

CHAPTER FOUR

FINDING AND ANALYSIS

A. Jamal Khashoggi and why was He a Target?

The killing of Jamal Khashoggi shocked the world. It is not only because of the grisly details of his death but also because of where it took place, inside a consulate, which enjoys special protections under international law. The case has raised questions about the immunity offered to diplomats and diplomatic premises, and the risk of abusing the system for unlawful activities and obstruct criminal investigations.¹

Khashoggi was a journalist who never compromised on his criticisms. Yet, he enjoyed good relations for long years with the royal circles of Saudi Arabia. Khashoggi supported his country should go through a process of serious political, cultural, religious, and economic reforms.

For this reason, he was known as an activist dissident in Western circles. Khashoggi's tenure as of 1991 as editor-in-chief of Al-Madina, one of the oldest dailies in Saudi Arabia, was one of the highlights of his professional career. After about eight years in this position, Khashoggi worked at Arab News, one of the few Saudi newspapers published in English. In those years, he continued his criticisms of the country, and he had to resign twice from Al Watan for this reason.²

¹ Karl Ritter, 2018, "AP Explains: Diplomatic Immunity and The Khashoggi Case", taken from <https://www.apnews.com> accessed on 20 December 2018 at 4:30 pm.

² Ian Black, 2019 "Jamal Khashoggi Obituary", taken from www.theguardian.com/international, accessed on 12 April 2019 at 3 pm.

Khashoggi's break with the regime in Saudi Arabia deepened after the Arab Spring protests that swept across many countries in the Middle East starting from Tunisia in 2010. He became a vocal critic of his own government's stance in this process. Khashoggi did not support revolution and reform movements in the region and accused the Riyadh administration of being "narrow-minded".³

The final break between Khashoggi and the King Salman administration occurred in December 2016. During a presentation at the Washington Institute on 10 November, Khashoggi was critical of Donald Trump's ascension to the U.S. presidency, asserting that Trump's Middle East policies would yield negative consequences for the region. As these remarks made the Riyadh government furious, Al Hayat under Khashoggi was banned from publishing. Saudi authorities correspondingly banned him from writing in newspapers, appearing on TV, and attending conferences.

Khashoggi's criticisms were very tough on interference in Yemen,⁴ which was initiated by the Crown Prince whose control on Saudi administration is increasingly tighter; on the sanctions against Qatar and the strong anti-Iran policies, and on the operations against the opposition figures.⁵ Specifically, Khashoggi's articles in the Washington Post during the last year have created distress in Riyadh. Although Khashoggi has no considerable supporters within the regime, the Saudi administration has followed his writings very attentively, and, in a sense, targeted him.

³ Anonymous, 2018, "Jamal Khashoggi Disappearance: Turkey asks to search Saudi Arabia's Consulate in Istanbul", taken from <https://www.cbc.ca/news/world>, accessed on 8 October 2018 at 3 pm.

⁴ Jamal Khashoggi, 2018, "Saudi Arabia's Crown Prince must Restore Dignity to his Country by Ending Yemen's Cruel War", taken from www.washingtonpost.com, accessed on 22 December 2018 at 2 pm.

⁵ Jamal Khashoggi, 2018, "Read Jamal Khashoggi's Columns for the Washington Post", taken from www.washingtonpost.com, accessed on 22 December 2018 at 2 pm.

The murder of Jamal Khashoggi case was one of the most shocking cases in the journalistic world. He worked at Washington Post as a journalist because of his sharpness when he criticizes the Saudi Government. He argued that Saudi Arabia was supposed to be a democratic country if it wanted a better life for its citizen. The murder that happened to Khashoggi occurred on 2nd October 2018, located at Consular office of Saudi Arabia in Turkey.⁶ The Turkish authorities suspected that the murder of Khashoggi was the Saudi Government, yet the fact might not be like that. Saudi authorities admitted that the perpetrators come from its country. However, they stated that the killing was not organized by the Government of Saudi Arabia and was out of their reach.⁷

