The Supreme Court sitting as the Court of Criminal Appeals

Criminal Appeal 2144/08

Before: The honorable Justice A. Procaccia
The honorable Justice M. Naor
The honorable Justice E. Rubinstein

The Appellant:	Abraham Mondrowitz
	v.
The Respondent:	State of Israel
	Appeal from the judgment of the Jerusalem District Court on February 10, 2008, in Misc. Motions file 10302/07, rendered by the Honorable Judge N. Ben-Or

On behalf of the Appellant:	Eitan Maoz, attorney at law; Nati Simchoni, attorney at law; Oren Aderet, attorney at law

On behalf of the Respondent:	Merlin Mazal, attorney at law; Nili Gesser, attorney at law

Judgment

Justice A. Procaccia:

This is an appeal from the judgment of the Jerusalem District Court (the honorable Judge N. Ben-Or) which ruled that the state's motion to declare the Appellant extraditable to the United States should be granted, for the purpose of trying him on criminal charges there for grave sexual offenses against minors, allegedly committed by him in the 1980s.

The factual background and the legal proceedings

1. The Appellant, born in 1947, is a psychologist by profession, and was a resident and citizen of the United States until 1984. In November 1984, the Appellant arrived in Israel; in 1996 he received Israeli citizenship; he has lived in Israel from the time of his arrival to this day, and has not left its borders.

2. During November 1984, the New York police opened a criminal investigation against the Appellant, on the suspicion that he had committed various sexual offenses against minors. In December 1984, a warrant was issued for his arrest; a short time thereafter, the New York police learned that he had fled to Israel. In February 1985, an indictment was brought against the Appellant in a New York court. In that indictment, which remains in effect to this day, the Appellant was charged with five counts of first-degree sodomy under Article 130.50 of the penal law of the State of New York; eight counts of first-degree sexual abuse under Article 130.65 of the aforementioned law; and another

count for the offense of endangering the welfare of a minor under Article 260.10 of said law. Said offenses were alleged to have been committed by the Appellant in his home between 1980 and 1984; the victims were five boys, minors at that time, aged nine to fifteen.

3. On the basis of the indictment that was filed, in February 1985 a New York court issued a warrant for the arrest of the Appellant, which remains in effect to this day. Another arrest warrant was issued against him by a federal court because of the suspicion that he had fled illegally from the United States in order to evade the law. This order remained in effect for 10 years until it was canceled in February 1995.

4. In March 1985, the United States Department of Justice sent a request to the State of Israel to arrest the Appellant based on the indictment that had been brought against him, until an official extradition request could be submitted in the matter. In May 1985, the Israeli Ministry of Foreign Affairs responded that it could not accede to the request that had been submitted by the United States, because the offenses attributed to the Appellant were not "extraditable offenses" in accordance with the existing extradition treaty between the government of the State of Israel and the government of the United States, which was signed in Washington on December 10, 1962, and went into effect on December 5, 1963 (the Convention on Extradition Between the Government of the State of Israel and the Government of the United States of America, Convention 505 documents, Volume 13, at p. 795; hereinafter: the Convention of Extradition or the Convention). At the time that Israel's response was given to the request by the United States to arrest the Appellant, Article II of the Convention contained a list of 30 offenses defined as "extraditable offenses." Among

them was the crime of rape. However, the offenses with which the Appellant was charged in the indictment – sodomy, sexual abuse and endangering the welfare of a minor – were not included in the detailed listing of "extraditable offenses" in the Convention. As will be explained below, the offenses listed in the indictment against the Appellant were always compatible with the definition of "extraditable offenses" under Israel's Extradition Law and the amendments thereto. The obstacle to extradition focused on the definition of "extraditable offense" in the Convention between Israel and the United States, which did not include the indictment offenses within the realm of "extraditable offenses" under the Convention. On that basis, Israel notified the United States that it would not be able to accede to its request to arrest the Appellant, thereby enabling extradition proceedings to begin.

5. In July 1987, at the request of the FBI, Interpol issued a "Red Notice" in the matter of the Appellant. That Notice contained a national arrest warrant, along with a request to the effect that if the Appellant should be located, he should be arrested immediately as a candidate for extradition (hereinafter: the Red Notice).

6. In 1988, an amendment to the Penal Law, 5737-1977 (hereinafter: the Penal Law) was passed in which, *inter alia*, the definition of the offense of sodomy was changed, and it established that "a person who commits an act of sodomy on another person under one of the circumstances enumerated in Article 345, *mutatis mutandis*, shall be deemed equivalent to a rapist" (Article 347 (B) of the Penal Law; the Penal Law (Amendment No. 22) 5748-1988, Compendium of Laws 5748 1246, at p. 62; the bill and explanations were published in the Penal Law Bill (Amendment No.

26) 5746-1986, 303). The day after the amendment to the law was passed, the Israeli authorities notified the American authorities that the Israeli law in that context had been amended and that, under the amendment, an act of sodomy in the circumstances of rape was now deemed equivalent to rape. This notice did not lead to an extradition request from the United States government. Their position was that said amendment in the Israeli law did not change the legal situation, which had prevented the extradition of the Appellant to the United States in the past, and that only by means of a suitable amendment to the Convention would it be possible to overcome the legal obstacle and implement his extradition. The letter P/1 indicates that, when the request to arrest the Appellant in 1985 failed, the competent entities in the United States reached the conclusion that only a suitable amendment to the definition of "extraditable offenses" in the Convention may lead to his extradition.

