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Extraditing Israeli Citizens to the United States- Extradition and Citizenship Dilemmas

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EXTRADITING ISRAELI CITIZENS TO THE UNITED STATES—EXTRADITION AND CITIZENSHIP DILEMMAS

*Yaffa Zilbershats**

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INTRODUCTION

The extradition of Israeli citizens to the United States has been very problematic in the last twenty years. Since 1978, when Israel amended its Extradition Law prohibiting the extradition of its citizens, it has stood in breach of its explicit international obligation towards the United States to extradite its citizens. This conflict recently reached a zenith when Israel refused to extradite Samuel Sheinbein, a citizen of both Israel and the United States, whose extradition was requested for his commission of a first degree murder in Maryland.

This case accelerated a very recent amendment to the Israeli Extradition Law regarding the extradition of citizens. The amendment provides that Israeli citizens who are also residents of Israel will be extradited solely to stand trial in the requesting state and on condition that, if they so wish, they will be returned to Israel to serve a custodial sentence imposed upon them. As the United States and Israel have not yet amended their extradition treaty, the treaty provision preventing either party from imposing restrictions on the extradition of citizens from Israel to the United States and vice versa remains in force, and thus creates a conflict with Israel's domestic law.

This article will address the problems of extraditing Israeli citizens to the United States from both a normative and substantive perspective. The analysis will lead to a conclusion that the United States and Israel should adopt an amendment to the United States-Israel extradition treaty based on the new provision of the Israeli law regarding the extradition of its citizens. This analysis will also support general conclusions regarding the definitions of extradition and citizenship.

I. THE NORMATIVE PROBLEM

A. *The Status of Extradition Treaties Within the Domestic Legal Systems of the United States and Israel*

Extradition is the process by which a person, charged with or convicted of a crime under the laws of one state, is arrested in another state and returned for trial and/or punishment to the state where he was

terrorism, control of drug trafficking, nuclear non-proliferation, respect for human rights, environmental protection, etc.

What is the role of quantitative "scorecards" in this process? The answer will depend on whether future scholars can find ways to fix the many methodological problems that beset the scorecard approach. It seems clear that a great deal of ingenuity and econometric skill will be required to overcome the formidable challenges that sanctions "games" present to those who would make use of quantitative analysis to study such games. Meanwhile, policy-makers will be well advised to continue to rely on old-fashioned heuristic judgment informed, perhaps, by something like the case method with which lawyers are familiar: examining future cases from the perspective of the deepest possible understanding of past cases, searching for experiential precedents in the way that lawyers and judges seek legal precedents, relying frankly on intuition and judgement to account for the inevitable dissimilarities and gaps in data that remain after the storehouse of known history is exhausted.

CONCLUSION

Sanctions continue to occupy an important middle ground between jawboning and war. The importance of getting sanctions right is well worth the effort of a more vigorous inquiry.

charged or convicted.¹ According to prevailing customary international law, a requested state has no duty to extradite persons to stand trial or undergo punishment in a requesting state.² Any obligation to surrender persons who have committed crimes in foreign countries is based on the existence of a treaty between the requesting and the requested states.³ Most extradition agreements between states are bilateral treaties.⁴ Israel and the United States signed a bilateral extradition treaty on December 10, 1962, which entered into force a year later on December 5, 1963.⁵

Extradition treaties, whether bilateral or multilateral, are part of public international law.⁶ However, they have a unique character since they are implemented solely by a state's domestic organs, rather than by international institutions.⁷ Domestic judicial and executive branches of the requesting and requested states must decide whether to request the extradition of a fugitive from justice and whether to grant it.⁸ Thus, extradition treaties are meaningless unless part of a state's domestic legal system.

United States federal legislation regulates the extradition of offenders who committed crimes in foreign countries and are now in the United States.⁹ This legislation states explicitly that "[t]he provisions of this chapter relating to the surrender of persons who have committed crimes

1. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 475 and introductory note, at 556-557 (1986); see also, e.g., *Terlinden v. Ames*, 184 U.S. 270, 289 (1902); *Draft Convention on Extradition*, 29 AM. J. INT'L L. 66 (Supp. 1935).

2. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 475 cmt. a.; see also MALCOLM N. SHAW, *INTERNATIONAL LAW* 482 (4th ed. 1997).

3. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 475 cmt. b.; see also, e.g., I.A. SHEARER, *EXTRADITION IN INTERNATIONAL LAW* 22-24, 27 (1971); 1 OPPENHEIM'S *INTERNATIONAL LAW* pt. 2 at 950 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992).

4. See LOUIS HENKIN, *INTERNATIONAL LAW, POLITICS AND VALUES*, 250 (1995). Bilateral treaties are the most common forms of extradition arrangement but there are also regional conventions. See, e.g., *European Convention on Extradition*, Dec. 13, 1957, 359 U.N.T.S. 273; *Additional Protocol to the European Convention on Extradition*, Oct. 15, 1975, *Europ. T.S.* No. 86; *Second Additional Protocol to the European Convention on Extradition*, Mar. 17, 1978, *Europ. T.S.* No. 98; *Convention on Extradition*, Dec. 26, 1933, 49 Stat. 3111. There is no universal treaty on extradition but the United Nations General Assembly has produced the *Model Treaty on Extradition*, 30 I.L.M. 1407 1991, which has formed the basis of inter-state extradition agreements.

5. *Convention on Extradition*, Dec. 10, 1962, U.S.-Isr., 14 U.S.T. 1707 (amended Apr. 11, 1967, 18 U.S.T. 382).

6. See GEOFF GILBERT, *TRANSNATIONAL FUGITIVE OFFENDERS IN INTERNATIONAL LAW* 14 (1998).

7. See *id.* at 2, 15-16.

8. The procedure for requesting and granting extradition varies from one state to the other. See *id.* at 70-74, 78-84.

9. See 18 U.S.C. §§ 3181-3195 (1994) (sections address extradition, particularly §§ 3181, 3184).

in foreign countries shall continue in force only during the existence of any treaty of extradition with such foreign government",¹⁰ meaning that the United States may only implement the procedure provided by Congress¹¹ if the requesting country has ratified an extradition treaty with the United States.

United States courts have held that an extradition treaty is self-executing, and that a fugitive may be arrested and extradited under the terms of the agreement alone, without the aid of implementing legislation.¹² In such a case, the Federal Law on Extradition serves only as a model code of extradition, and the process actually takes place according to the treaty.

In Israel, treaties do not become part of domestic law by virtue of their ratification, even if by their nature they are self-executing. Rather, treaties become part of Israeli law by a separate act of legislation.¹³ Some treaties are ratified without any further incorporation, in which case they are not considered part of Israeli domestic law, and are not implemented by its domestic courts.¹⁴ Some treaties are followed by incorporating legislation enacted after the ratification of a treaty, and so become part of Israel's domestic law.¹⁵ In certain cases, the legislature enacts a law

10. 18 U.S.C. § 3181.

11. 18 U.S.C. § 3184.

12. *See In re Metzger*, 46 U.S. 176, 188 (1847); *Valentine v. U.S.* 299 U.S. 5, 10, 18 (1936).

13. This rule was first expressed in C.A. 25/55, *The Custodian of Absentee Property v. Samara*, 10 P.D. 1829. The rule has since been affirmed in a number of cases. *See, e.g.*, C.A. 43/76, *Kupath Holim Maccabi v. State of Israel*, 31(1) P.D. 770, 777; H.C. 698/80, *Kawasma v. Minister of Defence*, 35(1) P.D. 617, 627; H.C. 393/82, *Jamait Askan v. Commander of IDF in the Judea and Samaria Region*, 37(4) P.D. 785, 793.

14. The Four 1949 Geneva Conventions on the Laws and Customs of War were ratified by Israel on July 6, 1951. *See* Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field, August 12, 1949, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, August 12, 1949, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 75 U.N.T.S. 135; Treatment of Prisoners of War, August 12, 1949, 75 U.N.T.S. 287. Israel never incorporated these conventions into its domestic legal system. When petitions were submitted to the Supreme Court sitting as the High Court of Justice against the orders of the military governor in Judea, Samaria and Gaza for violations of the 1949 Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, the High Court always ruled that this Convention was entirely customary international law. The Court went on to rule that since it was not enacted into domestic law, it did not have force in Israel's domestic legal system and could not serve as grounds for voiding the governor's orders. *See, e.g.*, H.C. 606/78, *Ayub et al. v. Minister of Defence et al.*, 33(2) P.D. 113, 120–123, 125–129; *Kawasama*, 35(1) P.D. at 617, 627, 636; *Jamait Askan*, 37(4) P.D. at 793.

