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State Responsibility for International Bail Jumping

La responsabilité de l'État pour les dérobades à la justice internationales

ROBERT J. CURRIE AND ELIZABETH MATHESON

Abstract

Over the last decade, there has been a spate of incidents in Canada and the United States involving Saudi Arabian nationals who, while out on bail for predominantly sexual crimes, were able to abscond from the countries despite having surrendered their passports. Investigation has revealed evidence supporting a reasonable inference that the government of Saudi Arabia has, in fact, assisted its nationals to escape on these occasions. This article makes the case that this kind of conduct amounts not just to unfriendly acts but also to infringements upon the territorial sovereignty of both states and serious breaches of the international law

Résumé

Au cours de la dernière décennie se déroule une série d'incidents au Canada et aux États-Unis impliquant des ressortissants saoudiens qui, alors qu'ils étaient en liberté sous caution pour des crimes à prédominance sexuelle, ont pu s'enfuir du pays malgré la remise de leur passeport. L'enquête a révélé des éléments de preuve permettant de conclure raisonnablement que le gouvernement saoudien a, en fait, aidé ses ressortissants à s'échapper à ces occasions. Cet article fait valoir que ce type de comportement ne constitue pas seulement des actes hostiles, mais des atteintes à la souveraineté territoriale des deux États et des violations graves du droit

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of jurisdiction. It surveys the possible remedies available to both injured states and, in light of the fact that neither state has sought any such remedy, examines possible remedial routes for the victims of the Saudi nationals' crimes. It remarks upon the utter failure of either Canada or the United States to address these acts, concluding that such wilful neglect both corrodes sovereignty and undermines the will to address sexual crimes.

international de la compétence. Il examine les recours possibles dont disposent les deux États lésés et, compte tenu du fait qu'aucun des deux États n'a sollicité un tel recours, examine les voies de recours possibles pour les victimes des crimes en question. Il fait remarquer l'échec total du Canada ou des États-Unis à lutter contre ces actes, concluant qu'une telle négligence délibérée corrode à la fois la souveraineté et sape la volonté de lutter contre les crimes sexuels.

Keywords: bail; international human rights law; jurisdiction; principle of non-intervention; sexual assault; sovereignty.

Mots-clés: agression sexuelle; caution; compétence; droit international de la personne; principe de non-intervention; souveraineté.

INTRODUCTION

It takes very little research into comparative criminal procedure to learn that, despite the myriad differences between the ways in which states administer criminal trials, most have some form of interim release for accused persons who are facing trial or appeal.¹ This mechanism is most commonly called “bail” and will be referred to as such here. The principles underpinning bail seek to balance the restriction of individual freedom with societal concern for the dispensation of justice: while it is desirable that some accused individuals not be incarcerated until guilt has been decisively established, the bailed accused is nonetheless required to abide by a set of restrictions designed to ensure that they will appear at their trial/appeal and not abscond from the court's territorial jurisdiction.

A common restriction of this kind is that the accused is required to surrender any passports that he or she possesses to the court or to the local police,² for the obvious purpose of making it harder (if not impossible) for the accused to flee the state's territory entirely. This requirement is most frequent when the accused is a national of a foreign state, and logically so,

¹ For background, see Harry R Dammer & Jay S Albanese, *Comparative Criminal Justice Systems*, 5th ed (Belmont, CA: Wadsworth, Cengage Learning, 2011) at 134–46.

² Such restrictions tend to be linked to an explicit requirement that the accused remain within the court's territorial jurisdiction. For examples of state practice, see *Criminal Code*, RSC 1985, c C-46, s 515(4) (f); Steve Coughlan, *Criminal Procedure*, 4th ed (Toronto: Irwin Law, 2020) at 304 (Canada); Ed Johnston & Tom Smith, *Criminal Procedure and Punishment*, 2nd ed (Saltford, UK: Hall & Stott, 2020) at 187 (United Kingdom); *Criminal Procedure Law of the People's Republic of China* 2013, art 69 (China); *Malama Kean v Magistrate of the District of Oshakati*, 2002 NR 413 (SC) (Namibia).

since an accused with roots in, or connections to, a foreign state will usually have even more motivation and ability to successfully abscond than a national of the prosecuting state. Unsurprisingly, it is extremely common for this condition to be imposed in extradition cases, where these concerns loom even larger.

Notwithstanding the surrender of their passport, however, accused persons do sometimes defy the conditions of their bail and abscond — the most common English colloquial phrase for which is “jumping bail.” Figures on how often this occurs, and how often it involves foreign nationals, would be difficult to obtain since it would involve reviewing the court records of a large number of states. However, media reports tend to indicate that it is at least an occasional occurrence. A noteworthy and recent example is the 2019 escape of former Nissan executive Carlos Ghosn from custody in Japan, engineered by a former US Special Forces member who was apparently hired as a “private consultant” for this purpose.³ Similarly, in late 2020, a Ugandan Canadian doctor, who had been convicted of trafficking fentanyl in Toronto and released on bail pending appeal, jumped bail and apparently fled to Uganda, with the suspected help of his family.⁴

Jumping bail is an illegal act that is typically prosecutable in the affected state, and assistance rendered to the fugitive by another person (practically inevitable in most cases) would add another layer of illegality since this assistance would almost invariably amount to an offence. The concern of this article, however, is where a third level of unlawful conduct is involved — that is, where the fugitive is assisted in jumping bail by the government of another state, including (but notionally not limited to) his or her state of nationality. Such conduct is, to say the least, an extremely unfriendly act from an interstate relations point of view and, as explored here, amounts to a serious

³ Simon Denyer, “Ex-Nissan Boss Carlos Ghosn Flees to Lebanon, Slams Japan’s Justice System,” *Washington Post* (1 January 2020), online: <www.washingtonpost.com/world/asia_pacific/ex-nissan-boss-carlos-ghosn-flees-to-lebanon-slams-japans-justice-system/2019/12/30/61e8g258-2b7c-11ea-bffe-020c88b3f120_story.html> (it appears that Ghosn had multiple passports, though there is some dispute over whether all of them were surrendered while he was out on bail in Japan). The “consultant” and his son, who assisted, were extradited to Japan and sentenced to two years and one year, eight months, respectively, and two other accomplices were successfully prosecuted by their home state, Turkey. See Yuri Kageyama, “Tokyo Court Sentences Two Americans to Prison for Helping Carlos Ghosn Flee Japan,” *Globe and Mail* (19 July 2021), online: <www.theglobeandmail.com/world/article-american-duo-sentenced-to-prison-by-tokyo-court-for-helping-carlos/>.

⁴ Brett Popplewell, “This Doctor Was Sentenced to 12 Years in Prison for Fentanyl Trafficking. Now He’s an International Fugitive,” *Toronto Life* (14 May 2021), online: <torontolife.com/city/this-doctor-was-sentenced-to-12-years-in-prison-for-fentanyl-trafficking-now-hes-an-international-fugitive/>. See also Blair Rhodes, “Convicted NS Sex Offender May Have Fled to Baghdad, Says Crown,” *CBC News* (27 May 2022), online: <www.cbc.ca/news/canada/nova-scotia/bassam-al-rawi-may-have-fled-to-baghdad-crown-says-1.6468602>.

intrusion into the internal affairs, sovereignty, and plenary jurisdiction of the prosecuting state.

This is not an abstract legal question but, rather, an issue of current significance. Starting in 2018, journalistic reporting revealed a series of cases in Canada and the United States where Saudi Arabian nationals, usually university students, jumped bail and escaped their trials on serious charges. Most of these charges involved sexual assault, though there were also murder, manslaughter, and firearms offences. In each of these cases, there are reasons (albeit of varying strength) to suspect that Saudi government officials assisted the individuals in escaping, for example, by providing new travel documents and even private planes in order to leave. While the facts differ somewhat between the cases, what emerges is a disturbing pattern of rogue conduct on the part of the Kingdom of Saudi Arabia (KSA) that not only has international law implications but also prevents redress for the victims.⁵

The rest of this article will proceed in four further sections. The second section will briefly review the known/reported facts of the Canadian and American bail-jumping cases. The third section will provide an analytical argument for the proposition that states that assist their nationals in jumping bail thereby breach the sovereignty of the prosecuting states and could be subject to state responsibility for so doing. It will also briefly discuss the availability of remedies. The fourth section will query whether, quite apart from the national interest in holding the offending states accountable, the prosecuting states owe any international law obligation, either free-standing or to the victims, to pursue redress. Some brief conclusions will then be offered in the fifth and final section.

FACTS ABOUT BAIL-JUMPING CASES

In the following subsections, the major reported cases of bail jumping are canvassed. All of these cases — whether Canadian or American and admittedly to different extents — have a troubling commonality — namely, the appearance that the KSA has assisted the accused individuals in escaping justice.

