

## The Case of Jamal Khashoggi and the Right to Life

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**Abstract:** The right to life imposes two main responsibilities on states. On one hand, states are charged with a negative obligation, which implies that states shall refrain from violating the right to life of the people in their territories. On the other hand, states have the positive obligation to ensure effective security that allows people to enjoy their right to life. In other words, states are obligated to protect the people in their territory from fatal acts of aggression. Türkiye's handing of the Khashoggi case over to Saudi Arabia raised the argument that, as a party to the European Convention on Human Rights (ECHR), it had violated the right to life by acting against procedural obligations in the case of the murder of Jamal Khashoggi. This study will briefly discuss the right to life and how states protect it and then examine whether Türkiye and Saudi Arabia had violated Khashoggi's right to life by acting against their procedural obligations regarding investigations and prosecutions that had taken place in Türkiye and Saudi Arabia by Türkiye transferring the Khashoggi case to Saudi Arabia after Jamal Khashoggi's murder.

**Keywords:** Jamal Khashoggi, Right to Life, Positive Procedural Obligation, Efficient Investigation, Transfer of Proceedings

### Introduction

All eyes turned to Türkiye after the dissident Saudi journalist Jamal Khashoggi was heinously murdered in the Saudi Consulate in Istanbul on October 2, 2018. Although he had been known as a supporter of the Saudi regime, Khashoggi's opposition to the Saudi regime deepened after publishing his articles in support of the Arab Spring protests. In 2017, he moved to the U.S. and started writing articles in the *Washington Post* generally criticizing the Saudi regime, especially King Salman.<sup>1</sup> Accessed 17.05.2024. Khashoggi had gone to the Saudi Consulate in Istanbul in the afternoon of September 2, 2018 to obtain official documents for getting married. Once many hours had passed with Khashoggi not coming out of the Consulate after entering, his fiancé Hatice Cengiz informed the authorities. Türkiye and the Consulate attracted the attention of the whole world once Khashoggi was revealed to have been heinously murdered in the Saudi Arabia Consulate.

While the Turkish Presidential Spokesman İbrahim Kalın said that Jamal Khashoggi was still in the Consulate building on September 3, 2018, the Saudi Arabia Government stated that Khashoggi had left the building from the back door<sup>2</sup> Turkish officials stated that 15 Saudi agents had arrived at the Consulate residence on September 2, 2018, with 10 of them having headed to the Consulate building and some of the conversations among them having been recorded. The recordings involved a suspicious conversation about an assumed premeditated murder.<sup>3</sup> In the recordings, Saudi agents were heard

<sup>1</sup> Türkiye Radyo Televizyon Kurumu (TRT) 'Portre: Suudi Arabistan Başkonsolosluğunda katledilen Cemal Kaşıkçı' (TRT Haber, 2020) (accessed 17 May 2024)

<sup>2</sup> Fatih Selami Mahmutoglu, Türk Ceza Hukuku Derneği "Kovuşturulması Suudi Arabistan'a Nakledilen Cemal Kaşıkçı Dosyasının Adli Yardım Bağlamında Değerlendirilmesi", 1 (accessed 17 May 2024)

<sup>3</sup> United Nations High Commissioner for Human Rights (UN HRC), (UN HRC Annex to the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions: Investigation into the unlawful death of Mr. Jamal Khashoggi, 19 June 2019), 20: "At 13:02, inside the Consulate, Mr. Mutreb and Dr. Tubaigy had a conversation just minutes before Mr. Khashoggi entered. Mr. Mutreb asked whether it will "be possible to put the trunk in a bag?" Dr. Tubaigy replied "No. Too heavy." He expressed hope that it would "be easy. Joints will be separated. It is not a problem. The body is heavy. First time I cut on the ground. If we take plastic bags and cut it into pieces, it will be finished. We will wrap each of them." "Leather bags." There was a reference to cutting skin. Dr. Tubaigy also expressed concerns: "My direct manager is not aware of what I am doing. There is nobody to protect me." At the end of the conversation, Mr. Mutreb asked whether "the sacrificial animal" has arrived. At 13:13, a voice said "he has arrived." In these recordings heard by the Special Rapporteur, Mr. Khashoggi's name was not mentioned."