15. *See, e.g.*, the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (ratified by Israel on Mar. 9, 1950). The treaty was followed by the Israeli Law Concerning the Prevention and Punishment of the Crime of Genocide, 1950, 4 L.S.I 101 (1949–1950).

that can be implemented by the courts pending the existence of a treaty. Such a law also serves as a tool for the incorporation of the treaties. Extradition falls into this last category.

Section 2 of the Israeli Extradition Law¹⁶ states that “[a] person may be extradited if . . . an agreement providing for reciprocity as to the extradition of offenders exists between Israel and the state requesting his extradition.” This provision’s dual effect is that Israel cannot extradite someone to a requesting state without the existence of a treaty, and automatically incorporates extradition treaties that Israel concludes into its domestic legal system.

Section 1 of the Extradition Law complicates the legal situation regarding extradition in Israeli law, which provides that “[a] person who is in Israel shall not be extradited to another state except under this law.”¹⁷ In contrast to the United States, where the Federal Law on Extradition serves only as a model code conferring priority in domestic law to any treaty arrangements, in Israel the extradition treaty will be part of domestic law as long as it does not contradict the provisions of the Extradition Law. In cases of a conflict between any extradition treaty ratified by Israel and Israeli domestic extradition law, the domestic law will prevail.

B. The Conflict Between Treaty Obligations and Domestic Law Regarding the Extradition of Israeli Citizens to the United States

The Israeli legislature, the Knesset, already considered whether to extradite Israeli citizens to stand trial or undergo punishment in a foreign country upon the enactment of the original Israeli Extradition Law in 1954. The then-Minister of Justice, Pinchas Rosen, strongly objected to the insertion of a clause prohibiting the extradition of Israeli citizens to a foreign county,¹⁸ although there were dissenting views.¹⁹ Finally, the 1954 Extradition Law did not include any provision regarding the extradition of Israeli citizens. The courts interpreted the law’s silence on that point as allowing the extradition of Israeli citizens, even in cases where the requesting country would not extradite its own citizens to Israel.²⁰

In accordance with this domestic legal situation established in 1954, Article IV of the 1962 Convention Relating to Extradition between Israel and the United States provided that “[a] requested Party shall not decline to extradite a person sought because such person is a national of

16. Extradition Law, 1954, 8 L.S.I. 144 (1953–1954).

17. 8 L.S.I. 144

18. See D.K. (1953) 2035, at 2036–37.

19. See D.K. (1953) 2035, at 2039–40, 2041–42, 2045–46.

20. See, e.g., C.A 308/75 Pesachovich v. The State of Israel, 31(2) P.D. 449 (1977).

the requesting Party.”²¹ This provision became part of Israeli domestic law, since it did not conflict with any other section of the Israeli Extradition Law.²² It also became part of United States domestic law²³ and fit into the general policy of the United States to extradite both aliens and citizens when all other requirements for extradition were met.²⁴

Israel's position changed and became more complex in 1978 when it decided to amend its Extradition Law. The amendment was initiated in 1977 by Menachem Begin, then head of the Knesset opposition party and later elected Prime Minister in 1977. He suggested that the Extradition Law be amended to prohibit the extradition of Israeli citizens to a foreign country.²⁵

His proposal was debated in the Knesset²⁶ and finally became law on January 3, 1978.²⁷ According to the amendment, “[a]n Israeli national shall not be extradited save for an offence committed before he became an Israeli national.”²⁸ The amendment also provided that “the courts in Israel are competent to try under Israeli law an Israeli national or resident of Israel who committed abroad an act which had it been committed in Israel, would be one of the offences included in the Schedule to the Extradition Law, 1954.”²⁹

This amendment created a very grave problem from a normative perspective; this article will analyze its substantive aspects in greater detail.³⁰ According to the amendment, Israel was prohibited from extraditing its citizens, and this new provision of domestic law prevailed over any international obligation which provided for the contrary.³¹ In the

21. Convention on Extradition, *supra* note 5, 14 U.S.T. at 1710. Since the Israeli Extradition Law was silent on the issue of extraditing Israeli citizens, Israel could also ratify arrangements that differed from its arrangement with the United States with regard to the extradition of citizens from Israel. For example, Article 6(1)(a) of the European Convention on Extradition, to which Israel is a party, provides that “[a] Contracting Party shall have the right to refuse extradition of its nationals.” European Convention on Extradition, Dec. 13, 1957, art. 6(1)(a), 359 U.N.T.S. 273, 280.

22. *Supra* text accompanying notes 13–16.

23. *Supra* text accompanying notes 9–12.

24. See SHEARER, *supra* note 3, at 110.

25. See D.K. (1977), 1452–53.

26. See D.K. (1978), 1032–36.

27. See Offences Committed Abroad (Amendment of Enactments) Law, 1978, 32 L.S.I. 63 (1976–1979).

28. 32 L.S.I. 63. This amendment became Section 1A of the Israeli 1954 Extradition Law.

29. See 32 L.S.I. 63. This provision became Section 4A of the Penal Law (Offences Committed Abroad) (Consolidated Version) 1973 27 L.S.I. 32 (1970–1973). Today this provision appears with certain changes in Section 15 of the Israel Penal Law due to Amendment No. 39 of the Israeli Penal Law, 1994, S. H. 1481.

30. See *infra* chapter III.

31. See Extradition Law, 1954, 8 L.S.I. 144 (1953–1954).

conflict between the United States-Israel Extradition Treaty, which obliged the parties to extradite their nationals, and the 1978 amendment to the Israeli Extradition Law prohibiting the extradition of Israeli citizens to any foreign country (including the United States), the Extradition Law prevailed. Israeli courts had to ignore a request of the United States to extradite Israeli citizens to stand for trial or punishment in the United States, which caused Israel to breach its Extradition Treaty with the United States.³²

C. How May the Conflict Be Solved?

1. Introduction

The conflict between Israel's domestic and international legal obligations regarding the extradition of citizens may be solved in two different ways. If one believes that the ideal law would not enable Israel to extradite its citizens, then the parties must amend the United States-Israel extradition treaty. However, if one believes that Israel should be able to extradite its citizens, then Israel must amend its Extradition Law.

The ideal law should be shaped by both normative and substantive considerations. This article will first address the normative considerations, and will then analyze the substantive issues.

2. Altering the Treaty Obligations

A review of the bilateral extradition treaties between the United States and other countries reveals that it is quite rare to find a strict provision obliging the states to extradite their citizens. Usually, United States extradition treaties avoid such explicit language as adopted in the United States-Israel extradition treaty, that "[a] requested Party shall not decline to extradite a person sought because such person is a national of the requested Party."³³

Extradition treaties concluded between the United States and civil law countries, which tend not to extradite their citizens, usually provide that while the contracting parties are not bound to extradite their citizens, the executive has discretionary power.³⁴ This flexible arrangement leaves

32. See *infra* chapter IV B 3(b).

33. Convention on Extradition, *supra* note 5, at 1710.

34. Supplementary Convention to the Extradition Convention of 1909, Feb. 12, 1970, U.S.-Fr., 22 U.S.T. 407 (Article III of the Convention amended Article V of the 1909 Convention). Article V of the 1909 Convention provided only that neither of the parties to the Convention would be bound to deliver up its own citizens. This wording was interpreted by the U.S. Supreme Court as prohibiting the extradition of citizens completely without leaving any discretion to state authorities to extradite even if they were willing to do so. See Valentine

the United States with the discretion either to reciprocate and not extradite its citizens to states that do not extradite their own citizens, or to extradite its citizens even in cases where no reciprocity exists.

As opposed to the civil law approach, common law countries generally extradite their citizens. A review of the extradition treaties between the United States and the United Kingdom,³⁵ and between the United States and Canada,³⁶ reveals that these treaties are silent on the question of extradition of citizens. Instead, these states extradite their citizens when they deem it proper by means of their domestic legal organs.

It should be added that common law countries sometimes conclude extradition treaties with the United States whereby the question of the extradition of citizens is handled in a manner similar to extradition proceedings between the United States and civil law countries.³⁷ In these cases, the United States and its treaty partners are not bound to extradite their citizens, but rather leave the decision whether or not to extradite to the discretion of their respective domestic authorities. Accordingly, it is evident that the provision in the United States-Israeli extradition treaty imposing an affirmative duty on both states to extradite their citizens is quite rare and extreme in United States extradition practice.