⁵ In keeping with the spirit of the #MeToo movement and evolving mores surrounding how victims of sexual assault are treated, we will refer to the complainants in these cases as “victims” rather than as “alleged victims” or “complainants.” This is not intended to ignore the issue of the burden of proof in criminal cases but, rather, to acknowledge that the appropriate starting point in sexual assault cases is to believe complainants who put forward credible allegations. In each of the cases being discussed here, moreover, the accused fled the jurisdiction rather than face trial, which makes the inference that the victim is telling the truth even safer.

CANADIAN CASES

The reported instances of absconding began in Canada in 2006. Taher Ali Al-Saba was charged with sexually assaulting two youths in Nova Scotia in June of that year.⁶ Al-Saba was released on \$10,000 bail but was required to hand over his passport to police as a condition of release.⁷ He failed to appear in the Nova Scotia Supreme Court, after which the Saudi Arabian embassy informed police that Al-Saba had returned to the KSA in August 2006, at which point his passport had already been handed over.⁸

Nova Scotia encountered the same issue again, just over a decade later. Mohammed Zuraibi Alzoabi, a Saudi national studying at Cape Breton University, was charged with the assault, sexual assault, and forcible confinement of a woman, as well as dangerous driving and assaulting a man with a motor vehicle.⁹ The Saudi embassy posted a large portion of Alzoabi's bail.¹⁰ However, in 2018, before he could be brought to trial, Alzoabi fled the country, even though he had handed over his passport as a condition of his bail.¹¹ Lee Cohen, an immigration lawyer, has stated that it is likely that Alzoabi was able to flee because the Saudi embassy issued new travel documents to him after his original passport was seized.¹²

US CASES

There have been significantly more reported instances of Saudi nationals jumping bail in the United States due, in part, to a broad investigation undertaken by Shane Dixon Kavanaugh of *The Oregonian*, an Oregon-based newspaper. Kavanaugh has uncovered, to date, criminal cases involving at least seven accused Saudi nationals who have disappeared from Oregon as

⁶ Shane Dixon Kavanaugh, "Not Just Oregon: Saudi Students in at Least 8 States, Canada Vanish While Facing Criminal Charges," *The Oregonian* (8 February 2019), online: <www.oregonlive.com/news/g66l-2019/02/4ed6d9c1bc2906/not-just-oregon-saudi-students-in-at-least-8-states-canada-vanish-while-facing-criminal-charges.html> [Kavanaugh, "Not Just Oregon"].

⁷ Michael Tutton, "Ottawa Looking into Case Where Saudi Fled Sex Charges after Embassy Posted Bail," *National Observer* (18 January 2019), online: <www.nationalobserver.com/2019/01/18/news/ottawa-looking-case-where-saudi-fled-sex-charges-after-embassy-posted-bail>.

⁸ *Ibid.*

⁹ Ross Lord, "Cape Breton Community Questions How Saudi Man Facing Sexual Assault Charges Allegedly Left Canada," *Global News* (18 January 2019), online: <globalnews.ca/news/4864219/alzoabi-sexual-assault-charge/>.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² Tutton, *supra* note 7.

well as similar instances in at least seven other US states.¹³ Below are just some examples of absconding discovered throughout *The Oregonian's* investigation. Perhaps the most well-known case is that of Abdulrahman Sameer Noorah, who was charged with first-degree manslaughter and felony hit and run following a fatal hit and run of fifteen-year-old Fallon Smart in August 2016.¹⁴ After his arrest, the Saudi consulate retained representation for Noorah and posted his bail.¹⁵ Noorah then turned over his passport to the US Department of Homeland Security and was placed under house arrest, which required him to wear an electronic monitoring bracelet.¹⁶ Two weeks before his June 2017 trial, Noorah disappeared.¹⁷ Authorities believe that Noorah cut his ankle monitor and used an illicit passport and private plane, likely provided by the KSA, to flee the country.¹⁸ In July 2018, the KSA contacted the Department of Homeland Security to inform them that Noorah was back in the KSA.¹⁹

The Noorah case, however, is only the tip of the iceberg. In 2012, Ali Hussain Alhamoud, a Saudi national studying at Oregon State University, was charged with multiple sex crimes in Lincoln County, Oregon, including first-degree rape. The Saudi government posted Alhamoud's bail, after which, on the very same day, Alhamoud boarded a plane in Portland and returned to Saudi Arabia.²⁰

Abdulaziz Hamad Al Duways,²¹ who was studying at Western Oregon University, was accused of sexually assaulting a classmate in 2014. It was ordered that Al Duways turn over his passport to his defence attorney. An official from the Saudi consulate posted Al Duways's \$500,000 bail, after which, he disappeared.

Waleed Ali Alharthi,²² a Saudi national studying at Oregon State University, was found to be in possession of child pornography and was accused of encouraging child sex abuse. An official with the Saudi consulate posted

¹³ Richard Read, "FBI: Saudi Arabia 'Almost Certainly' Helps Citizens Charged with Crimes Flee the U.S.," *Los Angeles Times* (19 January 2020), online: <www.latimes.com/world-nation/story/2020-01-19/saudi-arabia-citizens-crimes-flee-us>.

¹⁴ *Ibid.*

¹⁵ Shane Dixon Kavanaugh, "Gone: More Cases Emerge of Saudi Students Vanishing While Facing Oregon Charges," *The Oregonian* (13 January 2019), online: <www.oregonlive.com/news/2019/01/gone-more-cases-emerge-of-saudi-students-vanishing-while-facing-oregon-charges.html>.

¹⁶ Kavanaugh, "Not Just Oregon," *supra* note 6.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

Alharthi's \$500,000 bail, after which Alharthi was required to turn over his passport to a trial court administrator. He failed to appear in court on 2 April 2015. It was learned that Alharthi had boarded a plane in Mexico City bound for Paris a week before his scheduled court appearance.

Abdulla Almakrami,²³ a Saudi national, was arrested on suspicion of sexual assault and false imprisonment in 2014. His defence attorney posted his \$10,000 bail. Although his passport had been seized, he fled from Milwaukee, Wisconsin, after his arrest, and he resurfaced in the KSA months later, where he became active on social media.

Saud Alabdullatif,²⁴ a Saudi national studying at Eastern Washington University, was charged with forcible second-degree rape and unlawful imprisonment in May 2016, and his bail was set at \$100,000. Alabdullatif posted a bond through Ace's Bail Bonds in Spokane, Washington, to secure his release. That same day, he boarded a plane in Seattle and returned to the KSA.

Rashed Almarri, Abdulhadi Alras, Abdulhadi Binshafiah, and Ali Binshafiah,²⁵ all Saudi nationals, were arrested in Toledo, Ohio, in July 2015 on suspicion of committing a felony assault that left at least three people hospitalized. Bankers Insurance, a company that does business with the KSA, posted the individuals' bail. The next day, the four boarded a plane in Chicago, which was bound for Qatar.

Abdulrahman Ali Al-Plaies,²⁶ a Saudi national, was accused of causing a car accident that killed a seventy-nine-year-old woman in Xenia, Ohio, in June 1988. Officials with the Saudi embassy demanded Al-Plaies's release from jail on the grounds that he was mentally ill and not at fault for the accident. Authorities did not seize Al-Plaies's passport and were told that it had been misplaced or lost. Just days before Al-Plaies's trial, the judge reduced bail to \$25,000, which was put up by the Saudi embassy. Al-Plaies's left jail that day with a Saudi military officer and was never seen in the United States again.

BREACHES OF INTERNATIONAL LAW

As one of us has commented elsewhere,²⁷ anyone who has spent more than ten minutes studying international law could easily draw the conclusion that the conduct being examined here is unlawful. It is intuitive that states that assist their nationals in jumping bail, thereby interfering with the operation of the prosecuting state's criminal justice system, have breached

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ Robert J Currie, "Canada Letting Foreign Fugitives Get Away with Rape: Nova Scotia Victims of International Bail-Jumpers Deserve Answers, and Justice," *Chronicle Herald* (12 June 2021), online: <www.saltwire.com/halifax/opinion/robert-j-currie-canada-letting-foreign-fugitives-get-away-with-rape-100597520/>.

the territorial sovereignty of the latter state. However, it is worth teasing out with some precision why this is not just undesirable but also unlawful conduct that could draw a legal response or attract remedies.