Saudi Arabia is allegedly involved in this case because Jamal Khashoggi often criticized many of Saudi Arabia's policies in his articles, which makes everyone suspicious about what is the reason behind this murder. This complement the image of Saudi Arabia as a country that does not fully support the freedom of the press.⁸

Since there is no evidence can prove the reason behind this case yet, the Turkish Government urged Saudi authorities to deal with the suspect as soon as possible to be prosecuted before the Turkish Court for revealing the truth behind this matter. Turkey authorities said that Jamal Khashoggi was killed in just by a few minutes. It was revealed by the source who had listened to the entire recording before he gets executed. The recording was obtained from Khashoggi's Apple Watch, but there are many parties inquire

⁶ Anonymous, 2018, "Kronologi Kisruh Jamal Khashoggi, Wartawan Pengkritik Saudi", taken from <https://www.cnnindonesia.com/internasional>, accessed on 15 April 2019 at 2 pm.

⁷ Anonymous, 2018, "Klaim Saudi dan Upaya Jauhkan Pangeran dari Kasus Khashoggi", taken from <https://www.cnnindonesia.com/internasional>, accessed on 15 April 2019 at 2 pm.

⁸ Joseph M Fernandez, 2018, "The Qatar-Gulf Crisis: The Attack on Media Freedom and the West's Loss of Moral Authority", *Pacific Journalism Review: Te Koakoa*, Vol. 24, New Zealand, Pacific Media Centre, School of Communication Studies, Auckland University of Technology, p. 159.

about this recording.⁹

Saudi said that Khashoggi died because of bare hand fighting with one of the killers, but then after this recording has been found, it is clear that Khashoggi is not died because of the suspected reason. He was dragged from the main office to the working bench. Even the witness said they could hear his scream until they injected some kind of unknown liquid into his body. Some sources said that before Khashoggi died, he was beaten, tortured, and mutilated.¹⁰

Journalist protections have become a global concern because there is a significant increase regarding violence on journalists. Recognizing the importance of journalist safety and journalist freedom of expression, The General Assembly of the United Nations on 29 January 2018 adopted Resolution No. A/RES/72/175 about the Safety of Journalists and the Issue of Impunity. This resolution is the legal basis for all journalists to get protection when they perform their duties. This resolution is imposed by referring the Universal Declaration of Human Rights (UDHR), International Convention on Civil and Political Rights (ICCPR), and the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED).¹¹

B. Laws and Regulations Related in Khashoggi Assassination Case

1. Protection of Journalist in International Law

Violence against journalism has emerged as a global human rights issue as the

⁹ Anonymous, 2018, “Turki Sebut Khashoggi Dibunuh dalam Hitungan Menit”, taken from <https://www.cnnindonesia.com/internasional>, accessed on 15 April 2019 at 3 pm.

¹⁰ Anonymous, 2018, “Momen Penyiksaan Khashoggi Disebut Terekam di Apple Watch”, taken from <https://www.cnnindonesia.com/internasional>, accessed on 16 April 2019 at 2 pm.

¹¹ General Assembly of the United Nations.

number of those killed in the profession has steadily risen in the new millennium.¹² Antipress violence has emerged as a top threat to journalists' work around the world.

The threats to journalists have expanded to all the worlds and sometimes difficult to identify the actors, including the global growth of oppressive governments, terror networks, organized crime groups, gangs, cartels, and others that dominate regions inside countries or entire nations in crisis.

In order to achieve a fair, balanced and objective journalistic work article, the competence of a press is needed so that the press is clear in carrying out legal responsibility for its journalistic work. The growth and development of the media industry and the press, also required the strength of the press building based on idealism, commercialism, and professionalism.¹³

There are so many cases of violence to the press like Khasshogi here today, and we can bravely say the right of the press is not assured. People need someone who dares to criticize the government as Khasshogi did, so they can represent their fellow citizen to express what they feel to their authorities. Many are oppressed by their government and cannot say a word. Thus, we need press power to help to articulate the voice of the people.

