CrimA 9203/18

Appellant:	**Elad Gabber**
	v.
Respondent:	**Attorney General**

On behalf of Appellant:	Adv. Avigdor Feldman; Adv. Yahel Ben-Oved; Adv. Yemima Abramovich
On behalf of Respondent:	Adv. Avi Kronenberg; Adv. Shiran Cohen

In the Supreme Court sitting as a Court of Criminal Appeals

Appeal on the judgment of the Jerusalem District Court (Judge C. M. Lomp) in Extradition Case 62059-12-17 (Oct. 21, 2018).

Israeli Supreme Court cases cited:

[1] HCJ 8501/11 *Gabber v. Judge Alexander Ron*, (Dec. 15, 2011).

[2] CrimA 2490/18 *Journo v. State of Israel*, (January 8, 2019).

[3] CrimA 4596/05 *Rosenstein v. State of Israel*, IsrSC 60(3) 353 [2005] https://versa.cardozo.yu.edu/opinions/rosenstein-v-state-israel

[4] CrimA 6182/98 *Sheinbein v. Attorney General*, IsrSC 53(1) 625 [1999].

[5] CrimA 2258/11 *Dern v. State of Israel*, (June 20, 2012).

[6] CrimA 2144/08 *Mondrowitz v. State of Israel*, (Jan. 14, 2010) https://versa.cardozo.yu.edu/opinions/mondrowitz-v-state-israel

[7] CrimA 3439/04 *Bazak v. Attorney General*, IsrSC 59(4) 294 [2004].

[8] CrimA 3915/15 *Yam v. State of Israel*, (Sept. 6, 2015).

[9] CrimA 5227/10 *Yuval v. State of Israel*, (April 2, 2012).

[10] CrimA 8801/09 *Mayo v. Attorney General*, (Sept. 21, 2010).

[11] CrimA 7376/10 *Novak v. Attorney General*, (May 16, 2011).

[12] CrimA 2521/03 *Sirkis v. State of Israel*, IsrSC 57(6) 337 [2003].

[13] *A. v. Attorney General*, (March 12, 2009).

[14] CrimA 6384/11 *Ben Haim v. Attorney General*, (Feb. 5, 2014).

[15] CrimA 739/07 *Efrat v. Attorney General*, (June 7, 2007).

[16] CrimA 6328/12 *State of Israel v. Poldy Peretz*, (Sept. 10, 2013).

[17] HCJ 6396/96 *Zakin v. Mayor of Beer Sheva*, IsrSC 53(3) 289 [1999].

[18] CrimA 7621/14 *Gotsdiner v. State of Israel*, (March 1, 2017).

[29] LCrimA 1611/16 *State of Israel v. Vardi*, (Oct. 31, 2018) [English summary: https://versa.cardozo.yu.edu/viewpoints/summary-cases-2018-19-term#LCrimA1611].

[20] CrimA 4855/02 *State of Israel v. Borovitz*, IsrSC 59(6) 776 [2005].

[21] CrimA 7014/06 *State of Israel v. Limor*, (Sept. 4, 2007).

[22] CrimA 8080/12 *State of Israel v. Olmert*, (Aug. 6, 2014).

[23] CrimA 4506/15 *Bar v. State of Israel*, (Dec. 11, 2016).

[24] CrimA 1690/09 *A. v. State of Israel*, (Oct. 10, 2010).

[25] CrimA 3680/09 *Silverman v. State of Israel*, (Nov. 9, 2009).

[26] CrimA 6717/09 *Uzipa v. Attorney General*, (Dec. 6, 2010).

J U D G M E N T

(July 14, 2019)

Before: Justice U. Vogelman, Justice D. Barak-Erez, Justice Y. Willner

Justice U. Vogelman:

This is an appeal on the judgment of the Jerusalem District Court (Judge C. M. Lomp), in which the Appellant was declared extraditable to the United States pursuant to sec. 9(a) of the Extradition Law, 5714-1954 (hereinafter: the "Extradition Law").

Summary of the Relevant Facts

1. On March 13, 2017, the United States Government filed a request to extradite

the Appellant, born in 1982 (hereinafter: the "Extradition Request" or the "Request"). According to the Extradition Request, during the years 2010-2011, the Appellant initiated contact with female minors through on-line platforms for the purpose of documenting them while performing sexual acts. The Appellant recorded the minors, sometimes without their knowledge, and sometimes while presenting himself has a teenager. Thereafter, the Appellant approached the young women via social networks and solicited them to perform acts of a blatant sexual nature, while broadcasting live video. According to the Request, this was done by threatening that the documentation in his possession would be forwarded to their acquaintances and parents if they were to refuse. Many of the young women succumbed to the Appellant's extortion. Others refused, and the Appellant carried out his threats. According to the Request, the Appellant approached approximately 150 female minors, aged 12-17, in this manner, and held a large number of pictures and videoclips in his possession.

2. According to the Extradition Request, on August 15, 2014, a grand jury returned an indictment, filed against the Appellant in the Federal District Court of the State of California, for producing child pornography; coercing and soliciting a minor to perform sexual acts; extortion; and distributing child pornography. The indictment includes acts that relate to 19 female victims. Concurrently, an arrest warrant was issued against the Appellant.

3. The Extradition Request was supported by an affidavit of prosecutor Lana Morton-Owens (hereinafter: the "Morton-Owens Affidavit"). The affidavit details the evidence against the Appellant: the victims' testimonies, information from the platforms that the Appellant used, the content of the digital devices that were seized, and more. On November 1, 2017, the Minister of Justice instructed that the Appellant be brought before the Jerusalem District Court in order to determine whether he is extraditable.

It should be noted that concurrently with the filing of the petition to declare the Appellant extraditable, a request was filed for his arrest until the completion of the extradition proceedings. Upon the consent of the parties, the Appellant was placed under electronic monitoring while the proceeding was being conducted.