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planning to bring Khashoggi back to Saudi Arabia; however, he refused to go back. Afterward, Saudi agents told Khashoggi to text his son, but he nevertheless also refused this offer. Later on, Khashoggi asked, “There is a towel, will you drug me?” to which Saudi agents responded, “We are going to anaesthetize you.” Then the recordings reveal the noise of a commotion, movement, and heavy breathing, as well as a sound indicating the use of a plastic bag.<sup>4</sup> Although unable to be precisely determined, the hour of Khashoggi’s death is thought to have occurred 10 minutes after entering the Consulate building.<sup>5</sup>

Article 35 of the Vienna Convention on Consular Relations dated April 24, 1963 should be mentioned here as it concerns freedom of communication. According to this provision, “The official correspondence of the consular post shall be inviolable. Official correspondence means all correspondence relating to the consular post and its functions.” Some of the conversations in the Consulate building had been recorded and obtained by Turkish intelligence. This gave rise to a discussion regarding the legality of using these recordings as evidence, despite having been produced for official consular purposes.<sup>6</sup> Again, the investigation revealed on September 4, 2018 that smoke had been coming out of the backyard of the Consulate building. Witness statements submitted that Saudi agents had burned some documents. After Saudi Arabian authorities declared that meetings about entering the Consulate could start on September 9, Turkish and Saudi agents consulted each other on how the search would take place. On September 11, five Saudi agents were identified as have arrived in Istanbul, three of whom went to the Consulate building on September 12 and left the building on September 13.<sup>7</sup>

After a search warrant was finally issued on September 15, 2018, Turkish officials were allowed to enter the Consulate building to conduct an investigation of the crime scene. A group consisting of Saudi agents accompanied Turkish officials during the investigation. The results of the investigation demonstrated no trace to have been found left at the crime scene of the incident.<sup>8</sup> On September 19, Saudi authorities claimed that a commotion had occurred between Khashoggi and the agents with regard to Khashoggi being sent back to Saudi Arabia and that Khashoggi had died during this commotion in the Consulate. The investigation conducted by the Office of the Chief Prosecutor of Saudi Arabia charged 11 of the 21 suspects with the offence, five of whom were sentenced to death.<sup>9</sup> On January 3, 2019, the case was concluded against the 11 individuals, and the hearing was closed. The hearing date hadn’t been announced to the delegates from Türkiye, the United States of America, England, Russia, or China within due time, and translators were not allowed to be brought to the hearings. The date of the second hearing was January 31, and the statements asserted the Khashoggi’s murder to have been an accident.<sup>10</sup> Upon the claim regarding the case being transferred to the Saudi Arabian Courts in the hearing dated April 7, 2022, the Turkish Court decided to transfer the case regarding Jamal Khashoggi’s murder to the Saudi Judicial Authorities.<sup>11</sup> The Saudi Arabian Riyadh Criminal Court of the 1st Joint Chamber handed down sentences to eight of the defendants and acquitted others on May 30, 2022. On June 17, 2022, the 11<sup>th</sup> Assize Court of Istanbul issued judgment of non-suit due to the case of Jamal Khashoggi having been concluded in Saudi Arabia.

<sup>4</sup> United Nations (UN) High Commissioner for Human Rights, 20.

<sup>5</sup> United Nations (UN) High Commissioner for Human Rights, 20, gl 39: “The exact time of Mr. Khashoggi’s death could not be confirmed with certainty. The ten minutes reference is based on the fact that after ten minutes, Mr. Khashoggi voice was not heard.”

<sup>6</sup> Sadullah Özel, “Uluslararası Hukuk Açısından Cemal Kaşıkçı Cinayeti”, Dicle Üniversitesi Hukuk Fakültesi Dergisi (DÜHFD) 27/46 (2022, June), 180.

<sup>7</sup> One of the members of this group was a toxicologist. See. Mahmutoğlu, “Kovuşturulması ...”, 4.

<sup>8</sup> Mahmutoğlu, “Kovuşturulması ...”, 4.

<sup>9</sup> Anadolu Ajansı (AA), ‘Kaşıkçı cinayeti 2’nci yılı geride bıraktı’ (AA, 2020) (Accessed 17 May 2024).

<sup>10</sup> Mahmutoğlu, “Kovuşturulması ...”, 5.

<sup>11</sup> Anadolu Ajansı (AA), ‘Kaşıkçı cinayeti dava dosyasının Suudi Arabistan’a devrine itiraz reddedildi’ (AA, 2020) (Accessed 17 May 2024).

This paper discusses below whether Khashoggi's right to life had been violated due to the murder resulting from violation of the procedural obligations in relation to the right to life. For this purpose, the paper will briefly explain the right to life below before elaborating on the facts of the Khashoggi case and the relevant legal rules in detail. The last three sections will discuss specific situations that raise concerns as to the procedural rights of victims in order to assess whether transferring the Khashoggi's criminal case to the Saudia Arabia in itself constitutes a violation of Article 2 of the ECHR.

## I. The Right to Life

Protecting people's right to life is a state obligation. Other fundamental rights cannot be enjoyed without the right to life, thus effectively protecting that right occupies a prominent place in the human rights pyramid. In parallel with this, criminal law ultimately aims to protect the right to life in accordance with its importance based on this principle. The existence of a human being is an indispensable component of social life and becomes possible simply by safeguarding effective protections for the right to life. Arbitrarily depriving this right renders all the other fundamental rights meaningless and useless.

