CrimA 9334/08

Appellant: **Emad Ali**

v.

Respondent: **State of Israel**

The Supreme Court

[Nov. 23, 2011]

Before Justices M. Naor, E. Arbel, and Y. Danziger

Appeal of the judgment of July 1, 2008 and the sentence pronounced on Sept. 24, 2008 by the Beer Sheva District Court in CrimC 8237/06 *per* Judge Y. Zelkovnik.

Israeli Supreme Court cases cited:

[1] LCrimA 1178/97 *Kahana v. State of Israel*, IsrSC 51(3) 266.
[2] CrimA 7230/96 *A. v. State of Israel*, IsrSC 51(3) 513.
[3] CrimFH 2980/04 *Oiku v. State of Israel*, IsrSC 60(4) 34.
[4] CrimA 4596/05 *Rosenstein v. State of Israel*, IsrSC 60(3) 353.
[5] CFH 1558/03 *State of Israel v. Assad*, IsrSC 58(5) 547.
[6] CrimA 8831/08 *State of Israel v. Alshahra* (June 30, 2010).
[7] CrimA 9428/08 *El Najar v. State of Israel* (Dec. 12, 2008).
[8] CrimA 3827/06 *A. v. State of Israel* (March 27, 2007).
[9] CrimA 6328/09 *El Najar v. State of Israel* (June 22, 2010).
[10] CrimApp 1600/06 *A. v. State of Israel* (March 5, 2006).
[11] CrimA 6491/08 *Bradville v. State of Israel* (March 16, 2009).
[12] CrimA 4043/05 *State of Israel v. Bniat* (Aug. 10, 2006).
[13] CrimA 2985/10 *Hamed v. State of Israel* (Jan. 1, 2011).
[14] CrimA 172/88 *Vanunu v. State of Israel*, IsrSC 44(3) 265 (1990).
[15] LCrimA 9818/01 *Biton v. Sultan*, IsrSC 59(6) 554 (2005).
[16] CrimA 163/82 *David v. State of Israel*, IsrSC 37(1) 622 (1983).
[17] CrimA 9995/05 *State of Israel v. Rabinowitz* (Feb. 15, 2007).

[18] CrimA 6613/99 *Semirak v. State of Israel*, IsrSC 56(3) 529 (2002).
[19] CrimA 2285/05 *State of Israel v. Hemed* (Dec. 5, 2005).
[20] CrimA 3687/07 *Tochly v. State of Israel* (Feb. 20, 2008).
[21] CrimA 2180/02 *Kassem v. State of Israel*, IsrSC 57(1) 642 (2002).
[22] CrimA 3944/08 *Sha'aban v. State of Israel* (June 18, 2009).
[23] CrimA 1358/09 *Dahar v. State of Israel* (April 30, 2009).
[24] CrimA 4352/08 A. v. State of Israel (March 23, 2009).
[25] CrimA 6566/10 *Veridat v. State of Israel* (May 29, 2011).
[26] CrimA 5225/03 *Habas v. State of Israel*, IsrSC 58(2) 25 (2003).
[27] CrimA 5121/98 *Yissacharov v. Chief Military Prosecutor*, IsrSC 61(1) 461 (2006).
[28] CrimA 8974/07 *Honchian v State of Israel* (Nov. 3, 2010).
[29] CrimA 1746/00 *Barilev v. State of Israel*, IsrSC 55(5) 145 (2001).
[30] CrimA 3477/09 *State of Israel v. Hadad* (Feb. 4, 2010).

Lower court cases cited:
[31] CrimC (Beer Sheba) 8179/07 *State of Israel v El Najar* (July 9, 2007).
[32] MApp 3403/08 (Beer Sheba Magistrates Court) *State of Israel v. Harzallah* (April 14, 2008).

Foreign cases cited:
[33] *S.S. Lotus* (*France v. Turkey*), 1927 P.C.I.J. (ser. A) No. 10 (Sept.7).
[34] *United States v. Yousef*, 327 F.3d 56, §45 (2nd Cir. 2003).
[35] *United States v. Bowman*, 260 U.S. 94 (1922).
[36] *United Sates v. Pinto-Mejia*, 720 F.2d 248, 259 (2nd Cir. 1983)
[37] *United States v. Chua Han Mow*, 730 F.2d 1308 (9th Cir. 1984).
[38] *United States v. Schmucker-Bula*, 609 F.2d 399 (7th Cir 1980).
[39] *United States v. Felix-Gutierrez*, 940 F.2d 1200 (9th Cir. 1991).

JUDGMENT

Justice M. Naor

The appellant was convicted in the District Court (Judge Y. Zelkovnik) of weapons offenses (trading in weapons) and conspiracy to commit a felony, perpetrated in the Gaza Strip.

The central question in the appeal before us is whether the offenses attributed to the Appellant, which were committed outside the sovereign territory of the State of Israel, constitute crimes against the security of the State of Israel for the purpose of extraterritorial jurisdiction.

Background

The Charges against the Appellant

1. The Appellant, a resident of the Gaza Strip, was charged with the offense of trading in weapons under sec. 144(b2) of the Penal Law, 1977 (hereinafter: Penal Law), and the offense of conspiracy to commit a felony under sec. 499(a)(1) of the Penal Law.

2. According to the account in the information, on Jan. 30, 1986, the Government of Israel declared the Popular Front for the Liberation of Palestine (hereinafter: the Popular Front) to be a terrorist organization. The Appellant, at the time relevant to the information, was a resident of Beit Hanoun in the Gaza Strip, served as a police officer in the Palestinian Authority, and was involved in commerce. In 2001, the Appellant conspired with Fana Nasser Kafarna (hereinafter: Kafarna), Abdulrahman Juma (hereinafter: Juma) and others to supply weapons to the Popular Front, which constituted a threat to the security of the State of Israel. The role of the Appellant was to purchase the required weaponry and sell it to the Popular Front, as instructed by Kafarna and Juma, taking advantage of his connections in the Palestinian Authority. In the years 2001-2002, in order to execute the object of the said conspiracy, the Appellant purchased 65 Kalashnikov rifles, 5,000 rounds of ammunition for the Kalashnikovs, and 80 kilograms of TNT explosives from an arms dealer, as requested by the Popular Front, and sold it for profit to the Popular Front, which caused harm to Israel's security. Pursuant to these transactions, the Appellant drove Juma and another person to a deserted house in the Gaza Strip in order to test a device containing explosives supplied by the Appellant. In addition, the Appellant supplied the Popular Front with copper sheets for the purpose of producing pellets to be added to the explosive devices, hand grenades, and boxes of "diet sugar" intended for the production of explosives. The Appellant also supplied 100 uniforms. The Appellant stopped supplying arms and services to the Popular Front following a dispute about the prices demanded by the Appellant.

The Arrest and Interrogation

3. In the early hours of July 18, 2006, the Appellant was brought to Israel in the course of operations by the army and Israel Security Agency (hereinafter: ISA)[1]. The ISA began its interrogation of the Appellant on the same day. Additional interrogations took place throughout that month and the month of August. Interrogation of the Appellant was completed on August 13, 2006.

4. The Appellant was interrogated for the first time, on July 18, 2006, the day he was arrested. The main points of the interrogation were documented in a memorandum marked P/9. The said memorandum noted that during his interrogation the Appellant provided details about joining the Popular Front in 1988, that he headed a cell, and that he was twice arrested by the Israeli security services for the activities of that cell. Subsequently, after having been involved in taking action against Palestinian collaborators and in military activity of the Popular Front in the Gaza Strip, the Appellant acted like a "fugitive" and remained in hiding until he managed to escape to Egypt, from which he was expelled to Libya. Between the years 1989-1994, the Appellant studied in Cuba, funded by the Popular Front. In 1995, the Appellant returned to the Gaza Strip and began working in the Palestinian Police. According to the said memorandum (P/9), the Appellant also recounted that after his return to the Strip, in the course of 2002, at the request of Nassar Kafarna and a person by the name of Juma, who were members of the Popular Front, the Appellant purchased Kalashnikov rifles, ammunition for rifles, and T.N.T. explosives from an arms dealer named Nabil Ziddam; he also bought copper sheets and uniforms, and sold them to Kafarna and Juma. In addition, it was noted that the Appellant drove Juma and others to the place in which they ran a trial of an explosive device, and on another occasion he travelled with them to a place where they tried to launch a rocket containing explosive material that he had supplied them earlier. It was also noted in the memorandum that in the course of the interrogation, which began at 8:55 in the morning and terminated at 6:30 in the evening, the Appellant was given many cigarettes and several cups of coffee.

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[1] Ed: Formerly known as the General Security Service (GSS).

5. On the day of his arrest – July 18, 2006 – some three hours after the completion of the said ISA interrogation, the police took a statement from the Appellant (P/4) in which he confessed to the acts attributed to him (hereinafter: the statement or P/4). According to what was written in the statement, the Appellant confessed that he had traded with activists in the Popular Front in weapons purchased from a person by the name of Nabil Ziddam, and in uniforms and boxes of "diet sugar", exploiting his connections with the Palestinian Police. All this was done at the request of Kafarna and Juma. The Appellant also stated that on one occasion he had driven Juma and others to a place where they tried to activate an explosive device. Contrary to what he said in his interrogation by the ISA, in his statement the Appellant said that he was invited to join in the trial launch of the rocket, but refused. Furthermore, the Appellant was documented as saying that he knew that the weapons were intended for the Popular Front, but he did not know to what use they would be put by the organization, and that he traded in them for the purpose of financial gain. He also reported that Juma told him that the uniforms were intended for activists in the Popular Front. The statement P/4 was taken from the Appellant in Arabic and was written down in Hebrew. At the end of the statement, the Appellant was documented as stating: "After [the above statement] was translated for me into the Arabic language, I confirm it with my signature."

6. In the ISA interrogations of the Appellant that took place later in the month of July 2006, the Appellant retracted his confession and claimed that he had lied about his involvement in the trading of weapons with activists from the Popular Front. In an ISA interrogation conducted in the course of the month of August 2006, on August 7, 2006 (and documented in memorandum P/14), the Appellant once again admitted that he had traded in weapons with members of the Popular Front – Kafarna and Juma. On the same day, August 7, 2006, another statement was taken from the Appellant by the police (hereinafter: P/5). In this statement, the Appellant stated that he supplied Kafarna, an active member of the Popular Front, with 20 empty hand grenades and three Mirs devices[2]. The Appellant also noted in this statement that he had supplied Kafarna with a Kalashnikov rifle for the purpose of self-defense. In addition, he said that in 1990 he trained in Syria, in the framework of the compulsory training of the Popular Front. In subsequent

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[2] Ed: Cellphones from Mirs Communications Ltd.

interrogations of the Appellant, he once again denied that he had traded in weapons with the Popular Front.

