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FROM THE PAST TO THE FUTURE OF EXTRADITION: THE RISE OF A NEW OBLIGATION AS REVERSE EXTRADITION

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Abstract

Extradition, as a legal concept, has grown throughout the history of international relations. However, this is not just a simple result of the everyday headaches of international actors. Extradition, specifically the extradition of common criminals, also has a substantial intellectual background that has been developed by prominent scholars such as *Grotius* and *Beccaria*.

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The current scope of extradition agreements, whether they are unilateral or bilateral, includes an obligation to surrender a person who has been convicted or suspected. This situation is related to its intellectual background as well as its history.

Recent developments in international law, such as the denaturalization of dual citizens who have been involved in terrorist activities, have triggered new legal disputes over whether a state has any duty to open its borders to someone who is not its citizen anymore. However, it should be examined whether or not states are under an obligation to take and prosecute terrorists in terms of international law.

Consequently, such an obligation is essential for the establishment of international security. Recognition of this obligation as a valid legal institution can only be achieved via a well-structured international treaty.

Keywords: Extradition, Denaturalization, Terrorism, Transnational Crime, International Security.

Öz

İade, uluslararası ilişkiler tarihi boyunca gelişen hukuki bir kavramdır. Ancak bu, uluslararası aktörlerin günlük meselelerinin basit bir sonucundan ibaret değildir. İade, özellikle de adi suçluların iadesi, *Grotius* ve *Beccaria* gibi önde gelen düşünürler tarafından geliştirilmiş önemli bir entelektüel arka plana sahiptir.

İster tek taraflı ister iki taraflı olsun mevcut iade anlaşmalarının kapsamı, hüküm giymiş veya suç isnadı altında bulunan bir kişinin teslim edilmesi yükümlülüğünü içermektedir. Bu durum iadenin tarihiyle olduğu kadar entelektüel arka planıyla da ilgilidir. Uluslararası hukukta terör faaliyetlerine karışmış çifte vatandaşların vatandaşlıktan çıkarılması gibi güncel gelişmeler, bir devletin artık kendi vatandaşı olmayan birine onu yargılamak üzere sınırlarını açma

yükümlülüğünün bulunup bulunmadığı konusunda yeni hukuki ihtilaf başlatmıştır. Bu bağlamda, devletlerin uluslararası hukuk açısından teröristleri alma ve kovuşturma yükümlülüğü altında olup olmadığı incelenmelidir.

Neticede, böyle bir yükümlülük, uluslararası güvenliğin tesisi için elzemdir. Bu yükümlülüğün geçerli bir yasal kurum olarak kabul görmesi, ancak iyi yapılandırılmış bir uluslararası anlaşma ile sağlanabilir.

Anahtar Kelimeler: Teslim (İade), Vatandaşlıktan Çıkartma, Terörizm, Sınıraşan Suç, Uluslararası Güvenlik.

INTRODUCTION

It is much easier now to live abroad thanks to developments in communication and information technologies. These advancements facilitate the spread of 'transnational crimes' and 'international crimes'. As such, it is imperative that criminal activity of this nature be addressed by cooperation at the international level.[1] Furthermore, anti-criminal cooperation between states has more ancient roots than both of these categories of crime.

Extradition is the most important form of international cooperation on criminal matters[2]. Despite the monumental history of that legal institution, *"extradition"* is an expression that can be considered relatively new.[3] Before the term rose to

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1 Mariana Radu, "Controversies on the Legal Nature of Extradition," *Ovidius University Annals, Economic Sciences Series*, 13, no. 2 (2013), 144-148, 144.

2 Eralp Özgen, *Suçluların Geri Verilmesi* (Ankara: Ajans-Türk Matbaası, 1962), 4.

3 Timuçin Köprülü, *Suçluların Geri Verilmesi* (Unpublished Master Thesis, 2001), 1; İzzet Özgenç, "Türkiye'nin Taraf Olduğu Anlaşmalar Açısından Türk İade Hukukunun Değerlendirilmesi," Unpublished Master Thesis, (1984), 10.

prominence in international law literature, the legal phenomenon was communicated through the terms *"restituer"* and *"remettre"*, with both words deriving from the French language.[4] However, the term used in international law today is *"extradition"* and it has the same meaning in both English and French. This word was probably derived by *Voltaire (François Marie Arouet)* from the Latin words "*ex-*" and "*traditionem*".[5] The word *"trādĭtĭo"*, which is the singular form of the root of the word *"traditionem"* in Latin, corresponds to the delivery of something or transfer of a possession.[6] Since the word *"tradere"*, which is the Latin equivalent to the word *"extradition"*, has not been found yet in ancient Latin works, the term *"remittere"* was used in the works of that period, and therefore the derivation of the word *"extradition"* was delayed until the end of the eighteenth

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4 Özgen, *Suçluların Geri Verilmesi*, 20 *ff.*; Özgenç, *Türkiye'nin Taraf Olduğu*, 10; The terms *"restituter"* and *"remettre"* were used in the treaties between France and Wurtemberg dated 1759 and 1765, in the treaty between France and Spain of 1765, and in the treaty of France with Portugal and Spain, dated 1778. *See* Christopher L. Blakesley, "The Practice of Extradition from Antiquity to Modern France and the United States: A Brief History," *Boston College International and Comparative Law Review* 4, no. 1 (1981): 39-60, 40; Köprülü, *Suçluların Geri Verilmesi*, 1.

5 Douglas Harper, "Extradition", *Online Etymology Dictionary*, Access Date January 5, 2021, https://www.etymonline.com/word/extradition#etymonline_v_14125; Ananya Chakraborty, *Extradition Laws in The International and Indian Regime: Focusing on Global Terrorism* (Cuttack: Palgrave Macmillan, 2019), 30; For the opinion that the prefix *"ex-"* meaning *"out"* is of Greek origin, *see* Julio Ramírez Montañez, "The Extradition of Colombians from the Perspective of the Foundation for the Defense of Colombians with Orders of Extradition (DECOPEX)," *Asian Journal of Latin American Studies* 29, no. 4 (2016), 55-78, 58.

6 Charlton T. Lewis and Charles Short, "Traditio", *A Latin Dictionary*, Access Date January 5, 2021, http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.04.0059%3Aentry%3Dtraditio .

century.[7] The first usage of the term *"extradition"* in an official document is a French *decret-loi*, dated 1791, and the first treaty containing this word was signed in 1828.[8]

In the legal literature, the term "extradition" usually refers to an official procedure relating to surrendering someone from one state to another[9] or forcibly returning someone to a ruler who reigns over them.[10] In our opinion, extradition means the surrendering of an individual by one sovereign to another, to be judged or punished due to a criminal accusation.

Extradition is a legal institution that has its own political, legislative, and intellectual background. This background has a long history, and most of the conditions and principles are derived from it. Consequently, extradition has a complex structure dating back through centuries, even thousands of years, and there is a strong relationship between extradition and international developments, as well as concerns. As one of the outcomes of that deep and strong connection, extradition can be interpreted as a duty that is binding on states to surrender a person to another due to an accusation. That duty can be called "*the duty to extradite.*"

The duty to extradite should be looked at in light of the controversy about the nature of extradition. Because it has been questioned in some current studies, the aim and legal nature of extradition, as well as the need for adopting such a legal institution, should be reviewed through the lens of extradition's obligatory character. Those studies have demonstrated to us that the essence of extradition should be explained as the previous step of examination of the other possible duties that may become

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7 Blakesley, *from Antiquity to Modern*, 40 *ff.*

8 Özgen, *Suçluların Geri Verilmesi*, 20; Blakesley, *from Antiquity to Modern*, 40.

9 Mahmoud Cherif Bassiouni, *International Extradition: United States Law and Practise* (New York: Oxford University Press, 2014), 2.