TERRITORIAL SOVEREIGNTY AND JURISDICTION

The analytical starting point is in the realm of the axiomatic: that states are independent entities, equal in law to other states, and have full sovereignty over their territories (subject to other applicable rules of international law). The *Friendly Relations Declaration*,²⁸ a “quasi-constitutional document” of the international legal order,²⁹ provides that the principle of sovereign equality mandates that a state’s “territorial integrity” is “inviolable.” Arbitrator Max Huber pithily referred to sovereign independence as a state’s “right to exercise [in its territory], to the exclusion of any other State, the functions of a state.”³⁰ For its part, the International Court of Justice (ICJ) has noted that “respect for territorial sovereignty is an essential foundation of international relations.”³¹

While territorial sovereignty has many manifestations, the most relevant one is jurisdiction, used here in its international law meaning as “a state’s power to regulate or control persons, conduct, and events, or to subject them to the power of the state.”³² It is trite law that, within their territories, states have primary and plenary power to exercise both prescriptive jurisdiction (the power to make laws) and enforcement jurisdiction (the power to enforce those laws). This power is inherent in the nature of statehood³³ and implied by the principle of sovereign equality.³⁴ It follows, of course, that it breaches international law for one state to interfere with the territorial state’s exercise of its own jurisdiction.³⁵ From early days, moreover, states

²⁸ *Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations*, GA Res 2625 (XXV), UN Doc A/RES/2625(XXV) (1970) [*Friendly Relations Declaration*].

²⁹ Vaughan Lowe, *International Law* (Oxford: Oxford University Press, 2007) at 100.

³⁰ *Island of Palmas Case (Netherlands v United States)*, reprinted in (1928) 2 UNRIAA 829 at 838.

³¹ *Corfu Channel Case (United Kingdom v Albania)*, [1949] ICJ Rep 4.

³² John H Currie et al, *International Law: Doctrine, Practice and Theory*, 3rd ed (Toronto: Irwin Law, 2022) at 467.

³³ Phillip M Saunders & Robert J Currie, eds, *Kindred’s International Law: Chiefly as Interpreted and Applied in Canada*, 9th ed (Toronto: Emond, 2019) at 313.

³⁴ Juan G Ronderos, “Transnational Drugs Law Enforcement: The Problem of Jurisdiction and Crim Law” (1998) 14 J Contemporary Crim Justice 384 at 390–91.

³⁵ Robert J Currie & Joseph Rikhof, *International and Transnational Criminal Law*, 3rd ed (Toronto: Irwin Law, 2020) at 59; *R v Hape*, 2007 SCC 26 at para 62 [*Hape*]. For a recent example, consider Canada’s criticism of China’s detention of Michael Kovrig and Michael Spavor as “hostage diplomacy,” which sparked a reply from China that this statement amounted to “a ‘gross interference’ in [China]’s judicial sovereignty.” James Griffiths,

have been particularly protective of their exercise of criminal jurisdiction and the various operations of domestic criminal justice systems; indeed, as is often noted, much of the contemporary international law of jurisdiction emerged from inter-state conflicts regarding criminal matters.³⁶ State “sensitivity” on criminal matters has been linked to the centrality of the criminal law powers to statehood³⁷ and the desire to exclude other states from this sphere: “This feeling is based upon the dual observation that a state’s first responsibility is traditionally understood to be ensuring public order and the fact that the enforcement of criminal law is explicitly connected to the coercive power of the state, i.e., its monopoly of violence that is the marker of its internal claim to sovereignty.”³⁸

States, then, are guarded and particular about their exercise of criminal jurisdiction, specifically. This is not criminal law for criminal law’s sake but, rather, the idea that the criminal law entails a protective aspect that is being exerted by the state over its population; criminal law is used to suppress criminal conduct and to allow at least the possibility of redress for victims. Moreover, there is obvious utility to the state maintaining its “monopoly of violence”³⁹ and protecting people on its territory from the criminal enforcement mechanisms of foreign states, which would have no legitimacy and might subvert procedural/rights protections that the territorial state considers desirable or necessary.⁴⁰

Zeroing in even further, these cases specifically involve the exercise of enforcement jurisdiction by Canada and the United States. As will be explored in more detail below, the exercise of enforcement jurisdiction is

“China’s Speedy Release of Two Michaels a Dramatic Reversal after Insistence Case Had No Link to Meng Wanzhou,” *Globe and Mail* (24 September 2021) online: <www.theglobeandmail.com/canada/article-chinas-speedy-release-of-two-michaels-a-dramatic-reversal-after/>.

³⁶ Saunders & Currie, *supra* note 33 at 314.

³⁷ It has been suggested (we think non-controversially) that maintaining a criminal justice system is an inherently sovereign function of a state. See Frédéric Mégret, “Are There ‘Inherently Sovereign Functions’ in International Law?” (2021) 115:3 *Am J Int L* 452 at 485.

³⁸ Bert-Jaap Koops & Morag Goodwin, *Cyberspace, the Cloud and Cross-border Criminal Investigation: The Limits and Possibilities of International Law* (Tilburg: Tilburg Institute for Law, Technology and Society, 2014) at 61.

³⁹ *Ibid.*

⁴⁰ In saying this, we naturally do not intend to suggest that exercises of extraterritorial prescriptive jurisdiction are necessarily illegitimate since, when exercised within certain parameters, it is perfectly lawful. However, the fact that the international law of jurisdiction essentially entails different sets of rules for territorial and extraterritorial jurisdiction emphasizes the point being made here.

strictly territorially bounded under international law, and extraterritorial enforcement jurisdiction is essentially prohibited. By coming onto Canadian or American territory and interfering with domestic criminal prosecutions, the KSA has obviously interfered with the sovereign right of both states to exercise enforcement jurisdiction, on their territories, to the exclusion of other states.⁴¹ If anything, the breach is made more intense by the fact that the KSA's actions actually prevented criminal trials from taking place and is compounded by the fact that the Saudi state officials will have literally committed an offence by providing assistance with bail jumping.⁴² It is difficult to imagine a more profound interference with criminal jurisdiction.⁴³

This conduct by Saudi Arabia, then, breached the territorial sovereignty of Canada and the United States. There is no mitigation of the breach inherent in the fact that the Saudi government was aiding its own nationals in absconding. Regardless of the connections between a state and an object of enforcement, "enforcement jurisdiction ultimately comes down to whether or not the latter happens to be within the territory of the enforcing state."⁴⁴ The notion of interfering with a state's domestic exercise of enforcement jurisdiction, on its own territory, also lends itself to consideration through the lens of the principle of non-intervention, to which we will now turn.

THE PRINCIPLE OF NON-INTERVENTION

The principle of non-intervention has a substantial pedigree as a means of restraining unfriendly conduct between states — from its historical origin as a simple means of preventing war to its twentieth-century expansion into a prohibition on states interfering with each other's internal or external

⁴¹ Note the importance of this point. States are permitted to assist their nationals and, in some circumstances, entitled to do so under treaty and customary international law, even on the territory of foreign states. It is not, for example, the fact that the Saudi government provided its nationals with travel documents that engages the breach of sovereignty but, rather, the purpose and effect of so doing — both of which are the frustration of the local criminal justice process.

⁴² For example, a person who assists another person to jump bail could be charged as a party or accessory to breach of bail conditions, with obstruction of justice, facilitating the flight of a fugitive or any similar domestic criminal offence.

⁴³ Interestingly, in the Carlos Ghosn case, at least one government official expressed the view that Japan's sovereignty had been infringed. This seems an overstatement since, on all available evidence, the bail jumping in that case was engineered and carried out by private individuals (see [note 3](#) above).

⁴⁴ John H Currie, *Public International Law*, 2nd ed (Toronto: Irwin Law, 2008) at 336.

affairs.⁴⁵ It has been called “part and parcel of customary international law” by the ICJ,⁴⁶ which also provided an authoritative definition:

A prohibited intervention must ... be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State.⁴⁷

It has been clear for some time that the prohibition covers interference not just in a state’s external affairs but also in its “domestic”⁴⁸ or “internal”⁴⁹ affairs, and there is little doubt that intrusions into a state’s internal exercise of criminal jurisdiction of the sort being discussed here fall into the latter sphere. In reviewing the doctrinal literature, one can certainly find suggestions that the threshold is a low one and that facilitating bail jumping would breach the prohibition; one commentator posits that something as “apparently insignificant as an ill-chosen remark made by a statesman about the affairs of a foreign state” would qualify.⁵⁰

However, the ICJ’s careful emphasis on coercion reveals a limiting factor that might throw cold water on the idea that a simple interference with criminal jurisdiction — even in aid of a national — would actually breach the norm. Coercion, as Maziar Jamnejad and Michael Wood note, is “the essence of intervention,”⁵¹ and more nuanced views of state practice suggest that intervention is prohibited only where it “takes place through forcible or dictatorial means, and aims to impose a certain conduct of consequence on

⁴⁵ Philip Kunig, “Intervention, Prohibition of” in Anne Peters, ed, *Max Planck Encyclopedia of Public International Law*, online: <opil.ouplaw.com/home/mpi>.

⁴⁶ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*, [1986] ICJ Rep 24 at para 202 [*Nicaragua*].

⁴⁷ *Ibid* at para 205.

⁴⁸ *Vienna Convention on the Law of Treaties*, 23 May 1969, Can TS 1980 No 37 (entered into force 27 January 1980), preamble.

⁴⁹ *Friendly Relations Declaration*, *supra* note 28.

