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The Internationalisation of the Khashoggi Case: Prospects and Possibilities

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Turkey is likely to continue leaking information whenever it deems appropriate and make references to the Khashoggi murder in public speeches to keep it on the international agenda. [Getty]

From the beginning, Turkey has had several options in the Khashoggi case, the first being a cover up. Turkish leaders strongly believe that this operation also targeted Turkey where many dissidents in the Arab world have sought refuge. The unsolved murder of Khashoggi would have been a blow to Turkey's prestige and a sign of weakness in the eyes of Arabs. Moreover, a disappearance of a renowned journalist like Khashoggi would have attracted more criticism, or even blame, to Turkey, which has already been under pressure by many international human rights organisations. Turkey did not opt for a cover up, although some in the current US administration, who have strong ties with Mohammed bin Salman (MBS) would have preferred this.

As the second option, Turkey seeks to try the suspects of the murder. In fact, this was the Turkish government's first choice as voiced at the highest level several times. Under international law, and surely Turkish law, courts in Turkey have territorial jurisdiction in this case because it occurred in Istanbul. Although MBS said in an interview with Bloomberg that "the premises are sovereign territory", under international law, foreign embassies and consulates remain subject to the jurisdiction of their host country. In the case of consular relations, under the Vienna Convention on Consular Relations (VCCR), consular facilities and personnel are provided with a lesser degree of legal protection than those provided to embassies. While consular officers are protected from arrest and detention, there is an exception for "grave crimes" that definitely include murder. Therefore, Turkey initiated a

criminal investigation and demanded the return of the Saudi citizens that allegedly took part in the murder of Khashoggi. As the investigation develops, the list of suspects may expand. Thus, the second option would have given Turkey full control over the case; and due to this very reason, Saudi Arabia (KSA) rejected Turkey's demand for extradition, insisting that it will, and is, trying the suspects itself. However, this option might lead to criticism of Turkey by some international non-governmental organisations regarding the impartiality of the Turkish justice system. There is also the risk of a direct clash between Turkey and KSA, which Turkey is trying to avoid. Ultimately, whatever the outcome may be, this option will be regarded as a political one rather than a legal or just one, at least by some circles.

The internationalisation of the case was the last option, which apparently Turkey is promoting. Here internationalisation may denote two different but interrelated things. On the one hand, it is putting the Khashoggi case on the world's agenda, thereby increasing political pressure on KSA and possibly the US administration. From a legal point of view, on the other hand, it may serve as a means to bring those who are responsible to justice and prevent impunity. In the former, i.e. internationalisation in the political sense, Turkey seems to be successful to a considerable extent. Firstly, it has managed to shift the heavy burden which otherwise would have been put on its shoulders. Thanks to the skills and capabilities of Turkish intelligence services, Turkey gathered relevant information and possibly evidence pointing to the real suspects. Secondly, Turkey has been playing its cards strategically. Instead of putting all the blame directly on KSA, it only referred to some circles within the government, namely individuals and organisations associated with MBS. Thirdly, the Turkish administration has leaked the information piece by piece. This helped the case to be kept on the agenda of international media and forced other stakeholders, mainly KSA and the US, to review their previous positions in light of further evidence. Fourthly, Turkey was very open to sharing information not only with its NATO allies but also with KSA and possibly Russia. Fifthly, in their public statements, Turkish officials always underlined the inhumane nature of the murder and appealed to the conscience of people. In this way, they emphasised that Turkey is after the truth and nothing but the truth, giving it a higher moral status. Turkish tactics of internationalisation have proved to be successful to a certain extent. Nevertheless, if the Turkish administration hopes to achieve a complete modification of Saudi and US policies in the region by relying only on the internationalisation of the case, disappointment is inevitable. Accusations that the Trump administration has good relations with or supports a country that killed a dissidents in a horrific way is not enough to force it to change its

policy. With regards to Saudi policy towards the region, in the last few years Turkey and KSA fell out on many important issues including Egypt, Palestine, Qatar, the Syrian Kurds and the Muslim Brotherhood. Hence, even if MBS were to step down, it is highly likely that Saudi policy would remain as is unless there is a change in US policy.