4. To complete the picture, it should be noted that a number of years before the Extradition Request was filed, on February 2, 2012, the Jerusalem Magistrates Court (Judge A. Ron) convicted the Appellant, based on his guilty plea, of offenses of willful infringement of the privacy of another and unlawful penetration into computer materials. The Appellant was sentenced to six-months of imprisonment to be served by community service, as well payment of compensation and a fine (CrimC (Jerusalem Magistrates) 36144-08-11 *State of Israel v. Gabber* (Feb. 22, 2012)). In that proceeding, the victims of the offense were Israelis, and some of the offenses were committed directly upon the victims and not via a computer. The Appellant's argument that the information should be amended and that he should also be convicted of additional offenses to which he confessed, was rejected, as was his appeal (CrimA (Jerusalem District) 44985-02-12 *Gabber v. State of Israel* (May 9, 2012)). Additionally, a petition that the Appellant filed in this matter with the High Court of Justice (HCJ 8501/11 *Gabber v. Judge Alexander Ron* [1] (December 15, 2011) (hereinafter: "*HCJ Gabber*")) was denied.

The District Court's Judgment

5. On November 29, 2018, the Jerusalem District Court (Judge C. M. Lomp) ruled that the Appellant was extraditable to the United States. The court first found that there is an extradition treaty in force between Israel and the United States, as required under sec. 2A(a)(1) of the Extradition Law, and that the "double criminality" requirement was met in the Appellant's case, meaning that the offense for which he was charged in the United States is an offense in Israel that carries a sentence of imprisonment of one year or more. It was further held that there was sufficient evidence for the Appellant to be brought to trial in Israel – or a "basis for the charge" – and that the Appellant did not dispute this, except with regard to item no. 53 of the indictment – a claim that the court held should be clarified in the primary proceeding.

The court found that the offense's "center of gravity" is not in Israel, but rather in the United States. While it was indeed stated that the offense was committed and the investigation took place in Israel and that the Appellant is an Israeli citizen, however, the court held that where offenses that are committed via the internet are concerned, there is less significance to the physical location of the computer from

which the offenses were committed. The court held that in this case the legally protected interest is of the citizens of the United States, whose authorities initiated the investigation. Additionally, the court stated that the fact that the Appellant's case had already been addressed in Israel does not indicate that the majority of contacts is in Israel, inasmuch as he had stood trial in Israel for acts that were directed against Israeli victims, as specified above, some of which were even committed directly upon the victims of the offenses and not via a computer. It was held that it would be inappropriate to interfere in the discretion of the prosecutorial authorities that chose to charge him only for offenses that were committed vis-à-vis Israeli victims, and not for the remaining alleged offenses. It was further held that the fact that the Appellant admits to what is attributed to him does not make a difference in this context, and that the conclusion does not change in light of the enactment of Basic Law: Israel – The Nation State of the Jewish People (hereinafter: "Basic Law: The Nation State").

As to the delay in filing the Extradition Request, it was held that the extradition does not violate public policy. The court stated that the exception should be applied narrowly, and that a heavy burden of proof is required in light of the important interests inherent in extradition laws. The court ruled that the delay, which indeed occurred in filing the request – approximately 6 years from the time the evidence against him was discovered until it was filed – does not justify not extraditing the Appellant, since at issue are not "exceptionally exceptional" circumstances of delay within their meaning in case law. The court stated that the investigation was prolonged due to the identifying of the many victims and interviews that were held with many of them; the examination of a large volume of digital material; and additional evidentiary obstacles, which were not influenced merely by manpower considerations, as the Appellant argues. The court stated that the relevant instance in the United States will be able to address the matter of delay as part of examining the claim of alleged miscarriage of justice.

The court also rejected the Appellant's claim of selective enforcement in comparison to CrimC (Tel Aviv District) 37053-04-17 *State of Israel v. Anonymous* [2] (Nov. 22, 2018) (hereinafter: the "*Anonymous* **c**ase"). It was found that the *Anonymous* case concerned offenses of possession of obscene materials of minors, while the present case also concerns indecent acts, i.e. acts actively committed, attributed to the Appellant. The court stated that in the present case there are victims

who might be required to come to Israel in order to testify if the Extradition Request were denied, while in the *Anonymous* case the evidence comprised only documents and media files.

Finally, the court rejected the argument that the anticipated term of the Appellant's imprisonment in the United States is very lengthy compared to the situation in Israel, since it is presumed that whoever commits an offense shall bear the punishment that is customary in the country whose citizens he harmed, and since examining applicable punishment would render extradition law a nullity. The court stated that the Appellant would be able to request to serve his sentence in Israel, pursuant to sec. 1A of the Extradition Law.

And now to the appeal before us.

The Appellant's Arguments

6. The Appellant argues that he should stand trial in Israel and should not be extradited to stand trial in the United States. According to the Appellant, the center of gravity of the offenses that are attributed to him is in Israel, since the offenses were committed in Israel and the investigation material was gathered here. According to him, during his trial in 2011 he admitted to all the offenses for which he was investigated, including those that are included in the American indictment, and requested to stand trial for them in Israel. According to him, his request was denied since the investigation regarding the other offenses had not yet been completed at that time. The Appellant claims that in light of his admission, and in light of the fact that the charges are based on materials from his computer, there is no need at all to bring the victims of the offenses to testify. The Appellant further argues that given the enactment of Basic Law: The Nation State, which establishes the connection between Jewish Israeli citizens and their state as a fundamental principle, it should be held that he – as a Jewish Israeli citizen – should stand trial in Israel, since in the present case, the Basic Law indicates that the center of gravity is in Israel. According to him, a proceeding of deporting – even temporarily – an Israeli citizen may not be compatible with the values of the State of Israel. The Appellant argues that in the present case there is no explicit contradiction between the Extradition Law and Basic Law: The

Nation State, as opposed to the situation in CrimA 2490/18 *Journo v. State of Israel* [2] (January 8, 2019) (hereinafter: the "*Journo* case").