⁵⁰ RJ Vincent, *Nonintervention and International Order* (Princeton, NJ: Princeton University Press, 1974) at 3.

⁵¹ Maziar Jamnejad & Michael Wood, “The Principle of Non-Intervention” (2009) 22 *Leiden J Intl L* 345 at 348.

a sovereign State.”⁵² Philip Kunig’s review notes that prohibited intervention tends to occur in military, subversive, economic, or diplomatic forms,⁵³ but, in each case, it is prohibited because it seeks to compel the victim state to do or refrain from doing something. Beyond this, he notes, “there are many acts which States perform that touch the affairs of another State but are not clear-cut interventions.”⁵⁴

Seen in this light, the facilitation of bail jumping may not cross the (admittedly fuzzy) line of coercion and thus might not constitute a breach of the principle of non-intervention. Saudi Arabia, in the examples being examined here, has shown no sign that it wishes to extract concessions of any kind from Canada or the United States or force either state to make different choices about their “political, economic, social or cultural” systems. Rather, it seeks to keep these states from lawfully exercising their criminal justice powers over Saudi nationals. That said, it is highly arguable that pursuing this latter objective is indeed “coercive” in the legal sense, in that the Saudi actions seek not just to interfere but also (successfully) to prevent Canada and the United States from exercising their criminal jurisdictions. This is a physical, tangible interference with the victim state’s legal order, which leads to the physical impossibility of that state enforcing its local law in its own territory. Surely, these actions strike at the very heart of the sovereign state interests that the rule of non-intervention seeks to protect.

At the very least, even if it is not a breach of the prohibition, Saudi Arabia’s conduct is certainly an unfriendly act that tiptoes up to the line and constitutes an “interference,” if not an “intervention.”⁵⁵ This is underscored, perhaps, by the KSA’s own views on the relevant norms. In 2018, a Canada-Saudi diplomatic conflict was sparked by Twitter comments by Chrystia Freeland, then the Canadian Foreign Affairs minister, which criticized the KSA for imprisoning human rights dissidents. The Saudi foreign ministry’s objections in response were fierce and explicit:

[T]he Canadian statement is a blatant *interference in the Kingdom’s domestic affairs*, against basic international norms and all international protocols. It is a major, unacceptable *affront to the Kingdom’s laws and judicial process, as well as a violation of the Kingdom’s sovereignty*. ... The Kingdom views the Canadian

⁵² Kunig, *supra* note 45 at para 1.

⁵³ *Ibid* at paras 22–27.

⁵⁴ *Ibid* at para 6.

⁵⁵ We note parenthetically that it is certainly not in keeping with the spirit of “international comity,” which, while it has no obligatory force, is meant to help maintain harmonious legal relations between states. Regarding unfriendly acts and retorsion, see Neil McDonald & Anna McLeod, “‘Antisocial Behaviour, Unfriendly Relations’: Assessing the Contemporary Value of the Categories of Unfriendly Acts and Retorsion in International Law” (2021) 26:2 J Conflict & Security L 421.

position as an affront to the Kingdom that requires a sharp response to prevent any party from attempting to meddle in Saudi sovereignty.

... The Kingdom ... categorically rejects *any intervention in its domestic affairs and internal relations* with its citizens.⁵⁶

The contrast between a foreign minister's comment on social media and actual interference with a state's criminal justice system, on its territory, is notable. It certainly does not lie in the mouth of a state expressing such sentiments about the former to deny the legal significance of the latter. These remarks amount to an indirect admission that the Saudi conduct in the bail-jumping cases constitutes (as argued in the previous section) a breach of sovereignty, and they suggest that, were the roles reversed, the Saudi government would view them as a breach of the rule of non-intervention as well.

ANALOGUES: ABDUCTION AND EXTRATERRITORIAL ENFORCEMENT

It is sometimes worthwhile to analyze conduct by way of other conduct that it resembles, particularly in a field with the fluidity of international law. Mindful of the dangers of proceeding by analogy, we nonetheless think that there are two legal analogues that demonstrate effectively that the state conduct being discussed here is tainted with illegality: the prohibition on the exercise of extraterritorial enforcement jurisdiction and the legal regime around inter-state abduction.

Extraterritorial Enforcement

As noted above, incidental to sovereignty, states are entitled to exclusive exercise of enforcement jurisdiction⁵⁷ on their territories. The natural

⁵⁶ “#Statement: Throughout Its Long History, the Kingdom of Saudi Arabia Has Never Accepted Any Interference in Its Domestic Affairs by, or Orders from Any Country,” *Twitter* (5 August 2018) at 22:27, online: <twitter.com/KSAmofoaEN/status/1026278561399889926> [emphasis added]. Interestingly, part of Saudi Arabia's response to the purported offence was to relocate students who were attending Canadian universities on government scholarships. See Hailey Salvian, “Saudi Arabia Telling More Than 150 Students to Leave University of Regina,” *CBC News* (7 August 2018), online: <www.cbc.ca/news/canada/saskatchewan/saudi-arabia-university-students-scholarships-withdrawn-1.4776121>. This might explain in part why, to our knowledge, there have been no further Canadian incidents with Saudi students.

⁵⁷ Enforcement jurisdiction “concerns the power to take action consequent upon [a state's laws], usually by way of executive or administrative action, and includes all measures of constraint aimed at ensuring compliance with such rules”; it includes investigations, search and seizure, arrests, prosecutions, and any other “coercive judicial procedures.” Currie, *supra* note 44 at 334. See also Currie & Rikhof, *supra* note 35 at 97.

corollary of this norm is that states are prohibited from exercising enforcement jurisdiction on the territories of foreign states. This is a hard rule of customary international law, its modern recognition often traced to the decision of the Permanent Court of International Justice in *Lotus*,⁵⁸ and it is subject only to consent-based exceptions such as treaty or informal agreements. States are hostile to such conduct because it undermines basic territorial sovereignty in general as well as the state's legitimate monopoly on the use of coercive (and even violent) conduct. It is often argued that a breach of this rule also breaches the principle of non-intervention.⁵⁹

It is possible that, in facilitating bail jumping by its nationals, Saudi Arabia was in fact "enforcing" some law authorizing the government to do so, but this is both speculative and unlikely. Nor did these measures bear the usual trappings of enforcement jurisdiction, such as police investigation, search, seizure, arrest, and so on. In this sense, the conduct does not fall within the strict ambit of the rule since the actions taken by the Saudi officials were more along the lines of law breaking as opposed to law enforcing; they were acting, it might be said, more like criminals than police.

As argued above, this conduct is easily construed as unlawful simply because it interfered with the Canadian and American territorial exercise of criminal jurisdiction and thus breached sovereignty. However, invoking the prohibition on extraterritorial enforcement is analytically helpful in the sense that it provides further "taint" on this activity, particularly because it runs counter to the same policy prescriptions that underlie this rule. When a government official commits a crime in a foreign state, within the scope of their authority and with the specific intention and effect of obstructing criminal law, it is not simply a run-of-the-mill offence but also an act of hostility perpetrated by one state against another. Specifically, it frustrates the territorial state's ability to discharge its own criminal laws and processes and undermines its ability to protect its own population. It also deprives the territorial state of its entitlement to provide or refuse consent for foreign activities on its soil, which is the essential foundation of all criminal cooperation between states.

Abduction

As history bears out, states sometimes abduct individuals from the territories of other states, often to facilitate criminal prosecution. As the word "abduct" suggests, the territorial state does not give its consent for the seizure of the

⁵⁸ "[A State] may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention." SS "*Lotus*" (*France v Turkey*) (1927), PCIJ (Ser A) No 10 at para 45 [*Lotus*].

⁵⁹ *Hape*, *supra* note 35 at para 65; *Nicaragua*, *supra* note 46 at 108.

individual, who is instead spirited away by foreign government officials or their proxies to face foreign process. This sort of abduction has been agreed to be unlawful as a breach of territorial sovereignty since at least the time of the publication of the Harvard research in 1935.⁶⁰ Its illegality was re-emphasized by the United Nations (UN) Security Council during its engagement in the dispute between Argentina and Israel over the latter's famous abduction of Adolf Eichmann from Argentinian territory.⁶¹ Despite the fact that it still happens,⁶² it remains unlawful.⁶³ Abduction by government officials is essentially an arrest or at least done for law enforcement purposes, and, for this reason, it is usually framed as a breach of the prohibition on extraterritorial enforcement jurisdiction.⁶⁴

The Saudi conduct here shows no signs of constituting abduction, which by its very definition requires that the individual does not consent to being removed from the territorial state. There is certainly no evidence that the individuals were returned to Saudi Arabia to face any sort of legal consequences. However, the absence of any coercion of the involved individuals is the only missing element, which makes abduction another powerful, if supplementary, analogue that further demonstrates the illegality of the bail jumping. It is the lack of consent by the territorial state for an enforcement-related action that puts bail jumping essentially on all fours with abduction. It is not the lack of consequences for the individual removed that bears on the injury to the territorial state but, rather, the undermining of the latter's control over its own territory and legal processes.