There is a risk for Journalists while they do their work because sometimes the criticized authority gets upset and threat the Journalists indirectly. That was the main reason why journalist's freedom of opinion and expression need to be protected

¹² Jeannine E. Relly and Celeste Gonzalez de Bustamante, *Loc. Cit.*

¹³ A.S. Haris Sumadiria, *Loc. Cit.*

internationally, despite most countries' national laws, have recognized the freedom of the press as an exclusive provision.¹⁴

The European Court of Human Rights (ECHR) has frequently described freedom of expression as one of the essential foundations of a democratic society because it guarantees the right of every person to exchange information, debate ideas and express opinions. This is especially important in the context of politics so that members of the public can decide how to vote and which policies to support.

The freedom of expression itself is written in Article 19 Universal Declaration of Human Rights (UDHR) that states, "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." It can be concluded from that article that freedom of expression is fundamental for every human being.¹⁵

On Khashoggi case, his Freedom of Expression is not assured at all, because the main presumption of his assassination is his potency to lead the opposition group and his critics for the Saudi Government. If that presumption is correct, that means the Saudi Government has violated Khashoggi rights to express his Opinion according to Article 19 Universal Declaration of Human Rights.

Besides this declaration, there is Article 19 (2) International Covenant on Civil and Political Rights (ICCPR) which aim to ensure everyone right of expression

¹⁴ Benjamin Oliphant, 2013, "Freedom of the Press as a Discrete Constitutional Guarantee", *McGill Law Journal*, Vol. 59, No. 2, Montreal Canada, McGill University Faculty of Law Publications, p. 285.

¹⁵ Article 19 Universal Declaration of Human Rights.

undisputedly, stated as: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or print, in the form of art, or through any other media of his choice".¹⁶

Term 'everyone' in this article is meant to protect everyone without exception to express their thought and opinion freely. Expert views that this Article 19 must be understood in related to Article 20 ICCPR, in which, the latest article is generally regarded as providing for further restriction of the right to freedom of expression.¹⁷

General Comments No. 34 on Article 19 of ICCPR concerning Freedoms of Opinion and Expression explicitly states that "Freedom of Expression is a necessary condition to the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights".¹⁸ It means journalists rights to have freedom of expression is necessary considering their risk during performing their job.

General Comments may also have relevance to the case discussed. It says as follows: "Journalists are frequently subjected to such threats, intimidation and attacks because of their activities. All such attacks should be vigorously investigated in a timely fashion, and the perpetrators prosecuted, and the victims, or, in the case of

¹⁶ Article 19 of the International Covenant on Civil and Politic Rights.

¹⁷ Christof Heyns and Sharath Srinivasan, 2013, "Protecting the Right to Life of Journalists: The Need for a Higher Level of Engagement", *Human Rights Quarterly*, Vol. 2, United States, Johns Hopkins University Press, p. 304-306.

¹⁸ General Comments No. 34 on Article 19 of ICCPR concerning Freedoms of Opinion and Expression, para 3, taken from www.ochr.org, accessed on 5 July 2019 at 2 pm.

killings, their representatives, be in receipt of appropriate forms of redress".¹⁹

One should be noted that Saudi Arabia is not a State Party to the ICCPR. This means that there is no international legal obligation may be imposed on Saudi Arabia by referring to ICCPR. In a different situation, Turkey has signed ICCPR on 15 August 2000 and has also officially ratified it on 23 September 2003, by making Declarations and reservation. Turkey declares that it will implement ICCPR in accordance with the obligations under the Charter of the United Nations and will implement it only to the States with which it has diplomatic relations. In addition, Turkey declares that this ICCPR is ratified exclusively regarding the national territory where Turkey's Constitution and the legal and administrative order are applied.²⁰

