

Opinions

How the U.S. could prosecute Jamal Khashoggi's killers

By Lee C. Bollinger

Lee C. Bollinger is the 19th president of Columbia University and the Seth Low professor of the University. He is the co-author, with Geoffrey R. Stone, of "The Free Speech Century."

The First Amendment permits any individual in the United States to criticize political leaders, in public, without fear of retribution from the state. Journalists, whose job may entail investigating public officials, are afforded additional protections. But what happens when a U.S.-based journalist's work offends a foreign leader, who then turns vindictive? Should the journalist not expect the same protections?

The question is not an academic one: This is the case of Jamal Khashoggi, the U.S.-based Saudi Arabian dissident, author and contributing columnist for The Post, who was unsparing in his criticism of the Saudi regime. Six months ago, on Oct. 2, he was tortured and murdered at the Saudi Consulate in Istanbul and, according to U.S. intelligence authorities, at the apparent direction of Saudi Crown Prince Mohammed bin Salman. The Saudi government, after weeks of denials amid intense international criticism, eventually conceded that Khashoggi had been murdered at the consulate, supposedly by rogue Saudi operators. The regime promised their prosecution — and then, nothing.

In an ideal world, international conventions could be used to try the suspects in an international criminal court. But Saudi Arabia does not recognize the international criminal courts and has not signed on to relevant conventions.

There is another solution.

The deadly assault on Khashoggi — a legal resident of the United States, with children who are U.S. citizens — was also a brazen and an egregious assault against American values and against the First Amendment rights he exercised in this country. Federal prosecutors thus have an obligation to investigate and potentially bring a criminal case against Khashoggi's killers. It would be somewhat novel to prosecute the murder of a noncitizen abroad, committed by noncitizens — and there would be legal hurdles to overcome — but there are reasonable legal bases for a U.S. federal investigation and prosecution.

Principles of international law caution against one country asserting jurisdiction to prosecute crimes committed in other countries, but U.S. courts and international law recognize that extraterritorial jurisdiction — regarding crimes occurring outside the United States — can be warranted in certain circumstances.

Extraterritorial jurisdiction may be appropriate, for instance, where a crime offends the vital interests of the prosecuting state. The murder of a prominent journalist writing for a U.S. newspaper is a prime example of the sort of “censorship abroad” that, in today’s increasingly and inherently globalized discourse, undermines freedom of speech and the press here in the United States. Courts have also found extraterritorial jurisdiction for an offense that occurs in one country where the effect is felt in another (one example being shooting someone on the other side of an international border). And extraterritorial jurisdiction is considered appropriate for crimes such as piracy, terrorism and torture that are universally condemned by the international community — which the Saudis’ offense unquestionably was.

Consider the case for a torture prosecution. The relevant federal statute criminalizes any act committed by a person acting “under color of law” — the legal term for when someone has the appearance of legal authority, even if they don’t have it — intended to inflict severe physical or mental pain or suffering. (18 U.S.C. 2340A) And the statute applies only to “acts of torture committed outside the United States.” Torture inside a foreign consulate is certainly sufficient basis for the FBI to investigate.

International law recognizes that torture is so heinous a crime that countries have the responsibility to prosecute torturers within their borders, even if the crime is committed elsewhere. Whether a perpetrator of torture arrives in the United States voluntarily or involuntarily is immaterial; it only matters that he is “found” here. If U.S. authorities can arrange to capture the Saudi suspects and transfer them to the United States, they can be prosecuted for torture. This is not far-fetched; the United States has done it before.

A second potential prosecutorial path would be a federal civil rights case, based on a statute protecting individuals’ exercise of their constitutional rights. If two or more people conspire to “injure, oppress, threaten, or intimidate” any inhabitant of the United States in the free exercise of constitutionally protected rights — and if death results — the perpetrators could face life in prison or be sentenced to death.

Certain questions about the statute’s applicability in the Khashoggi case would need to be resolved, including whether the victim must be in the United States at the time of the offense if the victim is a noncitizen, but the statute’s legislative history strongly suggests that it would apply. Jurisdiction would be appropriate because of the vital U.S. interests implicated, and because the oppression of Khashoggi’s constitutional rights is felt in the United States, where he practiced his journalism.

The case for U.S. jurisdiction would be bolstered if prosecutors could show that aspects of the crime took place in the United States — for instance, if the Saudis communicated with Khashoggi in the United States when luring him to their consulate in Istanbul. Aggressive prosecutors can even utilize incidental contacts such as wire transfers through U.S. banks to build a jurisdictional case for conspiracy. Federal prosecutors have undertaken investigations based on far less evidence than the Khashoggi case presents.