STATE RESPONSIBILITY AND REMEDIES

Assuming that any of the above analysis is correct, then the state responsibility angle for the Saudi actions being examined here is straightforward.

⁶⁰ Harvard Research in International Law, "Draft Convention on Jurisdiction with Respect to Crime" (1935) 29 Am J Intl L 435, Spec Supp, Part II at 623–24.

⁶¹ Security Council Resolution S/Res/138, UN Doc S/4349 (1960).

⁶² Just as a recent example, in April 2018, the government of Turkey announced, with some enthusiasm, that its intelligence agency had been abducting Turkish citizens from foreign states, arising from what the government referred to as an "attempted coup." See "Turkish Government Says Its Spy Agency Has Snatched 80 People from 18 Countries," *CBC News* (5 April 2018), online: <www.cbc.ca/news/world/turkish-spy-agency-snatches-80-people-1.4606033>.

⁶³ Silvia Borelli, "Terrorism and Human Rights: Treatment of Terrorist Suspects and Limits on International Cooperation" (2003) 16 *Leiden J Intl L* 803 at 804; Robert J Currie, "Abducted Fugitives before the International Criminal Court: Problems and Prospects" (2007) 18 *Crim L Forum* 349 at 353–54.

⁶⁴ *Lotus*, *supra* note 58 at 18–19; Currie & Rikhof, *supra* note 35 at 561. The government of Canada, at least, has opined that, if there is an extradition treaty in place, an abduction would breach the treaty by subverting it. "Brief of the Government of Canada as Amicus Curiae in Support of Respondent in *United States v. Alvarez-Machain*" (1992) 31 *ILM* 919.

States are responsible for their internationally wrongful acts⁶⁵ and are thereby under obligations to cease the wrongful conduct and provide assurances of its non-repetition⁶⁶ and to make full reparation of the injury, whether it is held to be material or moral.⁶⁷ Given the secretive manner in which the Saudi conduct was carried out there are some questions as to how responsibility actually flows. However, all routes of liability flow back to the Saudi state, whether the relevant actors were employees of the Saudi foreign ministry or embassy (state organs),⁶⁸ any other individual who has state authority,⁶⁹ or any private person acting under the instructions, direction, or control of the Saudi government.⁷⁰ As the injured states, Canada and the United States would be free to invoke state responsibility.⁷¹

Short of the unlikely⁷² option of launching proceedings before the ICJ or an arbitral tribunal, there are self-help remedies of which Canada and the United States could avail themselves. As noted earlier, assisting a person to jump bail is itself a criminal offence of some sort, so if the individuals could be found and if the investigation provided evidence of their conduct, they could be prosecuted. If they are members of a Saudi foreign mission and/or within a certain class of diplomatic staff, they might be protected from prosecution by diplomatic immunity; in which case, they could be declared *persona non grata*.⁷³

Continuing on the state-to-state level, the injured states would certainly be entitled to publicly or privately launch a diplomatic protest with the Saudi government, which could involve calling in the relevant Saudi ambassador for instruction.⁷⁴ The state might also invoke countermeasures, amounting

⁶⁵ International Law Commission (ILC), *Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, UN Doc A/56/83 (10 August 2001), art 1.

⁶⁶ *Ibid*, art 30.

⁶⁷ *Ibid*, art 31.

⁶⁸ *Ibid*, art 4.

⁶⁹ *Ibid*, art 5.

⁷⁰ *Ibid*, art 8.

⁷¹ *Ibid*, art 42.

⁷² “Unlikely” in that formal state-to-state international cases are decidedly rare and because the Saudi regime is unlikely to provide the required consent that would ground the jurisdiction of any adjudicative body that was chosen.

⁷³ *Vienna Convention on Diplomatic Relations*, 18 April 1961, 500 UNTS 95 (entered into force 24 April 1964), art 9.

⁷⁴ Stefan Talmon, “Summoning or ‘Inviting’ an Ambassador: Is There a Difference?” in Stefan Talmon, ed, *German Practice in International Law* (14 July 2020), online: <gpil.jura.uni-bonn.de/2020/07/summoning-or-inviting-an-ambassador-is-there-a-difference/>; Annie Lowrie, “Explainer: What Happens When Ambassadors Get Summoned?,” *Foreign Policy* (22 February 2010), online: <foreignpolicy.com/2010/02/22/what-happens-when-ambassadors-get-summoned/>.

to either unfriendly, but non-breaching, acts of retorsion, or even go so far as to breach some existing legal arrangement between itself and the KSA as a means of pressuring the latter to provide reparations for the latter's breach.⁷⁵ The most injurious and offensive aspect of the Saudi conduct here was that individuals who were in the process of being prosecuted escaped the domestic criminal justice systems of the territorial states. The most logical form of reparation, then, would be for the KSA to surrender the individuals involved or at least to initiate an investigation that might lead to their surrender. While neither Canada nor the United States has an extradition treaty with the KSA, both states are able to engage in an extradition process on an ad hoc basis. Alternatively, the KSA might undertake to prosecute the individuals themselves, exerting nationality-based extraterritorial jurisdiction.⁷⁶ Beyond these solutions, all that remains to the injured states is to obtain red notices with the International Criminal Police Organization (INTERPOL), which would put police forces of the international community under formal notice that the individuals are sought for prosecution.⁷⁷ While it seems unlikely that the KSA would respond to the notices, they might result in arrests and even extradition if the individuals were to travel through an airport or land border of some state that was willing to go to these lengths.

We find it interesting that, as of the date of writing, Canada and the United States appear to have invoked virtually none of these options. Indeed, at the state-to-state level,⁷⁸ neither government has indicated that it even views the conduct as unlawful, let alone that they are bothered by it. More noise has been made in the United States, where Oregon senators sponsored an ultimately successful bill that compelled the Federal Bureau of Investigation (FBI) to declassify all information regarding Saudi bail-jumping assistance.⁷⁹ In response, the FBI declassified an intelligence bulletin indicating that it was almost certain that the bail-jumping assistance had taken place, expressing the view that this “undermin[es] US judicial process.”⁸⁰ However, the

⁷⁵ See generally Federica I Paddeu, “Countermeasures” in Peters, *supra* note 45.

⁷⁶ That is, if Saudi Arabia exerts nationality-based jurisdiction in criminal matters, which would be uncontroversial under international law. See Currie & Rikhof, *supra* note 35 at 69.

⁷⁷ See International Criminal Police Organization (INTERPOL), “Red Notices,” online: <www.interpol.int/en/How-we-work/Notices/Red-Notices>.

⁷⁸ Canada and the United States are both federal states, and, in each, the constitutional responsibility for the conduct of foreign affairs lies with the national or “federal” level of government.

⁷⁹ US Bill S2635, *Saudi Fugitive Declassification Act of 2019*, 116th Congress, 2019 (enacted).

⁸⁰ Federal Bureau of Investigation, “Saudi Officials Almost Certainly Assist Saudi Citizens Flee the United States to Avoid Legal Issues, Undermining the US Judicial Process,” *Intelligence*

FBI has only a domestic reach. Despite the fact that the Oregon senators are currently lobbying the Biden administration to address the problem, there has been no move at the federal level as of yet.⁸¹ Analysts have expressed the view that, while the problem is a matter of concern, it has been viewed by successive executives as less pressing than the need to maintain Saudi assistance in combatting radical Islamic terrorism.⁸²

In Canada, despite sustained investigation by journalists that featured repeated inquiries of federal authorities, the story has been met largely with indifference. When the Al-Saba case broke in 2007, Nova Scotia Crown Prosecutor Catherine Cogswell took the unusual step of commenting on the case in the media,⁸³ noting the frustration of the victims' families and calling on the federal government to introduce greater restrictions on bail for foreign nationals.⁸⁴ Then Foreign Affairs Minister Peter MacKay was reported to be "looking into it," but there is no evidence anything substantial was done.⁸⁵

As for the Alzoabi case, in April 2019, Philip Hannan, a communications official at Global Affairs Canada, stated in an email that no one at Global Affairs had contacted the Saudi embassy about whether it had helped Mohammed Zuraibi Alzoabi flee prosecution in Cape Breton, Nova Scotia. Nor did anyone at Global Affairs, the Canada Border Services Agency, the Department of Justice, or the Royal Canadian Mounted Police consider themselves responsible for finding Alzoabi.⁸⁶ In January 2019, Foreign

Bulletin (29 August 2019). The *Intelligence Bulletin* notes that the "almost certain" standard indicates a probability of 95–99 percent.