Protecting the right to life is also critical in terms of social phenomenon. One of the most important responsibilities states have is to guarantee fundamental rights and freedoms, and this responsibility comes to the fore in terms of this particular right. Likewise, creating a sense of confidence is essential in society regarding individuals' lives being under the unconditional protection of the state. Feeling safe in a society is an inherent condition for individuals to be able to exercise their liberties. Imposing sanctions for murder, even in cases where the victim consents to not punishing the offender, reveals the absolute social value of human life.

Article 2 of the ECHR emphasizes the significance of this right in its case law:

*Everyone's right to life shall be protected by law. No one shall be deprived of one's life intentionally save in the execution of a sentence of a court following one's conviction of a crime for which this penalty is provided by law.*<sup>12</sup>

A state's obligation as a party to the ECHR is not satisfied by only refraining from the intentional and unlawful taking of life.<sup>13</sup> It also includes the obligation to protect the life of individuals in its territory against fatal acts of aggression.<sup>14</sup> This obligation also has a procedural aspect. Within the scope of this obligation, States are obliged to conduct an effective investigation into murder cases.<sup>15</sup> States that are a party to the ECHR should adopt the rules of law that seek effective protection for the right to life in practice and should also fulfill their obligation in terms of penalties.<sup>16</sup> Although a conviction is not always expected as a result of an investigation, an investigation is expected to be sufficient enough to identify those who

<sup>12</sup> Protocol No. 13 of the European Convention on Human Rights (ECHR) prohibits imposing the death penalty as a judicial sanction.

<sup>13</sup> Şeref Gözübüyük – Feyyaz Gölcüklü, *Avrupa İnsan Hakları Sözleşmesi ve Uygulaması* (Ankara: Turhan Kitabevi, 2003), 156; Durmuş Tezcan vd., *Avrupa İnsan Hakları Sözleşmesi Işığında Türkiye'nin İnsan Hakları Sorunu* (Ankara: Seçkin Yayıncılık, 2004), 204; Kresimir Kamber, *Prosecuting Human Rights Offences*, Brill/Nijhoff, 2017, 218.

<sup>14</sup> Linos-Alexandre Sicilianos, "Preventing Violations of the Right to Life: Positive Obligations under Article 2 of the ECHR", *Cyprus Human Rights Law Review* 3/2 (2014, June), 118; Dimitris Xenos, "Asserting the Right to Life (Article 2, ECHR) in the Context of Industry", *German Law Journal*, 8/3 (March 2007), 231; Kamber, *Prosecuting ...*, 219.

<sup>15</sup> Anayasa Mahkemesi (AYM), *Serpil Kerimoğlu and others*, Application Application No: 2012/752, (17 June 2013), §54; Natasa Mavronicola, "Taking Life and Liberty Seriously: Reconsidering Criminal Liability under Article 2 of the ECHR", *Modern Law Review* 80/6 (November 2017), 1032; Martine Durocher, "United Nations Mission to Kosovo: In Violation of the Right to Life?", *Criminal Law Forum*, 27/4 (2016, December), 397; Marko Milanović, "The Murder of Jamal Khashoggi: Immunities, Inviolability and the Human Right to Life", *Human Rights Law Review* 20/1 (2020, March), 10.

<sup>16</sup> Theodora Christodoulidou, "The Duty to Investigate and Punish those Responsible for the Deaths of Missing Persons and Its Limits: European Court of Human Rights (ECHR) the Cases of Gurtekin, Akay and Eray and others v Cyprus", *Cyprus Human Rights Law Review* 3/1 (2014, May), 65. See. Anayasa Mahkemesi (AYM), *Binali Camgöz and others*, Application No: 2019/36978, (26 May 2022), §42. Anayasa Mahkemesi (AYM), *Müberra Yılmaz*, Application No: 2019/18532, (16 March 2022), §46.

are responsible for an incident.<sup>17</sup> In addition, Article 17 of the Constitution of the Republic of Türkiye foresees the State as being obligation to take effective measures regarding judicial and administrative means and to examine incidents in order to ensure that the legal system is properly designed to protect the right to life and that the system is duly implemented and applied.<sup>18</sup>

As a member state of the UN and a party to the Arab Charter on Human Rights, Saudi Arabia must also respect the right to life.<sup>19</sup> Article 5 of the Arab Charter on Human Rights stipulates: “1. Every human being has the inherent right to life. 2. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”<sup>20</sup>

On the other hand, human rights violations in Saudi Arabia and the illegalities in the investigation and prosecution of these violations have been the subject of many reports. These reports provide detailed information about freedoms and rights in Saudi Arabia. For example, Amnesty International publishes reports documenting serious human rights violations and unfair judicial processes in Saudi Arabia. There are detailed documents about the oppression, torture and forced confessions, especially against arrested human rights defenders, journalists and political activists. The organization constantly reports the lack of judicial independence and violation of the right to a fair trial in Saudi Arabia.<sup>21</sup>

The United Nations also monitors the human rights situation in Saudi Arabia and publishes reports.<sup>22</sup> In 2017, the United Nations Human Rights Council expressed concern about Saudi Arabia's practices on alcohol prohibition, freedom of expression and fair trials. Although the Saudi Arabian government regularly publishes human rights reports, these reports are generally prepared to defend the government's reforms and avoid external audits.