The United Nations has a concern about Journalists Protections. This global organization adopted the UN Plan of Action on the Safety of Journalists and the Issue of Impunity as the outcome of a process initiated by the Intergovernmental Council of the International Program for the Development of Communication (IPDC) in 2010.²¹ Recently, the United Nations General Assembly (UNGA) at 29th January 2018 adopted Resolution No. A/RES/72/175 about the safety of journalists and the issue of impunity.²²

Related to Khashoggi Case, the suspect has violated Article 1 and 10 from this resolution. Article 1 states: "Condemns unequivocally all attacks and violence against

¹⁹ *Ibid.*

²⁰ Anonymous, 2018, "United Nations Treaty Collection, Chapter IV Human Rights, 4th International Covenant on Civil and Political Rights", taken from <https://treaties.un.org>, accessed on 15 April 2019 at 3 pm.

²¹ *Ibid.*, p. 13.

²² United Nations General Assembly, No. A/RES/72/175 about the Safety of Journalists and the Issue of Impunity, taken from <http://www.un.org/en>, accessed on 22 May 2019 at 1 pm.

journalists and media workers, such as torture, extrajudicial killings, enforced disappearances, arbitrary arrest and arbitrary detention, as well as intimidation, threats and harassment, including through attacks on, or the forced closure of, their offices and media outlets, in both conflict and non-conflict situations”.²³

The above provision condemns all violence against journalists in every way. The worst part about Khashoggi Case is that he was murdered while he did not exercise a journalism activity. At that time, Khashoggi was only looking for some files that prove he is not a married person because he wants to marry his fiancé.

Further, Article 10 of this resolution may be read as follows; “Urges Member States to do their utmost to prevent violence, threats and attacks against journalists and media workers, to ensure accountability through the conduct of impartial, speedy, thorough, independent and effective investigations into all alleged violence, intimidations and attacks against journalists and media workers falling within their jurisdiction, to bring perpetrators, including those who command, conspire to commit, aid and abet or cover up such crimes to justice, and to ensure that victims and their families have access to appropriate remedies”.²⁴

Based on the above provision, the stressing is about all member states to do their utmost prevent violence, to ensure accountability through the conduct of impartial, speedy, thorough, independent, all alleged violence, threats and attacks against journalists and media workers falling, and within their jurisdiction, to bring

²³ *Ibid*, Article 1.

²⁴ *Ibid*, Article 10.

perpetrators, including those who command.

From what happened today, somehow Saudi authorities were not so cooperative in investigations, knowing the perpetrators are from Saudi Arabia. Turkish Minister of Foreign, Mevlut Cavusoglu said, “Until now, we have accepted Saudi Arabia’s offers for cooperation with us without hesitation. However, looking at the cooperation now, since we can’t find answers to the questions I just listed, this cooperation is not at the level we want”.²⁵ His statement reflects a disappointment because Saudi Authorities is acted like unwilling to settle this case. Thus, Turkish Governments urged to initiate an international investigation for this case if their cooperation with Saudi Arabia reaches a deadlock.

2. The Universal Declaration of Human Rights

The UN General Assembly adopted the Universal Declaration of Human Rights (UDHR) on 10 December 1948. It defines the fundamental freedoms and human rights that the Charter was established to foster. The UDHR, like the UN, is the result of the experience of the Second World War. World leaders decided to complement the UN Charter with a road map to guarantee human rights. The declaration sets down the basic principles at the very heart of the human rights movement. The Preamble states:

“The General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind,

²⁵ Anonymous, 2019, “Jaksa Ungkap Misi Pembunuhan Khashoggi versi Arab Saudi”, taken from <https://www.cnnindonesia.com/internasional> accessed on 14 June 2019 at 1 pm.

shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.”²⁶

According to Article 19 of the UDHR, everyone has the right to freedom of opinion and expression. Article 19 of the UDHR further states that the right to freedom of opinion and expression includes the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The right of freedom of expression is the right of each individual, independent from his or her race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status in society, to tell others about his or her thoughts and ideas in private, in public and via the media.