One might reach the same conclusion when considering Israel's practice. Israel is a party to the 1957 European Convention on Extradition, according to which "[a] Contracting Party shall have the right to refuse extradition of its nationals."³⁸ However, Israel's discretion not to extradite its nationals exists in its extradition practice not only when dealing with civil law European states, but also in its extradition treaties with both the United Kingdom³⁹ and Canada.⁴⁰ This survey reveals that a more flexible agreement on the issue of extradition of nationals, i.e., leaving it to the discretion of the states rather than imposing an affirmative duty, would not be inconsistent with either the United States' or

v. U.S., 299 U.S. 5, 9-10 (1936). Belgium and the United States still have such an article prohibiting extradition without discretion in their extradition treaty of 1901. *See Treaty for Mutual Extradition of Fugitives from Justice*, Oct. 26, 1901, U.S.-Belg., 32 Stat. 1894. For other countries having a similar provision as the amended U.S.-France provision see the Convention on Extradition, Oct. 24, 1961, U.S.-Swed., 14 U.S.T. 1845, and the Convention on Extradition, June 18, 1962, U.S.-Braz., 15 U.S.T. 2093.

35. *See Treaty on Extradition*, June 8, 1972, U.S.-Gr. Brit., 28 U.S.T. 227.

36. A long series of extradition treaties have been replaced by the Treaty on Extradition, Dec. 3, 1971, U.S.-Can., 27 U.S.T. 983, which entered into force March 22, 1976.

37. *See Treaty on Extradition*, Jan. 12, 1970, U.S.-N.Z., 22 U.S.T. 1; *Treaty on Extradition*, May 14, 1974, U.S.-Austl., 27 U.S.T. 957.

38. European Convention on Extradition, Dec. 13, 1957, 359 U.N.T.S. 271, 280 (Israel acceded on Sept. 27, 1967).

39. *See Agreement for the Reciprocal Extradition of Criminals*, Apr. 4, 1960, Isr.-U.K., 377 U.N.T.S. 331.

40. *See Extradition Agreement*, Mar. 10, 1967 Isr.-Can., 722 U.N.T.S. 262.

Israel's practice of extraditing citizens, and would avoid the conflict with Israel's Extradition Law that prohibits the extradition of citizens. It would be premature to decide whether Israel and the United States should modify their treaty obligations before analyzing the substantive arguments regarding extradition in general, and extradition of citizens in particular. Nevertheless, one can say that a change, if recommended, would not contradict the general practice of either the United States or Israel, since the strict prohibition on the extradition of citizens that appears in the current United States-Israel extradition treaty is rare.

3. Amending the Israeli Extradition Law

In order to conform Israel's international extradition obligation to the United States with its domestic law prohibition on the extradition of citizens, Israel could amend its law. Such an amendment could either oblige Israel to always extradite its citizens, or could leave the issue to the discretion of the Israeli authorities, enabling them to extradite citizens only to states that reciprocate by extraditing their own citizens to Israel. In fact, however, the Israeli legislature has chosen to take a different approach. A recent amendment to the Israeli Extradition Law provides that "[a] person who committed an extraditable offence according to this Extradition Law, and who is an Israeli citizen and resident at the time his extradition is requested, will not be extradited unless the following two conditions have been fulfilled:

1. The extradition request is to stand for trial in the requesting state.
2. The requesting state undertakes to return the person extradited to Israel, to serve his sentence if he is convicted and sentenced to imprisonment."⁴¹

This amendment is quite a natural result of the developing trend that provides for the transfer of foreign convicts to their countries of citizenship to serve their prison sentences. Both Israel and the United States joined the European Convention on the Transfer of Sentenced Persons, concluded at Strasbourg on March 21, 1983,⁴² and both have enacted laws to implement this treaty into their domestic legal systems.⁴³ The recent amendment to Israel's Extradition Law is inspired by the approach underlying these laws and treaty, but also differs from them.

41. Extradition Law (Amendment No. 6), 1999, S. H. 1708.

42. *See* Convention on the Transfer of Sentenced Persons, Mar. 21, 1983, 35 U.S.T. 2867, 2870.

43. Israel enacted the Law Regarding the Transfer of Prisoners to their Own Countries, 1996, S. H. 1603. The United States enacted 18 U.S.C. § 4100 (Supp. 1997).

The European treaty and the implementing laws refer to a foreigner, present in the foreign state where he is being tried and sentenced to prison. According to these legal instruments, such a person will be transferred to serve the prison sentence in his citizenship country only if the individual, the sentencing country and the citizenship country all consent to such a transfer.⁴⁴

In the case of the amendment to the Israeli Extradition Law, the Israeli offender is not present in the foreign country, but rather in his citizenship country—Israel. The Israeli Extradition Law currently provides that his extradition to the foreign sentencing country obliges the sentencing country and Israel to allow him to serve his sentence in Israel if he desires. Only his consent plays a role in such a case, and neither Israel nor the foreign state has any discretion in the matter. If the offender wishes to return to Israel to serve his sentence, he must be allowed to do so.⁴⁵

If the United States were to amend its extradition treaty with Israel, so as to enable the extradition of citizens only for the purpose of standing trial and commit itself to send the offenders back to Israel to serve the punishment, the execution of the treaty would provide the consent of both states to return extradited citizens to serve their punishment in their own country. This article must now consider whether the United States should adopt such a measure, and whether this is the ideal solution.

II. THE EXTRADITION OF CITIZENS FOR TRIAL BUT NOT FOR SENTENCE

A. Is There a Legal Duty to Prosecute or Extradite?

Hugo Grotius wrote that “the state in which the culprit lives should, on receiving the complaint, do one of two things either punish him itself as he deserves or deliver him to judgment of the complainant.” Grotius speaks about this rule of “aut-dedere out punire” (to extradite or to punish), as part of customary international law.⁴⁶

A survey of current authorities in public international law reveals that the duty of a state to extradite or to prosecute and punish offenders

44. European Convention on the Transfer of Sentenced Persons, *supra* note 42, at art. 3; Israeli Law Regarding the Transfer of Prisoners to Their Own Countries, *supra* note 43, at art. 3 & 4; U.S. Act to Implement the Treaties for the Transfer of Offenders § 18 U.S.C. 4100 (Supp. 1997).

45. See Extradition Law (Amendment No. 6), 1999, S. H. 1708; *see also, supra* text accompanying note 41.

46. HUGO GROTIUS, *THE LAW OF WAR AND PEACE* 237 (Louise E. Loomis trans., Walter J. Black, Inc. 1949) (1625).

is not considered to be binding customary international law. The common view is that such an obligation exists only if two or more states conclude a treaty providing for the same.⁴⁷

In the 18th and 19th Centuries, states actually did not follow a general practice of extraditing offenders whom they did not prosecute. Thus, the United States, for example, allowed anybody, whether a law-abiding person or a fugitive, to enter its borders and remain. In terms of its immigration policy, the United States refused to deport any person even if another state requested to try him. It was not until 1875 that the immigration policy changed to bar alien convicts from the United States, and once inside, subject them to deportation or extradition procedures.⁴⁸ France started an extradition practice as early as in the 18th Century. Britain and the United States followed only at the end of the 19th Century.⁴⁹ Nevertheless, in the 20th Century many states accepted the idea of extradition by signing bilateral and multilateral treaties, imposing a duty to extradite. Where these treaties recognize an exemption from the duty to extradite, e.g., where the state has the discretion not to extradite its nationals, the treaties usually impose a duty upon the state to prosecute those exempted from extradition.⁵⁰

Israeli law took a similar approach. In 1978, when the Extradition Law was amended to prohibit the extradition of Israeli citizens,⁵¹ the Penal Law was also amended so as to provide for the competence to prosecute Israeli citizens committing offences abroad.⁵² This amendment

47. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 475 introductory note at 557 (1986); *Draft Convention on Extradition*, *supra* note 1, at 41; 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 3, at 950; HENKIN, *supra* note 4; GERHARD VON GLAHN, LAW AMONG NATIONS 221–222 (7th ed. 1996); GEOFF GILBERT, *supra* note 6, at 15; SHAW, *supra* note 2, at 422; C. Shachor-Landau, *Extra-territorial Jurisdiction and Extradition* 29 INT'L & COMP. L. Q. 274, 275 (1980). One should bear in mind that this general rule against a duty to extradite does not apply to international crimes, such as war crimes, grave breaches of the Geneva Convention, and genocide to which universal jurisdiction exists, thus obliging a state to prosecute or extradite the offender. A different category of crimes includes drug trafficking and terror crimes such as aircraft hijacking and the taking of hostages. Treaties prohibiting this second category of crimes contain provisions imposing a duty to prosecute or extradite. These crimes, however, are not yet considered universal in the same way as the international crimes mentioned above (war crimes, genocide, etc.). Thus, states that are not parties to the conventions prohibiting these non-international crimes are not obliged to either prosecute or extradite. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404, reporter's note 1 at 255–57; see also HENKIN, *supra* note 4.