10 Özgenç, *Türkiye'nin Taraf Olduğu*, 10.

a part of extradition obligation in the future. Through this path, in this article, the essence of extradition will be analysed on historical and theoretical grounds. Then, an answer will be sought to the question: *"Why is extradition an obligation, especially if it is beneficial for all states?"*. This will lay the foundations for us to be able to explain the current content of the obligation of extradition. Finally, by mentioning current developments that may expand the scope of this obligation in the future, we will try to give this change an intellectual infrastructure. As a result, we will suggest a model agreement on extradition and international cooperation against terrorism. At this stage, the aim of this article is to determine whether an obligation of *"reverse extradition"* exists in international law and to guide the rise of such an obligation.

I. A BRIEF HISTORY OF EXTRADITION

Extradition's historical background may be examined from so many angles. In addition, extradition has a long history that even reaches back to ancient eras.[11] It is necessary to admit in advance that it is not feasible to discuss the entire history of extradition in all its details, in the case of a study that does not focus on the history of extradition. However, at least a brief explanation might be made, which is enough to point out the roots of the obligation of extradition.

The chronology of extradition is usually divided into three chapters: the ancient era, the classical era, and the modern era. In the near future, the modern era may be split into two as the periods of bilateral and multilateral treaties. Even multilateral treaties may be split into two as the period of classical

[11] Ayedh Hadi Alotaibi, "Current International Legal Problems in the Pursuit of Extradition Requests: The Practice of Saudi Arabia," Unpublished PhD Thesis, (2004), 4 *ff.*

multilateral treaties and arrest warrants, depending on further developments.

The oldest extradition request that is known was narrated in the Old Testament[12] and that was around the 1350s BC.[13] The peace treaty, which is written with hieroglyphics and signed between the Egyptian Pharaoh *Ramses II* and the Hittite Prince *Hattusili III*, is the very first international agreement that contains clauses about extradition.[14]

The Roman Empire, by imposing an obligation for other states to repair the offence against the Empire or the Roman citizens, turned the institution of extradition into a form of superiority over the requested states. The request for extradition made by the Roman State also contained an implied threat of war in case of the denial of this obligation.[15]

According to general recognition, the Treaty of Hudaybiyyah is one of the earliest examples of the Islamic State's treaties that contains some clauses about extradition.[16] However, in our opinion, it is not possible to qualify these clauses as extradition. First of all, this treaty foresees the restitution of men and women who accept Islam and flee to Madinah. So, there is

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12 Judges, *Old Testament*, 19-20.

13 Bassiouni, *International Extradition*, 4.

14 Anthony Ivan Shearer, *Extradition in International Law* (Manchester: Manchester University Press, 1971), 5; Alotaibi, *Pursuit of Extradition Requests*, 5; Köprülü, *Suçluların Geri Verilmesi*, 12.

15 Köprülü, *Suçluların Geri Verilmesi*, 12; Kayıhan İçel & Süheyl Donay, *Karşılaştırmalı ve Uygulamalı Ceza Hukuku Genel Kısım*, 1st Book, (İstanbul: Beta Basım Yayım Dağıtım A.Ş., 1999), 207; Ülkü Güler, "Türk Ceza Hukukunda Geri Verme" Unpublished Master Thesis (2010), 14.

16 Farhad Malekian, *Principles of Islamic International Law: A Comparative Search* (Leiden: Brill, 2011), 326; Özgenç, *Türkiye'nin Taraf Olduğu*, 24; Mustafa Avcı, *Osmanlı Ceza Hukuku Genel Hükümler* (Ankara: Adalet Yayınevi, 2018), 71.

not any coherent way to conclude that the Islamic Prophet *Muhammad* was admitting someone as a criminal just because he or she had accepted the Islamic religion. In addition, the Islamic Prophet *Muhammad* did not punish *Ebu Basîr*, who had escaped from two Makkan idolaters that took him back to Makkah based on the Treaty of Hudaybiyyah and had killed one of them. Even though he refused not to give *Ebu Basîr* to Makkan idolaters again, he gave him the freedom to leave.[17] Nevertheless, it is necessary to state that the fact that the Treaty of Hudaybiyyah did not contain any clauses that are technically about extradition does not mean that Islamic law refuses extradition. Moreover, the treaty signed with the King of Sudan in the year 31 Hijri regulates the extradition of fugitive slaves and Muslims who have fought against Muslims then fled.[18] As such, it can be concluded that Islamic law recognises extradition.[19]

It seems that in the ancient era, any formal procedure[20] or legal theory about extradition had not been developed.[21] As well as this, the idea of extradition of common criminals was not yet consistently advocated. Despite this, some exceptions have been identified in the Roman Empire of the 100s BC and in ancient Israel, where common criminals were extradited.[22] Also, the Code of Manu contained some provisions which arose from the belief that happiness would disappear if criminals got away with their crimes.[23]

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17 Ebû Abdullah Muhammed b. Ömer el-Vâkıdî, *Kitâbü'l-Meğâzî*, tr. Musa K. Yılmaz, ed. Marsden Jones, (İstanbul: İlkharf Yayıncılık, 2016), 533-535.

18 Avcı, *Osmanlı Ceza Hukuku*, 72.

19 Özgen, *Suçluların Geri Verilmesi*, 22.

20 Alotaibi, *Pursuit of Extradition Requests*, 6.

21 Blakesley, *from Antiquity to Modern*, 45.

22 Alotaibi, *Pursuit of Extradition Requests*, 6.

23 Alotaibi, *Pursuit of Extradition Requests*, 6, 7 *ff.*

Banishment may have been the most severe punishment possible in the ancient era. Because a person who was deprived of their lands and community would probably face the danger of misery, aggression or worse, even slavery.[24] Regardless of whether they fled away or were forcefully kicked out, the result was mostly the same for the sovereign. One way or another, troublemakers had been removed from society, and the case was closed with one of the harshest penalties.[25] Getting rid of the criminal was the solution, particularly when the times that *pater familias*, or clan leaders, held the power to punish. Insomuch that, it might be the best solution possible, therefore, not seeking extradition for common criminals was a foreseeable attitude in ancient times.[26] Even today, taking some criminals back might not be the best idea for a state's interests.[27]

Political criminals were another matter. They had to be found and destroyed. They were considered the enemies of society, as they were the ultimate danger to the true ruler. Thus, other sovereigns should have sent back those traitors unless they were not co-conspirators themselves.

Protecting the throne gained much importance in the classical era (middle age and pre-modern age). Political criminals have been subject to many treaties due to this. The treaty that was signed between King *Henry II* of England and King *Guillaume* of Scotland in 1174 and the Treaty of Paris, signed between King *Edward II* of England and King *Philippe IV* of France *(Philippe the Handsome, Philippe le Bel)* in 1303, are examples of the treaties signed in Europe during this era. These

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24 Özgenç, *Türkiye'nin Taraf Olduğu*, 19; Köprülü, *Suçluların Geri Verilmesi*, 11.

25 Shearer, *Extradition*, 7.

26 Blakesley, *from Antiquity to Modern*, 46 *ff.*

27 Özgen, *Suçluların Geri Verilmesi*, 5.

treaties had religious and political grounds, and they were essential for eliminating their political rivals.[28]

The treaty, signed between King *Charles V (Charles the Wise, Charles la Sage)* of France and the County of Savoy in 1376, is significant, amongst others. This treaty had a purpose of cooperation against common crimes, beyond protecting the political interests of the ruler, and there were some provisions on extradition of common criminals in this treaty. Even though this treaty was signed in the early classical era, it is considered too close to the classical era by scholars.[29] However, despite the existence of that example, the treaties signed afterwards in Europe by the end of the 1660s had always been politically based. The treaties signed between King *Charles II* of England and the Government of Holland in 1661 and 1662 have some provisions on the extradition of common criminals, but the main purpose of these treaties is to take back the men who were being accused of killing King *Charles I* of England. So, it was signed on political grounds.[30]

It is possible to coincide with some examples of extradition in the classical era in the Ottoman Empire, which adopted Islamic law, *e.g.,* Emperor *Mehmet II (Mehmet the Conqueror, Fatih Sultan Mehmet Han)* of the Ottomans ordered the ringleader, who had fled to Galata after *Pazzi*'s failed coup attempt in 1478, to be surrendered.[31]

The modern era has come with great transformations. Rapid improvements in the field of technology, especially rail systems and watercraft, and cosmopolitan city life that was brought

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28 Alotaibi, *Pursuit of Extradition Requests*, 8.