7. According to the Appellant, the American indictment was filed with significant delay, even though it is based on materials that were already gathered in 2011, and without a satisfactory explanation being provided. The Appellant argues that there is no basis for the argument that such extended time was necessary in order to complete the investigation. The Appellant further argues that he has been living in the shadow of the risk of extradition for 7 years, and this has taken heavy psychological and economic tolls on him and his mother, his only family, and that this amounts to a miscarriage of justice and violates his right to due process. It was argued that it was inappropriate to leave the discussion on this matter to the American instance. The Appellant states that he never fled the law and that he took responsibility for his actions, and argues that this should be given consideration in the decision regarding his extradition.

8. The Appellant raises a number of additional arguments. As to the offense of extortion that is attributed to the Appellant, he states that its statute of limitations under American law lapsed in 2016, such that the double criminality requirement is not met, and he should not be extradited for such offense. Additionally, the Appellant alleges selective enforcement compared to the case of *Anonymous*, who, as noted, was not extradited to the United State, despite many points of contact. According to him, these cases are not different. The Appellant further argues that there are no grounds for charge no. 35 in the American indictment, since it relates to a time when the Appellant was under arrest, and therefore could not have committed the acts attributed to him.

The Respondent's Arguments

9. The Respondent argues that there is no cause to intervene in the District Court's decision and that the declaration of the Appellant as extraditable should remain in effect. According to the Respondent, the majority of contacts of the offenses that were allegedly committed by the Appellant are in the United States, since the harm to the victims occurred there and the legal proceedings against the Appellant were initiated there. It was argued that the center of gravity is not in Israel, since the Appellant could

have committed his actions in any other state, and that the investigation in Israel was carried out pursuant to a request for legal assistance that was filed by the United States. According to the Respondent, it is proper to allow the victims of the offenses to participate in the legal proceeding in their country and in their language, and to allow them to choose whether to testify. According to the Respondent, the prosecution has broad discretion, and it chose not to try the accused for his actions that were directed towards minors in the United States, but only for his actions that were directly committed in Israel. The Respondent states that the Appellant's argument that it was appropriate to consolidate the charges against him had already been rejected. As to the implications of Basic Law: The Nation State, it was argued that, as had already been held, it cannot prevent the extradition of an Israeli citizen, particularly in light of the exception prescribed in sec. 1A of the Extradition Law, which allows an Israeli citizen to serve the sentence – if such shall be imposed – in Israel.

10. Regarding the argument of delay, the Respondent argues that no delay that amounts to a violation of public policy occurred, in light of the complexity of the investigation and the ongoing relationship between the authorities in Israel and in the United States. It was argued that the indictment was only filed in 2014 because there was a large number of victims – approximately 150 minors – who were spread across the United States, that extradition proceedings take a considerable amount of time, and that in that framework the authorities were also required to perform supplementary actions in order to verify the affidavits that had been taken.

11. As for the other arguments, as far as the claim of selective enforcement is concerned, it was argued that the said *Anonymous* case is not similar to the case at hand, and that the analysis of the center of gravity in this case is completely different. With regard to the Appellant's argument that the statute of limitations of the extortion offense had lapsed, the Respondent argues that the statute of limitations should be examined in light of Israeli law, pursuant to sec. 2B(a)(6) of the Extradition Law, and that since the offense of blackmail by threats is a felony – its statute of limitations has not yet lapsed, and that in any event, the investigation and the filing of the indictment stopped the clock on the statute of limitations. Finally, with regard to charge no. 53, it was argued that the indictment states that the act was committed "on or about" a certain date, and that the issue is a defense that should be examined in the framework of the

criminal proceeding by the trial court in the United States.

Request to Introduce New Evidence

12. The Appellant filed a request to introduce new evidence on appeal – psychological diagnoses that he underwent after the judgment had been delivered – which, he argued, could change the ruling. It was argued that it emerges from the expert opinion that the Appellant has second (of three) degree autism and personality disorders, a condition requiring behavioral and communication support. The Appellant states that while he did not claim in the District Court that his condition prevents extradition, the court was aware of the situation and took it into consideration in the decision not to order that he be held in custody. According to the Appellant, his condition should be taken into consideration, since he cannot conduct himself independently. Additionally, according to him, the justification not to extradite the accused in the *Anonymous* case was due to him suffering from autism, a fact that has relevance to the question of selective enforcement in the case at hand.

13. The Respondent argues that the request should be denied. It is argued that the Appellant's condition was already known since the beginning of the extradition proceedings, and that it was even agreed that he be released from arrest in order to receive medical opinions – but the Appellant refrained from filing them during the proceeding. It was argued that case law indicates that arguments regarding anxiety caused by the uncertainty involved in the extradition proceeding are to be rejected, and that it must be remembered that despite the Appellant's alleged communication difficulties, he successfully convinced approximately 150 minors to perform sexual acts.

14. Following the hearing we held on the appeal on May 2, 2019, the Appellant filed an additional request to introduce new evidence. The Respondent maintained his objection to the introduction of the evidence. In our decision dated June 17, 2019, we allowed the Appellant to introduce the said evidence, without taking any position on the merits of the matter. On June 24, 2019, the Appellant submitted the evidence, which includes a diagnosis by a medical committee of the National Insurance Institute, headed by Prof. Baruch Shapira, dated April 30, 2019, which states that a medical

impairment of autism was found – as well as a confirmation of a permanent, weighted medical disability of 50%, as well as a confirmation of entitlement to a general disability allowance in the amount of NIS 3,312, due to 100% incapacity. In its response dated July 1, 2019, the Respondent argued that the documents that were filed do not determine anything regarding the Appellant's ability to understand the extradition proceeding, and that if and to the extent that his medical condition has an impact on his criminal liability, he will be able to raise his arguments in the framework of the criminal proceeding in the United States.

Discussion and Decision

15. I will already state at this point that after reviewing the appeal and the parties' written and oral arguments, I have reached the conclusion that the appeal should be denied in its entirety, and that the declaration of the Appellant as extraditable should be upheld.