48. See *Draft Convention on Extradition*, *supra* note 1, at 41–46.

49. *Id.*

50. European Convention on Extradition, *supra* note 38, at §§ 6(1) & 6(2).

51. For a description of this process and the problem it created regarding Israel's international obligations towards the United States see *supra* text accompanying notes 25–32.

52. See Offences Committed Abroad (Amendment of Enactments) Law, 1978, 32 L.S.I. 63, (1976–79), Section 4A, then incorporated into the Penal Law 1977, L.S.I. Special Vol-

also stated that if the Israeli citizen were convicted abroad, but escaped to Israel before serving his sentence in part or in full, he would serve the sentence in Israel.⁵³

Do the consistent statements by legal authorities that there is no customary rule to prosecute or extradite⁵⁴ reflect the general practice at the end of the millennium? Can democratic states, which form the majority of the states of the world, maintain a practice whereby they give shelter to criminals escaping from foreign countries, without either extraditing them to the foreign state or prosecuting these criminals themselves?

The practice proves to be the contrary. Most states sign extradition treaties to avoid such a flight of criminals from justice. They take upon themselves a duty to either return these persons to a state that possesses jurisdiction over them, or when refusing to extradite, undertake to try such fugitives themselves.

Although it would be an exaggeration to claim today that there currently exists a clear customary international legal duty to prosecute or extradite, "several anti-terrorist conventions make this demand and academic writers are beginning to discern an obligation not to let the individual remain unpunished. A new norm of international criminal law may be developing."⁵⁵

B. Prosecution or Extradition—Which Comes First?

1. Introducing the Problem

When Israel modified its domestic law to prevent the extradition of its citizens to foreign countries (including the United States), it violated its international obligation towards the United States as established by the United States-Israel extradition treaty.⁵⁶ This, of course, is unacceptable. A state should first amend its international obligations before it enacts a law contradicting them. Nevertheless, one should bear in mind that Israel, by amending its Extradition Law so as to prohibit the extradition of its citizens, did not intend to become a haven for Jewish

ume, Penal Law Section 7A, which was slightly changed in Amendment No. 39 to the Penal Law of 1994, S.H. 1481.

53. Offences Committed Abroad (Amendment of Enactments) Law, 1978 32 L.S.I. 63, Section 7A, then incorporated into the Penal Law, 1977, L.S.I. Special Volume, Section 10A, which was slightly changed in Amendment No. 39 to the Penal Law, 1994, S.H. 1481, Section 10.

54. *Supra*, note 47.

55. GEOFF GILBERT, ASPECTS OF EXTRADITION LAW 8 (1991).

56. *See supra* text accompanying notes 21–29.

criminals, since it took upon itself a clear obligation to bring offenders to justice in Israel.⁵⁷ In fact, Israel decided that with regard to its citizens who committed offences abroad, priority should be given to the procedure of prosecution over the procedure of extradition. Why has the United States insisted since 1978 that it will not accept such procedure? Why has the United States rejected, as an alternative to the extradition of Israeli citizens, the prospect of prosecuting them in Israel? Does this mean that extradition is the preferable option?⁵⁸

In order to answer these questions, one must consider two (possibly competing) interests. First, one must gauge the public interest in bringing criminals to justice. Which jurisdiction can best achieve this? Is it in the requested state where the accused is located, or in another state that requests his extradition, i.e., generally the state where he allegedly committed the crime? Thereafter, one must consider the interests of the accused. In what forum will his interests best be protected—in the state where he is found, or in the state requesting his extradition?

2. The Public Interest in Bringing Offenders to Justice

When considering the goals of criminal law and criminal justice generally, it seems quite clear that they are best achieved where the offence occurred. The primary aim of criminal law is arguably retributive, and a criminal who is morally guilty should be prosecuted and punished to cause him pain commensurate with the harm caused by his offence.⁵⁹ Society desires to harm the offender because of some harm he committed in the past.⁶⁰ Such an interest in retribution will naturally exist in the society that the criminal injured, the society of the state where he committed the crime. Retribution is a necessary, but not sufficient, objective of criminal justice.⁶¹ One must add utilitarian or consequential goals such as future deterrence of the criminal or others from committing the same wrongful act,⁶² thus creating a degree of security in the community where the offence was committed.⁶³ Criminal justice also has educational

57. See 32 L.S.I 63. This provision became Section 4A of the Penal Law (Offences Committed Abroad) (Consolidated Version) 1973 27 L.S.I. 32 (1970–1973). Today this provision appears with certain changes in Section 15 of the Israel Penal Law due to Amendment No. 39 of the Israeli Penal Law, 1994, S. H. 1481.

58. See GILBERT, *supra* note 6, at 5, 13.

59. See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 8–9 (1968).

60. Ruth Gavison, *Punishment and Theories of Justice: Comments on Sadurski and Hoe Kema*, 25 ISR. L. REV. 351, 352 (1991).

61. *Id.*

62. See Antony Flew, *Retrospect and Prospect, Retribution and Deterrence*, 25 ISR. L. REV. 376, 381 (1991); Miriam Gur-Arye, *The Justification of Punishment: A Comment on Retribution and Deterrence*, 25 ISR. L. REV. 452, 453 (1991).

63. See Gavison, *supra* note 60, at 356.

goals; it makes behavior reliable, and it teaches in advance what behavior is right or wrong. Sometimes the threat of punishment may be sufficiently effective as to make actual punishment unnecessary.⁶⁴ This educational aspect of criminal law is also best achieved when applied in the jurisdiction where the offence was committed.

Therefore, the propositions that "jurisdiction based upon nationality is properly regarded as subsidiary to the territorial jurisdiction of the state where the crime was committed,"⁶⁵ and that the territorial principle of jurisdiction is "everywhere regarded as of primary importance and of fundamental character,"⁶⁶ are strengthened significantly. The procedure of extradition enables prosecution in the territory where the offence was committed according to the preferred territorial principle. The criminal is returned to the country that is chiefly interested in the discovery and suppression of his crime.⁶⁷

One should also not ignore one of the practical advantages of extradition, namely, the ease of collecting evidence. It is likely that authorities can best collect evidence and adduce proof of guilt in the jurisdiction where the extraditable individual committed his offense.⁶⁸ If the state declines to extradite the convict, and instead prosecutes him, evidentiary difficulties are likely to arise. This problem is much more complicated in common law legal systems than in civil law ones. Civil law legal systems typically have quite flexible rules of evidence, thus enabling a prosecutor to submit documentary evidence in a witness's absence, without cross-examination. If a civil law state decides to try him rather than extradite him, there is a higher probability that if he committed a crime, he will be convicted.

Common law countries, as opposed to civil law ones, have strict hearsay and cross-examination rules of evidence, which necessitates that witnesses be present at the trial. However, witnesses cannot be forced to come from abroad to testify, and voluntary testimony would likely prove prohibitively expensive. The failure of a common law state to extradite an offender to stand trial in the jurisdiction where he committed the crime, suggests that there is a very low chance that he will be prosecuted in a common law state to which he escaped.

64. See Flew, *supra* note 62, at 379.

65. *Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 433, 531 (Supp. 1935).

66. *Id.* at 485.

67. See *Draft Convention on Extradition*, *supra* note 1, at 38-39; see also G. V. LA FOREST, *EXTRADITION TO AND FROM CANADA* 79 (1977).

68. See *Draft Convention on Extradition*, *supra* note 1, at 39, 128; SHEARER, *supra* note 3, at 69, 122-123.

As noted earlier, it would be optimal to try criminals in the jurisdiction where they committed their crimes. If an offender escapes, the practice should be to extradite him to the jurisdiction where he committed the offence to stand trial. Nevertheless, some states have exceptions to this general rule. For example, most civil law legal systems do not extradite their own citizens.⁶⁹ Since, however, they generally prosecute using flexible rules of evidence, the goal of bringing offenders to justice is not completely contravened.⁷⁰

Israel is in general a common law legal system, particularly with regard to its laws of evidence.⁷¹ When the Knesset prohibited the extradition of Israeli citizens in 1978, it adopted this amendment with only a partial adjustment to the civil law system. The Knesset provided for jurisdiction over such nationals in Israel in the same way as in civil law legal systems, but it did not amend the strict common law rules of evidence, thus making the prosecution in Israel of Israeli citizens who commit offences abroad virtually impossible.⁷²

One might conclude that the best way to achieve the public interest of bringing criminals to justice is to extradite them to the place where the offence was committed. This rule is applicable to an extradition request concerning citizens of the requested state, or indeed, any other person. It has additional importance when a state which implements common law rules of evidence initiates the extradition request.