The right of freedom of expression does not only entitle every person to express any kind of information, facts and opinions that can be communicated to others (subject to limitations provided by the law) but also entitles every person to access any kind of information, facts and opinions publicly available. It is not bound to any national boundaries. Therefore, Article 19 of the UDHR also includes the right to seek, receive and impart information and ideas from all parts of the world.

The term “expression” has been defined by the UN Human Rights Committee as a

²⁶ Universal Declaration of Human Rights

broad term and not just confined to political, cultural or artistic expression. It is not limited to information and opinions considered to be useful or correct by the general public or public authorities. On the contrary, the value of freedom of expression in a society has to be measured by its treatment in connection with minorities and in connection with uncommon, disliked or even incorrect opinions, which do not justify censorship. Therefore, the right of freedom of expression also includes controversial and false expression.

Freedom of expression carries responsibilities and, as a non-absolute right, it may be limited. Article 29 paragraph 2 of the UDHR states that: “In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”²⁷

According to Article 29, paragraph 3 of the UDHR, these rights and freedoms cannot be exercised in a way that contradicts the purposes and principles of the UN. To prevent any interpretation of the UDHR that is contrary to its intent to provide for basic human rights principles, Article 30 of the UDHR makes it very clear that nothing in the UDHR shall be interpreted in a way that a state, group or person has a justification to destroy any of the rights and freedoms granted in the UDHR.

The UDHR is not a binding treaty, but a declaration adopted by the UN General Assembly. Through time and universal acceptance, however, many scholars argue that

²⁷ *Ibid.*

much of the UDHR has risen to the level of customary international law. In the Proclamation of Teheran, Final Act of the UN International Conference on Human Rights, Article 2 states that: “The Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family” and it “constitutes an obligation for the members of the international community”.²⁸

3. The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) was adopted on 16 December 1966 and entered into force on 23 March 1976. While the UDHR sets forth general principles of human rights, the ICCPR is a multilateral binding treaty. It stands alongside the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Based on Article 19, paragraph 1 of the ICCPR, everyone shall have the right to hold opinions without interference.²⁹ Based on Article 19, paragraph 2 of the Covenant, everyone shall have the right to freedom of expression. This right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or print, in the form of art, or through any other media of his or her choice.³⁰

The UN Human Rights Committee, the body of independent experts established by the ICCPR (Article 28) to monitor the implementation of the ICCPR and provide

²⁸ *Ibid.*

²⁹ The International Covenant and Political Rights.

³⁰ *Ibid.*

interpretation of its provisions, précised the scope of Article 19 in its General Comment No. 34, stating that: Paragraph 2 requires States parties to guarantee the right to freedom of expression, including the right to seek, receive and impart information and ideas of all kinds regardless of frontiers.

This right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, subject to the provisions in article 19, paragraph 3, and article 20. It includes political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse.

Freedom of expression and the media: Regarding the scope of freedom of expression and the media, the Human Rights Committee also stated that: "A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights". It constitutes one of the cornerstones of a democratic society.

The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. The public also has a corresponding right to receive media output".

According to the Human Rights Committee, a free press is not only a condition to ensure freedom of expression, but also a condition to ensure other political rights

guaranteed by the Covenant.³¹ According to Article 25 of the ICCPR, every citizen shall have the right and the opportunity to take part in the conduct of public affairs, directly or through freely chosen representatives.³²

The right to express thoughts and ideas in public which is also protected by the right of freedom of expression is further protected by Article 21 of the Covenant which entitles everyone to assemble with others peaceably and Article 22, paragraph 1 of the Covenant which entitles everyone to associate with others. Restrictions to Freedom of Expression, Freedom of expression is not absolute and can be limited when it conflicts with other rights.

According to Article 19, paragraph 3 of the ICCPR, the exercise of the right to freedom of expression carries with it special duties and responsibilities and may, therefore, be subject to certain restrictions. Such restrictions must be provided by law and be necessary for respect of the rights or reputations of others or the protection of national security or of public order or public health or morals.