7. When the competent authorities in the United States learned that, in the existing situation, the extradition and trial of the Appellant could not progress, they gradually began to close the files that were pending against him. Thus, in July 1993, the United States Department of State returned the extradition documents in the matter of the Appellant to the Department for International Agreements and International Litigation of the Ministry of Justice; in September 1993, the Kings County prosecuting authorities advised that they would not continue to handle the matter as long as he was not returned to the United States or arrested in another place; subsequently, the International Department issued an administrative closure of the file; in January 1995, the New York police closed the file that had been opened by its offices; in February 1995, the federal arrest warrant was canceled; in April 1995, the FBI notified Interpol of the closure of the file against the Appellant; and in June 1995,

Interpol canceled the Red Notice. However, the indictment and the original arrest warrant remained in effect the entire time.

8. Along with all of the above, official contacts began between the government of Israel and the government of the United States to amend the Convention. These contacts only bore fruit in July 2005, when the parties signed a protocol to amend the Convention, establishing that the list of "extraditable offenses" contained in Article 2 of the Convention up to that time would be replaced with a general provision stating that any offense for which the maximum punishment is one or more years' imprisonment would be deemed an "extraditable offense." This amendment in the protocol went into effect in January 2007 (hereinafter: the Amendment to the Convention or the Amending Protocol).

It should also be noted that until 2001, the Extradition Law, 5714-1954 (hereinafter: the Extradition Law or the Law) had defined an "extraditable offense" in accordance with Article 2 of the Law, with a reference to an addendum to the Law. This addendum included details of various offenses, including the offenses that constitute the object of the indictment against the Appellant. The 2001 amendment to the Law states that an "extraditable offense" is any offense which, had it been committed in Israel, would have been punishable by one year's imprisonment or a more severe sentence. The wording of the Amendment to the Convention, which was implemented in 2005 for the purpose of defining "extraditable offenses," followed that of the 2001 amendment to the Extradition Law.

9. On the basis of the amendment to the definition of "extraditable offenses" in the Convention, in September 2007 the government of the

United States submitted a request to Israel to extradite the Appellant into its custody for the criminal offenses attributed to him. In November 2007, the Appellant was arrested in Israel by the Israel police under Article 6 of the Extradition Law. A short time thereafter, a petition was filed before the Jerusalem District Court to declare the Appellant extraditable to the United States, and his arrest was extended until the conclusion of the extradition proceedings.

10. In the District Court, the Appellant claimed that he could not be extradited to the United States because of the existence of three exceptions to the extradition, which are set forth in the Extradition Law: first, he claimed that the offenses attributed to him in the American indictment had lapsed under the laws of the State of Israel, and, therefore, the exception of limitation for extradition under Article 2B (A) (6) of the Extradition Law was fulfilled; second, he claimed that he was cleared of the offenses in the United States, and, therefore, the exception of limitation for extradition under Article 2B (A) (7) of the Extradition Law was fulfilled; and third, he claimed that his extradition would offend "public policy" in Israel, and, therefore, the exception set forth in the provision of Article 2B (A) (8) of the Extradition Law was fulfilled. The Appellant further argued that the doctrine of "abuse of process" was available to him due to the long period of time that had elapsed since the offenses attributed to him were committed, and in view of the substantial delay that occurred in filing the request to extradite him.

In a detailed and reasoned judgment, the District Court denied these arguments one by one and declared the Appellant extraditable to the United States. The appeal before us turns on this declaration.

The judgment of the District Court

11. With regard to the issue of the statute of limitations, the District Court relied on Article 9 of the Criminal Procedure Law [Consolidated Version], 5742-1982 (hereinafter: the Criminal Procedure Law), under which the statute of limitations for a felony is ten years from the date on which the offense is committed. It was determined that this provision applies to the Appellant, but under Article 9 (C) of this Law, there are events that toll the running of the limitation period and lead to the beginning of its counting anew. These events also apply to extradition proceedings. For the purpose of deciding, the Court posed three questions: First – Would it have been possible to extradite the Appellant to the United States as of 1988, when the Israeli Penal Law was amended; and, alternatively, would it have been possible to try him in Israel under Article 15 of the Penal Law? Second – If it had been impossible to extradite the Appellant, does this have a ramification for the tolling of the limitation period? Third – Might Article 94A of the Criminal Procedure Law serve as the basis for tolling the limitation period if the impossibility of the extradition itself does not serve to suspend it?

12. The Court decided these questions as follows: First – It rejected the argument that it would have been possible to extradite the Appellant back in 1988, in view of the amendment to the Penal Law which states that an act of sodomy under circumstances of rape is equivalent to rape. The Court stated that, until the Amendment to the Convention in 2007, it would not have been possible to extradite the Appellant to the United States, since the aforesaid amendment to the Penal Law did not create a complete overlap between the sodomy offense and the rape offense, nor

did it cancel the independent status of each of the offenses in question. Hence, even after the amendment to the Penal Law, the legal situation with regard to the extraditable offenses remained as it was, and the offenses with which the Appellant had been charged did not constitute "extraditable offenses." According to the Court, even if internal Israeli law was changed, it did not affect the provisions of the Convention, which show that, until the amendment in 2007, the offense of sodomy, like the other offenses attributed to the Appellant, remained excluded from the list of "extraditable offenses," and he could not be extradited for them.