The Normative Framework – Extradition Law

16. In another case I discussed the general normative framework of extradition law at some length, stating:

> The extradition proceeding is a cooperative proceeding between states in criminal matters (see: CrimA 4596/05 *Rosenstein v. State of Israel* [3], 406 (2005) (hereinafter: the "*Rosenstein* case"); CrimA 6182/98 *Sheinbein v. Attorney General* [4], 639-640 (1999)); SHNEUR ZALMAN FELLER, EXTRADITION LAW, 24 (1980)). A number of objectives underly the extradition proceeding, the main purpose of which is to balance the public interest – both national and international – in eradicating cross-border crime and preventing offenders from fleeing the law, against the right to freedom of the person whose extradition is requested (see CrimA 2258/11 *Dern v. State of Israel* [5], para. 11 (June 20, 2012) (hereinafter: the "*Dern* case"). For a review of the objectives of the extradition proceeding, see: CrimA

2144/08 *Mondrowitz v. State of Israel* [6], para. 32 (hereinafter: the "*Mondrowitz* case")). In Israel, the proceeding is governed by the Extradition Law, which establishes that a person may be extradited from the State of Israel to another state if he committed an "extradition offense" (sec. 2A of the law), which is defined in sec. 2(a) of the law as an offense which, if committed in Israel, would be punishable by imprisonment for at least one year, provided that there is a treaty for the extradition of offenders between the State of Israel and the requesting state. The law further instructs – in regard to a person who has not yet been convicted, and whose extradition is requested in order to for him to stand trial – that he be declared extraditable if it be proven that there is sufficient evidence to try him for a parallel offense in Israel (sec. 9(a) of the law). The customary threshold for examining the sufficiency of the evidence in the extradition proceeding is a "basis for the charge", see: the *Dern* case, para. 48; CrimA 3439/04 *Bazak v. Attorney General* [7], 299-300 (hereinafter: the "*Bazak* case")). Alongside the aforesaid conditions, the law establishes exceptions, one or more of which will prevent the extradition of a person located in Israel to the requesting state (CrimA 3915/15 *Yam v. State of Israel* [8], para. 8 (hereinafter: the "*Yam* case")).

17. In the present case, there is no dispute that the preliminary conditions for extraditing the Appellant to the United States have been met: there is an extradition treaty between the Government of Israel and the Government of the United States; the offenses that are attributed to the Appellant are extradition offenses within their meaning in the law; and the evidence presented in the Appellant's matter meets the evidentiary threshold required for the purpose of extradition. The Appellant disputed this last condition with regard to one item in the indictment, and we shall address this below.

18. The dispute in this case revolves around a number of other questions that I will address in the following order: whether the "center of gravity" of the offenses

attributed to the Appellant is in the United States or in Israel, and the implications of Basic Law: The Nation State on the matter; whether there was a delay in the Appellant's extradition proceedings to an extent that amounts to a violation of public policy or a miscarriage of justice that would justify not extraditing him; whether his extradition constitutes selective enforcement; whether there is a health justification preventing his extradition; and additional arguments that the Appellant raised.

I will examine these questions below.

The Center of Gravity of the Offenses

19. There does not appear to be any dispute that both states have jurisdiction to try the Appellant for his actions in the present case (for a detailed discussion, see: the *Rosenstein* case, para. 36). The State of Israel has jurisdiction that stems from the Appellant's Israeli citizenship and by virtue of the territorial nexus, as the offenses were committed within the state's territory (sec. 7(a)(1) of the Penal Law, 5737-1977 (hereinafter: the "Penal Law")). The United States has jurisdiction that stems from a broad territorial nexus that applies to criminal acts that were intended to occur within the state's territory or the commission of which impacted the state (CrimA 5227/10 *Yuval v. State of Israel* [9], para. 85 (hereinafter: the "*Yuval* case"); CrimA 8801/09 *Mayo v. Attorney General* [10] para. 15 (hereinafter: the "*Mayo* Case"); the *Rosenstein* case, paras. 24-25). The acts were committed in Israel via the internet, by an Israeli citizen, and the investigation materials were seized in Israel, but the acts were directed against victims in the United States, and the law enforcement authorities in the United States began the investigation in the case and "motivated" the investigation in Israel after their approach for legal assistance.

20. In such a situation, in which both states have the *capability* to try the case, the question that arises is which state takes *precedence* for the legal proceedings. This Court has held that the decision should be made in accordance with the majority of the offenses' contacts – or "links", in other words, the location of the "center of gravity" of the attributed offenses (the *Yuval* case, para. 87; the *Mayo* case, para. 16;, the *Rosenstein* case, p. 416). In general, preference will be given to the physical location where the offense was committed, but this does not tip the scales, and each case will

be examined on its merits, in accordance with its contacts (the *Rosenstein* case, p. 419).

21. I am also of the opinion, as was the District Court, that the center of gravity in this case is in fact located in the United States and not in Israel. Indeed, the commission of the offenses and the investigation were in Israel, and the Appellant is an Israeli citizen, and accordingly there is a linkage to Israel. However, offenses of the kind that the Appellant committed are not limited to a narrow territorial area. An inherent characteristic of internet and computer offenses is their extra-territorial nature. This nature allows crossing borders in the blink of an eye and jeopardizing residents of states abroad. In the *Rosenstein* case, the Court emphasized that the expansion of the territorial linkage is meant to address this nature of offenses, "which, inherently, are not restricted to the borders of a single state" (the *Rosenstein* case, para, 30). In the case of offenses of such a nature, and particularly given the acceleration of technological development of on-line communications, the significance of the geographical location of the perpetrator of the offense diminishes (*cf*: the *Rosenstein* case, p. 433). The perpetrator can commit his actions from any state around the world and can send his arrows in any direction. All he needs is a network connection (the *Mayo* case, para. 17; see: ASAF HARDUF, CYBERCRIME: AN INTRODUCTION (2010) (Heb.)). Therefore, in these circumstances it is proper to locate the center of gravity based on the location of the victims (the *Mayo* case, para. 18; the *Yuval* case, para. 88; CrimA 7376/10 *Novak v. Attorney General*, [11], para. 14; the *Rosenstein* case, p. 432). The acts that the Appellant committed were directed at victims in the United States. That is where the victims were harmed, and the protected interests that were infringed are primarily located there.

