consular Consent and the Privileges Afforded the Consul-General, the Consular Residence and Consular Vehicles and the Issuance of Diplomatic Passports**

Much of the misinformed commentary following the disappearance of Kashoggi stems from a failure to perceive the nuances and restricted scope of consular immunities, compared to their diplomatic equivalents. President Erdoğan, in a parliamentary speech, claimed that his government was hamstrung by the provisions of the 'Vienna Convention', without specifying which of the conventions he was referring to.<sup>82</sup> His comment fails to appreciate that, in this instance, only the VCCR was applicable and that this Convention did not limit the many actions that his government should have taken both at the time of Kashoggi's murder and in the hours and days immediately thereafter. In this instance, there was much that Turkey could have done without falling foul of the VCCR and claims to consular inviolability.<sup>83</sup>

Admittedly, there is widespread appreciation that, without very special circumstances precluding wrongfulness, and without obtaining the Consul-General's consent, for Turkey to have entered the Consulate, would *prima facie* have violated its treaty

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80 Reuters staff, 'Saudi Consul General Leaves Turkey for Riyadh: Turkish Broadcasters' *Reuters* (16 October 2018) <<https://www.reuters.com/article/us-saudi-politics-dissident-consul/saudi-consul-general-leaves-turkey-for-riyadh-turkish-broadcasters-idUSKCN1MQ23T>> accessed 3 November 2020. Joyce Lee, Jason Aldag and Monica Akhtar, 'Senior Saudi Diplomat in Istanbul when Khashoggi was Killed Drops Out of Sight' *Washington Post* (12 November 2018) <[https://www.washingtonpost.com/world/senior-saudi-diplomat-in-istanbul-when-khashoggi-was-killed-drops-out-of-sight/2018/11/12/85f8e406-d7b1-11e8-8384-bcc5492fef49\\_story.html?utm\\_term=.ae897dd4ab61](https://www.washingtonpost.com/world/senior-saudi-diplomat-in-istanbul-when-khashoggi-was-killed-drops-out-of-sight/2018/11/12/85f8e406-d7b1-11e8-8384-bcc5492fef49_story.html?utm_term=.ae897dd4ab61)> accessed 3 November 2020.

81 Callamard (n 8) paras 16 and 19.

82 Amanda Ericson, 'Erdogan says the Vienna Convention hamstrung Turkey's Search for Khashoggi. Here's what that Is' *Washington Post* (23 October 2018) <<https://www.washingtonpost.com/world/2018/10/12/law-that-explains-why-turkey-cant-search-saudi-consulate-khashoggi/>> accessed 3 November 2020.

83 Even if the events of this fateful day had taken place in the diplomatic mission, the imminent threat to Kashoggi's life would still have amounted to justifiable grounds for the Turkish police to enter a diplomatic mission without any consent, either on the basis of distress excluding unlawfulness or on the basis that such activities fall within the implied exception to inviolability. So, while the territorial state will, as a rule, respect the inviolability of the diplomatic or consular mission, there is a suggestion that self-defence would give a receiving state the right to forcibly enter missions and open diplomatic bags, as was the case in 1973 when Pakistan searched the Iraqi embassy and discovered a cache of arms.

obligations under Article 31 of the VCCR,<sup>84</sup> particularly had it entered the parts of the consulate being used solely for consular functions, without the prior consent of the Consul-General. That said, consular<sup>85</sup> and diplomatic<sup>86</sup> inviolability are not absolute, and even the more categorical terms of inviolability expressed in the VCDR<sup>87</sup> have been questioned. It is linked to operational needs of the mission and limited to the diplomatic and consular function. It can be waived by the head of the mission or the sending State. In some cases, waiver is not even a requirement and consular and diplomatic staff will be denied the claim to immunity from arrest or detention in cases of grave crimes.<sup>88</sup> In the words of Eileen Denza: '[i]n the last resort, however, it cannot be excluded that entry without the consent of the sending State may be justified in international law by the need to protect human life.'<sup>89</sup> This view has found support in the jurisprudence of the ICJ in the *Tehran Hostages* case, where the Court held that:<sup>90</sup>

[n]aturally, 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.