29 Blakesley, *from Antiquity to Modern*, 48.

30 Blakesley, *from Antiquity to Modern*, 49.

31 Mahmut H. Şakiroğlu, *"Toskana," İç. TDV İslam Ansiklopedisi,* Vol. 41, (Ankara: TDV İslâm Araştırmaları Merkezi, 2012), 268.

about by the industrial revolution, have created suitable environments for criminals who need a place to flee.[32] Increased migration, relocation of criminals too, has enlarged the need to make extradition treaties between sovereigns. France took over the task of being the pioneer of the extradition treaties of the modern era.[33] Such a pitch that, by the 18th century, France had signed an extradition treaty with all its neighbours except Great Britain.[34]

Even if the treaty signed between France and Savoy in 1376 carried some traces of modern extradition treaties, the treaty signed between France and the Netherlands in 1736 was the first treaty which was a modern extradition treaty in a genuine sense.[35] As for the 19th century, French extradition treaties reached faraway states, even the United States of America (1843), Colombia (1850), Venezuela (1853), and Chile (1860).[36]

The contribution of France to the institution of extradition is not limited by the enlargement of the extradition range; France also contributed to embodying the extradition's content.[37] The treaty signed between France and Wurttemberg in 1759 was one of the much-detailed treaties of the early modern era and even contained some provisions about the expenses of extradition.[38] France pioneered 'the political offence exception' through the treaty with Belgium in 1834. In 1844, the treaty signed between France and Luxembourg regulated the implementation of extradition on all crimes except the ones underlined in the treaty

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32 Shearer, *Extradition,* 11 *ff.*

33 Shearer, *Extradition,* 17; Blakesley, *from Antiquity to Modern*, 51.

34 Blakesley, *from Antiquity to Modern*, 50 *ff.*

35 Blakesley, *from Antiquity to Modern*, 50.

36 Shearer, *Extradition,* 18.

37 Blakesley, *from Antiquity to Modern,* 51.

38 Shearer, *Extradition,* 17 *ff.*

and as of 1850, the rule of speciality was settled for the first time in a treaty, which was signed by France.[39] In the doctrine, it is stated that although its effect was relatively less compared to the treaties of France, the judicial decisions made in the United States of America took over as an important role in the development of extradition in the modern sense.[40]

According to *Shearer*, there were almost 1.500 bilateral extradition treaties in force at the beginning of the 1970s.[41] Additionally, the author calculated that more than 14.000 treaties were needed to establish a complete extradition network between all the existing member states of the United Nations.[42] For today, the exact number is 18.528, considering the current members of the United Nations.[43] It is obvious that spinning a web all around the world via bilateral treaties is far beyond the realms of possibility. In addition, ensuring a consistent extradition system and compatibility between international treaties and domestic legislation is also impossible. Besides, the treaties that have been signed by the same state with different counterparties differ widely in their provisions in many different ways.[44] Even though the United Nations has tried to shape bilateral treaties between states on uniformization with the Model Treaty on Extradition, this objective has not been reached.[45] It is stated by scholars that reaching a treaty with signatures of all states is not possible due to quality differences

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39 Blakesley, *from Antiquity to Modern,* 51.

40 Blakesley, *from Antiquity to Modern,* 51 *ff.*

41 Shearer, *Extradition,* 35.

42 Shearer, *Extradition,* 35.

43 *See* "Member States," *United Nations*, Access Date June 21, 2021, https://www.un.org/en/member-states/index.html .

44 İzzet Özgenç, *Türk Ceza Hukuku Genel Hükümler* (Ankara: Seçkin Yayıncılık, 2021), 1113.

45 Alotaibi, *Pursuit of Extradition Requests*, 42.

between law systems and considerations that judicial systems of some states are not trustworthy enough.[46] Practically, almost all multilateral extradition treaties have been regional. *Shearer* labels Common-wealth Scheme Relating to the Rendition of Fugitive Offenders as a prototype of a worldwide extradition treaty by taking into consideration that the scheme is composed of either rich, poor, developing and developed states.[47]

The pioneer of the multilateral extradition treaties was the continent of America.[48] While, even in Europe, which is the region where numerous bilateral extradition treaties have been made, the first multilateral extradition treaty was signed in 1957. Although it never came into force, 1879 was the date of the first multilateral treaty, which was directly aimed towards extradition and was signed by Argentina, Bolivia, Guatemala, Ecuador, Costa Rica, Peru, Chile, Uruguay, and Venezuela in Lima (Peru).[49] Some authors argue that the first multilateral extradition treaty was the Treaty of Amiens, which was signed by Great Britain, France, the Netherlands, and Spain in 1802.[50] On the other hand, *Zanotti* emphasised that the Treaty of Amiens was not directly aimed at extradition.[51]

In the scope of this article, we will not examine all the current extradition regimes. However, those two regimes must be mentioned since they are crucial to show how important strong relations between the states are in terms of extradition: *European Arrest Warrant* and *Nordic Arrest Warrant*.

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46 Özgen, *Suçluların Geri Verilmesi*, 24 *ff.*

47 Shearer, *Extradition*, 54.

48 Isidoro Zanotti, *Extradition in Multilateral Treaties and Conventions* (Leiden: Martinus Nijhoff Publishers, 2006), 1.

49 Zanotti, *Extradition*, 5.

50 Köprülü, *Suçluların Geri Verilmesi*, 18.

51 Zanotti, *Extradition*, 1.

The European Arrest Warrant, which regulates that extradition will be made through a facilitated delivery procedure within the European Union[52], was formed by the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and The Surrender Procedures Between Member States.[53] According to the 2nd article of this framework decision, the crimes related to the thirty-two categories of crimes listed in the article, if they are punishable in the issuing member state by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing member state, shall, under the terms of the framework decision and without verification of the double criminality of the act, give rise to surrender pursuant to a European Arrest Warrant.

The Nordic states, consisting of Denmark, Finland, Iceland, Norway, and Sweden, started their efforts to establish a common regional surrender regime in 1962. In this context, and under the influence of the European Arrest Warrant, they established the Nordic Arrest Warrant system with a multilateral treaty in 2005.[54] The Nordic Arrest Warrant is built on the trust between the Nordic states. Each one of the Nordic states considers the other Nordic states' legal systems and law enforcement to be qualified enough.[55] Thus, no lengthy procedures are required, and the state from which extradition is sought shall not invoke the principle of double criminality or the exemption of political offenses.[56]

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52 Bassiouni, *International Extradition,* 24.

53 European Union, "Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and The Surrender Procedures Between Member States," 45 *OJEC*, L 190, 18 July 2002.

54 Bassiouni, *International Extradition,* 40.

55 Shearer, *Extradition,* 63.

56 Bassiouni, *International Extradition,* 40 *ff.*

II. ON THE RATIONALE OF EXTRADITION

Modern extradition has been developed by international treaties. Despite some variations in their provisions, all the extradition treaties have a common point: every one of the extradition treaties puts the state that extradition is requested from under an obligation to extradite.

Extradition of political rivals (also the duty to extradite them) might be raised from necessities. However, there is a great intellectual background underlining the transformation of the object of extradition from political rivals to common criminals. The final form of the duty to extradite in the modern sense is mainly resultant of stimulating ideas that were put forward by scholars of the classical era, especially *de Vattel, Grotius, Pufendorf, Rousseau, and Voltaire*. Also, *Beccaria'*s opinions on the extradition of common criminals made a great contribution to the development of the current extradition institution.[57] Examining these ideas may help us understand the origins of fundamental principles of extradition. Thereafter, we must ask why today's sovereigns still follow 'the duty to extradite'.

The duty to extradite political criminals was raised from the necessity. Because political rivals had to be eliminated to protect the divine right of the sovereign. Being in a good relationship was not enough to guarantee that. So, they created an obligation for extradition. The treaties about this obligation were just reactions to critical events. On the other hand, the extradition of common criminals was something else almost entirely. That was a result of the intellectual process, and it was strongly related to the aims of punishment.