7. On Dec. 7, 2006, the Minister of Defense issued a certificate of privilege concerning, *inter alia*, the methods of interrogation employed by the ISA. After the certificate was issued, the Appellant was shown "paraphrases" of his interrogation, which related to things he had said in front of "others who were not in positions of authority." On April 19, 2007, this Court (*per* Justice A. Grunis) denied a petition submitted by the Appellant to disclose evidence (CrimApp 10537/06).

The Offenses attributed to the Appellant are Foreign Offenses

8. It should be noted at the outset that the offenses attributed to the Appellant were committed in their entirety in the Gaza Strip, and none, nor any part of any of them, were committed within the territory of the State of Israel, nor were their outcomes intended to occur in the State of Israel. The issue, therefore, is one of "foreign offenses" (sec. 7(b) of the Penal Law). Since we are dealing with foreign offenses, the written consent of the Attorney General to the prosecution was attached to the information, as required under s. 9(b) of the Penal Law. In principle, domestic criminal law applies to offenses that were committed in the sovereign territory of the state. In our legal system, such offenses are called "domestic offenses" (ss. 7 and 12 of the Penal Law; and see LCrimA 1178/97 *Kahana v. State of Israel* [1], at p. 269). There are exceptions to this rule, and a legal system may extend the application of its laws to criminal offenses committed beyond its territorial borders. In Israeli criminal law, such offenses are called "foreign offenses".

A foreign offense, according to its definition, is any offense that is not a domestic offense (sec. 7 of the Penal Law). A domestic offense is, as stated, an offense that is committed entirely or partially within the State, or the outcome of which is intended to eventuate in the State (sec. 7(1) of the Penal Law). In other words, a foreign offense is any criminal offense which was committed *entirely* beyond the territory of Israel, such as in our case. As a rule, the area of application of Israeli criminal law is within the territory of the State. When we seek to apply this law to foreign offenses, we must be able to point to a "connecting link", a "normative bridge", between the law of the state and these offenses that were committed beyond the borders of the

state, which will replace the territorial element (see CrimA 7230/96 *A. v. State of Israel* [2], at pp. 522-523; CrimFH 2980/04 *Oiku v. State of Israel* [3], at pp. 38-39; CrimA 4596/05 *Rosenstein v. State of Israel* [4], at pp. 383-385). Several jurisdiction-extending nexuses are accepted in most legal systems, including the Israeli legal system: an active personal nexus – between the perpetrator of the offense and the legal system; a passive personal nexus – between the victim of the offense and the legal system; a universal nexus – which relates to particularly serious offenses whose prevention is a matter of universal interest; a vicarious nexus – which relates to offenses that Israel will address by virtue of a treaty between itself and another state; and the protective nexus – which concerns acts that have harmed or were intended to harm essential state interests, such as security, the regime or the economy. These interests are specified in s. 13 of the Penal Law (for an elaboration of the various nexuses, see: S.Z. FELLER, FOUNDATIONS OF CRIMINAL LAW, vol. 1, 240-30 (1974) (Hebrew) (hereinafter: FELLER)).

9. In the trial court, the Respondent argued that Israeli law applies extraterritorially to the offenses attributed to the Appellant by virtue of the *protective* nexus. These offenses, it was argued, were committed against the security of the state (see s. 13(a)(1) of the Penal Law which states: "Israel's penal laws will apply to foreign offenses against national security, its foreign relations or its secrets"). The Appellant, on his part, argued that he perpetrated the acts attributed to him for purely economic motives, with no intention of harming national security. Therefore, he argued, for the purpose of extraterritorial application, no offenses *against* the security of the state are involved. In addition, the Appellant claimed that the Court did not acquire jurisdiction to try the offense of conspiracy attributed to him. The offense of conspiracy to commit a felony appears in s. 499(a)(1) of the Penal Law, which provides:

> 499. (a) If a person conspires with another to commit a felony or misdemeanor, or to commit an act in a place *abroad* which would be a felony or misdemeanor if it had been committed in Israel – and which also is an offense under the laws of that place, then he is liable –
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> (1) if the offense is a felony, to seven years imprisonment or to the punishment prescribed for that offense, whichever is the lighter punishment; [emphasis added – M.N.]

The Appellant claimed that because he was accused of conspiring to commit an act *abroad*, the matter falls within the scope of the latter part of s. 499(a)(1) of the Penal Law. Therefore, in order for the offense of conspiracy to arise, the substantive offense attributed to the Appellant, i.e. dealing in weapons, must also constitute an offense under the laws of "that place" – i.e. under the laws of the Gaza Strip. This, he argues, was not proved. On the substance of the charge, the Appellant argued that his confession from the first day of his arrest (P/4) is inadmissible due to the use of improper interrogation methods, and at the very least, the circumstances under which the confession was made reduce its weight considerably.

The Judgment of the District Court

10. Regarding the question of the application of the law, the District Court ruled that the circumstances of the Appellant's acts – the large-scale sale of weapons to a terrorist organization – were sufficient to justify the application of the penal laws of Israel to the acts, and it was not necessary to decide on the question of whether intention to harm security was also required. In any case, it was determined that the existing factual foundation showed that the Appellant was aware that the weapons that he sold would be used to harm the security of the State of Israel – such knowledge being equivalent to intention to harm the state. As for the offense of conspiracy, the District Court ruled that the Appellant was being tried in the framework of the first part of the section, which treats of the offense of conspiracy as a foreign offense against national security. In such a case, extraterritorial application of the law is permissible, just as domestic law may be applied to the offense of dealing in weapons.

On the merits, the District Court dismissed the Appellant's arguments concerning the admissibility and the weight of his confession to the acts attributed to him in the information. The District Court examined the Appellant's arguments that improper interrogation methods were employed against him, and that his confession was not given freely and voluntarily, and found them to be without substance. The District Court pointed to a contradiction in the Appellant's arguments that detracted from his claim that the confession was coerced: on the one hand, the Appellant said that he confessed after improper interrogation methods were employed; on the other hand, he argued that despite the pressures of the interrogation, he did *not* make any

confession, and that he signed the statement P/4 due to the pressure applied to him, without knowing that according to its contents, it was a confession.

In regard to the circumstances in which the confession was obtained, the District Court ruled that only the means of interrogation employed up to the time the Appellant made statement P/4 – which, as noted, was made already on the first day of his arrest – were relevant. It also found that the immediate commencement of the interrogation, as well as its duration, negate, or at least detract from, the Appellants' arguments with respect to the methods of interrogation used until he made statement P/4, such as his argument that he was put in solitary confinement in the freezing cold. In addition, the Court found that the testimony of the interrogators that the Appellant was not starved, threatened or put in solitary confinement was reliable. It was also determined that the ISA records correctly described what happened in the interrogation room. The court added that the interrogation of the Appellant was indeed very lengthy and even exhausting, but this was necessary for the purposes of the interrogation, and was not intended as a means of "squeezing" a confession out of the Appellant. Therefore, it was held that in the course of the ISA interrogation prior to delivery of statement P/4, the Appellant was not subjected to improper means of interrogation. A similar determination was made with respect to obtaining the confession at the police station. The court accepted as reliable the testimony of Onsey Harladin, a police investigator who took down statement P/4, that the Appellant made the statement voluntarily. It was also found that the transcription of the statement does not constitute a copy of memorandum P/9, and even though statement P/4 is generally consistent with what was recorded in P/9, there are differences between the two documents that attest to the fact that it is not a "clone".

11. As for the weight of the confession P/4, the District Court determined that even though the transcription of a suspect's statement in the language in which it was uttered is of utmost importance, in the circumstances of this case the transcription of P/4 in the Hebrew language did not detract from its weight. Officer Harladin speaks Arabic fluently, and he testified that he translated everything that the Appellant said. Moreover, the Appellant did not relate to the contents of the statement and did not indicate actual places in which, according to him, the meaning of his words had been distorted due to the method of transcription. The court further determined that statement P/5 simply added details about trade in additional weapons, without

negating or contradicting what was said in P/4. Thus, there is nothing in P/5 to detract from the weight of statement P/4. Additional support for the confession was found in the Appellant's testimony in court, in the framework of which he confirmed that he had transferred grenades and communications devices to Kafarna, an activist in the Popular Front. This testimony confirms the existence of a connection between the Appellant and the activists in the Popular Front with respect to the transfer of weaponry. Yet further support was to be found in the statement made to the police by another active member of the Popular Front – Shafik el-Barim (P/7). In his statement, Shafik confirmed that Juma is a senior activist in the Popular Front, who is involved in the military activity of the organization, including the launching of rockets. He also gave information about the connections of Kafarna, who is Juma's superior. In his testimony, Shafik denied that he had said these things to the police, but the court accepted the position of the prosecution that Shafik's statement prior to his testifying in court should be accepted, under s. 10A of the Evidence Ordinance [New Version], 5731-1971. The court found additional probative support in the statement of Emad Hassin (P/1), who supplied details about the arms dealer Nabil Ziddam that were identical to those provided by the Appellant.

12. The District Court therefore ruled that the Appellant's statement P/4 should be assigned substantial weight, and that the Appellant did indeed engage in the trade of weapons with activists from the Popular Front. Furthermore, the court held that the Appellant's argument that he acted from economic motives was not to be dismissed. However, in view of the circumstances as described, it found that the Appellant was aware of the fact that the weapons he supplied to the Popular Front were intended to harm Israel's security – and it seems that the profit motive bolstered the Appellant's support for the Popular Front that arose from his family and personal connections with the organization. The Court therefore convicted the Appellant of the offenses attributed to him in the information.

13. The court sentenced the Appellant to 12 years imprisonment, from which the period of his detention would be deducted. It also imposed an additional two-year conditional sentence, for a period of three years after completion of the prison term. The court remarked in its sentencing decision that the Appellant's deeds were particularly grave in view of the sheer volume of weapons that were sold, and in view of the terrorist nature and character of the organization to which they were sold. This gravity was exacerbated by the Appellant's knowledge that the arms were intended to harm the State of Israel or its citizens. The fact that it was not proved that these

weapons were actually used for the purpose of terrorist attacks within the territory of the State of Israel or for other hostile purposes is of no consequence. The court pointed to similar cases of arms smuggling and dealing in which heavy sentences were imposed upon the accused. In mitigation, the court took into consideration the fact that the Appellant had been dealing in arms for a relatively short period (only during the years 2001-2002). However, the fact that the Appellant had not expressed remorse for his actions added to the severity. The court therefore sentenced the Appellant to the said punishments.