There is no disputing that Saudi Arabia had grossly violated its obligations to Turkey (as the receiving State)<sup>91</sup> when its consular agents permitted and facilitated the torture and murder of Jamal Kashoggi in the Consular premises on Turkish soil. None of their actions on that fateful day could be construed as 'consular functions' and consequently covered by the international laws on inviolability. Abuse of these privileges does not void any privileges, but according to Milanovic, knowledge of sudden life-threatening events has been cited as grounds upon which 'prompt protective action' could supersede inviolability.<sup>92</sup> As such, there is some support for the opinion that the territorial State could have, without violating Article 31 of the VCCR, entered the Saudi Consulate to

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84 Editorial staff, 'Jamal Khashoggi: Turkish Police Search Saudi Consul's Residence' *BBC News* (17 October 2018) <<https://www.bbc.co.uk/news/world-middle-east-45887556>> accessed 3 November 2020.

85 VCCR Art 31.

86 VCDR Art 22(1).

87 The VCDR Art 22(1) seems to contain a 'total ban on entry by the agents of the receiving state without the consent of the head of mission' [Milanovic (n 10)].

88 This is all the more so, since, in this case, the Consul, who would have been petitioned for such consent was intimately involved as a spectator to the torture, abuse and Kashoggi's eventual death.

89 *Diplomatic Law* (4th edn, OUP, 2016) 123.

90 United States Diplomatic and Consular Staff in Tehran (*United States of America v Iran*) [1980] 180 ICJ 1 para 86.

91 VCCR Art 55.

92 Marko Milanovic, 'The Murder of Jamal Khashoggi: Immunities, Inviolability and the Human Right to Life—Part III: During the Attack' (*EJIL: Talk!*, 17 April 2019) <<https://www.ejiltalk.org/the-murder-of-jamal-khashoggi-immunities-inviolability-and-the-human-right-to-life-part-iii-during-the-attack/>> accessed 17 March 2021.

prevent the attack on Khashoggi on the basis of the urgent need to protect his international human right to life, and that the exigencies of the situation were such that waiting for consent from the Consul-General was not an option.<sup>93</sup> In this case, there would be grounds to question the need for consent, had there been real-time monitoring of the consulate, given that the Consul-General was privy to the non-consular functions which were being carried out in his consular office.<sup>94</sup> Given the involvement of the Consul-General in the events that led to Khashoggi's death, it is doubtful that any consent for the territorial State to enter the mission would have been forthcoming and could not likely be assumed.

As the head of a consular post, Mohammad al-Otaibi would have been entitled to certain consular immunities. Even so, these would not have been completely unfettered, and they would certainly have been 'of a lesser and more qualified kind'<sup>95</sup> than those extended to diplomats.<sup>96</sup> Article 41(1) of the VCCR specifically permits the receiving State to arrest or detain any consular officer for a 'grave crime', and Article 44 allows the receiving State to question the consular officer regarding matters outside of their consular functions.<sup>97</sup> This is why Mohammad al-Otaibi was so keen to get out of Turkey, as he is a material witness to the events that took place in the Saudi Consulate on 2 October 2018—events that were clearly beyond the scope of any consular functions.<sup>98</sup> In short, Turkey would have been well within the ambit of the VCCR had it taken steps to prevent al-Otaibi from leaving the country and questioning him as a part of their investigation.<sup>99</sup> Despite attempts to distance himself from the actions of the Saudi agents, the Consul-General was identified by Ms Callamard's report as 'being responsible for, or complicit in, or having directly or indirectly engaged in serious human rights abuse.'<sup>100</sup> In the words of Ms Callamard:

Mr. Khashoggi's killing occurred in the Consul General's office with the involvement of at least some people who had diplomatic immunity. This State act constituted a gross

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93 Callamard (n 8) paras 306 and Milanovic (n 10).

94 Callamard (n 8) paras 148. On the day of the crime, the Consul General cleared the Consulate of most non-Saudi employees and ensured that any employees remaining at the Consulate stayed put in their offices (para 200).

95 Milanovic (n 10).

96 Under VCDR Art 29 'the inviolability of a member of a diplomatic mission is categorical, and they are exempted from any obligation to give evidence as a witness under Art 31(2) VCDR' (n 19).