Criminal law seeks to achieve both retribution and prevention at the same time. According to the purpose of retribution, which might be the most ancient goal of the law, it is

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[57] Shearer, *Extradition*, 11; Bassiouni, *International Extradition*, 6.

indispensable to make the offender pay for his crime. The purpose of prevention aims on preventing crime and any undesirable behaviour either or both by using the fear of punishment as a deterrent (general prevention) or by using the re-socialising and recidivism prevention influences of the execution of the punishment (special prevention).[58] The idea of the duty to extradite common criminals was born from 'the purpose of retribution' but it evolved and developed due to 'the purpose of prevention'.

Hugo Grotius, a famous Dutch lawyer, is the scholar, who put forward the maxim of *aut dedere aut punire*.[59] According to the scholar, besides the perpetrator of the crime, people who participate in this crime by allowing, abetting, or assisting in any other way (e.g., counselling the criminal; praising or encouraging the crime; not preventing the crime, although they were under the obligation to do so; not helping to the victim; not spending their power and authority to deter the perpetrator, although it was their duty; and not revealing the truth, even though they were under the obligation to do so) should be punished because of their own guilt.[60] *Grotius* claims that protecting the criminal was also a crime[61], with reference to the assumption that the man who did not prevent a crime has greater

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[58] For detailed information on the purposes of punishment, *see*. Kai Ambos and Christian Steiner, "On the Rationale of Punishment at the Domestic and International Level," *Le Droit Pénal a L'épreuve De L'internationalisation*, ed. Marc Henzelin and Robert Roth, (Geneve: LGDJ, 2002), 312-317.

[59] Chakraborty, *Extradition Laws*, 2; Köprülü, *Suçluların Geri Verilmesi*, 6.

[60] Hugo Grotius, *The Rights of War and Peace*, ed. Knud Haakonssen, Vol. II, (Indianapolis: Liberty Fund, 2005), 1054 *ff.*

[61] Grotius, *The Rights of War and Peace*, 1053-1061; According to *Grotius* a pardon may be considered as innocent if only robbers and pirates, they have such a power as enough to make themselves untouchable and it is necessary for get them back to society. *See* Grotius, *The Rights of War and Peace*, 1074 *ff.*

guilt than the perpetrator.[62] *Grotius* says a state cannot exercise its power within another's borders. Thus, it is also not appropriate for a state that holds a fugitive criminal in its hand to return her/him on demand. If a state would rather refuse this demand, then it must punish the criminal itself. Originally, this maxim was formulated as either to extradite or to punish (*aut dedere aut punire*) by *Grotius*. Nowadays, an updated version of this formulation, which is either to extradite or to prosecute (*aut dedere aut judicare*), is approved by doctrine in terms of the presumption of innocence.[63]

Emerich de Vattel is another scholar who stands up for the existence of a legal maxim on the extradition of common criminals. On the other hand, *de Vattel* grants a wider place for asylum. *de Vattel* says we ought to hate crime but must love humans, even all humankind must love each other.[64] The scholar disapproves of the rejection of a man who has otherwise fled or been banished from his country due to his crime, unless there is an acceptable reason to reject her/him[65]. Even though they were criminals, they are still humans and, as per their natural rights, they need to live somewhere on earth.[66] According to *de Vattel,* besides pirates, men who announce themselves as enemies of humankind by committing crimes which threaten all of humanity, such as poisoning, assassination, or taking up arson as a profession, must be captured and eliminated through penalisation.[67] Furthermore, any sovereign who keeps those

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62 Grotius, *The Rights of War and Peace*, 1060.

63 Bassiouni, *International Extradition,* 7.

64 Emer de Vattel, *The Law of Nations*, ed. Knud Haakonssen, (Indianapolis: Liberty Fund, 2008), 227.

65 de Vattel, *The Law of Nations*, 227.

66 de Vattel, *The Law of Nations*, 226.

67 de Vattel, *The Law of Nations*, 227 *ff.*

kinds of criminals must return them to the country where the crime has been committed, if the sovereign of that state demands it.[68]

According to *Pufendorf* and *Billiot*, *aut dedere aut judicare* is not a maxim, which depends on natural law. The positivist opinion, which is advocated by those scholars, claims the duty to extradite is an imperfect obligation, which requires a treaty or domestic legislation or both.[69] The positivist opinion is dominant in the current doctrine and practice of international law. But, historically, *aut dedere aut judicare* used to be considered a way to protect world public order, by the scholars who defend the concept of *civitas maxima*.[70] Although the opinions of *Grotius* and *de Vattel* contain the elimination of some dangerous criminals according to the category of the crime they committed and thus refer to the purpose of special prevention in a sense; they are based on not leaving evil unanswered. Thus, the yeast of the extradition is not anything other than the retribution purpose of punishment.

Cesare Beccaria stated clearly that preventing a crime was way better than punishing the criminal.[71] According to the scholar, laws must be clear and simple, and besides that, society must focus on protecting the law, and it should be ensured that humans must be afraid of the law instead of other human beings.[72] *Beccaria* mentioned that one of the most effective ways to prevent crime was to ensure that there is not even a single

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68 de Vattel, *The Law of Nations*, 228.

69 Bassiouni, *International Extradition,* 12.

70 Bassiouni, *International Extradition,* 12.

71 Cesare Beccaria, *On Crimes and Punishments and Other Writings,* ed. Richard Bellamy, tr. Richard Davies, (Cambridge: Cambridge University Press, 1995), 103.

72 Beccaria, *On Crimes and Punishments*, 104.

place to flee where the real criminals were tolerated.[73] *Beccaria*'s opinions have steered the future developments in the extradition of common criminals, especially about the principle of double criminality and the rule of speciality.[74] Despite his reservations about the dangers of tyranny[75], *Beccaria* demonstrated the importance of preventing crimes and how extradition would be an excellent tool for doing so.. This approach attracted lots of prominent scholars' attention as well as tempted the sovereign, who was faced with the side effects of the upcoming modern era, which had started to feel its labour pains.

A. The Source of the Duty to Extradite

The sources of extradition should be distinguished as 'the sources of the duty to extradite' and 'the sources of extraditability'. That distinction arises from French law. Because according to French law, unlike the United States of America and other states that follow the American model, domestic law may allow accepting an extradition request even though there is no treaty between the requesting and requested states. So, domestic law can be the source of extraditability in the French model; but it cannot be the source of the duty to extradite.

There is still an undeniable *opino juris* that *aut dedere aut judicare* should be considered as a valid maxim about *jus cogens* violations.[76] However, according to the dominant opinion and current international law practice, the duty to extradite may arise only from a bilateral or multilateral agreement. Accepting an extradition request without a treaty is just an example of international courtesy (*comitas gentium*).[77]

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73 Beccaria, *On Crimes and Punishments*, 92.

74 Blakesley, *from Antiquity to Modern,* 50.

75 Beccaria, *On Crimes and Punishments*, 92.

76 Bassiouni, *International Extradition,* 9.

77 Özgen, *Suçluların Geri Verilmesi,* 10.

B. Questioning of the Rationale of the Duty to Extradite

Extradition is the son of international history and classical scholars' ideas. However, the pages of the calendar have been changed, and the legal paradigms have been shifted. Hence, the current rationale of extradition is still a matter of discussion. The current discussions may be gathered around one thought-provoking question: "*Why does extradition (as an obligation) still exist?"*

According to an opinion that refers to the existence of common morals and social order for all humankind in the doctrine, every state has benefits in the penalization of an immoral and illegal act, regardless of where it was committed. However, this opinion is strongly criticised by scholars, due to the fact that the assumption that there is one common social and moral order is far from reality.[78]

The second opinion on this issue claims that the state that has agreed to surrender the fugitive has some benefits in expelling her/him from its territory.[79] According to the scholars who criticise this opinion, it may not always be harmful to let the criminal stay within the borders of the country, and also, in case of extradition, the real benefits belong to the receiving state, not the deliverer.[80]

Another opinion about this issue considers the extradition as a reflection of sovereignty; thus, states declare these cooperation manifestos with other sovereigns toward their mutual benefits by admitting the fact that they cannot secure

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78 Edward M. Wise, "Some Problems of Extradition," *Wayne Law Review* 15, no. 2 (1969), 710.