Even if the Appellant committed similar acts upon Israeli victims, that is not sufficient to divert the center of gravity in the case attributed to him, as they can be perceived as distinguished offenses. *Firstly*, because the offenses at issue were mainly direct acts against victims in Israel that were not limited to an on-line medium. *Secondly*, the Appellant has already been tried for those offenses.

22. In this context, the Appellant claimed that the center of gravity is located in Israel since he was already put on trial in Israel and admitted to all the offenses – even those that were included in the American indictment and were not part of the criminal

proceeding in his matter in Israel. I cannot accept this argument. The prosecution decided not to charge the Appellant for his actions that were directed at victims in the United States. The Appellant objected to this decision, and his objections were rejected (the *Gabber HCJ* case). The Appellant also objected to the court's decision not to convict him of additional offenses pursuant to sec. 39 of the Penal Law, and his objections were rejected both directly in the ruling and on appeal, and indirectly in the petition to the High Court of Justice. I am of the opinion that there is no cause to revisit these decisions.

Indeed, it is true that when it was decided not to put the Appellant on trial in Israel for the said actions, the Extradition Request had not yet been filed on behalf of the United States. At present, the circumstances seem to have changed, since there is a pending request. However, I am not of the opinion that this is sufficient to change the ruling that was given in this matter. The authorities decided not to put the Appellant on trial for the actions that were attributed to him while they were aware of the investigation that the authorities in the United States initiated – since they were the ones that "motivated" the proceeding in Israel as well – and of the possibility that a request to extradite the Appellant may be filed. The basic principle that applies in extradition laws is *prosecute or extradite* (*Aut dedre aut judicare*; the *Mayo* case, para. 23). In this case, the State of Israel decided not to prosecute, but rather to extradite. It had its reasons, and there is no cause to deviate from previous judicial rulings concerning this decision.

23. The Appellant further argued that in light of his admission to the acts that are attributed to him, and due to the fact that the charges against him are based on digital material that was seized on his computer, there is no need for the victims of the offenses to testify, and he even undertook that he would refrain from summoning them to testify. It is true that the proceedings in the Appellant's matter are not expected to be as complicated as in other cases, since he chose not to conduct a defense and to confess to what was attributed to him. I am willing to assume that the complexity of the proceedings may be a possible consideration in examining the offenses' center of gravity, which could indicate that the majority of contacts are to one legal system or another (cf: the *Mayo* case, para. 18; the *Yuval* case, para. 88). However, in the case at hand, even if the Appellant's admission will obviate the need to hear evidence

regarding the commission of the offense and save judicial time, it does not nullify the linkage between his acts and the United States and the interest in having him stand trial particularly there. It is the prosecution in the United States that holds the discretion for conducting the proceedings, and they shall decide how to do so, but the system's interest in putting the Appellant on trial for infringing the protected interests cannot be exhausted by a criminal proceeding conducted in Israel. The victims, whose naivety was abused by the Appellant, are entitled to have their voices heard, and to do so in their language and in their country Thus, the Appellant's interest to conduct the proceedings in his country does not prevail.

24. The Appellant further argued that the enactment of Basic Law: The Nation State tilts the scales in favor of not extraditing him to the United States, due to the right the emerges therefrom to stand trial in Israel as a Jewish-Israeli citizen. The Appellant emphasized that he is not arguing that Basic Law: The Nation State always rules in favor of not extraditing, but that in the circumstances of the present case, it adds weight to the scales. I cannot accept this argument. I am also of the opinion, as has already been held, that the enactment of Basic Law: The Nation State does not change the conclusion that the Appellant is extraditable. The Basic Law is not meant to protect offenders in Israel. Its provisions do not address extradition or related matters, directly or indirectly (the *Journo* case, para. 33). We should note that the legislature clearly expressed objection to extraditing Israeli citizens. However, the legislature chose to change the existing law and amend the Extradition Law such that it will allow extradition from Israel (the Extradition Law (Amendment no. 6), 5759-1999; for a broader discussion, see: the *Rosenstein* Case, paras. 58-59). Basic Law: The Nation State has not changed this normative situation. Our case law has already addressed the constitutionality of the Extradition Law in the past, as it infringes the right to freedom pursuant to sec. 5 of Basic Law: Human Dignity and Freedom, and it was held that it is not an unconstitutional law (see: *ibid*, para. 37). In this context as well, the normative situation has not changed in light of the addition of Basic Law: The Nation State to Israel's constitutional tapestry.

Moreover, the Appellant will be permitted to request to serve his sentence in Israel, pursuant to sec. 1A of the Extradition Law, such that the concern that he will be "exiled" has no substance.

Public Policy and Delay

25. According to sec. 2B(a)(8) of the Extradition Law, a possible exception for extradition is violation of public policy or of a vital interest of the State of Israel. The term "public policy" in this context has already been developed in our case law (see: the *Yam* case, para. 10 and the references there). Suffice it to say that extradition shall be deemed contrary to public policy if it will materially violate the sense of justice, morality and fairness of the public in Israel (CrimA 2521/03 *Sirkis v. State of Israel* [12], IsrSC 57(6) 337 (hereinafter: the "*Sirkis* case")). If it is found that extradition is contrary to public policy within its meaning in the Extradition Law, the court will refrain from ordering it, even if the other conditions are met (*ibid*, para. 18). However, it must be remembered that given the important public interests that the law of extradition fulfills, such arguments will be accepted sparingly and only in unusual, exceptional cases (see: the *Mondrowitz* case, para. 114; CrimA 250/08 *A. v. Attorney General* [13] para. 31; the *Sirkis* case, p. 346).