Hence the appeal before us, which challenges both the conviction and the severity of the sentence.

The Arguments of the Appellant

14. The Appellant once again argued that Israeli law does not apply to his case, and that the information does not disclose an offense. In addition, the Appellant repeated his claim that his confession P/4 was not given freely and voluntarily, since it was obtained following the application of unlawful pressure by the ISA interrogators. The Appellant based this argument, *inter alia*, on a paraphrase of his statement to "another" that he was shocked by his arrest and therefore confessed. The Appellant also argued that he was not aware of the contents of statement P/4 that he signed, and that he signed only following pressure from the interrogators. He also said that he signed the statement on the understanding that this would bring about his release. The Appellant further claimed that the District Court was mistaken in regarding as credible the testimony of the interrogators, according to whom improper means of interrogation had not been used on him, and he claimed that the findings of the District Court attest to the fact that improper means were indeed employed.

In addition, the Appellant claimed that the transcription of his confession in the Hebrew language detracts from its weight, and its reliability is compromised in view of his contradictory statement documented in P/5, the contents of which he says he did not deny. Therefore, the transcription of P/4 in a language other than the original, and the contradiction between P/4 and the lawfully-obtained P/5, constitute cause for preferring the latter. It was also contended that weight should not be attributed to statement P/4 since the required time had not lapsed between

the police interrogation – at the end of which the Appellant signed P/4 – and the ISA interrogation that preceded it. The police interrogation was conducted only three hours after the completion of the ISA interrogation, and this was not sufficient to create the necessary separation to allow the Appellant understand that these were two different interrogations. Similarly, according to the Appellant, he was not properly cautioned against self-incrimination, and it was not explained to him that there is a difference between the police interrogation and its ramifications on the one hand, and the ISA interrogation on the other.

Finally, the Appellant argued that it had not been proven that he had *mens rea*. He claimed that the offense of conspiracy requires proof of intention that the offense to which the conspiracy relates will be perpetrated, and intention that national security will be harmed as a result. In view of the fact that he acted from purely economic motives, the prosecution did not raise this burden of proof. The Appellant therefore argued that his conviction could not stand.

15. Regarding the sentence, the Appellant argued that the Court did not assign sufficient weight to mitigating considerations, and imposed a prison sentence that was too severe. The Appellant reiterated that the offenses attributed to him were committed over a short period of time, motivated by economic hardship and the need to support his family, with no ideological motivation whatsoever. He also claimed that his health had deteriorated from the beginning of his detention, which was characterized by harsh conditions and loneliness. The Appellant further argued that his sentence was more severe than sentences that had been imposed in similar cases, constituting a deviation from the principle of uniformity in sentencing. He therefore appealed to this Court to reduce his sentence.

Arguments of the Respondent

16. With respect to the application of Israeli law to the offenses ascribed to the Appellant, the Respondent relied on the judgment of the District Court. Regarding the admissibility of the confession, the Respondent claimed that the Appellant's arguments were directed against factual findings and credibility, with which the appeal instance does not rush to interfere. Thus, it would be unwarranted to intervene in the findings of the District Court that the Appellant's confession was given on the first day of his detention, after he had rested in his cell; that the testimonies of the ISA interrogators regarding the conditions of the interrogation were credible, and that the

paraphrases of the confidential material did not lend any real support to the Appellant's claims about the use of improper interrogation methods. Moreover, this Court (*per* Justice A. Grunis) denied the Appellant's petition for disclosure of evidence, and ruled that the confidential material does not contain material that is essential to the Appellant's defense. The Respondent further argued that the Appellant's line of defense is not consistent. While on the one hand he argues that his confession was obtained as a result of improper means of interrogation, on the other hand he claims that statement P/4, in which he confessed to the charges in the information, did not record what he said.

17. As for the weight of the confession, the Respondent argued that this Court should not intervene in the factual findings of the District Court in regard to the separation of the police interrogation from that of the ISA. Regarding the transcription of the Appellant's confession in a language other than the original, the Respondent agreed that, as a rule, the confession of an accused should be written down in the language in which it was uttered. However, this does not affect the weight of the statement. According to the Respondent, the District Court correctly considered the totality of the circumstances surrounding the documenting of the statement, including the fact that the statement was translated for the Appellant, and the court correctly ruled that it was reliable. Regarding the mental element of the crime, it was argued that it had been proved that the Appellant was aware that the weapons were being transferred to the Popular Front, and that they were intended to serve the purposes of the organization against Israel. True, the Appellant acted for financial gain, but his level of knowledge about the fact that the organization is hostile to Israel and acts to harm Israel is equivalent to intention to achieve the outcome.

Regarding the punishment, the Respondent argued that the Appellant's sentence is consistent with the gravity of his actions, and with the appropriate level of punishment for these sorts of crimes. The Respondent added that the Appellant's acts did not constitute a one-time error, and they were not committed against the background of any particular hardship. It was also argued that the Appellant did not express remorse for his actions, nor did he take responsibility for them. The Respondent therefore requested that we allow the punishment to stand.

Discussion and Decision

18. The deeds attributed to the Appellant in the information were perpetrated, as stated, beyond the sovereign territory of the State of Israel. The Respondent agrees that these are foreign offenses. Its position is that these offenses have extraterritorial application by virtue of the protective nexus, since they are crimes against national security. We will first address the question of the extraterritorial application of the offenses of which the Appellant was convicted. Thereafter, the Appellant's other arguments regarding the admissibility of his confession and its weight, and his arguments as to the sentence, will be considered.

Extraterritorial Application and the Protected Interest – The Law Prior to and Subsequent to Amendment 39

19. The relevant statutory provisions concerning extraterritorial application were changed by the Penal Law (Amendment 39) (Introductory Part and General Part), 5754-1994, (hereinafter: Amendment 39; see also *A. v. State of Israel* [2], at pp. 519-520). The present case is governed by the statutory provisions as currently formulated, subsequent to Amendment 39.

20. As noted, the starting point is that the penal laws of a state apply within its sovereign territory. There are, as we have said, exceptions. When a foreign offense is directed against an essential interest of the state, domestic law may be applied to it by virtue of the protective nexus. The protective nexus is accepted in most legal systems, and it constitutes a "normative bridge" between the law of the state and the deed perpetrated beyond the borders of the state, replacing the territorial basis. The justification for this nexus can be found in the right of a sovereign state to protect, on its own, those interests that are vital to its existence, such as the interest of security.

Prior to Amendment 39 of the Penal Law, the provision relevant to our case was to be found in s. 5 of the Penal Law 5737-1977, which stated as follows:

> 5. The courts in Israel are authorized to try according to the laws of Israel a person who committed abroad *an act* which would constitute an offense if committed in Israel, and the act was harmful or was intended to harm the State of Israel, its security, its property, its economy or its foreign relations, its transportation links or its communication links with other states (emphasis added - M.N.).

Moreover, s. 5(b) of the Penal Law prior to Amendment 39 contained a list of *specific* offenses that had extraterritorial applicability due to the protective nexus. The interpretation of s. 5(a) of the Penal Law was discussed in the case of *A. v. State of Israel* [2]. That case concerned an accused who attempted to smuggle drugs from Venezuela to Canada by means of a bag on which he stuck a forged label so that it appeared to be an Israeli diplomatic pouch. The judgment of this Court dealt, *inter alia*, with the question of whether the penal laws of Israel could be applied to such acts, which fell within the category of foreign offenses. The Court decided, relying on the language of s. 5(a) of the Penal Law (prior to Amendment 39), that for the purpose of extraterritorial application by virtue of the protective nexus, it was sufficient that there was an *act* committed under circumstances that demonstrated intention to harm the state or which caused it actual harm. It also decided that the protective nexus was not confined to *specific* statutory provisions whose subject and purpose are the protection of vital national interests (*A. v. State of Israel* [2], at pp. 525-526).

Today, subsequent to Amendment 39, the provisions relevant to the protective nexus are to be found in s. 13(a) of the Penal Law, which provides:

> 13 (a) Israel penal laws shall apply to foreign offenses against –
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> (1) national security, the State's foreign relations or its secrets;
>
> (2) the form of government in the State;
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> (3) the orderly functioning of State authorities;
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> (4) State property, its economy and its transportation and communication links with other countries;
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> (5) the property, rights or orderly functioning of an organization or body enumerated in subsection (c).
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> …
>
> (c) "Organization or body", for the purposes of subsec. (a)(5) – …

Amendment 39 extended the scope of the protective nexus to the protection of Jews and Israelis from harm directed at them because of their identity. This is anchored in s. 13(b) of the Penal Law:

> 13 (b) Israel penal laws shall also apply to foreign offenses against –
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> (1) the life, body, health, freedom or property of an Israel citizen, an Israel resident or a public servant, in his capacity as such;
>
> (2) the life, body, health, freedom or property of a Jew, as a Jew, or the property of a Jewish institution, because it is such.

21. Thus, the wording of the Law subsequent to Amendment 39 is not identical to its wording prior to the Amendment. The pre-Amendment wording indicated that extraterritorial application of the law is possible both in the case of an "act" that harmed the state (or was intended to harm it) and to specific offenses from a closed list. The present text no longer relates to specific offenses, and the Law no longer refers to an "act" that harmed or was intended to harm the state or various interests; rather, it refers to foreign offenses "against" certain specified interests, including national security. Does the word "against" refer only to offenses that *by their nature* are directed against the essential interests of the state, and which are specified in s. 13 of the Penal Law, or does it also include acts, constituting offenses, that according to their *circumstances*, were directed against those same interests, for example, if they were committed with the intention of harming those interests.

This question is important in our context. As will be recalled, the Appellant was accused of the offense of trading in weapons, under s. 144(b2) of the Penal Law, which states:

> (b2) If a person produces, imports, exports, trades or performs any other transaction with weapons, which includes giving a weapon into the possession of another – whether or not for consideration – without having lawful permission to perform the said act, he shall be liable to fifteen years imprisonment.

The offense of trading in weapons is *not necessarily* related to protection of national security. In some circumstances, the act of trading in weapons may have the effect of harming national security or of indicating an intention to harm it. However, the purpose of the offense – or if you prefer, the interest it protects – is not the protection of national security. In presenting

their oral arguments, we allowed the parties to elaborate on their written pleadings on the question of the protective application to the present case.