Second, the District Court rejected the Appellant's argument that there was no impediment to trying him in Israel and since the Israeli authorities had refrained from doing so, the acts attributed to him were subject to the statue of limitations. In this context, the Court ruled that, while the penal laws of Israel apply to extra-territorial felonies and misdemeanors committed by someone who was a citizen or resident of Israel at the time of committing the offense or thereafter and, therefore, theoretically, it would have been possible to try the Appellant in Israel, in practice, since the victims of the sexual abuse attributed to the Appellant are all citizens and residents of the United States, and all of them were minors at the time the offenses were committed, it cannot be assumed that, on a practical level, these complainants could have left their homes and come to Israel for the purpose of giving testimony. In such a situation, without coercing the witnesses and in view of the practical difficulty involved in conducting the trial in Israel and meeting the burden of proof of the Appellant's guilt beyond a reasonable doubt, the Israeli prosecution, in effect, would not have been able to conduct a criminal trial against the Appellant in Israel. Hence, even if it had been

theoretically possible to order that the Appellant be tried in Israel, the Israeli court did not have the effective ability to subject him to the full force of the law.

Third, the Court assumed that there had been an impediment to trying the Appellant in Israel, and to his extradition as well, prior to the Amendment to the Convention in 2007. It stated that this impediment affected the running of the limitation period. In relying on the case law of this Court, Judge Ben-Or ruled that, first, there is no complete legislative arrangement on the issue of limitation in criminal offenses, so this issue is open to adjudicative development. It was also ruled that one of the general basic principles in this matter is that limitation does not work against someone who does not have the power to act. This is particularly true when the person claiming the applicability of the limitation is the one who deliberately created the impediment to taking action. In the circumstances of the matter, there was an impediment, under the Convention, to extraditing the Appellant to the United States, since the offenses of which he was accused in the United States did not constitute "extraditable offenses" under the Convention and, therefore, the limitation period was suspended until the impediment was removed by the Amendment to the Convention. The argument that the Convention of Extradition could have been amended before then cannot be used by a fugitive from justice, according to case law. Hence, the limitation must be counted as of the date of the amendment to the Convention in 2007, and not before that.

Fourth, the lower court also contended with a possible argument whereby an express provision of a law is required to suspend the running of the limitation period in the case of an impediment to taking

action. To that end, it invoked Article 94A of the Criminal Procedure Law. This provision states that a court to which an indictment is submitted is entitled to suspend proceedings if it learns that the defendant cannot be brought for continuation of his trial, and if the defendant evaded the law, the period of the suspension, up to the resumption of the proceedings, will not be counted in the limitation period. The lower court explained that, under the circumstances of the matter, the Appellant can be deemed to have evaded American Law, and, by analogy and "conversion of data," it is possible to apply to the circumstances of this proceeding the rationale of the provision in Article 94A of the Criminal Procedure Law, which enables, with the approval of the attorney general, the resumption of legal proceedings that were suspended in relation to someone who evaded the law, even if the periods of limitation have lapsed under Section 9 of the Criminal Procedure Law. In this way, Article 94A may also serve as the statutory basis for suspending the running of the limitation in this case.

The court further believed that there is no problem with the fact that Article 94A of the Criminal Procedure Law went into effect only in 1995, more than ten years after the indictment was brought against the Appellant in the United States and ostensibly after the offenses attributed to him in the indictment had expired under Israeli law. According to the lower court, this provision of the law embodies an existing principle and only proclaims its existence. Therefore, the date on which it went into effect in its statutory guise neither adds nor detracts; alternatively, the issuing of the Red Notice by Interpol halted the running of the limitation, in its capacity as an "investigative action," which constitutes a delaying factor, and, therefore, when Article 94A of the Criminal Procedure Law

went into effect, it was possible to apply it to the offenses in question, which had not yet lapsed.

Fifth, the Court rejected the Appellant's claim that there was no reason to extradite him because of fulfillment of the exception set forth in Article 2B (A) (7) of the Extradition Law which deals with the "forgiveness" of the offenses attributed to him by the requesting country. From a factual standpoint, it was noted that the files connected with the case had been closed "conditionally," as long as the Appellant could not be seized and in the absence of any benefit in leaving the files open. However, the indictment and the original arrest warrant that was issued as a result had never been canceled; the American authorities had continued to deal with the Appellant's case and had not abandoned it; and, over the years, operations and contacts had been conducted between the governments of the two countries in his case. It was ruled that these facts were not consistent with the claim of "forgiveness," because the existence of forgiveness requires the positive exercise of powers by a government authority, whereby said exercise must unequivocally attest to abandoning the objective of trying the accused in a criminal proceeding.