26. Violation of public policy may thus take many forms, one of which is delay. This Court has already ruled that in certain circumstances, a delay in extradition proceedings could amount to a violation of public policy (CrimA 6384/11 *Ben Haim v. Attorney General* [14], para. 25 of the opinion of Justice S. Joubran (hereinafter: the "*Ben Haim* case"); CrimA 739/07 *Efrat v. Attorney General* [15], para. 12 (hereinafter: the "*Efrat* case"), the *Sirkis* case, pp. 346-347)). The criteria that have been formulated in our case law point to a number of aspects that must be examined in order to determine whether there has been a delay that justifies not extraditing:

> The *length of the delay*, considering the complexity of the extradition proceeding; its *circumstances*, including the severity of the offense, the extent of the fault of the authorities and of the requested person in prolonging the proceedings and the requested person's conduct in the years that elapsed since the offense occurred; the *extent the delay prejudices the requested person's ability to conduct his defense*; and whether the period of time that the delay added to the proceedings in the requested

person's matter will lead to his extradition creating an *unjust and disproportionate outcome* (the *Yam* case, para. 12).

27. Moving from the general to the specific in this matter, I am of the opinion that it cannot be said that the delay, which did indeed occur in the extradition proceedings in the Appellant's case, is unusual to a degree that justifies not extraditing him. As to the *duration of the delay* and *its circumstances* – indeed approximately 6 years elapsed from the investigation in the Appellant's matter and until the time the Extradition Request was filed. During this period the Appellant experienced uncertainty regarding the future and the Sword of Damocles hovered over his head. It should be noted in the Appellant's favor that he did not flee from the fear of the law, but rather admitted to his actions. However, the severity of the offenses must also be considered. It is difficult to overstate the severity of the attributed actions, and they were committed against a large number of victims over a not inconsiderable period of time. Accordingly, the scope of the investigation was broad: approximately 150 victims across the United States were identified, and it was necessary to interview them and turn their testimonies into an indictment comprising 68 charges in the matter of 19 victims. The evidence also included the examination of a large volume of digital material, much of which was translated from Hebrew to English (para. 1 of prosecutor Joey Blanch's letter dated August 28, 2017 (hereinafter: the "Blanch Letter"). Indeed, it is regrettable that from the time of the filing of the indictment in 2014, additional significant time elapsed until the filing of the Extradition Request. However, there was some explanation for this in the need to verify the affidavits – due to the time that had passed – and to formulate the Extradition Request (the Blanch Letter, para. 2). This is contrary to the Appellant's arguments that the delay stemmed solely from manpower issues. Additionally, it should be noted that the delay of the proceedings *did not prejudice the Appellant's ability to conduct his defense*, inasmuch as he does not deny his actions.

28. I am thus convinced that even if part of the delay was not inevitable, this is not enough, under the circumstances, to justify not extraditing him, *since what is at issue is not an unjust, disproportionate outcome* (see: the *Yam* case, para. 15; the *Ben Haim* case, para. 36, and *cf*: the *Mondrowitz* case, para. 128). It must be remembered that an extradition proceeding, which involves authorities from various states, requires complex coordination and cooperation, which may take not inconsiderable time. It

must be hoped that the authorities will act as quickly as possible in order to prevent an unnecessary delay of justice. However, not every prolonging of an extradition proceeding justifies stopping it.

29. It should be further stated, in this regard, that the Appellant argued that the period of time during which he waited for the Extradition Request amounts to a violation of his right to due process, due to the psychological toll it took on him and his mother – his only family. Our case law has already held that the right to due process also applies in extradition matters, and that in cases in which it is materially violated, this could amount to a violation of public policy which would justify not extraditing (the *Mondrowitz* case, para. 112, the *Mayo* case, para. 25). However, I did not find that the Appellant argued that the criminal proceeding itself, as it shall be conducted in the United States, may be unfair, and arguments that relate to the difficulty of conducting a legal proceeding in a foreign legal system, and particularly in the United States, have already been rejected in our case law (see the *Mayo* Case, para. 25; the *Rosenstein* case, paras. 55-56). Rather, the Appellant argued that the mere delay in filing the Extradition Request violated his right to due process. I cannot accept this argument. We examined whether this delay amounts to a violation of public policy which justifies not extraditing, and we reached the conclusion that this is not the case. The Appellant's right to due process, insofar as it relates to conducting the extradition proceeding, was not violated due to the period of time that elapsed since the acts were committed, or, at least, was not violated to a degree that justifies not extraditing him. Indeed, the delay certainly exacted no small toll from him and his mother, but this is not enough to justify not extraditing. In any event, I am confident that the Appellant will be able to raise his arguments regarding miscarriage of justice in the framework of the criminal proceeding in the appropriate instance in the United States, and it is presumed that the court will examine the matters thoroughly and will rule on their implications.

Selective Enforcement

30. As noted, the Appellant claims selective enforcement in comparison with the *Anonymous* case. Arguments of such nature have been recognized in our case law as part of the general "equitable defense" doctrine, which also applies in extradition proceedings – whether as part of general criminal law or as part of the public policy

exception in the Extradition Law (see the *Mondrowitz* case, para. 117; the *Rosenstein* case, para. 10; for a discussion on the matter whether selective enforcement can also be argued as part of administrative judicial review in criminal procedure, see CrimA 6328/12 *State of Israel v. Poldy Peretz* [16] paras. 29-31 (hereinafter: the "*Peretz* case")). Selective enforcement is such that "infringes equality in the sense that it distinguishes, for the purpose of enforcement, between similar people or between similar situations in order to achieve a wrongful purpose, or based on an irrelevant consideration or out of pure arbitrariness" (HCJ 6396/96 *Zakin v. Mayor of Beer Sheva* [17], 305). Indeed, over the years various positions have been expressed regarding the scope of this argument (see: the *Peretz* case, para. 23; CrimA 7621/14 *Gotsdiner v. State of Israel* [18], para. 56 of the opinion of Justice Barak-Erez, and the supporting references there); LCrimA 1611/16 *State of Israel v. Vardi* [19], and *cf*: CrimA 4855/02 *State of Israel v. Borovitz* [20], 814; CrimA 7014/06 *State of Israel v. Limor* [21]). However, there can be no dispute that a fundamental condition for the claim is proof of discrimination, and in the present case I am of the opinion that the Appellant has not met this requirement.