79 Wise, *Some Problems of Extradition*, 710 *ff.*

80 Wise, *Some Problems of Extradition*, 711.

justice in their own territories.[81] Accepting or rejecting an extradition request as well as picking from more than one request is a form of usage of the power of sovereignty. Hence, extradition treaties are a sign of good relationships between states.[82]

According to *Wise*, states accept the extradition request due to the expectation that their favour will be returned if they make the same request themselves in the future.[83] The scholar points out that other scholars may direct the criticism that states should have discarded some certain conditions that limit extradition to maximise the benefits they expected, but that such a situation is not the case. *Wise* replies to this possible criticism with the thought that these issues are the product of political concerns other than extradition.[84]

Magnuson criticises the opinion, which assumes extradition as a concept that belongs to international law only and accepts that there is a rational give-and-take relationship that lies under extradition treaties. According to the scholar, this opinion fails to notice the current conjuncture of the law of extradition.[85] The scholar queries the reason why states need an extradition treaty if they already have some benefits in extradition.[86] Another critical question the scholar directed is why states form some rules and conditions which limit or aggravate extradition, if their interests are the primary goal.[87] According to *Magnuson,* the

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81 Radu, *the Legal Nature of Extradition*, 145 *ff.*

82 Radu, *the Legal Nature of Extradition*, 146.

83 Wise, *Some Problems of Extradition*, 711.

84 Wise, *Some Problems of Extradition*, 711.

85 William Magnuson, "The Domestic Politics of International Extradition," *Virginia Journal of International Law*, no. 52 (2012), 843.

86 Magnuson, *International Extradition,* 843.

87 Magnuson, *International Extradition,* 843.

opinion, which depends on the assumption of interest, also cannot answer that question: *"Why do states sometimes infringe extradition treaties?"*[88] *Magnuson* says that an opinion that is based on states' interests has failed to answer those questions, since it has overlooked some key variables such as domestic institutions and interest groups; and he states the main reason underlying the problem was the approach, which treats extradition as a phenomenon of the cooperation process between the states.[89] The scholar emphasises how great the importance of domestic interest groups' influence on the state's decisions about whether to comply with the treaty is.[90] *Magnuson* points out that domestic political interests may generate demands for extradition treaties, as well as deflect their formation and execution in a foreseeable way. Furthermore, he also states that it is always possible that a sovereign has some concerns other than the state's interests, such as the desire to be re-elected.[91]

In our opinion, the rationale of extradition should be searched for in the roots of this legal institution. As mentioned above, during the ancient and classical eras, fugitive political criminals always posed a threat that they might find some support or, even worse, assemble an army against their rivals, while they were still breathing abroad. Thus, it was natural that the sovereign's desired to end the fugitives' presences or at least to keep them locked up. Of course, establishing good relations with other sovereigns was an ideal way to avert many of the possible hiding spots of political rivals. However, it was still a problem how trustworthy the other sovereigns are. They might easily turn against the sovereign if it were to their own personal benefit politically. It was not possible to leave this issue to chance

88 Magnuson, *International Extradition,* 843.

89 Magnuson, *International Extradition,* 843.

90 Magnuson, *International Extradition,* 843.

91 Magnuson, *International Extradition,* 844.

because it was of vital importance. Probably *"pacta sunt servanda"* was the best instrument on hand, and extradition of political rivals must have been an obligation rather than arbitrary cooperation. It was obvious that this form of extradition was not an example of the international cooperation type which aimed to deliver mutual benefits for the whole of common society. This criticism was first expressed by *Grotius* in 1624.[92]

The interesting fact is, although the centre of gravity of extradition has shifted to the general prevention purpose of punishment, extradition's feature of being an obligation has not changed. In our opinion, the reason for this situation is habits or traditions. The presence of extradition as an obligation in current international treaties is the continuance of a tradition that has endured for hundreds of years since the classical era. However, it cannot be said that this tradition is completely devoid of value in terms of criminal policy. There is a proportionality between the range of a state's network of extradition treaties and the idea that there is not even a single place to flee from punishment. The regulation of extradition as an obligation rather than a discretion in international treaties is also important in terms of the inevitability of penalties. Thus, by putting each other under the obligation of extradition through international treaties, they protect their common interests in the deterrence of penalties, and by declaring their cooperation, they set forth the threat that they do not give criminals even a single place to flee. Enacting extradition as an obligation rather than discretion makes extradition inevitable by preventing the criminal from partnering with domestic interest groups in the state from which he fled. There still remains the possibility that states may violate their obligations for different political purposes or the different personal interests of decision-making authorities. This concerns

[92] Bassiouni, *International Extradition,* 6.

more fundamental questions related to the nature of international law, rather than extradition.

On the other hand, there is a question that still needs an answer: *"Why do states enact some limitations on extradition instead of maximising their benefits?"* The answer lies in the history of extradition. As mentioned above, the major interest of extradition does not take back any surrender. This approach held sway in the ancient era and lingered in the classical era. In sense of the modern extradition institution, the primary goal of states is to build strong fortified walls to prevent crime. However, international law's protection zone is not limited only by a state's interests. The thought of human rights, just like it has shaped other fields of law, either at domestic or international level, has also reshaped extradition law. Individuals also have some interests which are guaranteed by international law. The dominant opinion in doctrine considers that the rights and obligations in international law belong to states, not to individuals. Besides that, states may grant some protections to individuals, such as *the rule of speciality* and *the political crime exception*.[93] This stands on the same rationale as other treaties which protect human rights. States may anticipate some other benefits instead of extradition, with guaranteeing human rights or even avoiding some cumbersome fatigues. Of course, in a few instances, these anticipations may be preferred over a tiny part of the benefits based on general preventing purpose of punishment that might be provided by extradition.

[93] Christopher L. Blakesley, "Autumn of the Patriarch: The Pinochet Extradition Debacle and Beyond-Human Rights Clauses Compared to Traditional Derivative Protections Such As Double Criminilaty," *The Journal of Criminal Law & Criminology*, 91, no. 1 (2001), 4.

III. FOOTSTEPS OF A NEW DUTY: THE REVERSE EXTRADITION

Up to this point, we have examined extradition's history, and we have determined that the duty of extradition is the legacy of the entire history of international relations. Also, we mentioned its current function with regard to the prevention of general crime. Thus, we have answered the question of why we still need the duty of extradition. Now, we will evaluate some current events in international law, and we will examine if there is any extradition obligation outside of the duty to extradite in the context of current developments.

Donald Trump, the former president of the United States of America, wrote in one of his *tweets* on 17.02.2019 that "*The United States is asking Britain, France, Germany and other European allies to take back over 800 ISIS fighters that we captured in Syria and put them on trial. The Caliphate is ready to fall. The alternative is not a good one in that we will be forced to release them.....*"[94] In that tweet, *Mr Trump* publicly demanded that terrorists be taken over and prosecuted by western states. This tweet is not just a call for support from allied states. In fact, here, with a reference to Resolution no 2178 of the United Nations Security Council[95], the international obligation of states is evoked in terms of punishing those who go abroad to join terrorist organisations.

On the other hand, soon after that tweet, the *Trump* administration rejected receiving the USA citizen *Muhammed Darwis B.*, who was a member of ISIS and captured in northern Syria by Turkish security forces. The answer from the Republic

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[94] Donald Trump's Official Twitter Account (Banned), Access Date February 17, 2019, https://twitter.com/realdonaldtrump/status/1096980408401625088.