Sixth, the Court rejected the claim that, in this case, the exception to extradition set forth in Article 2B (A) (8) of the Extradition Law, which prevents extraditions that offend "public policy," was fulfilled. The court noted that, even though an extreme delay in submitting an extradition request may be considered as offending "public policy," for the purpose of implementing the exception it must be shown that extradition under those circumstances constitutes a clearly unjust act. In this case, where the authority was impeded from acting, and the

defendant himself was the one who created the cause of the impediment to his being placed on trial by fleeing from the requesting country, it cannot be said that there was a delay on the part of the authority in a way that gave rise to the "public policy" exception. According to the Court, there may be circumstances in which it would not be right to exercise the full rigor of the law against a defendant for reasons of "public policy" or "abuse of process", even when the running of the limitation period is tolled because of his deliberate conduct, and even without a delay on the part of the authorities. However, in this case, considering the nature of the offenses ascribed to the Appellant and their gravity, along with the status of the victims of those offenses, all but one of whom still wish to cooperate with the authorities and to bring the force of the law to bear on him, begs the conclusion that the Appellant does not have a defense based on the doctrine of "abuse of process," and that his extradition does not violate "public policy."

13. In light of the above, the lower court declared the Appellant to be extraditable, except for the eighth count of the indictment, for which , it was advised that the United States had rescinded the extradition request because it had lapsed under American law.

The parties' arguments on appeal

The Appellant's arguments

14. The Appellant's principal arguments focus on the issue of the limitation period for the offenses attributed to him in the indictment that was filed against him in the United States. According to the Appellant, under Articles 9 (A)(2) and 9 (C) of the Criminal Procedure Law, a

"double" limitation period has lapsed for these offenses, in the following senses: first, an initial limitation period ended in February 1995, after 10 years had elapsed from the date of the filing of the indictment against him; second, a second limitation period lapsed in March 1998, after 10 years had passed since the date on which the American authorities learned of the amendment to the Israeli Penal Law, from which time an act of sodomy under circumstances of rape could be considered equivalent to rape, since, as a result of the amendment to the law, the treaty could be interpreted to include the indictment offenses with which the Appellant was charged as "extraditable offenses."

15. With regard to the first limitation period, the only act that should be addressed above and beyond the filing of the indictment in February 1985, is the issuing of the Red Notice by Interpol. In this matter, it is argued that this Notice does not fall into the realm of "investigation pursuant to legislation" or "a proceeding on behalf of the Court," which toll the running of the limitation period under Article 9 (C) of the Criminal Procedure Law. Since no other action was taken that would serve to toll the running of the limitation period, it lapsed for the offenses in February 1995, after 10 years had passed from the date of the filing of the indictment.

The Appellant further argues, with regard to the first period, that the lower court erred in its belief that there was an impediment to bringing him to trial, which served to toll the running of the limitation period until the date of the Amendment to the Convention. According to his argument, Article 94A of the Criminal Procedure Law, which was discussed in the ruling of the lower court, does not even apply to the first

limitation period, because it entered into force following the expiration of that period and, accordingly, is not in any way applicable to this matter.

16. With regard to the second limitation period, the Appellant argues that there was no impediment, under any law, to his extradition following the amendment to the Penal Law, and from the date of the notice issued by Israel to the United States with regard to the amendment, on March 23, 1988. The United States, however, did not act in accordance with that notice and did not file a request for extradition pursuant thereto. According to the Appellant's argument, Israel believed, at the time, that it was possible to extradite him, and that there was no impediment to doing so. Moreover, the United States, by the very fact of filing the request for extradition in 1985, expressed its position that there was no impediment to extraditing the Appellant, even at that stage. The position of the United States in 1985, and the position of Israel with regard to the elimination of the impediment to extradition in 1988, gave rise to a situation whereby, at the very least, starting in 1988, it was possible to extradite the Appellant to the United States, and there was no longer any impediment to doing so. This is particularly applicable in light of the broad interpretation that has been given in case law to the concept of "extraditable offenses" for the purposes of the extradition conventions. Therefore, between 1988 – the date of the amendment to the Penal Law – and 1998, a second limitation period lapsed, during which nothing was done with regard to the Appellant's extradition. Only in November 2007, approximately 9 years after the second limitation period lapsed, did the formal extradition proceedings begin. This is an additional time interval which nearly amounts to a third limitation period, during which no action was taken toward extraditing the Appellant.

17. The Appellant argues further that the lower court erred in assuming that it was not possible to try him in Israel. According to his argument, even if some practical difficulties were involved in conducting the trial in Israel, because the witnesses were in the United States, this is not equivalent to an "impediment" to trying him before a court in Israel for extra-territorial offenses, pursuant to Article 15 of the Penal Law. In addition, the difficulties which the lower court had in mind diminished as the years went by and the principal witnesses for the prosecution grew up, and as the means of investigating witnesses from abroad and obtaining their testimony developed. There was, accordingly, no impediment to bringing the Appellant to trial in Israel.

18. Counsel for the Appellant have attacked the approach adopted by the lower court in applying a doctrine of general impediment as an element which tolls the running of the limitation period in criminal cases. They claim, that there is no foundation for this doctrine under law, and that Article 9 of the Criminal Procedure Law, in combination with Article 94A of that Law, are what define, statutorily and conclusively, the situations that toll the running of the limitation period in criminal cases. These provisions constitute an overall legislative arrangement in this matter, and it is not appropriate to apply the doctrine of general impediment to that arrangement and to deduce, on the basis of that doctrine, that the running of the limitation period should be tolled. The application of the doctrine of general impediment to the statute of limitations in criminal cases conflicts with the principle of legality in criminal matters and contradicts the duty of interpreting criminal law in favor of the accused. Even if any doubt arises in this context, it works in favor of the accused.