The ICCPR is binding, subject to valid reservations, understandings and declarations. Nowadays, 168 States are parties to the Covenant. At the time of writing, seven State parties had signed the Covenant but had yet to ratify it. Several State parties to the Covenant have made reservations and interpretative declarations to their application of the Covenant.

All-State parties that have ratified the ICCPR have agreed to ensure that the right

³¹ Monica Macovei, 2004, "Freedom of expression: A guide to the implementation of Article 10 of the European Convention on Human Rights", *Human Rights Handbooks No. 2*, Germany, Council of Europe, p. 61.

³² The International Covenant and Political Rights.

to freedom of expression can be effectively enforced. The Covenant does not provide details with respect to a specific mechanism that should be put in place. Each contracting State party is obliged to protect the right to freedom of expression by implementing an enforcement mechanism that fits in their respective legal system. The scope of the Covenant is, therefore also defined by decisions of international and domestic courts.

Therefore, each limitation of the right to freedom of expression is only permitted if it passes the three-part test provided by Article 19 paragraph 3 of the ICCPR³³:

- a. The limitation is provided by law which meets standards of clarity and precision;
- b. The limitation has a legitimate aim by protecting one of the exclusive aims listed in Article 19 paragraph 3 of the ICCPR (rights or reputations of others, national security, public order, public health or morals); and
- c. The limitation is truly necessary for the protection of the legitimate aim.

4. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The purpose of the Convention is to prevent and eradicate the use of torture and other cruel, inhuman or degrading treatment or punishment and to ensure accountability for acts of torture. There are currently 165 States Parties to the Convention.

The Convention represents the most detailed international codification of standards and practices regarding the prohibition against torture. It sets out the most widely

³³ *Ibid.*

accepted definition of torture (Article 1) at the international level, obliges States to take all necessary legislative, administrative, judicial and other appropriate measures to prevent acts of torture (Article 2), and specifies a range of additional steps that States must take to adequately prevent, prohibit and redress torture and guarantee non-recurrence. This includes:

- a. An obligation not to extradite, deport, expel or otherwise transfer a person to a State where they would be at risk of torture or ill-treatment (Article 3);
- b. The criminalization of torture under domestic law (Article 4);
- c. Establishing universal jurisdiction over torture (Articles 5-9);
- d. Ensuring remedies for victims of torture, including the right to complain and the right to redress (Articles 13 and 14).

Article 1, torture is defined as: “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind.”³⁴

Prevention of torture: A State Party has an obligation to take effective measures to prevent acts of torture in any territory under its jurisdiction, including legislative, administrative, judicial or other measures. Article 2(2) states that “no exceptional circumstances whatsoever” may be invoked in justification of torture.³⁵

The prohibition against torture and other forms of ill-treatment is well established as one of the few absolute human rights which must be respected without any restriction

³⁴ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

³⁵ *Ibid.*

or derogation (under international law, this is known as a *jus cogens norm*). This applies even in times of war or threat of war, internal political instability or public emergency, and there are no exceptional circumstances whatsoever under which torture can be justified, including any threat of terrorist acts or violent crime, or religious or traditional justification.

The prohibition against torture and other forms of ill-treatment is embodied in several international human rights treaties and declarations, including:

- a. The Universal Declaration of Human Rights (UDHR) (1948), Article 5: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”
- b. The International Covenant on Civil and Political Rights (ICCPR) (1976), Article 7: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

C. Vienna Convention on Diplomatic & Consular Relations v Human Rights

1. Human Rights and Diplomat Immunity: A Brief History

Domestic jurisdiction is a manifestation of state sovereignty and the principles of equality of states and non-interference in domestic affairs. In essence, jurisdiction concerns the power of the state to affect people, property and circumstances. Domestic jurisdiction, guarding certain state activities from outside intervention, is widely believed to be based on the territorial principle. That principle means, inter alia, that the courts of every country should be able to try offenses committed within its territory.³⁶

³⁶ Francisco Orrego Vicuna, 1991, “Diplomatic and Consular Immunities and Human Rights”, *The International and Comparative Law Quarterly*, Vol. 40, No. 1, Cambridge, Cambridge University Press, p. 34-35.