97 Lee and Quigley (n 20) 487–488.

98 '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'' (Marko Milanovic, 'The Murder of Jamal Khashoggi: Immunities, Inviolability and the Human Right to Life—Part IV: After the Attack' (*EJIL: Talk!*, 19 April 2019) <<https://www.ejiltalk.org/the-murder-of-jamal-khashoggi-immunities-inviolability-and-the-human-right-to-life-part-iv-after-the-attack/>> accessed 24 March 2021.)

99 Milanovic (n 10).

100 Callamard (n 8) paras 176.

and egregious violation of the Vienna Convention on Consular Relations (VCCR) and stymied efforts on the part of Turkey to investigate the crime. Using a consulate to kill and hide the crime undoubtedly violated Turkey's rights under the VCCR, but it also undermined core principles critical to the functioning of international relations.<sup>101</sup>

According to the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Mr Kashoggi was murdered and dismembered in the Consulate, and parts of his body were transported at 15:00 on 2 October 2018 to the Consul-General's residence, in vehicles with diplomatic registration plates.<sup>102</sup> Unlike the inviolability extended to a diplomatic car under VCDR Article 22(3), a 'consular vehicle enjoys no immunity or inviolability'. Instead, under Article 31(4) of the VCCR, consular means of transport are only immune 'from requisition for purposes of national defence or public utility, and does not protect them from search.'<sup>103</sup> Callamard's report notes that Turkey's failure to insist upon the immediate access to search the consulate's vehicles, resulted in the destruction of critical evidence of the crime.<sup>104</sup>

It is believed, on the basis of 'biological evidence',<sup>105</sup> collected in the residence's garden, that Khashoggi's body was dissolved in acid, 'likely burned in a large outdoor furnace over a period of three days',<sup>106</sup> and disposed of in the water well located in the consular residence's gardens. The VCCR contains no provisions like those contained in VCDR Article 30(1), which grants the diplomatic residence inviolability. Turkey has no legal obligation to seek the consent of the Saudi government to search the consular residence and was under no obligation to accept any limitations on its territorial right to access the premises in order to conduct a search for evidence pertaining to the crime. Callamard correctly pointed this out in her report,<sup>107</sup> noting that access to the consular residence was only granted fifteen days later on 17 October.

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101 Callamard (n 8) paras 223.

102 Editorial staff, 'Key Moments Surrounding the Killing of Jamal Khashoggi' *Associated Press* (22 October 2018) <<https://www.apnews.com/874760d515fa4ce0b6f2fa9e28d5f49a>> accessed 3 November 2020.

103 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, ILC Draft Articles on Consular Relations, with commentaries (1961) 2 Yearbook of the ILC 92 109.

104 Callamard (n 8) para 325.

105 Bethan McKernan, 'Jamal Khashoggi's Body was "Dissolved"', says Erdoğan Adviser' *The Guardian* (2 November 2018) <<https://www.theguardian.com/world/2018/nov/02/jamal-khashoggi-body-dissolved-acid-erdogan-adviser>> accessed 3 November 2020.

106 Editorial staff, 'Jamal Khashoggi's Body Likely Burned in Large Oven at Saudi Home' *Al-Jazeera* (4 March 2019) <<https://www.aljazeera.com/news/2019/3/4/jamal-khashoggis-body-likely-burned-in-large-oven-at-saudi-home>> accessed 3 November 2020.

107 Callamard (n 8) para 318.

This incident highlighted another potential area of abuse of privileges, when the Saudi agents travelled in and out of Turkish airports on diplomatic passports, while claiming diplomatic privilege to prevent their baggage from being searched. The x-rays of the contents of their luggage certainly should have raised suspicions if reports that a bone saw, syringes, electro-shock devices and signal jammers were in the luggage, are correct. If the Saudi Consulate refused permission to have the luggage searched, Turkey could have denied the consular bag entry to the receiving State and returned it to its place of origin. After all, the Human Rights Committee has endorsed the position that ‘the inviolability of the bag cannot take precedence over human life.’<sup>108</sup>

As Milanovic and others point out, Turkey was under no obligation to await this consent as, unlike the residence of a diplomatic agent,<sup>109</sup> the ‘residence and property of a consul enjoys no inviolability whatsoever.’<sup>110</sup> The Consul-General has no legal right to deny the Turkish authorities access to his residence or the consular vehicles, or to limit how a search should be conducted.<sup>111</sup> The failure to insist upon the immediate granting of access to search the residence of the Consul-General and the consulate’s vehicles, caused destruction of critical evidence of the crime. Correctly interpreted, there was no legal obstacle based on any consular privileges or immunities that should have impacted on the Turkish officials’ genuine desire to effectively investigate Kashoggi’s disappearance in either the Consulate or the Consul’s residence.<sup>112</sup>