⁸¹ "Senators Urge Biden to Act on Saudi Arabia's Alleged Role in Helping Fugitives Flee US," *Middle East Eye* (4 February 2021), online: <www.middleeasteye.net/news/us-senators-call-biden-act-saudi-arabia-role-fugitives-flee>.

⁸² Sebastian Rotella & Tim Golden, "Saudi Fugitives Accused of Serious Crimes Get Help to Flee While US Officials Look the Other Way," *ProPublica* (26 April 2019), online: <www.propublica.org/article/saudi-fugitives-accused-of-serious-crimes-get-help-to-flee-while-u-s-officials-look-the-other-way>.

⁸³ "NS Crown Questions How Accused Saudi Skipped Country," *CBC News* (18 January 2007), online: <www.cbc.ca/news/canada/nova-scotia/n-s-crown-questions-how-accused-saudi-skipped-country-1.641444> ["NS Crown Questions"].

⁸⁴ "Saudi National Flees Canada without Passport," *Globe & Mail* (16 January 2007), online: <www.theglobeandmail.com/news/national/saudi-national-flees-canada-without-passport/article1068833/>.

⁸⁵ "NS Crown Questions," *supra* note 83.

⁸⁶ Aaron Beswick, "Possible Saudi Aid to Man Accused of Cape Breton Sex Assault Never Probed by Government Agencies," *Saltwire* (12 April 2019), online: <www.saltwire.com/halifax/news/local/possible-saudi-aid-to-man-accused-of-cape-breton-sex-assault-never-probed-by-government-agencies-301429/>.

Minister Freeland told reporters in Sherbrooke, Quebec, that the Alzoabi case was being looked into.⁸⁷ However, internal emails from Global Affairs “tell a different story.”⁸⁸ “Based on the traffic I’ve seen there’s no proof of Saudi involvement,” Amy Mills, Global Affairs spokeswoman, wrote in an email, despite a Crown prosecutor in Cape Breton having stated that the Saudi embassy posted Alzoabi’s bail.⁸⁹ According to Mills’s email, “[t]here’s talk of reaching out to ask but that would be a political call and I don’t think anyone recommends that at this time.”⁹⁰ Brendan Sutton, a Global Affairs deputy director, responded: “Well put, Amy.”⁹¹ There is no indication that Canadian police sought an INTERPOL red notice for either fugitive.

In our view, the lack of action by the United States — and lack of interest on the part of Canada — is disturbing, particularly given the seriousness of the prosecutions that the Saudi nationals escaped and most especially because many of them involved sexual assault, sometimes of children. It is axiomatic that individual Canadian and US citizens have no standing in any state-to-state dispute under international law, and, therefore, none of the legal analysis provided here thus far would ground a remedy for any of the victims in these cases; the injured states are free, as Canada and the United States have done so far, to sweep the matters under the proverbial rug. This is unlikely to provide much comfort to the victims or to ordinary citizens who might reasonably expect their governments to respond in some way.

Thus, it is not just that the territorial state’s exclusive jurisdiction over criminal enforcement has been undermined but also that this breach of international law has resulted in real-life harm to people whom the criminal justice system is supposed to protect. It seems intuitive that the lack of response to the illegal actions of the KSA must amount to a breach of some duty owed by these states to their citizens, yet this is a complex question. Quite apart from whether some remedial proceedings might be available under domestic law, the only potential international law route would be by way of some obligation on the affected state to prosecute the alleged perpetrators or at least to attempt to do so. It is to that topic that we now turn.

⁸⁷ “Ottawa Looking into Case Where Saudi Fled Sex Charges after Embassy Posted Bail,” *CTV News* (18 January 2019), online: <www.ctvnews.ca/canada/ottawa-looking-into-case-where-saudi-fled-sex-charges-after-embassy-posted-bail-1.4259515>.

⁸⁸ Beswick, *supra* note 86.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

IS THERE AN OBLIGATION TO PROSECUTE?

EXTRADITE OR PROSECUTE?

The idea that states have a general obligation to prosecute crimes has been lurking in international law since Grotius, who postulated the principle of *aut dedere aut punire*, meaning “either extradite or punish.”⁹² Modern terminology replaces “punish” with “prosecute” (*aut dedere aut judicare*) to better reflect the possibility that an accused individual may be found not guilty.⁹³ The principle requires that states criminalize certain dangerous conduct through their criminal law as well as take steps to either prosecute those who engage in such conduct or extradite the offender to another state prepared to try them.⁹⁴

The justifications for the principle are clear. An obligation to either prosecute or extradite those who commit crimes works as a deterrent for potential future offenders, helps to avoid the problem of vigilante justice, and guarantees respect for the rule of law.⁹⁵ It avoids the possibility of some states becoming “safe havens” for criminals. Additionally, and perhaps most importantly, *aut dedere aut judicare* promotes healing and reconciliation for crime victims.⁹⁶ What is still being debated, however, is the principle’s status in international law. There has been disagreement about the extent to which *aut dedere aut judicare* applies today. More specifically, the breadth of the principle has been questioned – whether it has general, customary application or whether it only applies to specific international offences.

Customary International Law

An evaluation of international law, as it currently stands, suggests that the *aut dedere aut judicare* principle is only obligatory under custom for certain categories of crimes, the range of which is still in dispute.⁹⁷ For instance, there is recent consensus that there may be a customary duty to prosecute

⁹² Miles M Jackson, “The Customary International Law Duty to Prosecute Crime against Humanity: A New Framework” (2007) 16:1 Tulane J Intl & Comp L 117 at 126.

⁹³ ILC, *Report on the Work of Its Sixty-Sixth Session*, UN Doc A/69/10 (2014) at 139–65, online: <legal.un.org/ilc/texts/instruments/english/reports/7_6_2014.pdf> [ILC, *Report*].

⁹⁴ Trent Butte, “The Time of Human Justice and the Time of Human Beings: *Belgium v Senegal* & Temporal Restraints on the Duty to Prosecute” (2013) 45:2 Geo Wash Intl L Rev 349 at 360; ILC, *Report*, *supra* note 93 at 97.

⁹⁵ Sarah M Clanton, “International Territorial Administration and the Emerging Obligation to Prosecute” (2006) 41:3 Tex Intl LJ 569 at 582.

⁹⁶ *Ibid.*

⁹⁷ Jackson, *supra* note 92 at 127.

crimes against humanity,⁹⁸ and it is certainly arguable that the obligation to prosecute breaches of the *Geneva Conventions* has passed into custom.⁹⁹ Any assertion that the customary obligation applies more broadly has been largely rejected, at least up until this point, both by academics and in international politics. As recently as 2011, when Special Rapporteur Zdzisław Galicki proposed customary international law as a source of the obligation to prosecute or extradite, there was “general disagreement” among states with the notion that “the customary nature of the obligation to extradite or prosecute could be inferred from the existence of customary rules proscribing specific international crimes.”¹⁰⁰

There is, of course, powerful moral force behind the idea that states should be obliged to extradite or prosecute persons alleged to have committed serious crimes. The late M. Cherif Bassiouni was one of the foremost promoters of this point of view, arguing that the obligation “should be deemed a *civitas maximas*, ... because world states face a certain vulnerability presented by the harmful conduct of international, transnational and domestic criminality.”¹⁰¹ However, it has generally been accepted that no customary law obligation exists to either extradite or prosecute perpetrators even for most of the most serious international crimes.¹⁰² Even Bassiouni admitted that state practice shows that *aut dedere aut judicare* has not yet been recognized as making up part of general international law, except for the case of certain international offences or when a specific treaty obligation exists.¹⁰³

This is not to say such a customary obligation is not on the horizon. In 2014, the International Law Commission (ILC) submitted a report to the UN General Assembly that concluded its work on the obligation to prosecute or extradite. In that report, the ILC noted that states have expressed a desire for cooperation among both states and international tribunals in fighting

⁹⁸ Michael Scharf, “The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes” (1996) 59:4 Law & Contemp Probs 41 at 52.

⁹⁹ Currie & Rikhof, *supra* note 35 at 81; *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*, 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) [collectively, *Geneva Conventions*].

¹⁰⁰ ILC, *Report*, *supra* note 93 at 103.

¹⁰¹ M Cherif Bassiouni, “The Duty to Prosecute and/or Extradite: *Aut Dedere Aut Judicare*” in M Cherif Bassiouni, ed, *International Criminal Law*, vol 2: *Multilateral and Bilateral Enforcement Mechanisms*, 3rd ed (Leiden: Martinus Nijhoff, 2008) 35 at 35–39.