Diplomatic immunity is a well-established exception to that general international law principle of territorial jurisdiction. That exception developed from the concepts of sovereign immunity, the concepts of independence and equality of states, and the existence of a specific rule of international law. It is one of the oldest and most accepted rules of international law dating many centuries back. In its modern form, diplomatic immunity dates back to the establishment of permanent diplomatic missions in fifteenth-century Europe.

Since the sixteenth century, there were three main theories of diplomatic immunity. The first and oldest is the theory of 'personal representation'. It is essentially based on the notion that the representative should be treated as if the sovereign himself was conducting diplomacy. The two main flaws of this theory are that sovereignty is increasingly vested in the nation rather than a monarch, and it does not seem to cover personal acts of diplomats and low rank officials. The second theory, that of 'extraterritoriality', basically stands for the proposition that diplomats' offices, homes, and persons are to be treated as if they are on the territory of the sending state.

Today, contrary to popular belief, the idea that an embassy is physically a part of the sending country is largely treated as a little more than a fiction. Third, the theory of 'functional necessity', the predominant one at present times, suggests that the theoretical underpinning of diplomatic immunities lies in the simple fact that they are necessary for the performance of the diplomatic functions.

The status of human rights under international law was significantly enhanced since the Second World War. That development is largely a result of increasing recognition that some rights are outside, and independent of, the established legal order. In result,

walls of domestic jurisdiction are eroding. It can be said, some rights, notably those at the top of the hierarchy, are universally seen as non-derogable. On this reading, there is a scope for the argument that these rights are part of *jus cogens*.³⁷

2. Human Rights v Diplomatic Immunities: Which One Prevails?

In Khashoggi Assassination murder, human rights must be firmly enforced. All human beings are born free and equal in dignity and rights. Human rights cannot be separated from human beings. It is different from the right of immunity which is regulated in the Vienna Convention on Diplomatic Relations 1961 and the Vienna Convention on Consular Relations 1963 which have limitations so that the rights of Immunity granted to Diplomats can be revoked.

The most obvious solution in cases of conflict between human rights and diplomatic immunities would be to determine which one should prevail from a somewhat formal hierarchy perspective. As international law stands, it is difficult to reach a definite answer as to priority of one over the other. Nevertheless, the preceding analysis continued on the assumption that, under a normative analysis of hierarchy, human rights prevail over diplomatic immunities.

The assumption that human rights law prevails provides the necessary conditions for evaluating the simple hierarchy-oriented solution to conflicts in light of real-world dilemmas revolving around the reciprocity factor. That evaluation has shown that a simple hierarchy of laws approach is not likely to provide a sound solution to conflicts. First, immunity is seen as vital for conducting diplomacy. Second, the essentially reciprocal nature of diplomatic immunity indicates that, in the real world,

³⁷ M. Cherif Bassiouni, 2006, "International Recognition of Victim's Rights", *Human Rights Law Review*, Oxford, Oxford University Press, p. 206.

overwhelming support for strict adherence to diplomatic immunity rules, at almost any price, is likely to continue.

The revocation of diplomatic immunity already happened in WikiLeaks founder Julian Assange case, who took refuge in Ecuador's embassy in London, British government floated the idea of forcing entry into the building to seize him (an arrest warrant had been issued). The British Foreign Office argued that it had the right to revoke the embassy's diplomatic status under the country's Diplomatic and Consular Premises Act, passed in 1987.

Since the Human Rights prevails the Diplomatic Immunity in the context of the protection of human dignity, in the case of Khashoggi, Turkish authority has a right to interfere and doing the investigations in the location of massacre, the Consulate of Saudi Arabia in Istanbul.