19. The Appellant further argues that he should not be deemed to have evaded or fled from justice for the purpose of application of Article 94A of the Criminal Procedure Law, and that the same applies with regard to the argument of general impediment. He did not flee the United States and did not hide out in Israel. He merely refrained from returning voluntarily to the United States, and thereby exercised his constitutional right not to be extradited to another country. In addition, Article 94A of the Criminal Procedure Law does not apply to the matter, because the Appellant should not be deemed a person whom it would have been impossible to bring to trial. Furthermore, his trial has not yet begun and this, too, is one of the conditions for the applicability of the provision in question, which is not met in this case.

20. In addition to all that set forth above, the Appellant claims that, both from the standpoint of international law and for reasons of "forgiveness," "abuse of process" and "public policy" – as these terms are to be understood in Israeli jurisprudence – it would not be fitting and proper to extradite him to the United States. First, from the international standpoint, the passage of time is significant in the context of the right of an accused to a fair criminal proceeding (as set forth, for example, in Article 6 (1) of the European Human Rights Convention). Second, the United States should be considered as having forgiven the Appellant, in practical terms, for his actions, if we may judge by its conduct over many years. In addition, after nearly three decades, there is relevance to the principle of "public policy," and to the integrated principle of "abuse of process", which constitute an express statutory exception to extradition, pursuant to Article 2B (A) (8) of the Extradition Law. The right to a rapid conclusion of the proceedings is a material right in criminal law, and the limitation periods, which expired, reflect a public interest in not bringing

to trial, combined with the accused's personal interest in obtaining a fair criminal proceeding and preventing perversion of justice against him.

The arguments by the state

21. The state argues that the ruling by the lower court should be adopted.

According to its argument, the basic assumption is that the limitation periods for the acts committed by the Appellant have not lapsed under United States law, and the question is whether they have lapsed under Israeli law. The answer which must be given to this question is in the negative, in light of the following principal arguments: the guiding principle is that "an offender will not benefit," and a fugitive from justice is not entitled to benefit from the result of his misdeeds; with regard to the statute of limitations in criminal cases, the general principle is that the running of the limitation period is tolled when there is a legal impediment to continuing with criminal proceedings against a person, as may be learned from Articles 9 (C), 9 (D) and 94A of the Criminal Procedure Law; such an impediment, which has tolled the running of the limitation period, applies in this case. Accordingly, the limitation period did not expire prior to the request for extradition filed by the United States government.

22. In greater detail, the state argues as follows: first, the Appellant is subject to the principle that "an offender will not benefit from his offense." In fleeing to Israel, the Appellant escaped the fear of justice in the United States for nearly three decades; a fugitive from justice is not entitled to benefit from his escape.

Second, Article 94A of the Criminal Procedure Law embodies the principle that a criminal must not benefit from his flight. The Appellant should be considered a fugitive from justice in the United States and, accordingly, he is "one who evades the law," in the words of the provision in question. The fact that he did not hide within Israel does not negate the fact that he fled the United States law enforcement authorities.

Third, the impossibility of extraditing the Appellant to the United States pursuant to the Convention, prior to its amendment, presented an obstacle to the extradition. Until the amendment of the Convention, there was an absolute impediment to his being brought to trial. That legal impediment was combined with the behavior of the offender himself and, under circumstances of this type, it is not appropriate to enable the Appellant to benefit from the argument of the lapsing of the statute of limitations. Only since 2007, the year in which the Amending Protocol of the Convention went into effect, has it been possible, for the first time, to extradite the Appellant to the United States, and the position that was firmly held by the United States was that, prior to the aforesaid amendment, it was not possible to implement the extradition according to the wording of the Convention up to that time.

Fourth, it is not appropriate to intervene in the attorney general's discretion not to bring the Appellant to trial in Israel, particularly since conducting such a trial in Israel would have been fraught with difficulties. In any event, the United States preferred to hold the trial within the territorial jurisdiction in which the offenses were committed; it should further be recalled that Israel's *in personam*-active

jurisdiction with regard to criminal offenders who have an affinity to Israel, and who have committed offenses outside Israel, is residual by nature.

Fifth, the 1988 amendment to the Penal Law did not eliminate the impediment to extradition, because it did not overlap the offenses of sodomy and rape. Accordingly, this amendment did not affect the definition of "extraditable offenses" in the Convention, until the Convention was amended in 2007. This means that it would have been possible to implement the extradition only after the Convention was amended.

Sixth, the running of the limitation period with regard to the offenses attributed to the Appellant was tolled by a number of investigative operations by the United States authorities, under Articles 9 (C) and (D) of the Criminal Procedure Law. These actions include: a first arrest warrant issued against the Appellant in December 1984; the indictment filed against him in February 1985; an additional arrest warrant issued immediately thereafter; and a federal arrest warrant, also issued that month; in addition, the Red Notice was distributed in July 1987; between 1990 and 1994, contacts with Interpol were initiated by the US authorities to clarify their interest in extraditing the Appellant, and the FBI continued its tracking operations to locate him; in January 1995, the New York police resumed its efforts to locate witnesses; in November 1999, a detective from the New York police force was appointed to investigate the case and a number of actions were performed by him; in July 2000, as a result of information that the Appellant had filed an application for a US passport, the International Department notified Interpol that he was still wanted, and various police efforts were made

(ascertaining that the arrest warrant was up to date, distributing his photograph, and informing the Border Police that his arrival was expected), to ensure that he would be arrested upon his return.