### **Listening Devices, ‘Circumstances Precluding Wrongfulness’ and the Severance of Consular Relations**

Politics is fraught with trade-offs between what a State might legally be entitled to do versus the political fallout of acting on that entitlement. This seems to have weighed heavily upon the Turkish authorities in terms of the delicate way in which they handled the matter. By asking for consent to access the consular residence and consular vehicles, Turkey was clearly playing it safe so as not to escalate political tensions between it and the Saudi State. Sadly, this approach allowed the Consul-General and the Saudi agents

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108 Denza (n 61) 203.

109 Article 30(1) VCDR.

110 Foakes and Denza (n 19) para 8.31 ff 8.39; Lee and Quigley (n 20) 360–361. ILC Draft Articles (n 106) 110 para 9 specifically notes that ‘only very few bilateral conventions and municipal systems recognized the inviolability of a consular residence.’

111 Borzou Daragahi, ‘Jamal Khashoggi: Saudi Consulate Car Found Abandoned in Istanbul, Turkish Police Say’ *The Independent* (22 October 2018) <<https://www.independent.co.uk/news/world/asia/jamal-khashoggi-dead-saudi-arabia-consulate-car-istanbul-turkey-latest-police-investigation-a8596086.html>> accessed 3 November 2020. Eyüp Serbest - Fırat Alkaç, ‘Turkish Police Find Clothes in Suitcases Locked in Abandoned Saudi Consular Car’ *Hurriyet* (23 October 2018) <<http://www.hurriyetdailynews.com/three-suspicious-luggages-locked-in-saudi-consular-car-abandoned-in-istanbul-parking-lot-138174>> accessed 3 November 2020.

112 Callamard (n 8) paras 16 and 19.

to leave the country and for the various crime scenes to be effectively deep-cleaned, so destroying any chances of collecting viable evidence of the crime.

Perhaps part of the difficulty for Turkey was caused by the fact that the Turkish government had planted listening devices trained on the Saudi Consulate in Istanbul, which provided the audio recording of the moment of Kashoggi's torture and murder, and which would arguably amount to 'a violation of the inviolability guaranteed to the consulate under Article 31 VCCR.'<sup>113</sup> The difficulty for Turkey lay in the fact that having acquired the intelligence which confirmed that the activities inside the consulate on that day could not enjoy consular inviolability, they would have had to admit to having audio surveillance trained on the consulate. Unfortunately, in pandering to political considerations and motivated by a desire not to antagonise already fraught bilateral relations and risk retaliation directed at Turkish nationals in Saudi Arabia,<sup>114</sup> and conflating diplomatic privileges with less far-reaching consular privileges, Turkey may have neglected its duty to effectively investigate the killing of Kashoggi.

The ILC's Articles of State Responsibility (ASR) may also prove instructive in this case. Under Article 24(1):

[t]he 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.

In this case, prior to the death of Khashoggi, the Turkish authorities (as the territorial State responsible for the safe keeping of the journalist on their territory), could have entered the consulate without obtaining prior consent, in order to respond to his distress and to save his life. If such actions were seen as unlawful under the VCCR, the wrongfulness flowing from any violation of the consulate by the territorial authorities could be precluded by the immediate and distressing circumstances which Khashoggi faced and the legal obligations which Turkey bore to protect his right to life.

Callamard reports that Turkey should have requested Saudi consent to conduct an immediate search of the Consulate, with the threat that any failure to grant such a request would be met with immediate severance of consular relations.<sup>115</sup> In terms of the VCCR,

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113 Lee and Quigley (n 20) 346–348.

114 Callamard (n 8) 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 scene. Our interviews suggested to us that the Turkish government's concerns over diplomatic immunities and over the risks of escalation of the political crisis may have been a consideration,' and para 22 'we were told that Turkey initially sought not to escalate the issue of immunity further, including for fear of retaliation by the Saudi authorities.'