The priority of extradition as a means of achieving criminal justice will not apply when a country other than where the offence was committed makes the extradition request. In such a case, the procedure of extradition demonstrates no inherent advantage over that of prosecuting the offender in the requested state. Nevertheless, states tend not to restrict extradition only to requesting states that have territorial jurisdiction. Rather, in many instances when states conclude extradition

69. See GILBERT, *supra* note 6, at 175–176; IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 319–320 (1998); M. CHEIRF BASSIOUNI, *INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER*, 435 (1974).

70. See Theodor Meron, *Non-Extradition of Israeli Nationals and Extraterritorial Jurisdiction: Reflections on Bill No. 1306*, 13 ISR. L. REV. 215, 218–22 (1978); Judith Karp (First Deputy to the Attorney General of Israel), Report Regarding the Extradition of Citizens § 4 (Dec. 6, 1981) (unpublished report, on file with author).

71. See Aharon Barak, *The Tradition and Culture of the Israeli Legal System in EUROPEAN LEGAL TRADITIONS AND ISRAEL*, 473, 475–77, 479–82 (Alfredo Mordechai Rabello ed., 1944); Karp, *supra* note 70, at § 3.

72. See Meron, *supra* note 70; Karp, *supra* note 70; see also the Opening Remarks by the Minister of Justice for the Amendment of the Extradition Law Regarding on-Extradition of Citizens, May 12, 1998, D.K. (1998) 7082.

treaties, they permit extradition to any state asserting jurisdiction, whether territorial or other.⁷³

The new Israeli amendment speaks in general about extraditing Israeli citizens to stand trial in a requesting state on the condition that citizens are returned to Israel to serve their prison sentences. The amendment does not limit such extradition only to a requesting state where the offence was committed. This author believes that there may be many situations in which a requesting state would provide a more appropriate forum to try a person, even if the offence was not committed in its jurisdiction. For example, if the basis of jurisdiction is the victim's nationality, some witnesses might be situated in the requesting state; or, if the jurisdiction is based on the universal principle, some states may have a special interest in trying a fugitive offender. For these reasons, this article advocates that the new Israeli amendment is proper in its current form.

3. Protecting the Rights and Interests of the Offender

a) The Right to Stay in a Country

No person has an acknowledged legal right to stay in a country unless he is a citizen of that country. Only citizens possess an international human right to enter their country, a component of which is the right to stay there.⁷⁴ Translating this right to the notion of extradition may lead one to conclude that offenders fleeing from justice, if they are citizens of

73. See, e.g., Treaty Concerning Extradition, June 28, 1978, U.S.-F.R.G., art. 1(2), 32 U.S.T. 1487, 1488; Treaty on Extradition, Mar. 3, 1978, U.S.-Japan, art. I, VI(1), 31 U.S.T. 894, 897; Extradition Treaty, June 9, 1977, U.S.-Nor., art. I, III(3), 31 U.S.T. 5621, 5623; Treaty of Extradition, Jan. 13, 1961, U.S.-Braz., art. I, IV, U.S.T. 2094, 2098.

74. See American Convention on Human Rights, Nov. 22, 1969, art. 22(5), reprinted in BASIC DOCUMENTS ON HUMAN RIGHTS 504 (Ian Brownlie ed. 3rd ed., 1992); Fourth Protocol to the European Convention on Human Rights, May 12, 1968, art. 3, reprinted in BASIC DOCUMENTS ON HUMAN RIGHTS 347 (Ian Brownlie ed. 3rd ed., 1992); International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 12(4), reprinted in BASIC DOCUMENTS ON HUMAN RIGHTS 130 (Ian Brownlie ed. 3rd ed., 1992) (providing that "No one shall be arbitrarily deprived of the right to enter his own country") (emphasis added); Universal Declaration on Human Rights, Dec. 10, 1948, art. 13(2), 29(2), reprinted in BASIC DOCUMENTS ON HUMAN RIGHTS 24, 26 (Ian Brownlie ed. 3rd ed., 1992). But see MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS 218-21 (1993) (commenting that the right to enter and stay in the country is granted also to people who do not have a home country and the center of their lives is in the state to which they wish to enter and stay even if they are not its nationals). Others still insist that the term "his own country" mentioned in Article 12(4) of the International Covenant on Civil and Political Rights, *supra*, refers only to citizens. For a summary of the debate surrounding the proper interpretation of the phrase, see HURST HANNUM, THE RIGHT TO LEAVE AND TO RETURN IN INTERNATIONAL LAW 56-60 (1987).

the country to which they escaped, might not be extradited. Professor S.Z. Feller, a distinguished Israeli criminal law scholar and author of a comprehensive book on the law of extradition, believes that there is no moral and political right to send a citizen from his land even if he is a criminal, in the same manner that a state cannot deport its citizens regardless of their actions.⁷⁵

Professor Feller's proposition reaches too far. A citizen's rights to enter and stay in his country cannot be considered absolute, upon which a state may impose no legitimate restrictions. The regional human rights conventions such as the European Convention and the American Convention speak in fairly absolute terms about the right to stay in a country,⁷⁶ but the universal documents such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights⁷⁷ leave room to limit the right to enter and stay in the country for legitimate public interests. One of the interests justifying limitations on a citizen's right to enter and stay in his country is crime suppression. If this public interest is best achieved by extraditing the offender to the country where the offence has occurred,⁷⁸ then it trumps a citizen's right not to be forced to leave his own country.

b) The Protection of Basic Human Rights

Every offender deserves protection of his basic human rights, irrespective of where he is brought to justice. His life, dignity and physical well being, as well as his right to a fair trial, must be observed. Prosecution or extradition should be prohibited if they would violate the offender's basic human rights. Furthermore, neither a citizen of the requested country nor any other person should be extradited to a place where his rights will be violated. This being so, the argument that a state should not extradite its citizens because their rights may be violated in the foreign requesting country is not acceptable. If the justice administered by other states is untrustworthy, then the requested state should extradite neither its own citizens nor aliens.⁷⁹ The Restatement provides

75. S.Z. FELLER, *THE LAW OF EXTRADITION* 122 (1980); see also SHEARER, *supra* note 3, at 76 (stating that "[t]he deportation by a State of its own citizens is nowadays a rarity and invoked only in times of severe internal disorders.").

76. See Fourth Protocol to the European Convention on Human Rights, *supra* note 74; American Convention on Human Rights, *supra* note 74.

77. See Fourth Protocol to the European Convention on Human Rights, *supra* note 74; American Convention on Human Rights, *supra* note 74.

78. See *supra* text accompanying notes 56–73.

79. Charles de Visscher, *Document from the League of Nations Committee of Experts for the Progressive Codification of International Law, Report on Extradition*, 20 AM. J. INT'L L. 242, 244 (Supp. 1929).

that, in general, states do not conclude extradition treaties with states whose criminal justice system they mistrust.⁸⁰ In such case, extradition of citizens or any other persons is not possible.

When Israel amended its Extradition Law in 1978, prohibiting the extradition of citizens, the main impetus was the fear that Jews would be discriminated against, and would not obtain a fair trial outside Israel.⁸¹ As noted above, this is a very weak rationale for a state to refuse to extradite its own citizens. If Israel lacks confidence in a foreign legal system, it should not extradite any person there. This rationale for not extraditing Israeli citizens seems especially odd when the requesting state is the United States. Do the Israeli authorities really believe that an Israeli citizen would be discriminated against by a United States court if extradited there to stand trial? Will his fundamental human rights be violated in the United States? The assumption is that Israel will refuse to conclude any extradition treaty with a country that discriminates against Jews.⁸² Accordingly, once Israel does conclude an extradition treaty with a state, it cannot argue that its citizens should not be extradited there due to fear of discrimination.

c) The Offender's Right to Be Tried and Punished in His Natural Surroundings

Assuming that an extradited offender reaches a country where his human rights are guaranteed, he may still feel himself a stranger if he is not a citizen of that country. He might not be familiar with the language and the manners of that state, or with its legal system. He might be alone without his friends and family, and he might suffer from his isolation from his natural surroundings.⁸³ This is quite a strong argument against extradition, but only with regard to people who are torn away from the center of their lives to stand trial in a foreign county.