Illegalities in the investigation and prosecution of human rights violations in Saudi Arabia generally arise from the following factors.

- Fair trial deficiencies: Courts in Saudi Arabia do not comply with international fair trial standards. Often, there is no independence of the judiciary and defenses to the charges are ignored. Additionally, trials are held in secret and defendants have limited access to their lawyers.
- Torture and forced confessions: It is common for security forces to torture detainees. Torture practices in Saudi Arabia often go undetected and unpunished due to the lack of legal controls.
- Lack of international oversight: Saudi Arabia often resists independent oversight by the United Nations and other human rights organizations. This situation creates serious difficulties in the investigation and prosecution of crimes.<sup>23</sup>

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<sup>17</sup> Levent Emre Özgüç, Bireysel Başvuru İçtihatlarında Yaşam Hakkının Usuli Boyutu: Etkili Soruşturma Yükümlülüğü, 2. (accessed 17 May 2024).

<sup>18</sup> Anayasa Mahkemesi (AYM), *Rahil Dink and others*, Application No: 2012/848, (17 July 2014), §103.

<sup>19</sup> Özel, “Uluslararası ...”, 183.

<sup>20</sup> Milanović, “*The Murder*”, 6.

<sup>21</sup> Featured reports: “The Death Penalty in Saudi Arabia”: Discusses Saudi Arabia's extensive practice of imposing the death penalty. The government's responsibility for the deficiencies in the courts and the violation of the right to defense is emphasized. “Saudi Arabia: The Dark Reality of the Legal System”: This report examines in depth the lack of transparency of judicial processes and the independence of the courts in Saudi Arabia. “Saudi Arabia: A Dark Era for Human Rights”: The steps taken by the government to suppress dissent in 2017 and beyond are detailed. Particular emphasis is placed on the arrest and punishment of women's rights defenders.

<sup>22</sup> United Nations, A/RES/60/251; A/HRC/RES/39/6.

<sup>23</sup> The International Service of Human Rights (ISHR) Saudi Arabia: Kingdom must be held to account for suppression of dissent, following murder of journalist and widespread arrest of women's right of defenders (2018, October) (accessed 14 January 2025).



## II. Violation of the Right to Life as a Result of Violating Procedural Obligations Regarding

### Khashoggi's Murder

#### A. The general case

If a person dies as a result of an unnatural death as in the Khashoggi murder, the public prosecutor should conduct an investigation to reveal the cause of death and unearth the material facts. Those responsible for the incident who will be prosecuted should be identified before the trial through an effective investigation, and the relatives as well as the public should be satisfied with the decision that are given.

Article 1 of the ECHR provides the legal groundwork for effective investigation. According to this provision, states who are signatories to the ECHR shall secure the rights and freedoms defined in the ECHR, including the right to life (see Art. 2), for everyone within its jurisdiction. Indeed, a state that is party to the ECHR cannot be deemed to have protected the right to life when it does not investigate a suspicious death properly or in some cases where it does not even investigate the incident at all.<sup>24</sup> Furthermore, states' obligations to conduct an effective investigation differ from their procedural obligations. The European Court of Human Rights (ECtHR) accepts applications that are made on the grounds no effective investigation has occurred in order to assess whether a state has complied with its procedural obligations.<sup>25</sup>

In cases involving an unnatural death, the decision can be made that the right to life has been violated as a result of a State not fulfilling its procedural obligations as listed under Article 2 of the ECHR and thus failing to have conducted an effective investigation.<sup>26</sup> From the perspective of the ECtHR, the concept of an investigation should not be narrowly interpreted as in national laws because it should cover all the procedural steps carried out by the relevant authorities (i.e., all the stages of the proceedings including the final decision).<sup>27</sup>

While the ECtHR frequently examine cases where state officials have killed an individual unlawfully, this does not mean a state's procedural obligation to conduct an effective investigation is limited to incidences where an official has caused someone's death unlawfully.<sup>28</sup> Therefore, the question about whether Türkiye had conducted an effective investigation into the Khashoggi case will and should be interpreted within the framework of Article 2 of the ECHR.

Türkiye transferred the Khashoggi case to Saudi Arabia, a non-party to the ECHR. For this reason, a problem occurs with regard to assessing liability in case of a breach of a provision of the ECHR. As a contracting state to the ECHR, Türkiye has to take into account its international obligations when transferring a case regarding extradition decisions.<sup>29</sup> In the case of a breach of the procedural obligations for conducting an effective investigation into Saudi Arabia as a party of the ECHR, Türkiye would be found responsible for having committed a violation under Article 2.<sup>30</sup> If an action is filed for a

<sup>24</sup> Osman Doğru, *Yaşama Hakkı Anayasa Mahkemesine Bireysel Başvuru El Kitapları Serisi – 5*, Anayasa Mahkemesine Bireysel Başvuru Sisteminin Desteklenmesi Ortak Projesi, (Ankara: Council of Europe, 2018), 296; European Court of Human Rights (ECHR) Case of Makuchyan and Minasyan v. Azerbaijan and Hungary, 17247/13, (26 May 2020), §154.