[95] United Nations Security Council (UNSC). Resolution no. 2178, S/RES/2178, 24 September 2014.

of Türkiye was radical. Türkiye dropped him at the Greek border, and interesting images emerged because Greece rejected to take him into their borders. The United States of America accepted to take him after he stayed in the safe zone between Turkish and Greek borders for five days.[96]

The *Muhammed Darwis B.* case is an important event not just for Turkish-American relations, but also for European states. Since the *9/11 Attacks*, there has always been a tendency to denaturalize people who are deemed as terrorists. However, that leaning has accelerated after ISIS has emerged as a great threat to modern civilisations, with its rise as well as its downfall.[97] Many European states, including Belgium, France, Germany, the Netherlands, and Sweden, do not want to take in their hundreds of citizens, who have joined ISIS (it is estimated that there are more than 5.000 ISIS members from Europe, including double citizens), and applying denaturalization would prevent of deportation of those people to their home countries.[98] Also, the

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[96] Eileen AJ Connelly, "Turkey sends alleged American ISIS fighter back to US", *New York Post*, 16 11 2019, Access Date January 21, 2020, https://nypost.com/2019/11/16/turkey-sends-alleged-american-isis-fighter-back-to-us/; Salih Baran, "ABD'ye gönderilecek yabancı teröristin ara bölgede bekleyişi sürüyor", *Anadolu Ajansı*, 15 11 2019, Access Date January 21, 2020, https://www.aa.com.tr/tr/dunya/abdye-gonderilecek-yabanci-teroristin-ara-bolgede-bekleyisi-suruyor/1646129.

[97] Leslie Esbrook, "Citizenship Unmoored: Expatriation as a Counter-Terrorism Tool," *University of Pennsylvania Journal of International Law* 37, no. 4 (2016), 1275.

[98] Zeliha Eliaçık, "AB'nin yeni kör düğümü: Avrupalı DEAŞ'lılar," *Anadolu Ajansı*, 15 11 2019, Access Date January 23, 2020, https://www.aa.com.tr/tr/analiz/abnin-yeni-kor-dugumu-avrupali-deaslilar/1646360; In the doctrine, it is claimed that the denaturalization due to terrorism has no meaning other than its symbolic value, and that the real purpose of this implementation is to prevent these people from entering the country. *See* Patrick R. Wautelet, "Deprivation of Citizenship for 'Jihadists' Analysis of Belgian and French Practice and Policy in Light of the Principle

issue was raised in the European Parliament as a threat that should be prevented by precautions in the short and medium terms; and the questions of what kind of initiatives the European Union will take to protect its internal security, and what special technical and financial cooperation can be established between the member states have been opened to discussion.[99] *Robert Wainwright*, the former Director of Europol, has warned that it might be the most serious terrorist threat that the European states have ever faced since the *9/11 Attacks*.[100]

Denaturalization has many dimensions. It considers citizenship law as well as human rights. However, it is a critical question whether it can be a legal sanction as a punishment or security measure in terms of criminal law. Also, the denaturalization of members of transnational terrorist organisations is related to anti-terrorism and international security.

A. Denaturalization and the Protection of Individual Rights

As a matter of fact, denaturalization is not a new legal institution. Anyone who obtained their citizenship by fraud has

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of Equal Treatment," *SSRN Electronic Journal*, 11 02 2016, Access Date January 25, 2020, https://ssrn.com/abstract=2713742, 7; The fact that the *Ismail* family was not admitted to the United States for a while, even if they were not stripped of their citizenship, indicates the aim pursued by the western states. For detailed explanation of the *Ismails* case *see* Leti Volpp, "Citizenship Undone," *Fordham Law Review* 75, no. 5 (2007), 2579-2582, 2586.

[99] *See Nathalie Colin-Oesterlé*'s question (3 March 2020 - O-000022/2020) for oral answer to the Commission on behalf of the PPE Group, Access Date December 18, 2021, https://www.europarl.europa.eu/doceo/document/O-9-2020-000022_EN.html.

[100] Lucia Zedner, "Citizenship Deprivation, Security and Human Rights," *European Journal of Migration and Law* 18, no. 2 (2016), 223.

been denaturalized since the beginning of history. During and after the First World War, some actions that were considered disloyalty to the state were grounds for the deprivation of citizenship.[101] Today, denaturalization often serves the purpose of keeping terrorists out of a country's borders. In fact, there are not any rules that protect individuals against denaturalization in international law, other than the exception about those that will become stateless if they are denaturalized.[102] As it was stated in par. 33 of the Explanatory Report to the European Convention on Nationality, not leaving people stateless is a part of international customary law.[103] International law aims to prevent statelessness, as is proven by the Universal Declaration of Human Rights of 1948 art. 15/2.[104] For this purpose, the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness have been granted, and art. 4-a of the 1961 Convention recognises the rights of everyone to have citizenship. However, those legal documents are not directly banning the use of denaturalization as a tool against terrorism.[105] If the people who were deemed as being

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[101] For a brief history of denaturalization in the western countries especially the United Kingdom and Canada, *see* Craig Forcese, "A Tale of Two Citizenships: Citizenship Revocation for Traitors and Terrorists," *Queen's Law Journal* 39, no. 2 (2014), 558 *ff.*

[102] Esbrook, *Citizenship Unmoored*, 1300 e*t seq, E.g.*, The British Supreme Court stopped the denaturalization of a British national named *Al-Jedda*, who was originally Iraqi but had lost his Iraqi citizenship while becoming a British citizen, as he would have been stateless if he had been denaturalized. *See* Wautelet, *Deprivation of Citizenship*, 1, 3rd fn.; For the full text of the decision on the *Secretary of State for the Home Department v Al-Jedda* case *see.* [2013] UKSC 62, November 6, 2021, https://www.supremecourt.uk/cases/docs/uksc-2012-0129-judgment.pdf.

[103] Council of Europe, *Explanatory Report to the European Convention on Nationality*, Strasbourg, 1997, November 6, 2021, https://rm.coe.int/16800ccde7, ¶ 33.

[104] Vahit Doğan, *Türk Vatandaşlık Hukuku* (Ankara: Savaş Yayınevi, 2016), 28.

[105] Forcese, *Traitors and Terrorists*, 560 *ff.*

involved in terrorist activities have dual citizenship, international law does not have any rules against that. On the other hand, the current practice of using deportation as an antiterrorist tool can cause some serious issues with regard to human rights:

First of all, the current practice of denaturalization due to terrorism is administrative rather than judicial. As in the famous case of *Shamima Begum*, who had joined ISIS when she was a teenager and was stripped of her United Kingdom citizenship on national security grounds, denaturalization without trial may cause several problems in terms of the right to a fair trial. The first problem is about the presumption of innocence, or, more accurately, the presumption of being not guilty. Denaturalization is a serious sanction as well, as terrorism is a serious crime. Thus, even though combating terrorism requires some hard precautions, stripping off someone's citizenship means more than just a precaution or a tough but necessary decision. It has to be said out loud that it is a harsh sanction as much as it is a criminal sanction. More specifically, it is a kind of security measure in terms of criminal law. Hence, it should have been regulated as a judicial decision instead of an administrative one. And the second breach is about presenting in front of the court. Since the main reason for stripping off someone's citizenship is to keep her/him out of the borders, it will be problematic if this person wants to enter the country to present herself/himself in front of the court in her/his case against the denaturalization. The *Shamima Begum* case has proved that theory already.

There is another, and more serious, problem. The other state for which the person holds citizenship may apply capital punishment, which is banned in most western countries. The state which strips the citizenship of the individual may claim that the third secure state should not deport or extradite her/him to that country which applies capital punishment. However, it

cannot be expected for the third secure state to keep every captured terrorist within its borders forever, considering there are thousands of them and none of them are its citizens. It cannot be said that the state that abandoned its citizens has no responsibility for what will happen to its former citizens.

Also, the implementation of denaturalization raises some serious concerns about discrimination. In this case, the subjects of the denaturalization implementation are double citizens who are involved in events overseas. Hence, this could easily turn into a witch-hunt against a particular minority, group, or culture. Additionally, in some countries, *e.g.,* France and Belgium, the denaturalization of terrorists is foreseen only in terms of acquired citizenship; people who are citizens of that state by birth are exempted from that sanction.[106] So clearly, denaturalization and race are relevant. On the other hand, religion is another matter that can be a subject of discrimination[107]. As *Volpp* stated, wearing a t-shirt that has Arabic letters on it may be understood as a terrorist act by some people in western countries. *Raed Jarrar,* the man who was barred from boarding his flight from New York to California because he was wearing a t-shirt with the sentence *"we will not be silent"* in Arabic as well as English, is one of the concrete examples of the hostility against the Muslim people.[108]

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[106] Wautelet, *Deprivation of Citizenship*, 8, 12, 21; As in the Dutch law, there are other legal systems in which such a distinction is not made. *See* Wautelet, *Deprivation of Citizenship*, 8.