22. In its supplementary pleadings, the Respondent focused on the interest of national security. It argued that any *act* – performed with an intention to harm national security – sufficed to justify extraterritorial application. The Respondent insisted that the purpose of the protective nexus supported this interpretation. The Respondent also supported its arguments with the fact that charges are often filed in Israeli courts against persons accused of foreign offenses, which according to the *circumstances* of their commission, were directed against national security. The Appellant, on the other hand, argued that in order for the penal laws of Israel to apply to a foreign offense, the offense must be directed, by its very *nature*, against national security. Counsel for the Appellant agrees that this does not refer only to those offenses included in the relevant chapter of the Penal Law, titled Offenses Against "National Security, Foreign Relations and Official Secrets" (Chap. 7 of the Penal Law). According to him, it also refers to any offense that, in accordance with its defining *elements*, is directed against national security, such as an offense under the Prevention of Terrorism Ordinance. However, the offenses of which the Appellant was accused are not such offenses, and his counsel therefore argues that the Israeli courts did not have jurisdiction over the Appellant.

The Scope of the Protective Nexus subsequent to Amendment 39

23. This Court has noted in the past that "the protective conception – which is what concerns us – may be given limited or wide statutory expression … but it will always be the law that decides" (*A. v. State of Israel* [2], at p. 525). The legislature's ability to choose between wide or narrow protective application is consistent with the domestic law approach whereby the legislature is entitled to set the bounds of the law at its discretion, without taking into account constraints of foreign or international law (s. 9(a) of the Penal Law; and see the *Rosenstein* case [4], at p. 381; GABRIEL HALLEVY, THEORY OF CRIMINAL LAW, vol. 1 (2009), 446 (Hebrew). The relevant statutory provision in our context is sec. 13(a), and particularly sec 13(a)(1) of the Penal Law, which we will now examine.

Was it the intention of the legislature, in Amendment 39, to create a *change* in the situation that pertained prior to the Amendment? After having given this serious consideration, I propose to my colleagues that this question be answered in the negative. The starting point for the discussion is the language of s. 13(a)(1) of the Penal Law in its post-Amendment formulation: "Israel's penal laws shall apply to foreign offenses against – (1) national security, the State's foreign relations or its secrets." "Foreign offense" is defined negatively: it refers to any offense that is not a domestic offense. In principle, any criminal offense may fit the definition of "foreign offense". There is nothing in the *first part* of s. 13(a) that defines the scope of the protective nexus. The question is whether the word "against" must be interpreted as referring only to offenses which by their nature are directed against national security, such as offenses specified in the relevant chapters of the Penal Law and the Prevention of Terrorism Ordinance. In my opinion, the interpretation according to which the protective nexus remains applicable to all *acts* which by virtue of their *circumstances* are directed against national security is to be preferred.

The basis for this determination, as will be explained, is the interpretation of s. 13(a) in accordance with its purpose. Section 34U of the Penal Law states:

> 34U. If an enactment can be reasonably interpreted in several ways in respect of its purpose, then the matter shall be decided according to the interpretation that is most favorable for whoever is to bear criminal liability under that enactment.

Interpretation of the law in the criminal sphere is also purposive interpretation, in the framework of which one must examine the language of the law, as well as the goals and interests that the law is intended to realize (CFH 1558/03 *State of Israel v. Assad* [5], 557). An interpretation of the language of the law that is favorable to the accused may nevertheless be rejected if it fails to optimally realize the purpose of the law. This Court considered this point recently in CrimA 8831/08 *State of Israel v. Alshahra* [6]:

> Among several possibilities that realize the statutory purpose, the one to be chosen is that which realizes it in the fullest way, in both its subjective and objective purpose (AHARON BARAK PURPOSIVE INTERPRETATION IN LAW (2003) (Hebrew) 133-135 (hereinafter: BARAK, PURPOSIVE

> INTERPRETATION). Only where there remain several possible interpretations of the norm according to its statutory purpose, is the interpretation most favorable to the accused is to be preferred (CrimA 8831/08 *State of Israel v. Alshahra* [6], *per* Justice Y. Amit at para. 20).

Thus, the interpretation that most fully realizes the statutory purpose underlying s. 13 of the Penal Law is to be selected. Only in the event that the two possible interpretations comply with this requirement does s. 34U direct us to select that which is most favorable to the Appellant (see also: Aharon Barak, *On the Interpretation of a Penal Provision*, (2002) 17 MEHKEREI MISHPAT, 347 (Hebrew)).

24. The statutory provisions regarding extraterritorial application by virtue of the protective nexus, as formulated prior to Amendment 39, applied the domestic law to every act that harmed or was intended to harm "the State" or important interests such as the economy of Israel and its security. The present formulation restricts the application of the law by virtue of the protective nexus to offenses that are directed against *certain* interests, and it no longer allows for the application of the law to "any" harm to the "state". At the same time, I propose to my colleagues we should hold that despite the textual change, Amendment 39 did not reduce the scope of the protective nexus. Israel's criminal laws continue to apply to a person who perpetrates an *act* which, according to its circumstances, harmed or was intended to harm the security of the state, as was the situation that pertained prior to the Amendment.

From the Explanatory Notes to Amendment 39 it emerges that the scope of protection of those vital interests was not reduced. The Explanatory Notes are "silent" on the change of wording in relation to the protective nexus – a change which we discussed above. In my view, this "silence" is significant. It indicates a lack of intention to create a "revolution", other than a change in wording. Furthermore: the general attitude of the Explanatory Notes to the scope of the protective nexus manifests a desire to *expand* this scope from a substantive point of view in certain areas, and there is no mention of any intention to restrict it. Thus, regarding the proposed statutory change in the extraterritorial applicability, the Explanatory Notes to Amendment 39 noted that:

> The *main* changes in the bill are a clear-cut separation between the different types of application, and particularly, eradication of any aspects of

> protective application from universal application and personal-passive application; *expansion from a substantive perspective of the protective application* and of the personal-active application" (S.Z. Feller and M. Kremnitzer, *Criminal Code Bill – Preliminary and General Parts (Text and Brief Commentary)*, 14 MISHPATIM (1984) 128, 201-202 (Hebrew) (hereinafter: Feller and Kremnitzer) (emphasis added – M.N.).

The Explanatory Notes also mentioned that the rationale behind nullifying the particular offenses specified in s. 5(b) was the desire to avoid a *closed list* of offenses that have extraterritorial applicability due to the protective nexus, as it may suffer from omissions:

> In order *to avoid* casuistic specification which is liable to be incomplete, such as that found in s. 5(b) of the Penal Law [prior to Amendment 39], what is proposed is the general formulation of an offense of likely harm to the proper operation of the state authorities (s. 13(a)(3)) (*ibid*., at p. 202) (emphasis added – M.N.).

Another major change in the new Law was, as stated, the expansion of the protective nexus to foreign offenses against Israelis or Jews, wherever they may be (this expansion has been criticized: Yoram Shachar, *In Condemnation of the National Application of Criminal Law*, 5(1) PLILIM (1996) (Hebrew); for a different view, see: S.Z. Feller and Mordechai Kremnitzer, *Reply to the Article 'In Condemnation of the National Application of Criminal Law ' by Y. Shachar*, 5 *Plilim* (1996), pp. 65, 73 (Hebrew) (hereinafter: Feller and Kremnitzer – Reply)).

The intention was, therefore, to expand and not to constrict the protective nexus from a substantive point of view, vis-à-vis the situation prior to the Amendment. Thus, as we have said, the list of specific offenses to which Israeli criminal law applied by virtue of the protective nexus was revoked, and the protective nexus was expanded to apply also to foreign offenses against Jews and Israelis. The position whereby the new legislative provisions expand the protective nexus finds expression in the literature as well (see Y. KEDMI, ON CRIMINAL LAW, vol. 1 (2004), at p. 30 (Hebrew): "The new provision [s. 13 of the Penal Law] adopts a general formulation and avoids going into details that are liable to be found incomplete. The former provisions of the Penal Law – particularly the provisions of what was then s. 5 – should not be viewed as defining the borders").

25. Moreover, s.13(a)(3) of the Penal Law deals, as stated, with foreign offenses against the "proper operation of state authorities". As will be recalled, the Explanatory Notes to Amendment 39 mentioned that this *general* section was added to the protective nexus in order to break out of the bounds of the list of specific offenses that were once anchored in s. 5(b) of the Penal Law. Furthermore, the general nature of this interest, to which *no* specific chapter had been devoted in the Penal Law (such as chap. 7 dealing with security offenses) attests to the fact that the intention of the legislature was not to restrict it only to concrete offenses. In addition, s.13(a)(5) of the Penal Law treats of foreign offenses against rights, property or the orderly functioning of certain national institutions. Here, too, it is difficult to pinpoint offenses that are intrinsically directed against the proper functioning of those *specific* institutions. In other words, other interests that are anchored in s.13(a) are not confined to offenses that are *intrinsically* directed against them. In the same way, it cannot be said that foreign offenses against security are only those statutory provisions whose *purpose* is the protection of this interest.

26. The purpose of the protective nexus, particularly in the context of national security, lends support to the conclusion that the protective nexus is not confined to offenses that are *intrinsically* harmful to national security. The purpose of this nexus is, as stated, a response to the need of the state to protect itself from deeds that are perpetrated outside its borders and that are directed against vital interests that go to the very root of the existence of the state (see: *A. v. State of Israel* [2], at 521, and see IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW,(7th ed., 2008) 304-305). Regarding the purpose of the protective nexus, the Explanatory Notes to Amendment 39 note:

> Section 13 treats of protective application that is based on a special nexus of the type of offense to the State, when the offense is likely to endanger the political, security and economic foundations of the state, its standing and the orderly functioning of its institutions (Feller and Kremnitzer, at p. 202).

27. The question of the scope of the protective nexus subsequent to the legislative change introduced by Amendment 39 was considered by this Court in the *Alshahra* case [6]. There, at issue was the interpretation of s. 13(a)(4) of the Penal Code, which states: "Israel's penal laws shall apply to foreign offenses against State property, its economy and its transportation and communication links with other countries." In the above case, two residents of the Territories

were accused of dismantling stolen cars, forgery and dealing in stolen vehicles. The offenses attributed to them were all committed in Area A, under the control of the Palestinian Authority, and they were therefore considered foreign offenses. This Court considered the question of whether these offenses fall within the bounds of s.13(a)(4) of the said Penal Law, and held that Israeli law does not apply to the foreign offenses attributed to the accused. It was held there that it is not sufficient that the offense causes harm to the property of *individuals* in order for the protective nexus to arise. Even the fact that car theft constitutes a "national plague" is not enough to expand the application of the law. It was further held that the offense must be one that is directed against a protected value related to the economic infrastructure *of the state*. As an example, the Court cited the offenses of forgery of currency, or harm to goods that constitute part of an important export branch.