<sup>25</sup> European Court of Human Rights (ECHR), Kalicki v. Poland, 46797/08, (08 December 2015), §50; European Court of Human Rights (ECHR), Durmaz v. Türkiye, 3621/07, (13 November 2014), §53. For decisions see; Doğru, *Yaşama Hakkı*, 296.

<sup>26</sup> Xenos, "Asserting the Right to Life", 248; Giovanna Maria Frisso, "The Duty to Investigate Violations of the Right to Life in Armed Conflicts in the Jurisprudence of the Inter-American Court of Human Rights", *Israel Law Review*, 51/2 (2018, July), 173; European Court of Human Rights (ECHR), Case of Makuchyan and Minasyan v. Azerbaijan and Hungary, 17247/13, (26 May 2020), §121.

<sup>27</sup> European Court of Human Rights (ECHR), Case of Kotilainen and Others v. Finland, 62439/12, (17 December 2020), §93; see: Doğru, *Yaşama Hakkı*, 297.

<sup>28</sup> ECHR, Durmaz v. Türkiye, 3621/07, (13 November 2014), §54.

<sup>29</sup> For the 12<sup>th</sup> High Criminal Court of Istanbul, dissenting opinion regarding the application of the impediment to extradition to the country with the death penalty to the transfer of prosecution as well, see: Mahmutoğlu, "Kovuşturulması ...", 19.

<sup>30</sup> For the necessity of the requesting state not to have practices contrary to human rights in the extradition of criminals, see: Saloni Saini, "Law of Extradition", *Supremo Amicus* 12 (2019, December), 85. For the contractual responsibility of the

criminal offence against life, the ECtHR expands the state's procedural obligation starting with the investigation stage up to the sentencing phase. Thus, if a national court gave the decision of non-guilty to the crime against life to obscure material evidence, the state can be found responsible for having violated Article 2 of the ECHR by failing to have fulfilled its procedural obligations.<sup>31</sup>

Article 23 titled "Transfer of Investigation or Prosecution" in the Law on International Judicial Cooperation in Criminal Matters No. 6706. In addition, Article 24 titled "Transfer of Investigation or Prosecution to a Foreign State" of the same act states.

Within the framework of these rules, Türkiye is able to transfer a case in its jurisdiction to a foreign state. Although Law No. 6706 foresees alternative methods with some guaranties for the transfer of proceedings, they must be addressed for any instances of judicial cooperation before the transfer takes place in order to successfully argue that no violation of a fair trial has occurred. Unless these methods are addressed, such as obtaining a video defense of the accused, transferring the prosecution would be unlawful. The 11<sup>th</sup> Assize Court of Istanbul must have searched how legal order functions in Saudi Arabia, such as the conditions of prosecution, the penalties, and the provisions that foresee impunity, before ordering the trial to be transferred to that jurisdiction. As can be seen below, the 11<sup>th</sup> Assize Court of Istanbul decided to transfer the case without sufficiently inquiring into the appropriateness of the relevant conditions in Saudi Arabia according to international and national regulations. We should underline that the purpose of transferring the case is to enable a prosecution to be completed in a foreign state should this not be possible in Türkiye.<sup>32</sup>

## **B. The relationship between the independence of the judiciary and violation of the right to life regarding Khashoggi's murder**

ECHR assesses the independence of the investigation in terms of the obligation to conduct an effective investigation.<sup>33</sup> It implies that, if the investigation is not conducted by independent authorities, the effectiveness of the investigation will be questionable and not only emphasizes that the independence in question refers to institutional independence but also implies that the people conducting the investigation are to enjoy independence in practice.<sup>34</sup> The existence of a hierarchical relationship between investigators and suspects may raise concerns with regard to the independence of an investigation.<sup>35</sup> Therefore, any relationship between investigators and suspects/defendants must be averted.<sup>36</sup> In broader terms, compromised independence in an investigation into a criminal offence against the right to life would lead to a violation of Article 2 of the ECHR. In the same way, the Turkish Constitutional Court (TCC) emphasizes in investigations where public servants are suspects that those who are responsible for the investigation and those who are in charge of conducting the investigation should be independent from the people involved in the events in question. Moreover, this independence will not just refer to institutional and hierarchical means but also to *de facto* independence.<sup>37</sup>

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extraditing state in the extradition of criminals, see: Faruk Turhan, "Cezai Konularda Uluslararası Adli İş Birliği Kanununa Göre İadenin Kabul Edilebilirlik Koşulları: Doktrin ve Uluslararası Gelişmeler Işığında Bir Değerlendirme", *Süleyman Demirel Üniversitesi Hukuk Fakültesi Dergisi (SDÜHFD)* 8/2 (2018, December), 49.