With regard to the Red Notice, the state argues, in detail, that this is not merely an administrative operation, but rather, a material and essential tool for enforcing the law and locating fugitives, which constitutes an "investigation-promoting" operation, as it can lead taking active measures to locate and arrest a person. According to the approach adopted by the state, the gamut of actions described, and especially the Red Notice and the attempt to locate witnesses, are concrete investigative actions, which tolled the running of the limitation period for the purposes of Article 9 (C) of the Criminal Procedure Law. In light of the fact that, between the performance of the last investigative action and the filing of the request for extradition, the limitation period had not yet lapsed, we see that, on the date of the enactment of Article 94A of the Criminal Procedure Law – March 31, 1995 – the limitation period for the offenses attributed to the Appellant had not yet lapsed under the statute of limitations and, accordingly, that provision applies to him. It is further argued that the United States authorities could not have been expected to take more action than they did, and that the fact that, between 1985 and 2007, they refrained from filing pointless requests for the extradition of the Appellant should not be held against them; nor can the authorities in a foreign state be expected to take measures to adapt their extradition laws and proceedings to the statute of limitations in force in Israel, so that, at the appropriate time, a request for extradition they would address to Israel would comply with the requirements of the local law.

Seventh, the state goes on to argue that the European Human Rights Convention is of no avail to the Appellant, in light of his having evaded the law. Furthermore, Israel and the United States have not signed the Convention, and the right to conduct a trial within a reasonable period of time does not apply to a person who has evaded the law.

Eighth, it is argued that, in this case, the conditions for the exception to extradition, which concerns "forgiveness" on the part of the requesting country, pursuant to Article 2B (A) (7) of the Extradition Law, have not been met. "Forgiveness," for the purpose of this exception, must be deliberate and express, and requires a formal legal expression. Without that, it does not exist. In this case, shortly after the Amendment to the Convention Protocol, and once the path had been cleared for it to do so, the United States requested the Appellant's extradition. This indicates that there was no valid "forgiveness" for the purpose of applying the exception. Furthermore, the indictment and the original arrest warrant were not canceled, and the files were closed only "conditionally."

Finally, in the opinion of the state, the extradition of the Appellant is also not contrary to "public policy," nor does it give rise to a valid argument of "abuse of process". The long period of time that elapsed between the perpetration of the offenses and the realization of the extradition does not result from delay but, rather, from a legal impediment, pursuant to the limitations of the Convention of Extradition. The Appellant's flight was what gave rise to the need for his extradition, and the passage of time leading up to the extradition should be evaluated, *inter alia*, against the background of the gravity of the offenses attributed to him.

Supplementary arguments

23. As part of the oral pleadings that were held before us in the appeal, various questions arose which transcended the arguments by the parties. These included the question of the legal effect, in terms of applicability in time, of the 2007 Amendment to the Convention, which led to a change in the definition of "extraditable offenses" in the Convention, and whether it applies to offenses dating from 1984, which are attributed to the Appellant and which, at the time they were perpetrated, were not considered "extraditable offenses" pursuant to the Convention. This question is related to a broader question, pertaining to the applicability in time – retroactive, active or prospective – of amendments of this type to extradition conventions, with regard to offenses that preceded the amendment in question.

24. Counsels for the Appellant, in this context, analyzed the general principles that apply to the retrospective application of legislation, which may presumably be ruled out insofar as it purports to apply to actions that were already completed prior to its enactment, since it leads to a change in the legal outcome of situations that have already concluded. On the other hand, insofar as the purpose of the legislation is to govern an existing and ongoing situation which has not yet been completed, the application is active and prospective, and this does not create any difficulty. In the present case, it has been argued that applying the Amendment to the Convention to the offenses attributed to the Appellant would mean a retrospective application of the Amendment, given that such application affects the criminality of the act, and not only the procedural process that is related to the Extradition Law. The Amendment to the Convention, which changed the definition of

"extraditable offenses," was imposed upon an extradition process that had completely ended prior to the Amendment and, accordingly, it does not apply to this matter as, otherwise, this would mean that it is applied in a wrongfully retrospective manner.

25. The position of the state is that, at the level of substantive law, the condition of "double criminality" for the offenses was met with regard to the offenses committed by the Appellant, even prior to the Amendment to the Convention, because the Extradition Law, as it stood prior to the Amendment, included, in its broad definition of the meaning of the concept of "extraditable offenses," the offenses attributed to the Appellant as well. This means that, at the level of primary legislation, the offenses attributed to the Appellant constituted "extraditable offenses" even prior to the Amendment to the Convention. The legal deficiency, in its entirety, resulted from the narrow definition of the "extraditable offenses" in the Convention, and from that alone. In fact, Article 11 of the protocol of the 2007 Amendment to the Convention expressly states that it is to apply to offenses that were committed both before and after it went into effect. This retrospective application of the Amendment to offenses that were committed prior its going into effect is consistent with Israeli and international law with regard to extradition conventions. In fact, extradition conventions also apply to offenses that were committed prior to their enactment. The provisions of extradition conventions are procedural, rather than substantive by nature, and, accordingly, there is no impediment to applying them retrospectively. The Court must examine whether an extradition convention exists and what its provisions are at the time of the hearing of the request for extradition, in contrast to the question of whether such a convention existed at the time the offenses were committed and what the content of its provisions was at