The Appellant in our case argued that the said rulings indicate that Israeli law applies only to those foreign offenses that are *intrinsically* directed against the state, and that an analogy should be drawn from that interpretation to our case. However, the *Alshahra* case [6] also noted that the *accumulation* of offenses of car theft and dealing in stolen parts perpetrated by an individual entity can result in an argument that offenses against the national economy are at stake (para. 29). From this it transpires that the Court did not interpret the section as applying only to offenses intrinsically harmful to the national economy. The Court was prepared to apply the protective nexus to offenses of theft and trade in stolen parts, which are not intrinsically directed against the interest of the national economy, if, under the *circumstances***,** the accumulation of car thefts and trade in stolen car parts by the individual indicate harm to the national economy.

28. We would note that the trial courts have held that the provisions of s.13(a) of the Penal Law are not confined to *certain* statutory provisions, and that protective application extends to a range of matters that may harm protected national values (see the decision of the Beer Sheba District Court – CrimC (Beer Sheba) 8179/07 *State of Israel v El Najar* [31]: in the main proceedings, the accused confessed to the alleged offenses, and filed an appeal to this Court, but the appeal turned only on the severity of the sentence – CrimA 9428/08 *El Najar v. State of Israel* [7]; and see: MApp 3403/08 (Beer Sheba Magistrates Court) *State of Israel v. Harzallah* [32]).

29. The function of the protective principle is to protect important interests from various threats. Clearly, there are some deeds which, by virtue of their *circumstances***,** present a real

threat to the security of the State of Israel, even if they do not constitute "pure" security offenses like s. 111 of the Penal Law that prohibits the delivery of information to the enemy. Thus, for example, a person's acts that constitute a link in the terrorism chain, whether they be the funding of the activities of a terrorist organization or the smuggling of weapons to that organization, constitute a concrete threat to security. In the past, people were tried in Israel for foreign offenses where the *circumstances* of their commission indicated a threat to security, such as weapons offenses (for digging tunnels in the Gaza Strip that were intended for the smuggling of weapons from Egypt to the Strip), offenses of prohibited military exercises or the funding of the activity of terrorist organizations (see e.g.: CrimA 3827/06 *A. v. State of Israel* [8]; CrimA 6328/09 *El Najar v. State of Israel* [9] (hereinafter: the *El Najar* case); CrimApp 1600/06 *A. v. State of Israel* [10]; CrimA 6491/08 *Bradville v. State of Israel* [11]). Admittedly, the protective principle is limited to the offenses that endanger one of the interests specified in s.13(a) of the Penal Law (see FELLER, at p. 275). However, this does not mean that the scope of the principle is limited only to specific *statutes*. *Within the bounds* of the protective nexus it is possible to include *acts* that, of course, constitute offenses that by their circumstances constitute a threat to a particular vital interest that the law seeks to protect, no matter where the act was committed.

30. The protective principle is especially important in modern times, in which the commission of crimes unbounded by territorial constraints is easier and more possible than ever, and there is a real need for prevention. Moreover, today, the interest in bringing the offenders to justice, and the interest in preventing them from using states as havens, are interests common to all states, and therefore, there is a discernable trend to extend the scope of application of domestic law to acts perpetrated beyond the state borders (Feller and Kremnitzer – Reply, at p. 73). This is certainly so in the case of terrorist activity. The State of Israel is often threatened by terrorist elements, and stands at the forefront of the struggle against terror. This struggle demands confronting every link in the chain of terrorist acts, whether within the borders of the State of Israel or beyond them. This Court has addressed this in the context of the smuggling of weapons that are liable to end up in the hands of terrorist elements, noting that –

> No great expertise is required to understand that the uninterrupted supply of weapons and ammunition contributes to the persistence of the wave of violence and terror. The channels for smuggling ammunition and weapons

> constitute an artery that feeds the terrorist activity and they are, therefore, an integral part of it. It is patently obvious that the gravity, the risk and the abhorrence associated with acts of terror themselves also impact on the punishment of those who are involved in the early – but vital – stages of the chain of terror (CrimA 4043/05 *State of Israel v. Bniat* [12], *per* Justice A. Grunis, at para. 8; see also CrimA 2985/10 *Hamed v. State of Israel* [13], my opinion, at para. 10).

The protective principle, when it is not restricted to a closed, specific list of offenses, allows for effective, focused action against those links in the chain of terror whose operational base is often to be found outside the territory of the State of Israel. The purpose of the Law, therefore, is best realized when the scope of the protective application is not confined to a list of specific offences that are *intrinsically* directed against national security.

31. What emerges from the above is that the protective nexus is confined to the protection of certain fundamental national interests, but not exclusively to offenses that are *intrinsically* prejudicial to those interests. Extraterritorial jurisdiction may *also* apply to acts – constituting offenses – whose circumstances indicate that they present a serious risk to these interests, or that there is an intention to harm them (for a position in the academic literature supporting the application of Israeli law to *acts* that were perpetrated with the intention of harming national security see: Yoram Dinstein, *The Amendment to the Foreign Offenses Law*, 2 IYUNEI MISHPAT (1973), 829, 836 (Hebrew)) . This, in my opinion, is the interpretation that best realizes the purpose of the legislation subsequent to Amendment 39, as well. A different interpretation, such as that proposed by the Appellant, does not permit effective confrontation of the chain of terrorist links, the operation of which presents a great danger to national security. As such, it does not constitute a reasonable interpretation, and does not fulfill the purpose of the legislation.

32. Concern about the "imperialist" application of Israeli penal law, as claimed by the Appellant, is unwarranted. The fact that the state is authorized to apply its laws to foreign offenses does not mean that the authorities of that state are permitted to operate in the territory of a foreign sovereign in order to enforce those laws (see Feller and Kremnitzer – Response, at p. 67; and see: Monika B. Krizek, *The Protective Principle of Extraterritorial Jurisdiction: A Brief History and an Application of the Principle to Espionage as an Illustration of Current United*

States Practice, 6 B.U. INT'L L.J. (1988), 337, 357). Moreover, prosecution for foreign offenses is subject to special oversight. A person may not be tried for a foreign offense other than by the Attorney General or with his written approval (s. 9(b) of the Penal Law). This supervision allays the concern about the application of domestic law to cases that do not justify such action.

Comparative Law

33. Extraterritorial application by virtue of the protective nexus is accepted, as stated above, in most legal systems. As a matter of principle, international law does not restrict the scope of the protective nexus, and each state may define its limits (*S.S. Lotus* (*France v. Turkey*) [33]; S.Z. Feller, *Criminal Jurisdiction: Borders and Restrictions*, 2 IYUNEI MISHPAT (1973), 582 (Hebrew)). At the same time, one must be careful not to abuse this nexus when it oversteps its purpose, i.e. the protection of basic, fundamental interests (MALCOLM N SHAW, INTERNATIONAL LAW (6th ed., 2008) 666-667). The interest of security is, in any case, recognized as an interest worthy of protection.

The modes of implementation of the protective nexus in different legal systems are varied. Thus, there are legal systems in which the protective nexus is confined to a list of specific statutes (§5 stGB (Germany)); some legal systems apply domestic law to some offenses that are specific but formulated broadly (the French penal law applies the protective principle, for example, to the offense of destruction of a document, equipment, a structure, etc., where this poses a threat to the essential interests of the state, including national security (Code Penal [C.Pen.] art L. 411-9 (Fr.)). There are also systems of law that choose to apply domestic law to acts at a certain level of severity committed beyond their borders, when these acts harm important interests (Estonian Criminal Code §9).

In the United States, the protective principle, as justifying extraterritorial application, is recognized in the framework of Restatement (Third) of the Foreign Relations Law of the United States §402(1)(1987), which states that domestic law may have extraterritorial application to particular conduct by foreigners, outside the territory, that is directed against national security or against certain other national interests. This is subject to the application of the law being reasonable (§403), and provided that it is possible to identify an express or implied intention of

the legislature to the effect that the particular statute should apply extraterritorially, on condition that this is consistent with the right to due process (*United States v. Yousef* [34]; *United States v. Bowman* [35]). Extension of the application of the law should ideally comport with international law, but this is not essential (*United Sates v. Pinto-Mejia*, 720 F.2d 248, 259 (2nd Cir. 1983) [36]; the *Rosenstein* case [4], at p. 382). In various decisions in the United States, extraterritorial application of the law was justified by virtue of the protective nexus, primarily in regard to drug-related offenses or offenses against representatives of the authorities dealing with narcotics, and various offenses directed against governmental authorities (*United States v. Chua Han Mow* [37]; *United States v. Schmucker-Bula* [38]; *United States v. Felix-Gutierrez* [39]).

Recently, application of the law has been extended to offenses that constitute support for terror or terrorist organizations, even if they were committed by foreigners beyond the borders of the state. This extension was justified, *inter alia*, on the basis of the protective principle and on the basis of the right of the state to protect itself against acts that endanger its security (see *United States v. Yousef* [33]; Alexander J. Urbelis, *Rethinking Extraterritorial Prosecution in the War on Terror: Examining the Unintentional yet Foreseeable Consequences of Extraterritorially Criminalizing the Provision of Material Support to Terrorists and Foreign Terrorist Organizations*, 22 CONN J, INT'L L. 313, 321 (2007)).

The scope of protective application, therefore, differs from one legal system to another, and over the years, it has also been altered by legislation, in view of the changing needs of the times, such as the extension introduced in the United States. The scope of the protective principle, insofar as *national security* is concerned, is flexible, in accordance with concrete national requirements. A state is entitled to define the scope of protective application for itself. I do not believe that the change in the wording of the Law in the framework of Amendment 39 was intended to cause a revolution and a constriction.