<sup>31</sup> European Court of Human Rights (ECHR), Case of A and B v. Georgia, 73975/16, (10 May 2022), §41; See: Doğru, *Yaşama Hakkı*, 324.

<sup>32</sup> Mahmutoglu, "Kovuşturulması ...", 16.

<sup>33</sup> Christodoulidou, "The Duty", 64; Durocher, "United Nations", 398; B. C. J. L van Hout (Britt), The Obligation to Investigate Under Article 2 of The European Convention on Human Rights in Iraq, (MA Thesis, Tilburg Law School), 2013, 32; Milanović, "The Murder", 39.

<sup>34</sup> European Court of Human Rights (ECHR), Case of Khabirov v. Russia, 69450/10, (12 Jan 2022) §95.

<sup>35</sup> Amy M. L. Tan, "The Duty to Investigate Alleged Violations of International Humanitarian Law: Outdated Deference to an International Accountability Problem", *New York University Journal of International Law and Politics* 49/1 (Fall 2016, July), 221; Milanović, "The Murder", 39.

<sup>36</sup> Doğru, *Yaşama Hakkı*, 306. In the same direction, see: Douwe Korff, *Right to Life- A Guide to the Implementation of Article 2 of the European Convention on Human Rights*, Human Rights Handbooks No:8 (Belgium: Council of Europe, 2006), 38.

<sup>37</sup> Anayasa Mahkemesi (AYM), *Vetha Oğru*, Application No: 2018/25614, (16 June 2022), §89.

In the case of Jamal Khashoggi, some of the defendants were Saudi Arabian state officials who had allegedly taken orders directly from the Crown Prince.<sup>38</sup> The basic administrative order of Saudi Arabia states the judiciary to be an independent power, and arrangements are to be made to provide necessary guaranties for the judges to ensure independent and impartial decisions and to avoid interventions in judicial bodies. On the other hand, due to some situations' practical appearance and especially due to the king having the last word in the appointment of high-ranking members of the judiciary, the independence of the judiciary becomes a matter of concern.<sup>39</sup> If the Crown Prince, who was alleged to have relationships with the defendants, has a hierarchical influence over the courts, the investigation can't be deemed to be independent. As mentioned earlier, however, the judicial system is to sustain an independent and impartial perception.<sup>40</sup> In this case, due to the case being transferred to a state where the independence of the judiciary organs is highly disputable, Türkiye's responsibility as a contracting state may rise under Article 2 of the ECHR due to a breach in procedural obligation.

Another matter that can be examined in relation to the independence of the judiciary is having an investigation that is open to public scrutiny.<sup>41</sup> The right to a public trial is also essential in terms of an effective investigation.<sup>42</sup> On January 3, 2019, a lawsuit was filed in Saudi Arabia regarding Khashoggi's murder; unfortunately, the trial remained unopen to the public.<sup>43</sup> Even though representatives from the United States of America, Russia, France, the United Kingdom, China, and Türkiye intended to attend the trial, the facts that the trial date had been announced to the representatives without due time before the trial and that translators were not allowed to enter the courtroom may demonstrate the trial to have lacked sufficient instruments for public scrutiny.<sup>44</sup> Given that trials are to be conducted as publicly as possible, organizing it in a closed courtroom was problematic in terms of an effective investigation.<sup>45</sup> Hence, the fact that the prosecution had been transferred to a state where the investigation was not open to public scrutiny and thus no effective investigation could be ensured allows for the argument to be made that Khashoggi's right to life had been violated by Türkiye's failure to fulfill its procedural obligations.

Finally, we ought to state that the existence of alleged active collusion between the murderers and the Saudi state in the Khashoggi murder case had resulted in the violation of the right to life as well.<sup>46</sup>

### **C. Khashoggi's right to life being violated as a result of impunity based on amnesty and repentance**

A decision regarding impunity for a criminal offence against life based on the statute of limitations or general/special amnesty can be considered within the framework of Article 2 of the ECHR. The ECtHR interprets an extended concept of investigation in order to have it encompass trial and judgment phases. Even though Article 2 of the ECHR states that the applicant is not entitled to receive a decision regarding punishment for a third person who'd been previously charged with a criminal offence, national courts should assure that cases involving the criminal offence of murder do not go unpunished, for having these cases go unpunished could cause undesirable erosion in the public's trust of the law.<sup>47</sup> Undoubtedly, this

<sup>38</sup> Mostaghimi, Alex, "Transfer of Criminal Proceedings." *International Enforcement Law Reporter*, 38(4), 2022, April, .157–160. Milanović, "The Murder", 40. The court's relationship with the Prince makes the trial of the accused in Saudi Arabian courts also questionable.

<sup>39</sup> Mehmet Ali Yargı, *Suudi Arabistan'ın Yargı Sistemi*, (İstanbul: MÜİF Vakfı Yayınları, 2014), 205.