The difficulty a foreigner might face as a result of a trial conducted in a foreign legal system in a foreign language can be reduced by mandating the use of a competent interpreter.⁸⁴ While it is undoubtedly more convenient to stand trial in one's home country, the interest of bringing criminals to justice is probably best served by trying the offender in the state of commission. While taking measures to reduce the harm to the

80. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 475 introductory note at 558 (1986).

81. D.K. (1979) 1452; D.K. (1981) 1032.

82. See Karp, *supra* note 70, at § 6.

83. See generally SHEARER, *supra* note 3, at 95–96, 118–27 (discussing disadvantages faced by foreigners in foreign courts).

84. See *Draft Convention on Extradition*, *supra* note 1, at 129.

offender during the trial process, that interest must prevail and the trial must be held in the state of commission. One should bear in mind that had the foreign offender not fled to his native country, he would have stood trial in the foreign state of commission. If that is so, why should the offender who fled but was later caught enjoy any advantage over his fellow offender who did not try to escape from justice?⁸⁵

Once the offender is convicted and sentenced to prison, his isolation from his natural surroundings becomes more meaningful. To serve a prison sentence in a foreign environment, away from friends and family, without knowing the language of that country, seems to place an excessive burden on the convicted prisoner. If we believe that punishment has rehabilitative as well as retributive and deterrent purposes, then serving that punishment in a foreign state is problematic.

Sensitive to this problem, Shearer wrote as early as 1971:

A new approach is therefore suggested. . . . [T]he extradition ought to be limited to the trial and judgment only; that an extradited national, once he has been sentenced by a foreign court, should be returned to his home state to serve the sentence imposed abroad but subject to the regulations—including those relating to remission or reduction of sentence, parole and probation—in force in his home state. . . .

....

. . . The main purpose of the proposal is to secure to the most appropriate forum jurisdiction over crime and at the same time to secure to the most appropriate organs the task of corrective punishment and rehabilitation. These latter organs, it is suggested, are those of the prisoners home state.⁸⁶

Shearer's proposal was adopted by scholars⁸⁷ and by the practice of some states. The Netherlands has changed its extradition law in this direction, providing in a 1988 amendment that nationals of the Netherlands may be extradited if the requesting state undertakes to return them to serve any prison sentence imposed upon them in the Netherlands.⁸⁸ Israel's recent amendment to its Extradition Law also pursues this approach, allowing the extradition of a citizen to stand trial

85. See *id.*; see also SHEARER *supra* note 3, at 98.

86. See SHEARER, *supra* note 3, at 126–27.

87. See, e.g., Shachor-Landau, *supra* note 47, at 293; see also GILBERT, *supra* note 55, at 99.

88. See D.J.M.W. Paridaens, *The Extradition of Nationals According to Dutch Law*, INT'L REV. PENAL L. 515 (1991).

in the foreign requesting country only if the latter agrees to send the extradited citizen back to Israel to serve any prison sentence.⁸⁹

C. Concluding Remarks—Redefining Extradition?

The United States should accept Israel's amendment to the Extradition Law, and change its extradition treaty with Israel so as to provide that citizens will be extradited only to stand trial, and thereafter be sent back to their country to serve a prison sentence. This arrangement strikes a proper balance between the emerging international obligation not to let offenders go unpunished, and the best interest of the public and the offender. It ensures that the offender will stand trial in the jurisdiction where the offence was committed, which is the most proper forum to prosecute criminals, but also does not isolate the convicted offender from his social environment for a lengthy period. It enables him to serve his prison sentence in his own country where he can best be rehabilitated.

Amending the United States extradition treaty with Israel so as only to allow the extradition of citizens to stand trial while sending them back to their own country to serve their prison sentence comports with the current trend in international law to transfer foreign convicted prisoners to serve their sentences in their own country. Israel and the United States are both parties to the European Convention on the Transfer of Sentenced Persons, and have enacted laws to implement its provisions.⁹⁰ Once Israel and the United States provide in their extradition treaty for the transfer of a citizen to serve a prison sentence in his own country, this will serve as both states' actual consent to allow such transfer (without which the European Convention cannot be implemented).⁹¹

An amendment of the United States international obligation with Israel regarding this matter will demonstrate to the civil law countries that the United States is ready to send citizens to serve their sentences in their home country. This shift in attitude may create a movement among the European states to change their Extradition Law arrangements with the United States, thus permitting the extradition of citizens to stand to trial in the United States. Once this happens, a major barrier to the creation of a universal extradition law will fall, promoting the international suppression of crime, while protecting the rights and interests of extradited offenders to the greatest extent possible.

89. See *supra* note 41. In her 1981 Report, Judith Karp had already suggested to amend the Israeli Extradition Law in this direction. See Karp, *supra* note 69, at § 10.

90. See *supra* notes 42, 43.

91. See *supra* text accompanying notes 44, 45.

This whole process, starting with the general trend to transfer foreign prisoners to serve prison sentences in their own countries, and advancing to the obligations states take upon themselves in extradition treaties to extradite citizens solely for the purpose of standing trial, actually modifies the classical definition of extradition. When dealing with the extradition of citizens, extradition no longer refers to the transfer of offenders both to stand trial and to serve a prison sentence in a requesting state, but only to their transfer to stand trial.

The extradition of aliens who are citizens of a third, non-requesting state, would also only be for the purpose of standing trial if the requesting state commits itself to transfer prisoners to serve their punishment in their own country. If the extradited foreigner is a citizen of the requesting state, then one may characterize his extradition as serving both the purpose of standing trial and for serving punishment. However, one might argue that in such case, extradition is redefined as only for the purpose of standing trial too. According to the new trend to transfer convicts to serve their custodial sentence in their own country, a foreigner, whether extradited to stand trial in the requesting state or tried in the requested state, will still be transferred to serve his sentence in his country of citizenship, which is in this case the requesting state. The issue of transfer to serve a punishment becomes a separate matter, independent of that of extradition. Extradition is confined only to the question of transfer to stand trial.

III. WHO IS A CITIZEN FOR EXTRADITION PURPOSES

A. The Need for Effectiveness

The extradition of citizens is handled by states in three different ways: some states will never extradite their citizens, others will always extradite them, and there is an emerging trend followed by some states (including Israel) to extradite citizens only for the purpose of standing trial, while returning them to serve any prison sentences in their own country. If a state adopts the practice of extraditing its citizens, then the question of defining who is a citizen for extradition purposes is completely irrelevant. In such a case no difference exists between a citizen and a foreigner. However, when a state either refuses to extradite citizens completely, or extradites them only on condition that they will return to serve a custodial sentence, then the question of who is included in the definition of a citizen becomes important.

As previously argued, the only justification for treating a citizen differently than a foreigner regarding extradition is the belief that he should

not be isolated from his social environment. Thus, with the additional objective of promoting the suppression of crime, the proper balance is to send the offender to trial in the requesting state, but permit him to return to his country to serve a sentence.

In reality, there are many instances in which persons are citizens of a certain state but their contacts to that state are very weak. This may occur, for example, when a citizen of one state moves the center of his life to another state without retaining contacts in his former state; states often do not annul emigrants' citizenship. Such persons may acquire a new citizenship without losing the first one, even if they lack ties to the state of their first citizenship. Ineffective citizenship may also exist when it is attained automatically. If a state does not impose a residency requirement before being granted citizenship, then people may become citizens without having actual contacts to the conferring state.

The law should ideally permit a citizen not to be extradited, or should permit a citizen to be extradited to stand trial but not to serve a sentence, only if that state of citizenship is the center of the offender's life, and is actually the place where he has real contacts, e.g., where his family and friends live or where he is employed. In practice, some persons may have more than one effective citizenship. In such a case, any of the states of citizenship is permitted to protect such person and insist that he should be returned to serve a custodial sentence imposed upon him after extradition to a requesting state. This article shall now examine whether the above mentioned requirement of effective citizenship as a basis for any form of protection from extradition of citizens exists as a matter of international law and United States and Israeli law.

B. *Effectiveness in Real Law*

1. International Law

Most extradition agreements are regulated by bilateral treaties. When they make any reference to the issue of the extradition of citizens, they do not define the term. Each state defines a citizen according to its own law.⁹² The European Convention on Extradition, which provides in Article 6(a) that "[a] Contracting Party shall have the right to refuse extradition of its nationals" goes on to state in Article 6(b) that "[e]ach Contracting Party may . . . define as far as it is concerned the term

92. This is done with regard to extradition and with regard to any other issue involving a citizenship requirement. International law is quite passive on the definition of citizenship in general. See *infra* text accompanying notes 97, 98.