the time. The definition of the types of "extraditable offenses" is included within the procedural provisions governing the ways of realizing the offender's legal affinity to the requesting country. The extradition process answers the procedural question of how to clarify the criminal liability of an accused for perpetrating the offenses attributed to him in the requesting country. Accordingly, there is nothing wrong with applying the 2007 Amendment to the Convention to the Appellant's case, even though the offenses attributed to him were committed prior to the Amendment, and even though, at the time they were committed, they were not classified as "extraditable offenses" pursuant to the Convention between Israel and the United States.

Motion to permit the filing of a position on behalf of the victims of the offenses

26. A short time after the hearing of the appeal, an organization called "Survivors for Justice", the members of which are survivors of sexual assault in the Orthodox Jewish communities of the United States, and two of its founders, who are among the Appellant's victims (hereinafter: the Applicants), filed a motion to permit them to present the position of the victims of the offenses regarding the harm they would sustain if the appeal were allowed. The motion states that, although the possibility of presenting such a position is not found in the ordinary codes of procedure, hearing the position of the victims of an offense, as part of the judiciary proceeding, is not foreign to the codes of procedure in Israel, especially following the enactment of Basic Law: Human Dignity and Liberty and the Rights of Victims of an Offense Law, 5761-2001 (hereinafter: the Rights of Victims of an Offense Law); it is also possible by virtue of the inherent authority of the Court; and it

cannot violate the rights of the Appellant or the good order of the proceeding, because the balance between the rights of the victims of the offense and the rights of the accused is, in any event, part of the of considerations that the Court must examine in the extradition process.

27. The state and the Appellant are both opposed to this motion.

The state argues that the status of the victims of an offense in extradition proceedings requires separate study and discussion, and that, at this time, this matter is not directly governed by law. This proceeding and all its circumstances is not the proper place to discuss this issue, especially since the victims' position, in the context of the offenses that are the object of the extradition request, was discussed extensively in the state's arguments. Furthermore, both of the pleaders with whom the motion originated are not among the victims of the offenses according to the indictment filed against the Appellant. Accordingly, they do not fall under the definition of "victims of an offense" in this proceeding.

The Appellant also argues that the Applicants do not fall under the definition of "victims of an offense" under the Rights of Victims of an Offense Law. Furthermore, presenting the position of victims of an offense in extradition proceedings is not even possible. According to his argument, even if the Applicants had a recognized status in extradition proceedings under law, their position, as is customary under the Rights of Victims of an Offense Law, is presented through the office of the state attorney, and not directly in pleadings before the Court. Therefore, even though, as a general rule, the position of victims of an offense should be heard, it is not appropriate for it to be heard in this proceeding.

28. The motion should be denied. The status of victims of an offense in extradition proceedings has not been expressly anchored in law and requires separate discussion and clarification. In addition, the Applicants in this case *prima facie* do not meet the definition of "victims of an offense," as this term is used in the Rights of Victims of an Offense Law. In any event, the state, in its extensive argumentation, commented on the harm which was done to the victims of the offenses attributed to the Appellant, pursuant to the indictment which was filed against him. In light of the above, allowing the motion will make no substantive contribution to clarifying the various aspects that arise in this proceeding. Hence, in the context before us, it is also not appropriate to rule on the fundamental aspects of the status of victims of an offense in extradition proceedings.

Discussion and decision

General background

29. An indictment was filed against a person in a certain country in 1985, for grave crimes committed in that country. The person fled to Israel, which has an extradition treaty with the country in question. The extradition proceedings were not executed for 22 years, due to the wording of the convention of extradition between the two countries, which did not contain, within its definition of "extraditable offenses," the offenses specified in the indictment against the person wanted for extradition. The extradition proceedings did not take shape until 2007, the year in which the convention was amended, leading to a change in the definition of "extraditable offenses," to include the offenses in the indictment against the person in question. Is it possible, under those

circumstances, to extradite the accused to the country requesting the extradition, after 22 years have elapsed from the date on which the indictment was filed, when, throughout all that time, he was within the reach of Israel's law-enforcement authorities for the purpose of his extradition? Can an extradition proceeding, under these circumstances, have the strength to withstand the exception to extradition set forth in the Extradition Law, under which a person may not be extradited to the requesting country for an offense that has expired under the statute of limitations stipulated in the laws of the State of Israel? Does such a proceeding have the strength to withstand the exception to extradition, as set forth in the Law, regarding the harm to "public policy," which encompasses, *inter alia*, the principle of "abuse of process" and the accused's right to due process, in view of the large amount of time that has elapsed since the offenses were committed and the indictment filed, and up to the opening of the extradition proceedings? Meanwhile, the question arises as to whether the Amendment to the Convention, by way of changing the definition of "extraditable offenses," constitutes an improper retrospective application, insofar as it is applied to offenses that were committed prior to the change, or whether this is an active application of a contractual arrangement between countries, which is lawfully exercised with regard to offenses that were committed prior to the Amendment to the Convention. These, in essence, are the issues to be decided in the present proceeding.