[107] Fatih Düğmeci, *Türkiye İnsan Hakları ve Eşitlik Kurumu'nun Yapısı ve İdare Üzerindeki Ayrımcılık Denetimi* (Ankara: Adalet Yayınevi, 2019), 325, *326.*

[108] Volpp, *Citizenship Undone*, 2585 *ff.*

B. Denaturalization and the Protection of the Civilisation

The recently increasing trend of denaturalization due to being a suspect of terrorism[109] should be questioned from two different angles. The first question is about the efficiency of this conduct, both at the international and domestic levels. And the second question aims to detect which states are obligated to render the punishment (at least, prosecuting) and rehabilitation of the members of transnational terrorist organisations. But, before seeking an answer to those questions, we must carry out a brief explanation of the reason why we are talking about extradition instead of deportation.

It has been claimed that there should be a request from the receiving state so the process of extradition can be started.[110] In practice, the state that wants to send a criminal to her/his country usually deports her/him. However, deportation does not include any obligation to prosecute. Thus, deportation is not the ideal solution in terms of antiterrorism, because security at the international level requires eliminating terrorism itself as much as possible. Hence, captured terrorists must be prosecuted and punished after their crimes have been proven. One of the functions of punishment is to release the criminal from her/his

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[109] While whereas in the 30 years to 2002, there was only one person who was denaturalized, this number was 41 between the years of 2oo6 and March 2014, and between 2013 and 2014 alone, 37 people lost their citizenship in the United Kingdom. *See* Zedner, *Citizenship Deprivation,* 231.

[110] M. Emin Artuk, Ahmet Gökçen, M. Emin Alşahin and Kerim Çakır, *Ceza Hukuku Genel Hükümler* (Ankara: Adalet Yayınevi, 2019), 1131; According to *Turhan*, it is not possible to perform an extradition without request. However, the author states that Turkish Criminal Code art. 12/3-b indirectly allows Republic of Türkiye to offer to extradite someone to another state. *See* Faruk Turhan, "Cezai Konularda Uluslararası Adlî İş Birliği Kanununa Göre İadenin Kabul Edilebilirlik Koşulları: Doktrin ve Uluslararası Gelişmeler Işığında Bir Değerlendirme," *Süleyman Demirel Üniversitesi Hukuk Fakültesi Dergisi,* 8, no.2 (2018), 9 *ff.*

guilt. Also, the superior aim of prisons should be the rehabilitation of criminals during prison time, so they can return to society in peace.

Theoretically, every state should be obligated to punish and rehabilitate terrorists that they have captured and keep them away from radical organisations. However, that mission cannot be fulfilled only by the states which are militarily combating terrorism. First and foremost, it is impossible to re-socialize these kind criminals and provide them with a clean life in a society where they have no common roots. Since it is known that the human resources of terrorist organisations generally consist of people who are not well integrated into society, the best place to locate those criminals is in the country that will be detected in the context of the criteria of the genuine link theory.[111] Only through these means can they be kept away from radical groups. On the other hand, western countries that apply denaturalization to people who are deemed involved in terrorist activities ignore their obligation to international society. In fact, their wrongdoings are not just against international mutual interests,

[111] The genuine link theory is a principle introduced by the very famous *Nottebohm* decision of the International Court of Justice, which stipulates criteria for determining a person's real nationality. If there is a suitable place for a terrorist to be rehabilitated and re-socialized through punishment, we believe this can be determined within the criteria of the genuine link theory such as habitual residence, centre of interests, family ties, participation in public life, and manifestation of connection to the given country in the education of children. For the criteria and substance of the genuine link theory in terms of international law, *see* Judit Toth, "The Genuine Link Principle in Nationality Law", *Hungarian Yearbook of International Law and European Law,* 45, no. 1 (2014), 45-50; For the full text of the decision, *see* International Court of Justice Reports of Judgments, Advisory Opinions and Orders. '*Nottebohm* Case (Liechtenstein *v.* Guatemala)', Second Phase Judgment of April 6th 1955, December 21, 2021, https://www.icj-cij.org/public/files/case-related/18/018-19550406-JUD-01-00-EN.pdf.

but also, domestic society's interests are affected badly by their irresponsible conduct. Just building a wall and keeping the terrorists beyond the wall is not an effective means of protection. As seen in the *9/11 Attacks*, *the* world is too small to sweep terrorism under the carpet.[112] If terrorism wins somehow anywhere in the world, it will become a direct or indirect threat to all civilisations.

As it is seen, there is a need for 'an obligation', so states could be forced to receive and punish these criminals even though they have been denaturalized. As aforementioned, deportation is not an effective way to obligate those states to punish criminals. Also, there is no way to force them to give back those people's citizenship, in terms of international law.

Despite the need for a remedy for reverse extradition, it is hard to say there is a norm that can be the source of this obligation in international law. According to *Grotius*, no private legal communities or public entities shall be held liable for the defects of their members unless they acted with them or were negligent in the crime.[113] A father is not responsible for the crimes of his child, a master is not responsible for his servant's actions, just as a chief is not responsible for his officers' wrongdoings.[114] But also, it must be said that a father must take action about the wrongdoings of his child and a state's responsibility in regards

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[112] Both the *9/11 Attacks* and the *7/7 London Bombings* proved that the threat can somehow ooze from the outside of borders. Of course, we cannot deny how important it is to secure the border and keep immigration under control. However, it must be acknowledged that denaturalization is something else than protecting border security. This is the dumping out of the people that were suspected of terrorist affiliation and means that terrorism can be tolerated as long as it stays outside the borders. For more about how the *9/11 Attacks* and the *7/7 London Bombings* revealed the importance of border security, and its reflections on European immigration law, *see* Zedner, *Citizenship Deprivation*, 225-228.

[113] Grotius, *The Rights of War and Peace*, 1055.

[114] Grotius, *The Rights of War and Peace*, 1055.

to the wrongdoings of its citizens are not too different. However, that point of view is not enough to create an obligation in terms of international law. There should be a treaty to create this obligation, and recent developments in international relations have demonstrated to us that it is possible for such an agreement to be signed between the Republic of Türkiye and New Zealand. The *Suhayra Aden* case proves that those two states are on the same page about receiving and punishing captured members of transnational terrorist organisations by the countries that will be detected in terms of the true nationality principle.

Suhayra Aden was born in New Zealand; she lived there until the age of six, then immigrated to Australia permanently with her family. She lived in Australia until she joined ISIS in 2014. She had dual citizenship from both Australia and New Zealand, until Australia stripped her of her citizenship. She was captured by Turkish security forces when she tried to enter Türkiye illegally. New Zealand Prime Minister *Jacinda Ardern* said in a statement to the press that every reasonable person is aware that *Suhayra Aden* is an Australian. She claimed that Australia has been passing their responsibility to New Zealand by unilaterally denaturalizing this person, who has been living in Australia since the age of six and whose family and friends are there. She also stated that Australia and New Zealand should cooperate with regard to terrorists with dual citizenship, and she said she conveyed their concerns about the issue to her Australian counterpart. Australian Prime Minister *Scott Morrison*, on the other hand, stated that, as the Prime Minister of Australia, establishing national security is their priority, and that its current laws automatically strip the citizenships of dual citizens that are involved in terrorist acts.[115] The crisis came to an end in the

[115] For more details and the comments of both of the prime ministers *see* Praveen Menon and Colin Packham. "New Zealand PM urges Australia to 'do the right thing' over terror suspect's citizenship", *Reuters*, 16 02 2021,

context of this case with the reception of *Suhayra Aden* by New Zealand.

