In the current tense discussions both in Israel and in the Jewish diaspora concerning the new wave of anti-Semitism, politicians and commentators alike have overlooked the legal dimension of kinship responsibility (in the sense of kol Yisrael arevim ze laze) that exists in the Israeli penal code. Section 13 of this code, enacted in 1994, enshrines in law an express Israeli commitment to the diaspora-homeland security nexus.

Section 13, part of a wider reform of the code, granted Israeli courts jurisdiction over what is termed “extra-territorial crimes,” that is, crimes committed outside Israel. Section 13 is unique in the way that it relates to what is defined in its title as “crimes against the state or against the Jewish People.” It states that:

Israeli criminal law will also apply to offenses committed outside Israeli territory against: 1. The life of an Israeli citizen, Israeli resident or public servant, his body, his health, his freedom, or his property, because he is one of the above. 2. The life of a Jew, his body, his health, or his property, because he is a Jew, or the property of a Jewish institution, because it is Jewish.

In this section, Israel defined in explicit terms the connection between the diaspora and the State of Israel as the state of the Jewish people. Clearly, this connection was already affirmed and defined in the Law of Return, which established that “every Jew is entitled to make aliyah to

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Israel.” It is also clear that the Law of Return and the corresponding Israeli commitment to the Jewish people are the elements that often defined the Israeli national interest as a “Jewish interest.” Over the years, this interest compelled state action to save Jewish communities in distress and bring them to Israel. Israel’s military ties and arms transfer policies were also influenced, among other things, by the desire to guarantee the well-being and civil rights of diaspora communities, and they were used “as quid pro quo for permission to emigrate.” By enacting the section on the “Security of the Jews,” the State of Israel expressed its commitment to protect all Jews regardless of their citizenship and their countries of domicile, as if they were citizens of the state and as if the crimes committed against them were committed within Israel’s state borders.

In order to assess the far-reaching significance of the inclusion of the “Security of the Jews” clause in the penal code, we must understand the territorial principle of the law prior to the amendment of the penal code. In principle, criminal law is applied territorially. This means that the authority of a state to implement criminal sanctions is applied to a geographic/physical space over which the state has sovereignty. Within its sovereign domain, the state should exercise, in principle, a monopoly over the means of violence, and only its official institutions should determine criminal behavior.

“Extraterritorial” Connections

The scope of the law is based therefore on the fundamental requirements of state’s sovereignty. Obviously, criminal law derives from the right of the sovereign to use force in order to enforce these laws. Since the sovereignty of other states also derives from their own claim to legitimate monopoly over the means of violence and inheres in their enforcement within their own borders, it is not possible to implement criminal sanctions established by one country in another’s territory.

This territorial limitation to the application of criminal law has a number of “extraterritorial” exceptions, which are based on different linkages or connections arising from the special character of a specific crime or from the personal links of the perpetrator or the victim of the crime.

The universal connection is a connection that gives every state, qua state, judicial jurisdiction over crimes committed against international law. A grave violation of international law is by definition extraterritorial and constitutes a violation of the sovereignty of all states as one, harming
as it does the very basis of civil society, as it exists. The classic example now is genocide. In the past, piracy was the prime example of a crime that was granted universal jurisdiction due to its extraterritorial character. The universal connection in essence provides authority to every state to apply its own criminal laws against an offender, while he/she is in that state’s domain.

The Protective Connection. When a crime endangers the very existence of states’ sovereignty, their security, or economic well-being, states are entitled to protect themselves. This means that when a certain violation jeopardizes the very basis of the state’s fighting capability or its regular administration, the state is entitled to apply its criminal norms in order to protect itself, even though the violation occurred outside the state’s borders. The justification for this application of criminal norms outside state boundaries lies in the great danger to the state’s authority and order. This danger can be so severe that it sometimes justifies violation of another state’s sovereignty.

The Passive Personal Connection. According to this (weaker) principle, a state may apply its criminal laws to those who harm its citizens or residents when they are outside its territorial bounds. This principle rests on the state’s obligation to protect its citizens even when they are outside its sovereign domain. It is also based on the personal (kin) connection to the state. This connection is termed passive because it relates to victims who are “passive” relative to the damage caused to them.