'nationals' within the meaning of this Convention."⁹³ Article 6(b) actually makes a dual provision: first, that no requirements are imposed on states by international law regarding the definition of citizens for the purpose of their non-extradition, and second, that a state may establish a special definition of the term 'national' when dealing with extradition. The European Convention on the Transfer of Sentenced Persons has adopted a similar approach.⁹⁴

The Restatement provides that, "[i]n general, the definition of nationality for purposes of extradition is the same as for other purposes."⁹⁵ However, there are exceptions. Thus, for example, Sweden and Denmark include nationals of Sweden, Denmark, Finland, and Norway, as well as aliens domiciled in Sweden and Denmark, in the term 'nationals' for the purpose of non-extradition.⁹⁶

In this stage of the development of international law, it is not surprising to find such a flexible approach towards the definition of citizenship with regard to questions of extradition. International law treats the whole issue of the definition of citizenship ambiguously. On one hand, the Universal Declaration on Human Rights acknowledges that every person has a right to nationality.⁹⁷ On the other hand, international law continues to consider the issue of citizenship as part of a state's sovereignty and thus out of the reach of international regulation.⁹⁸ If every state decides on its own who should be its citizens, and the whole question of citizenship is beyond the reach of international law, what is the meaning of the international right to nationality? This vagueness in international law regarding citizenship is very problematic when applied to questions of extradition.

Reciprocity might not exist if each state were to define independently who are its citizens for the purpose of extradition. It is possible for states to enlarge the definition of citizenship and thus significantly limit

93. European Convention on Extradition, *supra* note 38.

94. See Convention on the Transfer of Sentenced Persons, *supra* note 42. This Convention provides in Article 3(1)(a) that a sentenced person may be transferred under the Convention only if that person is a national of the state requesting his transfer in order to serve his sentence. The Convention goes on to provide in Article 3(4) that any state may define as far as it is concerned the term "national" for the purposes of the Convention.

95. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 475 cmt. f. (1986).

96. 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 3, at 956 n.2 (referring to 444 U.N.T.S. 348).

97. Universal Declaration on Human Rights, art. 15, *supra* note 74, at 24.

98. Article 1 of the Convention on Certain Questions Relating to the Conflict of Nationality 1930 states that: "it is for each state to determine under its own laws who are its nationals" 179 L.N.T.S. 89 (No. 4137), *Tunis and Morocco Nationality Decrees Case* (Fr. v. Gr. Brit.), 1923 P.C.I.J. (ser. B) No. 4, at 24 (Feb. 7). 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 3, at 851-853. P. WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 65-70 (1979).

the whole scope of extradition. For this reason, international law should move towards creating guidelines for states regarding the definition of citizenship in extradition matters. These guidelines should be based on the clear rationale for exempting citizens from a full or partial process of extradition, namely, not to isolate them from their social environment.

Shearer wrote in 1971 that "[q]uestions of 'effective nationality' appear not to have been raised internationally in respect to the extradition of dual nationals."⁹⁹ It seems that international law has not yet confronted the issue of effective nationality and extradition, either with regard to dual nationals, or in any other context. The time is now ripe to confront these issues.

2. United States Law

It is unsurprising that the United States domestic legal system lacks a definition for the term "citizen" with respect to extradition. For many years, the United States has engaged in a consistent practice of extraditing its citizens both for trial and for punishment.¹⁰⁰ Indeed, even in those cases where extradition treaties contain a reservation whereby the United States preserves its discretion not to extradite its citizens, in practice it usually does extradite citizens, even where the receiving states do not reciprocate and will not extradite their own citizens to the United States.¹⁰¹

Now that the United States has become a party to the European Convention on the Transfer of Sentenced Persons, and to other treaties providing for the transfer of offenders to serve their prison sentence in the country of their citizenship,¹⁰² and has enacted a federal law to implement such treaties, it becomes important to define the term "citizen" for this purpose. Will the United States agree to transfer any citizen prisoner to a foreign state, or only such persons who will be transferred to their effective citizenship country? Will the United States request the transfer of all United States citizens, or only those whose center of life is in the United States? If the United States adopts a practice whereby it will extradite its citizens only to stand trial, it will have to address the above mentioned issue of whom to request back to the United States—

99. SHEARER, *supra* note 3, at 131; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 475 cmt. f. (1986) (providing that "Dual nationals are usually considered nationals of the requested state, even if their other nationality is that of the requesting state"). This proves that no attention is being given to the effectiveness of nationality.

100. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 475.

101. *See, e.g.,* *Charlton v. Kelly*, 229 U.S. 447 (1913).

102. *See* Convention on the Transfer of Sentenced Persons, *supra* note 42.

any citizen, or only those who have effective contacts to the United States.

3. Israeli Law

a) The 1978 Amendment to the Extradition Law

The 1978 amendment to the Israeli Extradition Law provided that “[a]n Israeli national shall not be extradited save for an offence committed before he became an Israeli national”.¹⁰³

The legislature actually did not define who is an Israeli citizen for purposes of non-extradition. When deciding to amend the law to prohibit the extradition of citizens however, the Israeli legislature was aware of the fear that Israel would become a haven for Jewish criminals.¹⁰⁴ The Israeli law of nationality enables any Jew who immigrates to Israel to become an Israeli citizen almost automatically.¹⁰⁵ Israel feared that Jews from all over the world who commit crimes would flee to Israel, and then seek shelter from extradition on the grounds of their Israeli citizenship.¹⁰⁶ Israel honestly intended to avoid becoming such a haven for criminals, and sought to create a legal arrangement whereby only a person who was an Israeli citizen at the time of the commission of the offence would be protected from extradition. In fact, however, the law was inadequately drafted to achieve this goal. First, Jews could enter Israel, very easily become citizens, commit a crime abroad, and then flee to Israel (from which, according to the law, they could not be extradited).¹⁰⁷ Second, many Jews who held Israeli citizenship without having any actual contacts to Israel knew that if they committed a crime and then fled to Israel, they could not be extradited.

b) The Sheinbein Case

Samuel Sheinbein was born in the United States on July 25, 1980. In October 1997, an indictment was filed against him in the Circuit Court of Montgomery District in Maryland for first degree murder and conspiracy to commit first degree murder, but he had escaped to Israel in

103. Offences Committed Abroad (Amendment of Enactments) 1978, 32 L.S.I. 63 (1976–1979). This amendment eventually became Section 1A of the Israeli Extradition Law. *See supra* text accompanying note 28.

104. *See* D. K. (1977) 553.

105. *See* Nationality Law § 2, 1952, 6 L.S.I. 50, (1951–52).

106. *See* D. K. (1977) 553.

107. Offences Committed Abroad (Amendment of Enactments) 1978, 32 L.S.I. 63 (1976–1979). This amendment eventually became Section 1A of the Israeli Extradition Law. *See supra* text accompanying note 28.

September. The United States requested his extradition, and the Israeli Minister of Justice asked the District Court of Jerusalem to decide whether he should be extradited according to Israeli law.

Samuel Sheinbein is a United States citizen, and spent all his life there. His native language is English, his family lives in the United States and he was educated there. However, Samuel Sheinbein is also an Israeli citizen. His grandparents immigrated to Israel in the 1930s, and his father was born there in 1944. The state of Israel was established in 1948, and according to the 1952 Israeli Nationality Law, his grandmother and his father were granted Israeli citizenship. The state of Israel argued before the Israeli District Court that Israeli citizenship had not been legally granted to Samuel Sheinbein's grandmother and father. The District Court rejected this argument, and stated that both the grandmother and the father were Israeli citizens.¹⁰⁸ The Supreme Court affirmed that statement.¹⁰⁹ According to the Israeli Nationality Law, a child born outside of Israel to an Israeli citizen automatically becomes a citizen of Israel.¹¹⁰ Thus, Samuel Sheinbein, born in the United States to an Israeli citizen, became an Israeli citizen and enjoyed dual nationality.

The District Court that decided on Sheinbein's extradition had to base its decision on the 1978 amendment to the Extradition Law. According to the plain language of the statute, Israel could not extradite Sheinbein since he committed the offence while holding Israeli citizenship. However, the District Court felt that a decision not to extradite Sheinbein would be unjust. The court pointed to the conflict between Israel's international obligation vis-à-vis the United States to extradite any person including its citizens, and its domestic law prohibition against the extradition of its citizens. In the court's opinion, Israeli jurisprudence required that where a conflict existed between international law and domestic law, the court should interpret domestic law so as to avoid the conflict.¹¹¹ For this reason, the court decided to define the term "national" which appears in the Extradition Law narrowly. According to the court, it would only include such citizens for the purpose of non-extradition whose center of life was in Israel, i.e., whose citizenship was effective. According to the District Court, persons holding Israeli citizenship who did not live in Israel, and whose center of life was

108. See C.A. (Jm.) 1545/97. *The Attorney General v. Ploni* (forthcoming opinion on file with author) § 97-110.

109. See C.A. 6182/98 *Shinebein v. The Attorney General* (Feb. 2, 1999) (forthcoming opinion on file with author) dissenting opinion of President Barak para. 1-8, majority opinion of Justice Or, para. 1.