New Zealand Prime Minister *Jacinda Ardern* emphasised the awareness of fulfilling her international responsibilities when announcing the decision. *Ms Ardern* also stated that the responsibility of *Suhayra Aden* belongs to Australia, not the Republic of Türkiye. However, since Australia passed their responsibility, she is a concern of New Zealand now. She stated that Australia agreed to consult with them in similar cases that are likely to occur in the future. Regarding whether *Suhayra Aden* will be prosecuted by New Zealand, she set forth that every New Zealander involved in terrorist acts should be aware that they can be investigated under New Zealand law but that the issue is a judicial matter.[116] An important statement about the reintegration of *Suhayra Aden* and her children into society was made by *Ms Aden*'s lawyer, *Deborah Manning*. She stated that the family is going through difficult times, and that her client, like every mother, focuses on her children, and that the family needs privacy and time above all else. She stated *Ms Aden* and her children are looking forward to returning to New Zealand to begin their new life, and they hope to leave the troubled days behind and lead a normal life as much as possible.[117]

Access Date April 14, 2021, https://www.reuters.com/article/us-newzealand-australia-turkey-idUSKBN2AG035.

[116] Rachel Pannett, "New Zealand to resettle suspected Islamic State militant and her children after Australia revoked citizenship", *The Washington Post*, 26 07 2021, Access Date April 14, 2021, https://www.washingtonpost.com/world/2021/07/26/zealand-islamic-state-australia/ .

[117] "Isis 'terrorist' bride Suhayra Aden and her children to return to NZ", *NZ Herald*, 26 07 2021, Access Date April 14, 2021, https://www.nzherald.co.nz/nz/isis-terrorist-bride-suhayra-aden-and-her-children-to-return-to-nz/MCHFHKTT4KKGLN64RTO3O3VCBU/#/.

C. The Essence of the Reverse Extradition

There is an obvious need for an obligation that forces the states to take and prosecute the enemies of modern civilisations. This is the only way dangerous criminals can be held accountable for their crimes and be re-socialised. A fair agreement about that obligation must contain the following aspects:

Firstly, the duty to take and prosecute must depend on the criteria of the genuine link theory. A criminal must be prosecuted and punished in the most appropriate country, so that he or she can open a new and clean page. This country cannot be anywhere except the place that he or she can call home, and in terms of international law, the home should be detected on the grounds of the criteria of the genuine link theory. The state in which the criminal was a citizen, legally or in appearance when the crime was committed, must be obligated in the first place. It should be accepted as a presumption that this is the person's home until the contrary is proven. On the other hand, if there is a country that is more appropriate in terms of the genuine link theory, it should also be possible for the person to be given to this state. Also, denaturalization should not be a reason to decline a request relating to the duty to take and prosecute.

Secondly, even though their grounds are partly common, the duty to take and prosecute is a different term than 'the transfer of prisoners' and 'the transfer of prosecution'. The fundamental difference is that the duty to take and prosecute depends on the idea of mutual combating against transnational terrorism, while the others consider domestic criminal objectives or some humanist interests. Thus, the scope of the duty to take and prosecute is limited by terrorism, especially transnational terrorism.

Thirdly, the terrorist organisations that are within the scope of the duty to take and prosecute must be mutually determined by the police of both parties. Since there is not any consensus on

the definition of terrorism[118], it would be efficient to detect which organisations are terrorists according to both parties. Essentially, the state that denaturalizes its citizen has already accepted that the case is involved in terrorism. On the other hand, if there is no denaturalization implementation, deportation is a practical way for sending terror suspects to their home country. However,

[118] *Schmidt* and *Jongman* determined that between 1936-1981, there were 109 different expressions defining terrorism in the international law text. *See* Alex P. Schmid and Albert J. Jongman, *Political Terrorism: A New Guide to Actors, Authors, Concepts, Data Bases, Theories, and Literature* (New Jersey: Transaction Publishers, 1988), 5; In this respect, it is difficult to claim that terrorism is accepted as a crime violating *jus cogens* norms in current international law. On the other hand, *Bassiouni* states that some acts of terrorism-violence are amongst the international crimes that can be qualified as jus cogens violations in the future. According to the author, after the *9/11 Attacks*, terrorism, began to be considered amongst the crimes, such as genocide, crimes against humanity, war crimes, and torture, that states had the duty to not provide a safe haven. Thus, a crime suppressed at the national level became a concern of the common interest of the international community. According to *Bassiouni*, just as the line between national crimes and international crimes is dynamic, the line between *jus cogens* violations and other international crimes is dynamic as well in terms of international legal assistance mechanisms. Terrorism, which was not once considered a violation of *jus cogens* norms, has turned into a problem that causes international concerns in the era of globalization. Thus, the door has been opened for the definition of terrorism as a *jus cogens* crime. Currently, states need more than their cooperation to suppress domestic crimes committed within their borders. In that case, all humanity refers to a single society (*civitas maxima*) against of the acts of terrorist organizations, especially transnational terrorist activities. *See* Mahmoud Cherif Bassiouni, *Introduction to International Criminal Law* (Leiden: Martinus Nijhoff Publishers, 2014), 148*ff.* 495, 500; It is stated in the doctrine by *Petersen* that combating terrorism effectively within democracy has become an urgent task for western states. However, we claim that it is urgent as well as indispensable task for every state and legal organization. For the opinion that is mentioned, *see* Antje C. Petersen, "Extradition and the Political Offense Exception in the Suppression of Terrorism," *Indiana Law Journal*, 67, no. 3 (1992), 767.

reverse extradition is not just the duty of taking criminals, but also the duty of prosecuting them. Therefore, mutual identification of terrorist organisations within the scope of the agreement is valuable. In addition, well-connected coordination mechanisms between states should be established, so that this list can be updated for further improvements.

Lastly, the domestic laws of the parties must be made suitable for fulfilling this obligation. Domestic law must allow for the punishing of criminals according to the rules of the jurisdiction[119], as well as the crime types described in criminal codes. For example, a criminal organisation must be directly targeting the sovereignty of the Republic of Türkiye to be considered as a terrorist organisation in terms of the Turkish Code of Combating Terror. Hence, expanding the Turkish jurisdiction is not enough to establish the legal grounds of the prosecution of transnational terrorists.

CONCLUSION

Extradition has developed as an obligation throughout history. The duty of extradition of common criminals was indeed born of the retribution purpose of punishment, but it was also raised by the general preventive purpose of punishment. Today, extraditing an offender is still an obligation, even though states already have interests in extradition. Regulating extradition as an obligation by international treaties is a habit. However, this is not just an ordinary habit. It reveals that there is no paradise for

[119] It cannot be said that there is a rule as universal jurisdiction over terrorism. According to *Chakraborty*, who has the opinion that the lack of consensus on the concept of terrorism in international texts and the differences in the domestic regulations on terrorism play an important role in this, terrorism is not within the scope of universal jurisdiction in peacetime. However, if terrorism is used as a tool in cases where the law of armed conflict is valid, in this case, there is no doubt that states have universal jurisdiction. *See* Chakraborty, *Extradition Laws*, 183, 186.

criminals to escape to, as these states impose an obligation to extradite criminals. Current extradition treaties, therefore, serve the general preventive purpose of punishment. However, at this point, we are on the verge of a new extradition obligation that also aims to rehabilitate the person who committed a crime.

Extradition has developed in history in connection with events in international relations. One of the current events that will affect the future of extradition is the issue of terrorists who have been stripped of their citizenship. Terrorism is no longer a problem that states can hide outside their borders to protect themselves, nor is it an issue that can simply be swept under the carpet. Combating against terrorism is a common problem for the entirety of humanity. For this reason, it is at least a moral responsibility not to allow the captured terrorists to fall into the clutches of radical organisations after they have received their sentences. It has become a necessity to force states, by an obligation depending on international treaties, to take, prosecute, and rehabilitate captured terrorists, even if their citizenships have been stripped because they involved in terrorist activities. The conclusion of such an agreement between the Republic of Türkiye and New Zealand would be beneficial not only for the interests of these states but also for the security of all humanity.

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