115 Callamard (n 8) para 302.

Turkey may have considered severing consular relations with Saudi Arabia, giving the staff an opportunity to leave the consulate, which would have allowed them access to search the premises. That said, given the efficiency with which the crime scene was sanitised, it is not clear that any evidence would have remained for collection, if the staff had been given a few days to vacate the consulate. Such a step would definitely have come at a high political cost and could well have resulted in retaliatory responses aimed at the Turkish Consulate and diplomatic staff in Saudi Arabia.<sup>116</sup>

## Part 5: New Norms of International Law and their Impact on how Diplomatic and Consular Inviolability should be Interpreted

Although President Erdoğan may have misinterpreted the application of the VCCR as precluding the Turkish authorities from their unhindered investigation of the death of Kashoggi in the Saudi Consulate, his comment in a parliamentary speech that the Vienna Conventions may need to be reviewed or revised, hints at what the author thinks could be a solution.<sup>117</sup> I would argue that all that is needed is for international jurisprudence to inform the way in which we interpret and apply the provisions contained in the two conventions. What I will illustrate now, is that there are several trends in international law which show a move away from inviolability where such privileges might be used to perpetrate acts that are contrary to international law. International legal principles that have acquired the status of peremptory norms of international law need to prevail where obligations in other branches of international law (such as diplomatic and consular inviolability) are being used to permit the perpetration of violations of these peremptory norms.<sup>118</sup>

### The Dilution of Head of State Immunity

The first of these trends is the move away from absolute head-of-state immunity. Alongside consular and diplomatic privileges, there is a similar privilege which extends to heads of State or government and senior State officials, which is termed state immunity. Historically, State immunity was granted to preclude the prosecution or issuance of a civil summons against a foreign ‘state or its representatives’.<sup>119</sup> Initially, the immunity was considered absolute, but that has undergone some variation since the ILC drafted the Convention on Jurisdictional Immunities of States and their Property, which was adopted by the UN General Assembly in 2004, pursuant to widespread

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116 Milanovic (n 10).

117 F Brinley Bruton, Saphora Smith and Josh Lederman, ‘Turkey’s Erdoğan says there’s Strong Evidence to Show that the Khashoggi Killing was Planned’ *CNBC* (23 October 2018) <<https://www.cnn.com/2018/10/23/turkey-khashoggi-statement-by-erdogan.html>> accessed 3 November 2020.

118 Andrea Bianchi, ‘Human Rights and the Magic of *Jus Cogens*’ (2008) 19 *EJIL* 491; Milanovic (n 65) 71–72.

119 Dugard (n 17) 6.

customary international law adoption.<sup>120</sup> State immunity from domestic court processes is no longer absolute, but is granted in qualified instances where the acts are of a public or governmental nature (also termed *jure imperii*). State immunity no longer precludes the issuance of a prosecution or civil claim against heads of State or government and senior State officials in respect of commercial activities (also referred to *jure gestionis*).

There are questions around the limits of the licence granted to heads of State or government and senior State officials under the guise of acts *jure imperii* ('acts of government'). Courts have considered some challenges to the actions of State agents on foreign soil, which were deemed to be covered by the *jure imperii* protection. So, for example, where State agents assassinated opponents of the State on foreign soil, those acts were not covered by sovereign immunity, unless they formed part of an armed conflict and were in accordance with international humanitarian law.<sup>121</sup> But, taken together, there is evidently a move away from blanket immunity for all actions of heads of State.

### **State Responsibility and Diplomatic Law**

As Milanovic points out:

Both the ICJ and the ILC have been clear that countermeasures cannot be used to preclude the wrongfulness of violations of diplomatic and consular privileges and immunities. But neither have said that circumstances precluding wrongfulness such as distress cannot be so used, nor is there any reason of principle why they could not be so used.<sup>122</sup>

The ICJ explained in the *Tehran Hostages* case that

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.<sup>123</sup>

In this regard, the ICJ ruled that 'that countermeasures against diplomats and diplomatic premises are excluded by special rules of international law' on the grounds that an escalation of counter measures can threaten the need to ensure diplomatic channels are

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<sup>120</sup> *ibid* 10.

<sup>121</sup> *Letelier v Republic of Chile* 488 F Supp 665 (DDC 1980); Jurisdictional Immunities of the State (*Germany v Italy*; Greece Intervening) 2012 ICJ Reports 99.