¹⁰² *Ibid.*

¹⁰³ *Ibid* at 41.

crime, particularly international crime, in accordance with the rule of law.¹⁰⁴ In making that statement, the report referenced a meeting between heads of states in 2012:

In the Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, the Heads of State and Government and heads of delegation attending the meeting on 24 September 2012 committed themselves to “ensuring that impunity is not tolerated for genocide, war crimes, crimes against humanity and for violations of international humanitarian law and gross violations of human rights law, *and that such violations are properly investigated and appropriately sanctioned, including by bringing the perpetrators of any crimes to justice, through national mechanisms or, where appropriate, regional or international mechanisms, in accordance with international law.*”¹⁰⁵

The report is evidence that a growing number of states are recognizing the importance of criminal prosecution in protecting the human rights of their citizens. Additionally, in its concluding remarks, the report explicitly states that any of the ILC’s scepticism regarding customary status for the principle should not be construed as implying that it “has not become or is not yet crystallizing into a rule of customary international law.”¹⁰⁶ However, the report also states that the obligation to combat impunity through prosecution is “given effect” by various conventions, not by an external duty to prosecute.¹⁰⁷ Therefore, it seems that the ILC currently shares the scholarly viewpoint: any duty to prosecute crime, outside of crime falling into particular established categories, is not customary and, thus, must be found in treaties.

Treaties

In modern international law, an increasing number of treaties explicitly create an obligation to extradite or prosecute *vis-à-vis* certain offences. Under these treaties, usually referred to as “suppression conventions,” an extradite or prosecute obligation is paired with a clause awarding jurisdiction to any party state that apprehends a perpetrator, creating what is often referred to as “conditional universal jurisdiction.” To wit, all party states agree that any of them may prosecute any person alleged to have committed the targeted offence and that if they do not prosecute they must extradite to another party state willing to do so. The practical effect is that the states are obliged to facilitate prosecution of the offender, directly or indirectly. According to Miles Jackson, although the specific language proclaiming

¹⁰⁴ ILC, *Report*, *supra* note 93 at 92.

¹⁰⁵ *Ibid* [emphasis added].

¹⁰⁶ *Ibid* at 103.

¹⁰⁷ *Ibid* at 92.

the obligation occasionally differs, over seventy international agreements include *aut dedere aut judicare*.¹⁰⁸ These include the *Convention on the Prevention and Punishment of the Crime of Genocide*,¹⁰⁹ the *Geneva Conventions*,¹¹⁰ and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.¹¹¹

However, none of these explicit articulations of the duty to prosecute are applicable to the crimes of the absconding Saudi nationals. Each of the suppression conventions is specific to a particular crime or range of crimes, and, while they certainly display variety — narcotics trafficking, cybercrime, a range of terrorist acts — they do not typically catch the class of “common crimes” of which the Saudi nationals are accused (mostly, sexual assault). It might be possible for a particular act to be caught — for example, if some conduct met the fairly low threshold for involvement with an “organized group” under the *United Nations Convention on Transnational Organized Crime*,¹¹² this convention’s extradite or prosecute obligation might be available. On the whole, however, the class of criminal conduct here, while serious, does not have an obligation to prosecute attached to it.

AN IMPLICIT DUTY TO PROSECUTE IN INTERNATIONAL HUMAN RIGHTS LAW?

Coercive Human Rights

As discussed above, the types of crimes committed by the Saudi students in both Canada and the United States are not attached to any explicit, treaty-based duty to prosecute. However, there is emerging consensus that certain general human rights instruments implicitly establish a duty to prosecute criminally all violations of human rights.¹¹³ This is relevant as sexual abuse and violence against women, which make up a majority of the crimes committed by the absconding Saudi nationals, have been recognized as “human rights offences.”¹¹⁴ These general treaties do not directly refer to

¹⁰⁸ Jackson, *supra* note 92 at 127. See also Neil Boister, *An Introduction to Transnational Criminal Law*, 2nd ed (Oxford: Oxford University Press, 2018), chs 16, 20.

¹⁰⁹ *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 276 (entered into force 12 January 1951), arts 4, 6.

¹¹⁰ Scharf, *supra* note 98 at 43–44; *Geneva Conventions*, *supra* note 99.

¹¹¹ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987), arts 6–7.

¹¹² 12 December 2000, 2225 UNTS 209 (entered into force 29 September 2003).

¹¹³ Mattia Pinto, “Historical Trends of Human Rights Gone Criminal” (2020) 42:4 Hum Rts Q 729 at 731.

¹¹⁴ Krešimir Kamber, *Prosecuting Human Rights Offences: Rethinking the Sword Function of Human Rights Law* (Leiden: Brill/Nijhoff, 2017) at 110; Pinto, *supra* note 113 at 735. And see Angela Hefli, *Conceptualizing Femicide as a Human Rights Violation: State Responsibility under International Law* (Cheltenham, UK: Edward Elgar, 2022).

any state obligation to investigate and prosecute individuals who have committed human rights offences.¹¹⁵ However, they do both recognize the individual's right to a remedy for a human rights violation and impose an obligation on states to respect and ensure treaty-protected rights.¹¹⁶ The right to a remedy implies both enforcement of the victim's human rights and redress for the violation.¹¹⁷

The right to a remedy established by these agreements has resulted in enforcement bodies moving towards recognizing a duty to prosecute. These bodies, including the UN Human Rights Committee (HRC), the Inter-American Court of Human Rights, and the European Court of Human Rights, "have interpreted their mandate in monitoring compliance with international conventions as comprising the imposition of obligations to criminalize, prosecute, and punish human rights violations."¹¹⁸ According to Mattia Pinto, this increasing reliance upon human rights law to order states to ensure criminal accountability at the domestic level amounts to what Alexandra Huneeus has dubbed "international criminal law by other means."¹¹⁹ There is a large literature on this subject, covering the breadth of international human rights law instruments, which we do not intend to canvass here.¹²⁰ Generally speaking, the argument that these general treaties impose a duty to prosecute on states is reflective of the emerging principle of "coercive human rights," which holds that modern criminal law needs to be refined to meet modern human rights obligations:

The necessity of reconstruction of the criminal process in line with these developments is generally seen as a result of the contemporary untenability of the sovereignty-based arguments against the necessity of an application of the requirements of international human rights law, which have been successfully penetrating into domestic criminal justice discourse leading to a perceptible process of *domestication* of international human rights standards in the national constitutional and legal discourse. ... [I]n the structure of criminal process, the emerging concept of the *procedural obligation* in human rights law, which in its criminal-law aspect, in the most general terms, can be determined

¹¹⁵ Carla Edelenbos, "Human Rights Violations: A Duty to Prosecute" (1994) 7 Leiden J Intl L 5 at 8; Scharf, *supra* note 98 at 48.

¹¹⁶ Edelenbos, *supra* note 115 at 8.

¹¹⁷ Kamber, *supra* note 114 at 48.

¹¹⁸ Pinto, *supra* note 113 at 755.

¹¹⁹ *Ibid*, citing Alexandra Huneeus, "International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts" (2013) 107 Am J Intl L 1.

¹²⁰ Professor Liora Lazarus's scholarship is instructive. See e.g. Liora Lazarus, "Positive Obligations and Criminal Justice: Duties to Protect or Coerce?" in Julian Roberts & Lucia Zedner, eds, *Principles and Values in Criminal Law and Criminal Justice: Essays in Honor of Professor Andrew Ashworth* (Oxford: Oxford University Press, 2012) 135.

as the obligation to investigate, prosecute and, if appropriate, punish criminal attacks on human rights, [has been introduced]. Such an obligation is not owed to the society as a whole but to the person who has suffered personal damage by the occurrence of a criminal offence.¹²¹

According to Krešimir Kamber, even though the scope and strength of human rights protection via criminal law varies widely amongst states, depending on regional, social, and political values, there has been a trend towards a universal acceptance that human rights law creates positive procedural obligations.¹²² More specifically, she argues that one of these developing universal obligations is a “coercive duty” on states to prosecute harmful conduct.¹²³

This idea of coercive human rights, in this context, can be seen in modern human rights instruments, including a number of conventions, declarations, and other non-binding instruments created by various UN bodies, that express the idea that states ought to provide criminal justice mechanisms for serious breaches of human rights standards.¹²⁴ One such document, for instance, is the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (*Victims Declaration*), unanimously adopted by the UN General Assembly in 1985¹²⁵ and primarily concerned with victims of criminal offences under domestic law.¹²⁶ The preamble of the *Victims Declaration* calls on states to “establish and strengthen the means of detecting, prosecuting and sentencing those guilty of crime.”¹²⁷ This goal is evident in the content of the declaration, particularly Article 4, which states that victims “are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.”¹²⁸ While the principles of the *Victims Declaration* are non-binding recommendations “for the appropriate measures to be taken at the international, regional and national level in securing victims’ rights,”¹²⁹ its wide acceptance at the international level signals a shift towards victim-centred justice and, thus, a duty to prosecute violations of victims’ human rights.

¹²¹ Kamber, *supra* note 114 at 1–2 [italics in original].

¹²² *Ibid* at 47.

¹²³ *Ibid*.

¹²⁴ Pinto, *supra* note 113 at 738.

¹²⁵ *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, UNGAOR, 40th Sess, UN Doc A/Res/40/34 (1985) [*Victims Declaration*].