The Active Personal Connection. According to this principle, a state is allowed to invoke extraterritorial jurisdiction and apply its own criminal norms to crimes committed outside the country in proceedings against a state citizen who actively violated criminal law while outside the country, and who then chose to return to his/her country of citizenship. This connection prevents the state from becoming a sanctuary for its citizens who are accused of committing offenses while abroad, since the state puts them on trial. This jurisdiction can also be used as an alternative to extradition of the offender to the state where the crime was committed.

It is in light of this understanding of the territorial jurisdiction principle and of the connection that allows deviation from it that one must see the special significance of the “Security of the Jews” clause that exists in the Israeli penal code. When the Knesset added the “Security of the Jews” clause in 1994, it established a new extraterritorial principle, an additional connection that makes possible the application of Israeli criminal norms outside the borders of the state. The significance of the clause is that the State of Israel sees the protection of all Jews as one of its
supreme responsibilities and considers every Jew, wherever he or she may reside, to be covered by its legal protection.

The legislators’ intent to create a new and special extraterritorial connection can be evaluated through the reading of the explanatory remarks offered on the bill, and the remarks made by then justice minister Dan Meridor in the Knesset plenum, when the bill was going through its first reading. The explanatory remarks said:

Likewise it should be emphasized that special protection is granted in Section 13(b)(2) to the life, health, freedom or property of a Jew, because he is a Jew, and that this is without any other connection to the State of Israel. The point of this is that just as when such an injury is directed against an Israeli, or an Israeli public servant because he holds such a position, the real injured party—according to the motive and object of the crime—is the state and the physically injured party is apprehended as someone who represents it or who is part of it, so, too, a similar rationale lies behind the protective application regarding injuries to a Jew or to Jewish institutions because they are such. This is an expression of the State of Israel’s existence as the State of the Jewish people.

In his remarks to the Knesset during the bill’s first reading, Meridor said:

We accept in the bill Professor Feller’s proposal to take upon ourselves as a Jewish state the responsibility to protect the life of a Jew, if he is harmed because he is Jewish. One may ask, of course, if there is a convention like this in other countries, and perhaps there is not. But there is no state that has written in another Basic Law, as in our Basic Law: The Knesset, Section 7a, the definition of Israel as the “state of the Jewish people.” When a Jew is persecuted anywhere because he is a Jew, not because he committed a criminal act, I think that it has to be made possible for us to apply the criminal laws of the State of Israel against the party who injures him, according to our judgment.

Significance and Application

The practical significance of the “Security of the Jews” clause is that Israeli courts have jurisdiction over acts committed by foreigners against Jews because of their Jewishness. This means that from the point of view of the State of Israel, there is no substantive difference whether anti-
Semitic offenses are committed inside or outside of Israel. In other words, in contrast to every other offense committed against Israeli citizens or Jews outside of Israel, and for which the court is not ordinarily empowered to judge, when an offense is motivated by anti-Semitism, the court has full jurisdiction. In addition, the conferment of judicial jurisdiction on an Israeli court, and the treatment of the offense as if it was committed within the borders of Israel, provides the State of Israel the authority to demand the extradition of the offender.

Presumably, an extradition request would, in this case, run up against the commonly known roadblock of “dual criminality,” the requirement that necessitates that the offense prompting the extradition request exist in both the petitioning state and the state being petitioned. Since this clause in the Israeli penal code is unique and does not exist in the laws of other states, it appears that such an extradition request will not be heeded in practice. Nevertheless, much depends on the rules and laws of extradition, and situations may exist wherein the country where a crime was committed would be prepared to find a way to facilitate the extradition of a suspect to Israel.

To the best of my knowledge, the “Security of the Jews” clause has yet to be activated. This in no way diminishes the declarative and ideological importance of this law. It cannot be seen as beyond the realm of possibility that in the future, in certain circumstances, the law will cease to be merely words and will become a living and breathing reality.