<sup>122</sup> Milanovic (n 10).

<sup>123</sup> United States Diplomatic and Consular Staff in Tehran (*United States v Iran*) Judgment [1980] ICJ Rep 3 para 86

kept open at all times, and more especially during times of conflict.<sup>124</sup> According to the ILC ‘the exclusion of any counter-measures infringing diplomatic and consular inviolability is thus justified on functional grounds.’<sup>125</sup>

While counter-measures cannot be taken against diplomatic or consular agents, there is no rationale or *lex specialis* rule for the other circumstances precluding wrongfulness (such as distress) to fail in an attempt to overcome diplomatic or consular inviolability,<sup>126</sup> especially when the distress results from the actions of consular officials acting outside of the scope of their consular functions, and using consular inviolability to shield their unlawful actions. Article 24(1) of the Articles on State Responsibility states that

[t]he 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.

Admittedly Turkey obtained intelligence about the threat to Kashoggi’s life from audio surveillance equipment that was unlawfully monitoring the events in the consulate. However, once it had that information, Turkey could have raised distress as a grounds for precluding wrongfulness, had it elected to instruct its police to storm the consulate without first seeking consent, and so saving Khashoggi from his attackers. But distress could only be relied upon prior to Kashoggi’s death, and in so far as there were no ‘other feasible alternative to rescue Khashoggi’.<sup>127</sup> There would have been two grounds for the justification for Turkish officials to enter the Saudi Consulate in order to save Khashoggi’s life, had they been monitoring the audio surveillance in real time, ‘either through the operation of exceptions from the inviolability rule regarding consular premises<sup>128</sup> or by invoking distress as a circumstance precluding wrongfulness.’<sup>129</sup>

## Conclusion

The death of Jamal Kashoggi was a low point for the project of accountability for breaches of international law. The fact that it played out in a Consulate and a full investigation was hindered by claims of consular inviolability, albeit misconstrued, is particularly damning for international law. I would argue that Kashoggi’s death can perhaps serve as the catalyst that States need to begin to engage in dialogue about how

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124 International Law Commission Articles on State Responsibility (ASR) and Commentary (2001) 2 Yearbook of the ILC Part Two 339 para 14.

125 *ibid* 340 para 15.

126 Article 55 ASR and commentary. See, also, James Crawford, *State Responsibility: The General Part* (CUP 2013) 697.

127 Milanovic (n 10) 38.

128 As argued in part 3.

129 Milanovic (n 10) and as argued in parts 4.1, 4.3 and 5.2.

the notion of inviolability has evolved over time, and that a growing body of customary international law exists, that would support the conclusion that using diplomatic and consular privileges to shield the perpetration of breaches of international law is no longer tenable.

The Kashoggi incident has highlighted the need for States to really understand the application of the VCCR, as opposed to the VCDR, and how the provisions compare on questions of inviolability of the mission and residence premises and transportation, access for the purposes of investigation, and compelling consular staff to give evidence. There is also a need for correct monitoring of misuse of diplomatic passports and the remedies available to States when they suspect diplomatic bags are being used to conceal contraband or tools to be used in the commission of a crime. The functional purpose of all the provisions contained in the Vienna Conventions needs to be reiterated—many perceived obstacles can be overcome with this rationale in mind.

In addition, there are several trends in international law (including the dilution of absolute head of State immunity) which indicate a move away from inviolability where that gives impunity for serious breaches of international law. There is also a body of jurisprudence in the area of State responsibility, which provides States with circumstances that might preclude wrongfulness with defences such as distress. All of these provide impetus to the development of a body of practice which should support a customary law position that legal privileges should not be relied upon to permit breaches of international law.<sup>130</sup>

International lawyers are used to weighing equal but sometimes conflicting norms. It invariably comes down to a State's political choice 'as to which norm to respect and which to violate, paying the legal and political cost for whatever choice it made.' By highlighting the emergence of trends that support accountability, we can take events like the death of Jamal Kashoggi and use them to empower States to make politically difficult decisions, and, in so doing, be part of a groundswell of *opinio juris* that will, over time, make it politically dear for States to continue to claim inviolability over accountability for breaches of international law.

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130 Milanovic (n 10) 54.

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