International justice in the Khashoggi murder

Although the Turkish manner of handling the case seems to be appreciated in political and humanitarian terms, it is very difficult to bring the case before an international court and achieve results as a matter of criminal law. Neither Turkey nor Saudi Arabia are parties to the Rome Statute of the International Criminal Court (ICC) in the Hague. Even if they were, murder does not fall within the jurisdiction of the ICC because it is not among the crimes exhaustively enlisted in its statute, namely genocide, crimes against humanity and war crimes. However, shedding light on the activities of KSA has prompted questions about what it is doing in Yemen. Again, neither KSA nor Yemen are parties to the ICC statute; and the way to bring the Saudi and Yemeni individuals responsible for war crimes or crimes against humanity to justice is through the United Nations Security Council (UNSC) where the US would use its veto power. Another way is to establish ad hoc tribunal to deal specifically with the Khashoggi murder like the Special Tribunal for Lebanon (STL). Such a tribunal was established by the UNSC to hold trials for the people accused of carrying out the attack of 14 February 2005, which killed 22 people, including the former prime minister of Lebanon, Rafik Hariri, and injured many others. Again, it seems very difficult to establish such a tribunal in the absence of KSA's consent. Alternatively, Turkey and KSA could establish an ad hoc international tribunal or at least an impartial international investigation commission with the participation of third country nationals. Then, the suspects would be tried according to the findings of the investigation commission in Turkey, KSA or a third country. However, KSA has already rejected the trying of the suspects in Turkey. In the absence of serious international pressure, which is currently the case, KSA is against the establishment of such an international commission and tries to keep the issue strictly domestic. A third country would be a serious alternative as applied in the Lockerbie case, where a Scottish court convened in the Netherlands and applied Scottish law. Again, for this to happen, an agreement between the stakeholders and immense international pressure are needed.

Even if the stakeholders are willing, in the absence of a national court, the issue of the applicable law (both substantive and procedural law), the composition of the court and the implementation of the possible verdicts pose serious challenges to the parties. In many jurisdictions, the recordings of the murder cannot be used as evidence in a court of law because many judges may consider them illegally obtained evidence. Furthermore, in many jurisdictions even confession is not enough to establish the commission of the crime of murder in the absence of the dead body or at least some parts of it. So far, none of Khashoggi's body parts have been found. In legal terminology, he is still a missing person.

However, Turkey can still internationalize the Khashoggi case. It can invoke the international state responsibility of KSA. So far, Turkey has not mentioned this and has only focused on the individual criminal responsibility side of the murder. State responsibility is different from the responsibility of individuals. According to the law of state responsibility, which was generally codified by the International Law Commission's Draft Articles in 2001, every internationally wrongful act of a state entails the international responsibility of that state. It is clear that KSA breached the sovereignty of Turkey by committing a murder through its agents in Turkish territories. Therefore, KSA is obliged to make reparations, which could involve in the Khashoggi case compensation or satisfaction. Satisfaction often takes the form of an official apology, which has not been expressed by KSA and interestingly has not been demanded by Turkey yet.

What next?

So far, Turkey played its cards skilfully. Within Turkey, it is widely accepted that the Khashoggi murder was a trap for Turkey and Turkey cleverly managed to get out of it. Even this should be deemed satisfactory for the Turkish administration, which has managed to turn the crisis in its favour. Turkey is of the opinion that the outside world admires it because it shows cooperation with foreign governments in the service of justice. Turkey has also gained a more favourable moral position through the internationalisation of the case. To a certain extent, both KSA and the US administrations are left in a difficult position. However, it would be naive to expect a considerable policy change in the region in the foreseeable future. Turkey is likely to continue leaking information whenever it deems appropriate and make references to the Khashoggi murder in public speeches to keep it on the international agenda.

From a legal standpoint, it is highly unlikely that an international investigation commission will be set up let alone an international tribunal. For this to happen, strong international pressure from all members of the UN Security Council is needed. It would not be very reasonable to think that a few individuals who took part in the murder will be punished by KSA; the highest ranking officials involved will remain untouched, and KSA will never attempt such a horrific act in the near future, especially in Turkey.

So far, the best thing achieved by the internationalisation of the murder has been the partial ceasefire in the port city of Hodeida, Yemen. Since the internationalisation of the Khashoggi murder highlighted the humanitarian catastrophe in Yemen, many Western governments decided to stop selling arms to KSA, which depends on them in Yemen. In addition to Yemen, KSA may feel under pressure to change its policy towards Qatar and lift the blockade. As Qatar is the closest ally to Turkey in the region, this move would be regarded as an achievement for Turkey. In regards to the Saudi government, it is highly unlikely that MBS will be removed from his position but some of his powers might be delegated to more senior members of the Saudi royal family. This may result in a shift the one-man rule that MBS has established to a more balanced, stable and predictable one.