31. Indeed, there is a certain similarity between the *Anonymous* case and the present case – the accused there used his computer in Israel to commit offenses that were directed at the United States, and was charged, *inter alia*, with possession and publication of obscene materials of minors, and his punishment was even reduced due to his being diagnosed as autistic (the *Anonymous* case, p. 18). However, I am of the opinion that the differences outweigh the similarities. The main difference, as the District Court stated, relates to the fact that the indecent acts and extortion involved the Appellant's active conduct. As opposed to the accused in the *Anonymous* case who possessed obscene material, in the present case the Appellant acted in order to obtain them, and while doing so seriously harmed a large number of young women. It should be noted in this context that if the proceeding were to be conducted in Israel, it is possible that the victims would need to come to Israel in order to deliver testimony, even if only regarding the matter of the harm that was caused to them, even though the Appellant admits to his actions. This is contrary to the *Anonymous* case where the evidence was based solely on documents and media files. These considerations tilt the center of gravity towards the United States, in comparison to cases of possession of materials alone. The young age of the accused in the *Anonymous* case, who was

prosecuted as a minor in Juvenile Court, was also a consideration in favor of not extraditing.

32. To this one must add that infringement of equality where there is a clear, consistent policy is not the same as one distinct case. The Appellant could not have demonstrated – and in any event he did not attempt to claim – that he relied on the authority's consistent enforcement policy, and that not putting him on trial was tainted by *male fide* on the authority's behalf (the *Peretz* case, para. 32). Therefore, even if we were to assume, for the sake of argument, that the enforcement was somewhat different, this is not a severe flaw in the authority's conduct that would justify intervention (*ibid*, paras. 33-34).

Not Extraditing due to the Appellant's Medical Condition

33. The Appellant argues that he has high level autism and has personality disorders, and that he is unable to conduct himself independently, and therefore, he should not be extradited. As noted in the framework of his request to introduce evidence on appeal, the Appellant presented a document confirming his disability (as specified above in para. 14).

34. Regarding the request to introduce new evidence on appeal, in general, the appeal instance will not accept new evidence, except if "this is required in order to do justice", in which case the appellate court is permitted "to take evidence or direct the previous instance to take such evidence as it may direct" (sec. 211 of the Criminal Procedure [Consolidated Version] Law, 5742-1982). The case law of this Court has prescribed three considerations which should be taken into account in this context: *First*, whether the petitioner had the possibility of obtaining the additional evidence during the hearing in the previous instance. *Second*, the interest in preserving the principle of finality. *Third*, the nature of the additional evidence and the prospects that its submission will lead to a change in the outcome reached by the previous instance (CrimA 8080/12 *State of Israel v. Olmert* [22], para. 11). This last consideration is of primary importance (CrimA 4506/15 *Bar v. State of Israel* [23], para. 76; CrimA 1690/09 *A. v. State of Israel* [24]). In the present case, I am not of the opinion that the Appellant's request meets the said criteria. As I indicated above, it is doubtful whether

the Appellant was unable to present the evidence – or at least a part thereof – and, as shall be specified below, the additional evidence does not change the final outcome.

35. Even if I were to assume that the new evidence was before us and that the Appellant has autism at the level that was determined, I am not of the opinion that the argument that his condition prevents extradition should be accepted.

First, the Appellant did not argue in the District Court that his medical condition prevented his extradition, although his condition was known, even if the medical disability had not been formally determined. The Appellant also received the Respondent's consent to leave the electronically monitored arrest for the purpose of examining his medical condition and receiving opinions, but he refrained from filing them prior to the appeal, despite the fact that he claims that his condition has been making it difficult for him to conduct himself in an independent manner for years.

Second and of primary importance, our case law has held that the suffering by the person requested in an extradition proceeding is inherent to the proceeding itself and does not contradict the basic principles of society (the *Yuval* case, para. 97; the *Mondrowitz* case, para. 115), and public policy necessitates refraining from extraditing a person only if it will lead to severe abuse and indescribable suffering (the *Sirkis* case, p, 347). This also holds true when the extradition relates to a person who suffers from health problems, since "a fragile health condition cannot grant a person immunity from bearing the consequences deriving from his actions" (CrimA 3680/09 *Silverman v. State of Israel* [25], para. 9). In the present case, the Appellant's condition does not prevent him from standing trial – and even he does not claim otherwise. Furthermore, the Respondent justifiably stated that the Appellant's condition and his communication disabilities did not prevent him from maintaining on-line contacts with approximately 150 young women and soliciting them to perform various sexual acts. There is no dispute that the Appellant's condition may limit his ability to conduct himself independently, and that conducting a criminal proceeding in a foreign state is not easy, but this is not a violation of an intensity that justifies not extraditing him.

36. The Appellant's arguments regarding his condition will be raised at the appropriate place and time for the purpose of sentencing. It is presumed that the

authorities in the United States will provide a solution that is suitable to the Appellant's condition during the conducting of the proceeding. To this one must add that the sentence can be served in Israel, and at that stage, as well, it is presumed that the authorities will consider the Appellant's condition and give it appropriate weight in deciding upon his matter.

Additional Arguments

I. *The Statute of Limitations for the Extortion Offense*

37. The Appellant argues that the offense of extortion that is attributed to him was committed in 2011, and its statute of limitations under American law already lapsed in 2016. Therefore, he claims that the double criminality requirement was not met for this offense and he should not be extradited for it. This argument must rejected. In the past, the Extradition Law prescribed a "double" criterion for examining the statute of limitations, in the framework of which the laws of both the extraditing state and the state requesting the extradition were examined. At present, the normative situation has changed. Section 2B(a)(6), which was added to the law in 2001 (Extradition Law (Amendment no. 7) Law, 5761-2001), prescribes that a possible exception to extradition is if the statute of limitations for the offense (or the punishment therefor) lapsed pursuant to the laws of the *State of Israel* (see: Extradition Law (Amendment no. 8) Bill, 5761-2000). Meaning, we are not examining the laws of the statute of limitations in the state to which the extradition is requested, but rather according to our laws (see: the *Efrat* case, para. 4; the *Mondrowitz* case, para. 59). It should be noted that there is an opinion that even at present, following the amendment of the law, the statute of limitations laws of the requesting state should also be examined, and this has not been decided in our case law (See: CrimA 6717/09 *Uzipa v. Attorney General*, [26], para. 62 (hereinafter: the "*Uzipa* case"); the *Bazak* case, para. 21). I am of the opinion that there is also no need to rule on this question in the present case, for reasons upon which I shall elaborate below.