From the General to the Specific

34. The Appellant traded in weapons and conspired with operatives of a terrorist organization whose aim was to harm Israel's security. These acts posed a great danger to the security of the State of Israel. The Appellant traded in weapons with Popular Front operatives on a large scale, the weapons that were delivered were suitable for hostile terrorist activity, and the

trade was conducted in the early days of the second Intifada. One of the ISA investigators even testified that the weapons supplied by the Appellant to the Popular Front were destined for purposes of hostile terrorist activity against Israel (pp. 85-86 of the transcript). Even if these were not offenses that intrinsically endanger national security, nevertheless, by virtue of their *circumstances*, the offenses materially endangered the security of the State of Israel and its inhabitants. The District Court ruled that the Appellant knew with near certainty that the weapons that he delivered were intended for use against the State of Israel. I see no reason to intervene in this conclusion. The Appellant was very familiar with the activities of the Popular Front. In the past, he was a member of the organization, and even headed one of its cells. In addition, in the past, he participated in military exercises of the Popular Front, and studied abroad with funding from the Front (Memo P/9). From these findings it emerges that the Appellant was aware with near certainty that the weapons were intended to harm the security of the state. This knowledge – with its practical repercussions for national security – overshadows the economic motive for the acts, and is equivalent to an intention to harm security (see and compare: CrimA 172/88 *Vanunu v. State of Israel* [14] at p. 295-297; LCrimA 9818/01 *Biton v. Sultan* [15]). Hence, there is no bar to the application of Israeli law to the Appellant by virtue of the protective nexus.

35. The Appellant's knowledge that his acts posed a great danger to Israel's security has ramifications for the question of the right to due process. In *Rosenstein v. State of Israel* [4], the Court considered the question of whether the extension of the application of Israeli law to a person who normally would not be subject to it involves a breach of the person's right to due process. The Court considered the matter in terms of both principle and practice (at pp. 390-392). Referring to US law, it was noted that, in principle, a person whose acts are known to have repercussions within the borders of a foreign country exposes himself to prosecution under that country's laws, and his contention that his right to due process was violated will not be heard. This is the case in the present matter. The Appellant knew, as we have said, with a high level of certainty that his acts would entail harm to Israel's security and he can only blame himself for the fact that Israel now seeks to prosecute him according to its laws. The practical aspect involves the question of whether expansion of the application makes it difficult for the Appellant

to plead his case, to bring witnesses etc. Such arguments cannot be raised in the abstract – concrete obstacles must be identified. The Appellant did not do so.

36. Thus, the Appellant carried out acts that presented a real danger to the security of the State of Israel. He knew, with near certainty, that the weaponry in which he was dealing would be used to harm Israel. This knowledge is equivalent to intention. The offenses of weapons dealing and conspiracy that are ascribed to the Appellant, which constitute foreign offenses, are admittedly not intrinsically directed against national security. However, the finding that the circumstances of the *acts* substantiating these offenses create a threat to security, is sufficient to determine that the relevant penal provisions apply extraterritorially to the Appellant.

Double Criminality and Specific Nexus between the Offense and the State

37. The Appellant argued that s. 144(b2) of the Penal Law, under which he was charged, applies only to the territory in which the act was perpetrated, since the actus reus of this section includes a requirement that trading in weapons be carried out "without lawful permission". His contention is that application of this penal provision extraterritorially is unreasonable, for it would mean the criminalization of all arms trade carried on outside of the state if done without the permission of the authorities in Israel, even if it was in no way prohibited under the laws of the place in which it was executed. He also argued, as will be recalled, that for the purpose of a conviction of the offense of conspiracy to commit an offense outside of Israel, the criminality of the substantive offense under the laws of the place in which it was carried out must be proven. I will discuss these arguments in the order presented.

The penal provisions under which the Appellant was charged apply, as stated, by virtue of the protective nexus. Therefore, the question of whether his acts are punishable in the territory in which they were perpetrated is immaterial. The protective nexus prevails, and the foreign law does not restrict its scope. This means that for the purpose of extraterritorial application by virtue of the protective nexus, *there is no* requirement of double criminality (see: s. 9(a) of the Penal law; FELLER, at p. 278; CrimA 163/82 *David v. State of Israel* [16], at p. 647 (hereinafter: the *David* case)).

The significance of the absence of double criminality is that the act or omission that occurred outside the borders of the state is liable to incur criminal liability in Israel even if it

does not constitute an offense in the place in which it took place (the *David* case [16], para. 35, at p. 647). The Court reiterated this in the *Alshahra* case [6], where it considered the far-reaching implications, from the point of view of the accused, of extending the application of the penal laws beyond territorial borders, and their application to acts committed outside the territory of the state by virtue of the protective nexus. It was pointed out there, in reliance on the said section of the *David* case, that extension of territorial application requires great caution, *inter alia* because the act or omission might not in any way constitute an offense outside of Israel (the *Alshahra* case [6], para. 25). In the present case, the harm, anticipated with a high degree of probability, to the security of the state constitutes a connecting link, a type of "normative bridge" connecting the event that occurred outside the borders of the state to the penal law of the State of Israel (see the *Oiku* case [3], at pp. 38-39; following the abovementioned case of *A. v. State of Israel* [2]; the *Rosenstein* case [4]). We therefore determined that the element of harm to national security was present. We must now "transport" that entire event over that normative bridge into the territory of Israel, and examine whether the act would have constituted an offense if committed in Israel. In the *Oiku* case [3], the petitioner was tried in Israel for exporting drugs from Holland to various countries. The petitioner argued that he could not be tried for an export offense since the export of drugs that was prohibited under the Drugs Ordinance was the export of drugs from Israel, whereas in his case the drugs were exported from Holland. This Court dismissed that argument and ruled, on the basis of the universal interest in stopping the drug trade, that the extraterritorial principle should be applied to the petitioner's case by way of "reconversion" or "hypothetical criminality". As elucidated in the *Oiku* case [3], adopting such a technique is not justified in every case, but only in those cases in which the purpose of the legislation that extended the application of Israeli law beyond the borders of the state provides justification for doing so, and in cases in which the offense for which conviction is sought involves protected social interests that are not local in nature (the *Oiku* case [3], end of para. 14, pp. 46-47, 49). The weapons offenses of which the Appellant was accused are not of a local nature. They were designed to preserve public order. Admittedly, in our case, we do not know whether trading in weapons or the transfer of weapons from one person to another for no consideration did or did not require a permit in the Gaza Strip at the relevant time. This, however, is immaterial. Once we found that it was highly probable that harm would be caused to

the interest of national security as a result of the trade in which the Appellant engaged, the fact that the particular act was permitted in the Gaza Strip, or permitted when accompanied by a permit, is irrelevant, because Israel's societal interest in protecting national security is in any case harmed – whether the Appellant had a permit for the trade from the authorized body in the Gaza Strip or whether no such permit was necessary. In my opinion, we must therefore say simply that trade in weapons in the Gaza Strip (or elsewhere), in the knowledge that there is a high degree of probability that this will be injurious to the security of the State of Israel constitutes, *in Israel*, an offense under s. 144(b2) of the Penal Law. As opposed to this, offenses involving trade in weapons in foreign states, when they will have no impact on the State of Israel, will not be considered foreign offenses in Israel, and the concern of counsel for the Appellant that all weapons offenses worldwide will be caught in the net of foreign offenses is unwarranted.

The Appellant's argument concerning the offense of conspiracy must be dismissed as well. As will be recalled, the offense of conspiracy to commit a felony is prescribed in s. 499(a)(1) of the Penal Law, as follows:

> 499. (a) If a person conspires with another to commit a felony or misdemeanor, or to commit *an act in a place abroad which would be a felony or misdemeanor if it had been committed in Israel – and which also is an offense under the laws of that place*, then he is liable –
>
> (1) if the offense is a felony, to seven years imprisonment or to the punishment prescribed for that offense, whichever is the lighter punishment; [emphasis added – M.N.]

The offense that is the object of the conspiracy attributed to the Appellant was committed, as will be recalled, outside of Israel. The Appellant argued that according to the last part of s. 499(a)(1), incrimination for a conspiracy whose purpose was the commission of a crime outside of Israel is possible only if the offense that is the object of the conspiracy constitutes a criminal act under the laws of the place where it was committed. In other words, there must be double criminality. The Appellant argues that in our case, because the offense that was the object of the conspiracy was committed outside of Israel, a conviction for conspiracy to

commit that offense is only possible if the elements necessary for criminal liability are present in the place of commission. We cannot accept this interpretation. The last part of s. 499(a)(1) extends the *territorial* application and prescribes that a conspiracy that was formed within the borders of the state is punishable even if the offense that is the object of the conspiracy was to be committed outside of Israel (and see FELLER, at p. 259). In the case before us, the locus of both the conspiracy and the offense that is the object of the conspiracy is outside the state. The offense of conspiracy and the offense that was the object of the conspiracy are foreign offenses to which the regular laws concerning applicability apply. In other words, double criminality is not required as a condition for conviction of the offense of conspiracy.

We should, however, clarify that domestic law does not apply extraterritorially to the offense of conspiracy simply because we found that it applies to the offense that is the object of the conspiracy. It is necessary to determine whether domestic law applies independently to the offense of conspiracy, under the regular laws governing extraterritorial application. Indeed, prior to Amendment 39, the Penal Law stated that if domestic law applied to the offense that was the object of the conspiracy, then it also applied automatically to conspiracy to commit that offense. However, this provision was repealed in the framework of Amendment 39 (see Feller and Kremnitzer, at p. 201). In any case, in the present matter the offense of conspiracy to deal in weapons, like the offense of trade in weapons itself, was committed in circumstances which, as the Appellant knew, posed a danger to national security with a high degree of probability. Therefore, domestic law applies independently to the offense of conspiracy by virtue of s. 13(a)(1) of the Penal Law.

Moreover, even if I were to conclude that the conviction for the offense of conspiracy should be set aside, this would not affect the Appellant's sentence, for the court does not impose additional punishment – where the substantive offense has been proven – for the conspiracy that preceded the offense (see e.g. CrimA 9995/05 *State of Israel v. Rabinowitz* [17], *per* Justice E.E. Levy, at para. 9, and the references there).

This concludes the discussion of the question of jurisdiction. I shall now move on to the question of the admissibility of the Appellant's confession and its weight.

Admissibility of the Appellant's Confession and its Weight

38. The Appellant presented detailed arguments relating to the admissibility of the confession P/4 and to its weight. In effect, however, most of his arguments amount to an application to intervene in the trial court's factual findings and its determinations concerning credibility. As a matter of principle, an appellate court will be reluctant to intervene in findings of fact and the credibility of witnesses, and in the present case I see no justification for deviating from this principle. Concerning the confession and its admissibility, the Appellant argued, as stated, that his confession was made following the application of improper techniques in the course of the interrogation. However, in his *testimony*, the Appellant argued that he did not say any of that which was attributed to him in P/4. He also claims that what appears in the memoranda of his various interrogations, including memorandum P/9 that describes the Appellant's involvement in weapons trade with the Popular Front (as described above), is not true. The Appellant testified that "I in no way thought, even when I was forced to sign, that I was signing on any kind of confession" (p. 41 of the trial transcript). According to the Appellant, despite the pressure applied in the interrogation, he refused to give any incriminating information, and in his words in his testimony, "I am not prepared, even if I should be murdered, to say things that are not correct, and what was correct I wrote" (p. 133 of the transcript). Indeed, as noted in the opinion of the District Court, here we have contradictory arguments on the factual plane, which weaken the Appellant's contention that his confession was made under coercion (see and compare: CrimA 6613/99 *Semirak v. State of Israel* [18], at p. 544 (hereinafter: the *Semirak* case)).