110. See Nationality Law § 4, 1952, 6 L.S.I. 50, (1951-52).

111. See *Ploni*, para. 112-14.

elsewhere, would not be granted the protection of non-extradition.¹¹² With regard to Sheinbein, the District Court decided that his Israeli citizenship was not effective, and accordingly could not prevent his extradition from Israel. The court added that since the United States—where he had committed the crime and which was requesting his extradition—was the center of his life providing him with its citizenship, there was no reason to prevent his extradition as requested.¹¹³ Sheinbein appealed to the Israeli Supreme Court. In a 3-2 decision, the Supreme Court overruled the District Court, and decided not to extradite Sheinbein.

President Barak, who wrote the primary dissenting opinion,¹¹⁴ agreed with the District Court's view that the term "national" appearing in the Extradition Law should receive a special, narrow interpretation.¹¹⁵ He also agreed with the need to avoid the conflict between the international obligation and the domestic law by interpreting the statute narrowly to include only effective citizenship.¹¹⁶ He went still further to explain such interpretation not only to reconcile international and domestic law, but also based on the rationale for the non-extradition of citizens. President Barak explained that the main justification for non-extradition of citizens is the desire to bring them to justice in their natural surroundings. If a citizen such as Sheinbein does not live in Israel, and Israel is not the center of his life, then there is no reason to prevent his extradition from Israel, especially if the requesting country, where he committed the crime, is the center of his life.¹¹⁷

The majority opinion was led by Justice Or,¹¹⁸ who actually agreed that ideally, the law should be as the District Court and President Barak argued. However, he believed that such an outcome could not be reached by an expansive interpretation of the language of the 1978 amendment to the Extradition Law. He argued that the statute clearly and explicitly provided for the non-extradition of citizens without limiting the statute to those who possessed effective citizenship.¹¹⁹ Justice Or also examined the legislative history of the extradition provisions, inferring that the legislature intended to exempt any citizen from extradition, whether or

112. See *Ploni*, para. 113, 115–24.

113. See *Ploni* para. 118, 125.

114. See *Shinebein*, dissenting opinion of President Barak. Judge Kedmi joined President Barak's opinion and added a few remarks in a separate dissent.

115. See *Shinebein*, dissenting opinion of President Barak para. 19–22.

116. See *Shinebein*, dissenting opinion of President Barak para. 17.

117. See *Shinebein*, dissenting opinion of President Barak para. 14.

118. With whom Justice Ilan and Justice Mazza concurred.

119. See *Shinebein*, majority opinion para. 19.

not residing in Israel.¹²⁰ According to the majority opinion, in order to effect the ideal solution (under which non-extradition of citizens would apply only to those persons whose center of life was in Israel), the Knesset had to amend the Extradition Law.¹²¹ The majority decided that in the meantime, under the prevailing law, Sheinbein could not be extradited to the United States.¹²²

c) The 1999 Amendment to the Extradition Law

A decision at first instance in the Sheinbein case was still pending when the Knesset published a proposal to amend the Extradition Law with respect to the extradition of citizens.¹²³

The proposed amendment provided that:

1. Israeli citizens will only be extradited to stand trial on condition that they will be sent back to Israel to serve a prison sentence, if they so wish.
2. This privilege will only be granted to citizens who are also residents of Israel.
3. In order to be granted this privilege, a person must be a citizen and a resident of the state of Israel at the time he committed the offence.

This amendment, in modified form, became law after the Supreme Court delivered its ruling not to extradite Sheinbein.¹²⁴ The final statutory provision followed the first two elements of the proposal, but not the third. It provides that in order for an extradited offender to be granted the right to return to Israel to serve his prison sentence, he is required to have been an Israeli citizen and resident when the extradition request was made,¹²⁵ and not when the offence was committed.

This modification actually shifts the balance towards the interests of the individual, at the expense of the public interest in suppressing crime through the process of extradition. According to the new law, a person

120. See *Shinebein*, majority opinion para. 10–13.

121. See *Shinebein*, majority opinion para. 4–9.

122. See *Shinebein*, majority opinion para. 22. See also *Shinebein*, concurring opinion of Judge Ilan. Justice Mazza did not write a separate opinion.

123. The District Court gave its decision on the Shinebein case on September 6, 1998 while the proposed amendment was on March 23, 1998. See Draft Bill amending the Extradition Law, 1998, H. H. 2707.

124. The Court gave its decision on February 2, 1999. The amendment to the Extradition Law was passed on April 19, 1999. See Extradition Law (Amendment No. 6), 1999, S. H. 1708.

125. See Extradition Law (Amendment No. 6), 1999, S. H. 1708; see also *supra* text accompanying note 41.

may be a foreigner as a matter of Israeli law when committing the crime and still obtain the above-mentioned protection, under which he returns to serve his sentence in Israel. He may commit a crime, flee to Israel, become an Israeli citizen and then seek protection.

This outcome could be avoided were the courts to require a considerable residence period, e.g., at least five consecutive years, before someone could be entitled to the protection of returning to Israel to serve a custodial sentence. In such a case, it would be evident that Israel is the center of such a person's life. The rationale of a convict serving a prison sentence in his own social environment could justify his return to Israel to serve his sentence. If the residence requirements were interpreted in this way, one might assume that a criminal who commits an offence outside Israel, when not yet an Israeli citizen, and thereafter flees Israel, will be apprehended and his extradition requested before he meets the residence requirement. In such a case, even if the fugitive has already become an Israeli citizen, he would be extradited without the right to return to serve his sentence, since he had not been resident in Israel for the considerable period of at least five years.

C. Conclusion—Reconsidering the Definition of Citizenship

International law fails to define who is a citizen in the context of extradition, whether in bilateral or multilateral extradition treaties. This is unsurprising given the universal policy of respecting a state's autonomy to determine the identity of its citizens. United States law does not define who is a citizen when dealing with extradition matters, since the United States consistently extradites persons whether or not they are citizens.

Israel began avoiding the extradition of its citizens in 1978, which forced the state to reconsider who should be granted a citizen's protection against extradition. The Sheinbein case highlighted the circumstance of a citizen who is not resident in Israel for a considerable period of time before the extradition request is made, and who does not have his main contacts in Israel, such as family ties, friends, and work. Such a person is not an effective citizen of Israel and should not be granted any protection from extradition, even if he holds Israeli citizenship. The Sheinbein court could not follow this rationale due to contravening statutory provisions. However, the legislature considered both the extradition and citizenship issues when it reviewed the Extradition Law after the Sheinbein judgment. Following the 1999 amendment to the Extradition Law, an Israeli citizen must also be a resident of Israel to derive any form of protection regarding an extradition. A citizen who is not an effective citizen of Israel will not be protected.

This is the correct outcome. It serves the rationale of protecting citizens against the extradition: namely, that they should be tried and punished in their natural surroundings. Accordingly, international law should adopt a similar definition of citizenship for extradition matters, one that will influence domestic legal systems and provide an ideal legal model.

IV. FINAL REMARKS

The very recent Israeli amendment to its Extradition Law regarding the extradition of citizens strikes a proper balance between the rights of the citizen to serve a punishment in his natural surroundings, and the public interest in bringing criminals to justice in the most appropriate forum. This amendment softened the Israeli prohibition on extradition of citizens, but it still stands in conflict with the United States-Israeli extradition treaty's provision obliging the states to extradite their citizens without exception. The United States and Israel should modify their agreement to reflect the adoption of the new Israeli provision.

The new Israeli law follows recent trends in the definitions of both extradition and citizenship, stating that citizens will be extradited solely for the purpose of standing trial, and will be sent back to the requested state to serve their prison sentence. Extradition of both citizens and aliens is now becoming a process whereby states extradite fugitive offenders only to stand trial, since international law and prevailing state practice provide that service of prison punishment should be in the country of citizenship, regardless of where the offender was tried.

The Israeli law also provides that only Israeli citizens who are also resident in Israel will be returned to serve their punishment there. Since the rationale for the return of citizens to serve a prison sentence in their own country is based on the need to rehabilitate them in their social environment, the standard in the context of extradition should always be effective citizenship. Only those citizens who actually reside in a state for a considerable period before extradition should benefit from the privilege of serving their prison sentence in their country of citizenship.