38. In terms of Israeli law, the Respondent is correct that the statute of limitations for blackmail by threats under sec. 428 of the Penal Law – which corresponds to the offense for which the Appellant is charged – has not yet lapsed. This is due to the fact

that we are concerned with a felony (sec. 24(1) of the Penal Law), for which the statute of limitations is 10 years (sec. 9(a)(2) of the Criminal Procedure [Consolidated Version] Law, 5742-1982 (hereinafter: the "Criminal Procedure Law")). Therefore, it is not necessary to examine whether – as the Respondent argues – the investigation, the filing of the indictment and the filing of the Extradition Request stopped the clock on the statute of limitations, in accordance with sec. 9(d) of the Criminal Procedure Law (*cf*: the *Mondrowitz* case, para. 71).

39. As for the law of the State of California, which applies to the Appellant's matter, the Extradition Request clearly states that the statute of limitations for the offenses attributed to the Appellant has not lapsed. The Morton-Owens Affidavit refers extensively to the question of limitation, and clarifies that for the offense of extortion, for which the punishment is two years of imprisonment, there is a 5-year statute of limitation – while the indictment against the Appellant was filed in 2014, less than 5 years after the acts were committed (para. 26 of the Morton-Owens Affidavit), and this is sufficient to stop the clock on the statute of limitations. This is an affidavit that was given by an American prosecutor who is well versed in the applicable statute of limitations law, and in the indictment and investigation proceedings in the matter of the Appellant. I am satisfied that this is sufficient for the purpose of the extradition proceeding (see: the *Uzipa* case, para. 62). Additional arguments that are raised in this matter should be examined in the framework of the criminal proceeding before the appropriate instance in the United States.

II. *Charge no. 53*

40. The Appellant argues that charge no. 53 of the indictment does not have an evidentiary basis because it refers to a time when the Appellant was under arrest. As the Respondent stated, para.111 of the indictment states that the act was committed on *or about July 16, 2011*. The Appellant was under arrest as of July 11, 2011. This difference is not sufficient to undermine the alleged evidentiary grounds of the charge, considering that the court does not examine the credibility and the weight of the evidence in the framework of the extradition proceeding as long as at issue is not evidence that is *prima facie* worthless (the *Uzipa* Case, para. 9). As the District Court correctly stated, this argument should be examined in the primary proceeding, since

an extradition proceeding is not a full criminal proceeding that determines the accused's guilt or innocence (the *Bazak* case, para. 12).

Conclusion

41. Thus, I have found that the Appellant's arguments should be rejected, and that there is no cause to intervene in the District Court's judgment. The majority of the contacts in regard to the offenses attributed to the Appellant are tightly linked to the United States, and it follows that there is no place to intervene in the determination regarding extraditing the Appellant to that country for the purpose of standing trial. Additionally, I have not found that the delay in initiating the proceedings against the Appellant amounts to a violation of public policy to an extent that justifies not extraditing him. This is also the case in regard to the suffering that the extradition may cause him due to his medical condition. I have also not found that the Appellant has an equitable defense claim, as it has not been proven that the decision in his case is tainted by selective enforcement. The Appellant's additional arguments are also rejected.

I do find it appropriate, prior to signing, to state that the difficulty in the Appellant's condition was not unnoticed. It is presumed that the authorities in the various states will provide a suitable solution, and the Respondent should communicate the need to consider his disabilities to the relevant authorities (in Israel and in the United States). Additionally, if the Appellant will be convicted and sentenced to imprisonment, then – as stated – the possibility is open for him to serve it in Israel, and this could, to a certain extent, alleviate the difficulties which he is expected to face, and it is presumed that consideration will be given to his medical condition and to what it entails.

In conclusion. I recommend to my colleagues that the appeal be denied, such that the declaration of the Appellant as extraditable to the United States shall remain in effect.

Justice Y. Willner:

I concur.

Justice D. Barak-Erez:

1. I concur in the opinion of my colleague Justice U. Vogelman, but would like to clarify my opinion regarding two points raised in that opinion.

2. First, I wholeheartedly concur with the decisive statement that Basic Law: Israel – The Nation State of the Jewish People bears no relevance to the discussion of questions of extradition. Not only were these matters already clarified in previous case law, but it is proper to reiterate – from the aspect of basic considerations of justice – that one cannot conceive that our legal system would grant different treatment to people standing criminal trial based on their religious or national origin. It appears that it would have been better had such an argument never been raised at all.

3. Secondly, considering the additional difficulty involved in conducting a criminal proceeding from the perspective of a person with disabilities (see and *cf*: Sagit Mor and Osnat Ein-Dor, *Invalid Testimony: Disability and Voice in the Criminal Procedure*, 16 MISHPAT U'MIMSHAL 187 (2015)), I would like to reinforce the words of my colleague as to the presumption that applies to the authorities in the United States in all that relates to providing a solution to the Appellant's difficulties. We are not ignoring the additional difficulty which the Appellant faces due to the detachment from his supportive environment. However, as my colleague emphasized, we must also consider the matter of the complainants. There is some comfort in the fact that if the Appellant will be convicted and be sentenced to imprisonment, he will be able to request to serve his sentence in Israel, pursuant to the Serving a Prison Sentence in the Prisoner's Country of Nationality Law, 5757-1996.

Decided as stated in the judgment of Justice U. Vogelman.

Delivered this day, the 11th day of Tamuz 5779 (July 14, 2019).