39. In his *appeal*, the Appellant insists that it was the improper means of interrogation that led to the confession in P/4. It was argued that the findings of the District Court – that the interrogations of the Appellant were drawn out and harsh, he was permitted only few hours of rest and sleep, and sometimes he did not know when the interrogations were going to end – attest to the use of improper methods of interrogation. He also adds that he was handcuffed until he bled, and that food was withheld. These improper means of interrogation justify, so he contends, the voiding of the confession and at least, a significant lessening of its weight. These arguments, too, must be dismissed.

The District Court found – and I find no reason to interfere in these findings – that prior to making the statement in P/4, no improper methods were employed in the Appellant's

interrogation. The interrogation methods described in the judgment of the District Court, such as the Appellant not knowing when the interrogation would end, refer to the whole duration of the Appellant's interrogations, which, as will be recalled, continued until the middle of August, 2006. The Appellant, however, challenges the admissibility of his statement P/4, which was recorded on the first day of his arrest. In examining the admissibility of this statement and its weight, therefore, the District Court was correct in considering the interrogation methods that were employed up until the time that this statement was made. In this context, the District Court found, relying on the testimony of the interrogators, on the one hand, and on its impression of the Appellant's testimony on the other, that in the course of the ISA interrogation that *preceded* the transcription of statement P/4 and during its transcription, no improper methods of interrogation were used on the Appellant. There is no justification for interfering in these findings. As stated by the ISA interrogators, whose testimonies were consistent and detailed, the atmosphere in the interrogation to which memorandum P/9 relates was good, and during that session the Appellant drank coffee and smoked cigarettes. The interrogation did indeed continue for 9 hours, but this was necessary for the purposes of the interrogation, and it cannot be said that this affected the Appellant's ability to insist on his innocence. Memorandum P/9 reflects what went on in the interrogation. The memorandum is detailed, and contains a record of the time of the interrogation and its duration. Furthermore, in the appendix to memorandum P/9, which the Appellant signed, there is a statement that the Appellant was informed of his right to remain silent in the interrogation. In these circumstances, what is recorded in the memorandum may be relied upon as support for the testimonies of the interrogators (see the *Semirak* case[18], at p. 548.

The District Court was also convinced of the reliability of the testimony of the police interrogator Harladin, who took down statement P/4 (and was the only one present when it was taken down), to the effect that the Appellant was alert at the time of the interrogation, and that he was not forced to sign the statement. The Appellant's testimony, on the other hand, contained contradictions and inaccuracies. Thus, for example, the Appellant claimed in his testimony that he complained to the judge in the arrest hearing about the way he was being treated by his interrogators. However, as noted in the decision, no mention is made of this in the transcript of the hearing on the application to extend the arrest. The Appellant further argued that his statement P/5 is a faithful representation of what happened. In his testimony, however, he added

details that did not appear in the original. Neither did I find any cause for intervening in the determination that the police investigation in which the statement was taken down was separate from the ISA interrogation, and that P/4 is not a "reproduction" of P/9. The police interrogation took place three hours after the completion of the ISA interrogation, in the course of which there was no further interrogation; the Appellant was cautioned in Arabic; the police investigator introduced himself as a policeman; between P/4 and P/9 there are differences, the most material of which is that in P/4 the Appellant denied his participation in an attempt to launch a rocket, whereas P/9 records that he confirmed that he had participated in the attempt. These circumstances attest to the existence of the required separation between the ISA interrogation and the police interrogation (see and compare: the *Semirak* case [18], at pp. 550-551).

40. The Appellant also argued that the fact that the statement was transcribed in the Hebrew language, rather than in the language in which it was spoken – Arabic – negates its admissibility, or at least reduces its weight.

Section 8 of the Criminal Procedure (Interrogation of Suspects) Law, 5762- 2002 states that if the suspect's interrogation at the police station was recorded in writing, this record shall be in the language in which the interrogation was conducted, and if it is not possible to record the interrogation in the language in which it was conducted, a visual or audio record should be made. In our case, this requirement was not fulfilled. In an ordinary case, such a defect might have significantly reduced the weight of the confession, and it is even possible that it would have affected its very admissibility. However, in certain circumstances, the weight of the statement may be judged on its substance in order to decide whether the record departs from the truth (see: CrimA 2285/05 *State of Israel v. Hemed* [19], *per* Justice E.E. Levy at para. 4; CrimA 3687/07 *Tochly v. State of Israel* [20], *per* Justice S. Joubran, at para. 12; and *cf.* CrimA 2180/02 *Kassem v. State of Israel* [21]). In this case, it cannot be said that the recording of the statement in Hebrew affects its weight in a material way. The police interrogator who took the testimony speaks Arabic fluently, and he testified that he made a simultaneous translation of everything that the Appellant said. Furthermore, after the statement was transcribed, he translated it for the Appellant, who then signed it. The statement in question is detailed, and its contents are similar – although not identical – to what the Appellant said in the ISA interrogation, which was documented in memorandum P/9. The Appellant, on his part, insisted in his testimony that he did not tell his interrogators anything, and that he did not know what was written in the statement.

Consequently, he did not raise specific arguments relating to distortions that resulted from the manner in which the statement was recorded. In the above-mentioned *Semirak* case [18], too, the circumstances of which were similar, it was ruled that the weight of the statement was not affected (at p. 552). Also, the statement found support in the statements of Shafik al-Brim and Emad Hassin. In his appeal, the Appellant did not argue against the admissibility of those statements or against their contents. In these circumstances, despite the defect in the recording of the statement, there is no basis for doubting the reliability of the translation. Thus, the defect does not materially reduce the weight of the statement. As for P/5 – I accept the ruling of the District Court that what is described in P/5 adds to what is stated in P/4 and does not contradict it. In light of this, the Appellant's arguments must be dismissed insofar as they relate to the admissibility of his confession and its weight.

The Punishment

41. The Appellant delivered weapons, on a large scale, directly into the hands of a terrorist organization whose aim is to harm the State of Israel. The Appellant even participated in a test of the explosive material conducted by the members of the organization. In view of the type of arms that were delivered and the scale of the operation on the one hand, and the danger this posed to the State of Israel and its population on the other, the acts of the Appellant are very grave. This Court has already said that the heinous nature of the acts of terror themselves projects onto the grievousness of the acts of those who participate in the chain of terror at any of its stages. This Court has set a policy of harsh, deterrent sentencing for those who participate in the chain of terror, as stated in CrimA 3944/08 *Sha'aban v. State of Israel* [22] *per* Justice Y. Danziger, at para. 7):

> This Court has often emphasized the need to impose deterrent, appropriate sentences in respect of each and every link in the chain of terror … (CrimA 1358/09 *Dahar v. State of Israel* [23]).

Furthermore:

> The State of Israel's battle against murderous terror is not only a battle against the perpetrators and those who dispatch them, but against all those

> who, in some form or another, "grease the wheels" of the machinery of terror, and against every person who constitutes a part of this "chain of death". Every single level of activity of the terrorist organizations requires an appropriate legal response in the framework of the war on terror … (CrimA 4352/08 *A. v. State of Israel* [24]).

It is immaterial if the acts were perpetrated with the intention of harming national security or if the motive was financial profit (see the *Hamed* case [13], at para. 10). In any case, in the present matter the Appellant knew with near certainty that the weapons that he was delivering to the Popular Front would be used in the organization's activity against Israel – this knowledge being equivalent to intention – and the profit motive in his actions enhanced his support for the organization and its aims. In addition, in the past the Appellant had been an active member of the Popular Front. These circumstances exacerbate the severity of the deeds. The absence of proof that the weapons were actually used in activity against the State of Israel is also immaterial (see and compare: the *El Najar* case [9]). The sentence imposed by the District Court is detailed and reasoned, and it is evident that appropriate weight was given to the various considerations, including the Appellant's personal situation, and the fact that his criminal activity continued for a relatively short period of time. The sentence that was imposed comports with the severity of the deeds, and there is no justification for intervening here.

The Appellant submitted medical documents concerning the medical situation of his wife, who is suffering from a serious illness and is being treated in the Sheba Hospital. The Respondent, on its part, argued that the documents show that the Appellant's wife was released from hospital on Nov. 16, 2009, and that by then she had received the appropriate treatment and her life was not in danger. In view of this, said the Respondent, the medical situation of the Appellant's wife cannot change the picture in relation to the overall considerations for punishment or justify intervention in the sentence. The Appellant argued, in response, that his wife's health remained precarious, and that she is receiving treatment in a hospital in the Gaza Strip. He attached a medical document dated April 24, 2011 in support of this argument. Even if the wife's situation remains difficult, the document attached by the Appellant is illegible, and its contents were not specified in the Appellant's notice. The Appellant's response does not show that his wife is hospitalized or that she requires assistance on a daily basis. There is not enough here to justify intervention in the severity of the sentence, which in general will occur only in

those cases in which the trial court departed radically from the appropriate sentencing policy (see e.g. CrimA 6566/10 *Veridat v. State of Israel* [25]).

42. In conclusion, I recommend that my colleagues dismiss both parts of the appeal.

43. The trial in the District Court was held *in camera*, and the judgment was not reported. The judgment raised questions of principle, and the Respondent is therefore requested to address, within 15 days, the question of whether there is any obstacle to reporting this judgment in whole or with redactions. We will then ask for the response of counsel for the Appellant.

Justice E. Arbel

I concur in the comprehensive opinion of my colleague Justice M. Naor.

Justice Y. Danziger

1. Having examined the comprehensive, learned opinion of my colleague Justice M. Naor, I have decided to concur in her opinion, both with respect to the reasoning and with respect to the outcome. I accept Justice Naor's conclusion, for the reasons elucidated in her opinion, that Amendment 39 to the Penal Law did not change the normative situation regarding the scope of application of protective jurisdiction vis-à-vis the normative situation that pertained prior to the Amendment. I also agree with Justice Naor's determination that:

> …the protective nexus is confined to the protection of certain fundamental national interests, but not exclusively to offenses that are *intrinsically* prejudicial to those interests. Extraterritorial jurisdiction may *also* apply to acts –constituting offenses – whose circumstances indicate that they present a serious risk to these interests, or that there is an intention to harm them [emphasis original – Y.D.] (para. 31 of Justice Naor's opinion).