<sup>40</sup> Özgüç, Bireysel Başvuru, 3.

<sup>41</sup> Tan, "The Duty to Investigate Alleged" 222; In the same direction, see: AYM, *Müberra Yılmaz*, Application No: 2019/18532, (16 March 2022), §47.

<sup>42</sup> Korff, *Right to Life*, 37; van Hout (Britt), *The Obligation to Investigate*, 34.

<sup>43</sup> Mahmutoglu, "Kovuşturulması ...", 5; Anshita Agrawal, "Murder of Jamal Khashoggi: A Mystery", *International Journal of Law Management & Humanities* 3 (2020, June), 1066.

<sup>44</sup> Korff, *Right to Life*, 39. Mahmutoglu, "Kovuşturulması ...", 5.

<sup>45</sup> Doğru, *Yaşama Hakkı*, 322.

<sup>46</sup> Korff, *Right to Life*, 49.

<sup>47</sup> Doğru, *Yaşama Hakkı*, 324; Mavronicola, "Taking Life", 1033.

does not imply an obligation that suggests that all prosecutions should result in convictions. Nonetheless, the ECtHR underlines that perpetrators should not be left unpunished, especially for the offences state officials commit against the right to life.<sup>48</sup>

The ECtHR evaluates the statute of limitations and the sentence in the context of an effective remedy and emphasizes that neither general nor special amnesty should be granted.<sup>49</sup> The Turkish Constitutional Court also states that the requirements of Article 17 of its Constitution<sup>50</sup> should be respected during the post-investigation phase and remarks that violations of victims' right to life should not be left unpunished.<sup>51</sup>

Possibilities do exist in Saudi Arabia for defendants to gain impunity, such as forgiveness and repentance. How amnesty is applied in Saudi Arabia and how a case is closed as a result should be determined. The complete annulment of a conviction would be a situation of impunity.<sup>52</sup> According to Art. 22 Para. 3 of the Saudi Arabian Code of Criminal Procedure, cases of repentance that fulfill the requirements of the Sharia may be dismissed. Again, Art. 23 Para. 2 of the Saudi Arabian Code of Criminal Procedure states that a criminal case may also be dismissed if the victim or their heirs forgive the defendants.<sup>53</sup> According to the same article, this amnesty does not prevent the initiation of a public lawsuit. However, even if a public lawsuit is filed, impunity can appear by way of repentance. As a consequence, Türkiye would be found responsible for having violated Article 2 of the ECHR for breaching procedural obligations by transferring the case to a country where the defendants may unjustifiably go unpunished, due to amnesty and repentance options being able to be claimed in a trial in Saudi Arabia.<sup>54</sup>

#### **D. Failing to start an investigation within a reasonable time and violating the right to life in the case of Khashoggi's murder**

Another issue that should be considered in the Khashoggi murder within the scope of the investigation obligation is whether the investigation had begun within a reasonable time and whether evidence had been collected in a timely manner.<sup>55</sup> In criminal investigations, promptly examining a crime scene and collecting evidence without undue delay are crucial for an effective investigation.<sup>56</sup> The ECtHR and the Turkish Constitutional Court consider the obligation of an effective investigation as an instrumental obligation and the matter of "taking all necessary measures" contained within this expression to include collecting evidence and conducting the necessary examinations.<sup>57</sup> Despite Jamal Khashoggi having been murdered on October 2, 2018, Turkish authorities were not able to enter the scene until October 15,

<sup>48</sup> Xenos, "Asserting the Right to Life", 247; Doğru, *Yaşama Hakkı*, 335.

<sup>49</sup> European Court of Human Rights (ECHR), *Abdülşamet Yaman v. Türkiye*, 32446/96, (02 November 2004), §55. In the aforementioned decision, an evaluation was made on the fact that the state servant was not left unpunished.

<sup>50</sup> The wording of the provision is as follows: "Everyone shall have the right to protect and develop their material and moral integrity."

<sup>51</sup> AYM, *Müberra Yılmaz*, Application No: 2019/18532, (16 March 2022), §49.

<sup>52</sup> Mahmutoglu, "Kovuşturulması ...", 20.

<sup>53</sup> "On September 7, 2020, the Riyadh Criminal Court commuted the death sentences of these five individuals to 20-year jail terms after the Khashoggi family pardoned them to spare the death sentence." Mehak Goel, vd., *Murder of Jamal Khashoggi: An International Law Perspective* (2020, October), University of Minnesota Human Rights Library 18. Saudi Arabia Code of Criminal Procedure

<sup>54</sup> In fact, according to some news sources, the decision was made to end the trial against 11 people after Khashoggi's son tweeted that he had forgiven the defendants. Mahmutoglu, "Kovuşturulması ...", 19-20. Sources: Aljazeera, 'Jamal Khashoggi's son Salah says family 'forgives' killers', (2020, May)

<sup>55</sup> Frisso, "The Duty to Investigate", 175.