¹²⁶ Kamber, *supra* note 114 at 93.

¹²⁷ *Victims Declaration*, *supra* note 125, preamble.

¹²⁸ *Ibid*, art 4.

¹²⁹ Kamber, *supra* note 114 at 93.

Duty to Prosecute under the International Covenant on Civil and Political Rights (ICCPR)

The main human rights instrument of interest here is the *ICCPR*¹³⁰ as both Canada and the United States are parties. Any duty to prosecute under the *ICCPR* is generally conceived as an obligation to provide a remedy for violation of substantive *ICCPR*-protected rights.¹³¹ The relevant procedural obligations of parties can be found in Article 2. Article 2(1) provides that a state party is required to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights found in the treaty. Relatedly, Article 2(3) requires a state party to provide an effective remedy to those whose rights are violated as well as to ensure that such remedies are enforced. These obligations are binding on all states parties to the *ICCPR*,¹³² and a failure to bring perpetrators of human rights violations to justice could give rise to a breach of the treaty.¹³³

However, it is important to remember that the right to a remedy under the *ICCPR* does not exist in a vacuum. Any obligation to prosecute under Article 2(3) of the *ICCPR* has to be taken in conjunction with one of the substantive provisions of the treaty.¹³⁴ Thus, in order to demonstrate a breach of obligation on the part of Canada or the United States, it first has to be shown that the crimes committed by the Saudi nationals actually amounted to human rights violations. There are several applications that could be raised, but Liora Lazarus convincingly locates an implied positive right to individual protection from crime in Article 9, which protects, *inter alia*, the “security of person.”¹³⁵ In *General Comment no. 35*, the HRC distilled its findings in a number of previous matters and stated:

The right to personal security also obliges States to ... protect individuals from foreseeable threats to life or bodily integrity proceeding from any government or private actors. States parties must also take both measures to prevent future injury and retrospective measures, *such as enforcement of criminal laws*, in response to past injury[.]¹³⁶

¹³⁰ 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 2(1).

¹³¹ Kamber, *supra* note 114 at 122.

¹³² United Nations Human Rights Committee (UNHRC), *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) at para 4.

¹³³ *Ibid* at para 18.

¹³⁴ Kamber, *supra* note 114 at 123.

¹³⁵ Liora Lazarus, “Security, the Right To,” in Rainer Grote et al, eds, *Max Planck Encyclopedia of Comparative Constitutional Law*, online: <oxcon.ouplaw.com/home/mpeccol>.

¹³⁶ UNHRC, *General Comment No 35: Article 9 (Liberty and Security of Person)*, UN Doc CCPR/C/GC/35 (2014) at para 9 [emphasis added].

At least so far as the sexual assaults go, this duty is reinforced by the *Convention on the Elimination of All Forms of Discrimination against Women*,¹³⁷ Article 2 of which obliges states to “take all appropriate measures,” including the use of legislation, to eliminate discrimination against women. Moreover, the UN Special Rapporteur on Violence against Women has suggested that there is now a rule of customary international law requiring states to address gender-based violence with “due diligence,” which includes “positive action to prevent and protect women from violence, punish perpetrators of violent acts and compensate victims of violence.”¹³⁸

All of this would suggest that, as sexual crimes are paradigmatically “human rights crimes,” even when perpetrated by private actors, any reasonable construction of the right to personal security would impose an obligation on Canada and the United States to prosecute the offences at issue here. A duty to be “duly diligent” would certainly also encompass the police and the governments of Canada and the United States to make some kind of effort to apprehend the perpetrators once they jumped bail, particularly where there are at least some avenues (INTERPOL notices, diplomatic representations, and so on) available for them to do so.

Remedial Considerations

Given that some authority exists for a finding of a duty to prosecute in relation to violations of the *ICCPR*, one question still remains: what avenues are available for the victims to receive remedies? The *ICCPR* provides two petition systems, either of which could theoretically be used to establish a breach of Canada’s or the United States’ duty to prosecute the Saudi nationals. First, there is a petition system under which the HRC can receive and consider complaints from states parties regarding other states parties’ non-compliance with their *ICCPR* obligations.¹³⁹ Under this first system, the responsibility would be on another state to report the violation.

The more helpful system is likely the second, which permits individuals (rather than states) to submit complaints directly to the HRC for consideration.¹⁴⁰ Under this system, complaints can be submitted by the alleged abuse victim (so long as they have exhausted all local remedies), and they are to be forwarded to the relevant state party, which is required to respond to

¹³⁷ 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981). Canada has signed and ratified, and the United States has signed.

¹³⁸ Yakin Ertürk, Special Rapporteur on Violence against Women, *Integration of the Human Rights of Women and the Gender Perspective: Violence against Women – The Due Diligence Standard as a Tool for the Elimination of Violence against Women*, UN Doc E/CN.4/2006/61 (2006) at 2.

¹³⁹ Currie, *supra* note 44 at 427.

¹⁴⁰ *Ibid* at 428.

the HRC within six months.¹⁴¹ While the HRC's final views on the matter after the state responds are technically non-binding, "given that they are usually publicized by one or the other party, ... such views may serve as a source of political pressure on States, thus encouraging compliance."¹⁴² However, this remedy is only available if the offending state is a party to the *Optional Protocol to the ICCPR*¹⁴³ — thus, Canada can be subject to the regime, but the United States cannot.¹⁴⁴ Therefore, the *ICCPR* would only provide a claims mechanism for individual Canadian victims. It would be the responsibility of another state to report the US violation in order to provide redress for US victims.

Moreover, introducing a sense of realism to this route is probably wise. The legal developments regarding a human rights-based obligation to prosecute are far more advanced under the *European Convention on Human Rights* and even the *American Convention on Human Rights* than the *ICCPR*.¹⁴⁵ State party adhesion to the views of the HRC, moreover, is (to put it politely) uneven, and its findings are not subject to direct application in the law of states parties. The battle for an individual remedy in these cases would certainly be uphill if it were to be undertaken.

CONCLUSIONS

This article has presented what we hope is a convincing case that a state that assists its nationals (or any individuals) to jump bail has acted in a manner that breaches some fairly fundamental principles of international law and has manifestly violated the sovereignty of the territorial state. In the case examples used, it seems inarguable that Saudi Arabia has breached the sovereignty of both Canada and the United States in so doing. However, these cases also illustrate the disappointing reality — disappointing, certainly, from the point of view of the victims of the alleged crimes — that, while offended states have a number of solid and potential avenues for remedy, they may fail to pursue these out of some vague sense of national

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

¹⁴⁵ *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953); *American Convention on Human Rights*, 21 November 1969, 1144 UNTS 123 (entered into force 18 July 1978). For a review, see Liora Lazarus, "Annex A, Advice for the Stern Review: The Human Rights Framework Relating to the Handling, Investigation and Prosecution of Rape Complaints" in United Kingdom Home Office, *The Stern Review* (2010) at 125. On the European side, in particular, see generally Lauren Lavrysen & Natasa Mavronicola, eds, *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR* (Oxford: Hart Publications, 2020).

interest or through simple neglect. Nor are potential direct remedies for the victims without obstacles.

From several points of view, this is not a good thing. On some views, the sovereignty of states in international law is “not so much a static fact as a reiterative process of assertion: not just something states possess, but rather something they repeatedly claim, and that is repeatedly recognized by other states.”¹⁴⁶ To the extent that this is the case, then, when states permit intrusions into their sovereignty, without protest,¹⁴⁷ it is undermined. This is particularly the case, in our view, with regard to a “hard” rule of customary international law like the prohibition of one state interfering with another’s jurisdiction generally and the specific prohibition on extraterritorial enforcement jurisdiction. Notionally, where this conduct goes unprotested, then the entire norm itself is weakened. Realistically, the failure of Canada and the United States to protest the Saudi conduct here may or may not threaten the status of the overall rule, but it can hardly be healthy for the sovereignty of either state. This is, as well, to say nothing of the victims, who are left largely without redress. It is hollow for legal doctrine to describe the international law of jurisdiction as being intended to allow states to use their criminal laws to protect their nationals when breaches of that law are left unaddressed and perpetrators are blithely permitted to go free. In a time when, at least in North America, dialogue about sexual crimes is more open than ever, it is profoundly disappointing that states might use the difficulties involved with transnational prosecutions as an excuse to do nothing. As both public policy and moral imperative, more is surely required.

¹⁴⁶ Florence Gaub & Lotje Boswinkel, “How the Gulf States Are Using Their Air Space to Assert Their Sovereignty” (2021) 97:4 *Intl Affairs* 985 at 987.

¹⁴⁷ There is intriguing work currently under way on the manner in which “state silence” can undermine international law. See University College London, “ERC State Silence Project,” online: <www.ucl.ac.uk/laws/research/groups-and-projects/erc-state-silence-project>.

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