2. At a time when civilian settlements within the sovereign territory of the State of Israel are subjected to terror attacks from the terrorist organizations, and when missiles and mortar shells rain down on these areas and cause injury to persons and property, the legal system cannot sit idly in the face of an objective need to bring any person who participates, directly or indirectly,

in terrorist activity directed against concentrations of Israeli citizens to justice, and this includes those who supply weapons and ammunition to terrorist organizations.

In practice, international law leaves the job of prosecuting terrorists in the hands of the various states, according to their domestic law (see: Emmanuel Gross, *The Struggle of Democracy with the Terror of Suicide Bombers – Is the Free World Equipped with the Moral and Jurisprudential Tools for this Struggle?* DALIA DORNER VOLUME 219, 293 (2009)). Those who are involved in "the terrorist enterprise" in all its forms should be aware that the fact that they are operating outside the sovereign borders of the State of Israel does not grant them immunity from prosecution in the courts of the State of Israel.

3. As for the language in which the Appellant's statement was recorded, I agree with Justice Naor's conclusion that despite the defect in the recording of the statement – i.e. that the statement was not recorded in the language in which the interrogation of the Appellant was conducted (Arabic), notwithstanding the provision of s. 8(1) of the Criminal Procedure (Interrogation of Suspects) Law, 2002 (hereinafter: the Interrogation of Suspects Law), nor was there a video or audio recording as required under s. 8(2) of the above Law where "it is not possible to record in writing the interrogation of the witness in the language in which it was conducted " – in the concrete circumstances of the particular case, we are dealing with an admissible statement to which full weight must be attributed, inasmuch as "the Appellant did not raise specific arguments relating to distortions that resulted from the manner in which the statement was recorded" (para. 40 of Justice Naor's opinion).

4. However, I do believe that a few points warrant mention. As a rule, the case-law directs that notwithstanding the provision of s. 8(1) of the Interrogation of Suspects Law, where the court is convinced that even though the confession was not transcribed in the language in which the suspect was interrogated, it accurately reflects what the suspect said in his interrogation, the confession will be admissible and full weight may be attributed to it (see, for example, the opinion of Justice E.E. Levy in the *Hamed* case [13] to which Justice Naor referred in para. 40 of her opinion). Frankly, this approach – in my opinion – renders s. 8(1) meaningless, and I believe that it is problematic. In practice, it is the direct continuation of the accepted approach in the case law of this Court prior to the enactment of s. 8 of the Interrogation of Suspects Law (see e.g.: CrimA 5225/03 *Habas v. State of Israel* [26], at p. 31).

5. It therefore appears that there has been no change in the approach of the case law to the matter of the language in which the suspect's confession was recorded, despite the clear, explicit directive in the Interrogation of Suspects Law. The question arises: Does not the enactment of this Law attest to a change of direction in relation to the appropriate position on the language in which the suspect's confession was recorded? I am of the opinion that the Interrogation of Suspects Law – which constitutes an additional expression of the trend to enhance the rights of suspects and accused persons as part of the "constitutional revolution" – sought to introduce a substantive change in the normative situation that pertained prior to its enactment. The legislature is deemed not to waste its words, yet, nevertheless, I think that the case law has not given full expression to the change that the legislature sought to bring about in relation to the manner of recording the confession of a suspect.

6. Due to the importance of the confession that the accused made at the time of his questioning by the police, which in many cases can ground the conviction of the accused (see and compare: Dalia Dorner, *The Queen of Evidence v. Tarek Nujidat*, 49(1) HAPRAKLIT (2006), 7, 8 (Hebrew)), the police must be absolutely meticulous in its recording of the confession so that it reflects as accurately as possible the contents of the statements of the suspect and the manner in which they were made. The only possible way of ensuring this is by complying with the statutory provisions concerning the language in which the confession is recorded, for there is no more efficient and certain means than recording the suspect's confession in its original language in order to describe what he said to his interrogators. The process of translation of the suspect's confession into Hebrew is liable, unfortunately, to distort the confession and even to detract from the meaning of what the suspect said, since in every language there are subtleties and expressions that cannot always be accurately translated, but which are sometimes essential for an understanding of the spirit of the suspect's confession and the process of its delivery. In certain cases, the translation is even liable to cause things to be taken out of context. Owing, *inter alia*, to these concerns about possible distortions in the suspect's confession as a result of the translation, the legislature stipulated, in the framework of s. 8(2) of the Interrogation of Suspects Law, that where the written record of the course of the interrogation is not in the language in which the interrogation was conducted, visual and audio recordings will be made of the interrogation, as is the practice today in most Western states, and this is also what emerges from

the Explanatory Notes to the Criminal Procedure (Interrogation of Suspects) Bill [*H.H*. 2928, 5761 54].

7. Moreover, when the contents of the confession are merely translated for the suspect and he signs the document that was written in a language in which he is not fluent, and when the interrogation is not filmed or taped, one cannot know if the translation, which was done by a translator acting for the police, is reliable. The legislature, too, was aware of the possibility that mistakes in the translation of the confession in the course of the police interrogation may not be entirely innocent:

> The proposed amendment constitutes an improvement in the protection of the rights of the accused, and prevents or reduces the possibility of errors, misunderstandings or *deliberate mistakes*, thereby enhancing the ability of the court to clarify the truth of a question that is so central in criminal law [emphasis added – Y.D.].(Explanatory Notes to the Bill).

In a situation in which the suspect does not understand what is written in the confession but signs it, who will guarantee that the written document contains the exact, complete statement of the suspect? As long as the interrogation is not recorded audio-visually, the translated confession contains the "seeds of disarray", and this is what motivated the legislature to lay down the rules anchored in ss. 8(1)-8(2) of the Interrogation of Suspects Law. Indeed, the police enjoys a presumption of regularity, and its actions should not be suspect *a priori*, but after all, the translation was made in the interrogation rooms, and in the absence of an audio-visual record of the course of the interrogation, there is a real difficulty in conducting effective judicial review of the manner in which the interrogation was conducted and with respect to the reliability of its record.

8. Where there is no audio-visual record and the confession was not recorded in the suspect's language, it is not sufficient, in my opinion, that the contents of the confession be translated for the suspect. Rather, the suspect needs to read his confession for himself, in his own language. This reading of the confession by the suspect, when it is written in his language, immediately after it has been made, is of great importance, for it allows for the correction in real time of mistakes that were made in the transcribing of the confession.

9. Furthermore, if the accused later contests the translation of his confession to the police, it will be difficult for the court to decide on such a matter. The accused is unable to produce evidence to support his argument, since the evidence concerning the circumstances of the translation of the confession are usually in the exclusive control of the police, and within the knowledge of the interrogators who were in the room during the interrogation. Therefore, in order to prevent an unnecessary factual disagreement, the rule must be scrupulously observed from the outset, thus obviating a complex retroactive factual investigation, in the framework of which the police benefits from an presumption of regularity that upsets the balance of power vis-à-vis the accused, and is ultimately liable to violate his constitutional rights.

10. For all the above reasons, I am of the opinion that only limited weight should be attributed to the suspect's signature on the confession that was translated for him. However, I believe that a breach of the provisions of ss. 8(1)-8(2) of the Interrogation of Suspects Law should have real repercussions not only with respect to the weight of a confession, but primarily at the level of admissibility, in view of the ongoing strengthening of the right to a due process at all stages, as expressed in the case-law exclusionary doctrine, and in view of the recognition of due process as a constitutional right (CrimA 5121/98 *Yissacharov v. Chief Military Prosecutor* [27]).

11. In CrimA 8974/07 *Honchian v State of Israel* [28], I emphasized that a breach of the obligation regarding the transcription of a suspect's confession in the language in which he was interrogated is liable to entail the exclusion of the confession by virtue of the right to a due process:

> In this context, it should additionally be noted that this Court has more than once insisted on the importance of the fact that the suspect should understand the substance of the accusations against him and the nature of the interrogation process that is being conducted., On this basis, the case law established that "the obligation to record the confession in the language of the person being interrogated is of great importance, and we take a dim view of the continuing disregard by the police of this Court's repeated directive that statements must be taken down in the original language (see e.g. the opinion of (then) Justice D. Beinisch in CrimA 1746/00 *Barilev v. State of Israel* [29], at p. 147 (hereinafted: the *Barilev* case); and see and compare in this regard,

the judgment of this Court in CrimA 3477/09 *State of Israel v. Hadad* [30], para. 29 of my opinion). The fundamental purpose of this jurisprudential policy is to ensure the maintenance of proper procedure, and it must be scrupulously observed as a guarantee for the discovery of the truth and to ensure human rights and the rights of the suspect being interrogated and the accused. Therefore, in the *Barilev* case [29], it was determined that in certain circumstances, violation of this provision is likely to lead to the exclusion of the confession of the suspect due to the breach of the right to a due process:

> It is clear that in the appropriate case, when the statement that was taken thus gives rise to a suspicion as to its reliability due to it not being recorded in the original language, we will not hesitate to exclude it, and in any case, we may not assign any weight to it. Moreover, if the police continue to disregard its standing orders and directives in this matter, there may be no option, in the appropriate case, other than to give expression to the gravity of this misconduct by excluding the statements. We would add that we are prepared to assume that the police interrogators face a difficult task in conducting investigations involving complainants, witnesses and accused persons who speak different languages and are not fluent in Hebrew. This is part of our reality. This reality cannot provide an exemption from the need to find solutions that will ensure protection for the accused and due process (the *Barilev* case [29] , para. 7 of my opinion).

12. Therefore, the consequences of a breach of the duties imposed on the police regarding the documentation of a suspect's confession must be examined from the perspective of due process and in light of the rules that were formulated on this matter in the *Yissacharov* case [27]. Obviously, every case will be examined on its merits, in light of its circumstances, and in accordance with the discretion of the court. However, the court must consider the fact that the defect in the language of the documentation of the interrogation is not confined to the technical plane, and the consequences for the weight of the confession alone. Rather, the defect may be material, such that it will affect the very admissibility of the confession.

Decided in accordance with the opinion of Justice M. Naor.

Given this day, 26 Heshvan, 5772 (Nov. 23, 2011).