<sup>56</sup> European Court of Human Rights (ECHR), *Case of Boboc and others v. The Republic of Moldova*, 44592/16, (07 June 2022), §57. Also see: Doğru, *Yaşama Hakkı*, 305.

<sup>57</sup> Özgüç, *Bireysel Başvuru*, 3; Tan, "The Duty to Investigate Alleged", 222; Also see: Anayasa Mahkemesi (AYM), *Nuray Zencir*, Application No: 2018/3087, (2 February 2022), §53-54; Durocher, "United Nations", 398; van Hout (Britt), *The Obligation to Investigate*, 30.



2018.<sup>58</sup> In this case, whether the right to life in Article 2 had been violated due to the failure to fulfill the procedural obligations as a result of the investigation being initiated late is worth discussing.

The decisions of the Turkish Constitutional Court note that investigations should be carried out without an unreasonable delay and with due diligence. Although the court takes into consideration that difficulties may be encountered that can hinder the progress of an investigation, authorities should act as promptly as possible to shed light on an incident. Otherwise, state authorities may be viewed as indifferent to unlawful acts, which could then substantially undermine society's confidence in the rule of law.<sup>59</sup> The fact that the Saudi authorities had rejected the Turkish government's demand to enter the consulate building is one obstacle in conducting the investigation. However, one can argue that taking the suspects into custody would have created an element of pressure on the Saudi authorities so that the necessary permits could have been obtained sooner, the claim being that, despite the obstacles from the Saudi government, Turkish authorities still had reasonable options to which could have resorted.<sup>60</sup> However, the inviolability of "*Consulate buildings*" in Article 31 of the *Vienna Convention on Consular Relations*.<sup>61</sup> Article 41 of the Convention is titled Personal Immunity of Consular Officers and states.

Based on the above-mentioned provisions, Khashoggi's right to life cannot be said to have been violated by claiming that the Turkish authorities in charge of the investigation had entered the consulate late. Neither can the Turkish authorities be claimed to have not completed the collection of evidence phase in a reasonable time nor ultimately to have not acted in accordance with procedural obligations.<sup>62</sup> The acts of kidnapping and murder obviously fall outside the scope of official responsibilities. Hence, the inviolability of consulate buildings and immunity of consular officers are not applicable in such cases. Yet, Turkish authorities are argued to have been hesitant to enter the consulate building and to have not taken action against Saudi officers so as not to cause a political crisis.<sup>63</sup> Moreover, not taking action prior to obtaining Saudi Arabia's consent is understandable based on the reciprocity principle.<sup>64</sup>

## Conclusion

One of the most fundamental duties of a state is to ensure the effective application of the right to life. This right is regarded by many national and international legal rules as an indispensable value that cannot be interfered with. In particular, the wording in Article 2 of the ECHR explicitly supports the importance of the right to life.

States that are parties to the ECHR are obliged to shelter the people in their territories from offences and other conduct that may unlawfully deprive them of their right to life. Because this obligation also involves a procedural aspect, states are required to conduct effective investigations, especially in cases of murder. In the Jamal Khashoggi case, Türkiye sought to fulfill its procedural obligations within the framework of the right to life through an investigation and subsequent prosecution. However, the possibility of a decision on impunity for the defendants in Saudi Arabia's trial through amnesty and repentance may result in Türkiye having violated Article 2 of the ECHR for transferring the case to a state where the procedural rights of the victims are not sufficiently respected. Furthermore, the allegations that collusion had occurred between the murderers and the Saudi administration, as well as

<sup>58</sup> Mahmutoglu, "Kovuşturulması ...", 15; Milanović, "The Murder", 44.

<sup>59</sup> AYM, *Vetha Oğru*, Application No: 2018/25614, (16 June 2022), §90.

<sup>60</sup> Mahmutoglu, "Kovuşturulması ...", 15.

<sup>61</sup> Philemon Y. Yang, *The Inviolability of Diplomatic and Consular Premises in International Law*, (Master Thesis, University of Ottawa), (Ottawa: 1939), 127.

<sup>62</sup> "While Turkey would have been perfectly within its rights to several consular relations, this would inevitably have deeply aggravated its relations with Saudi Arabia. It is genuinely difficult to say that human rights law could reasonably expect a state to pay such a price, i.e. that the expected political fallout, including possible Saudi retaliation (however unjustified) is worth nothing in the balance and that Turkey's authorities should be owed little or no deference in making this kind of judgement." See Milanović, "The Murder", 45.

<sup>63</sup> Özel, "Uluslararası ...", 180–181.

<sup>64</sup> Özel, "Uluslararası ...", 176. Goel, *Murder of Jamal Khashoggi*, 4.

the questionability of the Saudi judiciary's independence, demonstrates that Türkiye can be found to have failed to fulfill its procedural obligations for the same reasons. Therefore, one can rightfully claim the allegations of Khashoggi's right to life having been violated to have a legitimate basis in the context of Article 2 of the ECHR.

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