30. The answer to the above questions is largely affected by an overview of the status and location of the extradition laws in Israel within the overall normative fabric of the Israeli legal system and constitutional law in particular. The harmonious integration of extradition laws within the framework of the basic constitutional principles that establish the

basic rights of mankind to freedom, including freedom from extradition, and the close relationship between the extradition proceedings and criminal law in Israel – both substantive and procedural – have a direct impact on the proper response to the questions before us. In addition to all this, in the interpretation and application of the extradition laws, considerable weight is also given to Israel's obligations vis-à-vis the Convention member states to assist and cooperate in bringing offenders to justice within their territory, as part of its duties as a member of the international community.

On the status of the extradition laws, their purposes and their normative characterization

31. The conceptual basis of Israel's extradition law is founded on three levels. The first level embodies mankind's constitutional right not to be extradited, which is anchored in the Basic Law: Human Dignity and Liberty. Article 5 of the Basic Law states that: "There shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition or otherwise." With these words, the Basic Law declares the constitutional status of mankind's right not to be extradited to another country for the purpose of conducting his criminal trial – a status that requires all government authorities to honor that right (Article 11 of the Basic Law). The Basic Law also states that the restriction of the right to liberty is possible, but subject to the terms and conditions set forth in the limitations clause (Article 8 of the Basic Law). The second level consists of the Extradition Law and the Extradition Regulations (Procedures and Rules of Evidence in Petitions), 5731-1970, which were enacted thereunder. These pieces of legislation jointly create a detailed operational mechanism for the extradition of a person in Israel

to another country, which seeks to bring him before a criminal court in its territory. Article 1 of the Extradition Law states that: "A person located in Israel may only be extradited to another country pursuant to this Law," and other provisions of the Law set forth the preliminary conditions for extradition and the various exceptions to extradition that preclude the extradition of a person to the requesting country. The third level is that of the international conventions that Israel has signed with other countries, which govern the specific extradition relations between the State of Israel and the various countries on the international level. The conventions are given legal status in Israel by virtue of the Extradition Law, Article 2A (A) (1) of which states that a necessary condition for the extradition of a person is that "between the State of Israel and the requesting country, there is an agreement regarding the extradition of offenders" – an agreement that may be bilateral or multilateral, and which may be general, with regard to the extradition of wanted persons in general, or individual, with regard to the extradition of a specific wanted person. In this way, the Extradition Law grants "approval, under domestic law, to the convention of extradition, and makes it – in the words of the Law – a component of Israeli law" (Criminal Appeal 6914/04, Feinberg v. Attorney General, IsrSC 59 (6) 49, 63 (2005), hereinafter: the Feinberg Case). The conventions express the shared desire of the signatory countries for the existence of an operative legal infrastructure, which enables reciprocal cooperation among them in the extradition of offenders (Criminal Appeal 7303/02, Hekesh v. State of Israel, IsrSC 57 (6) 481, 495 (2003), hereinafter: the Hekesh Case). Upon signing, the conventions become an integral part of Israeli law; they are "conditional to the existence of extradition relations,

and are what casts extradition law's substantial content." (Criminal Appeal 4596/05, Rosenstein v. State of Israel, paragraph 15 of the ruling rendered by Justice Levy (unpublished, November 30, 2005), hereinafter: the Rosenstein Case; a petition for an additional hearing was denied: Further Criminal Hearing 11414/05, Rosenstein v. Attorney General (unpublished, January 31, 2006)).

32. In long-term comprehensive case law, this Court has pointed out the various purposes underlying the extradition laws and the great importance inherent in them. The principal purpose of these laws is to give the international community the legal means to contend with the spread of crime throughout the various countries, by way of reciprocal cooperation and assistance to the authorities (Criminal Appeal 6182/98, Sheinbein v. Attorney General, IsrSC 53 (1) 625, 639 (1999), hereinafter: the Sheinbein Case). Associated with this general purpose are additional purposes, primarily that of preventing offenders from evading the law and preventing the transformation of the State of Israel into a shelter for offenders, with the risk that this entails for the well-being and safety of the public in Israel, and in light of the damage to Israel's image in the eyes of other countries, and even in its own eyes (Hekesh Case, at 498). Another purpose involves promoting the principle that a person should be tried according to the most natural legal system under the circumstances of the case, which is indicated by the majority of contacts linking it to the accused and the offenses attributed to him (Rosenstein Case, paragraphs 39-42; Criminal Appeal 250/08, Anonymous v. Attorney General, paragraph 34 (unpublished, March 12, 2009), hereinafter: the Anonymous Case).

33. The general importance entailed in accomplishing all of these purposes becomes even greater in light of the sophistication, organization and complexity that characterize international crime, which has continued to develop over the last few generations. With the development of international access routes and communications, crime tends to cross spatial and national borders and to expand throughout the length and breadth of various countries. International crime, which is becoming more and more frequent, is reflected, *inter alia*, in the offenses of global terrorism, human trafficking, money laundering, trafficking in dangerous drugs, and computer and Internet offenses. These phenomena are increasing in intensity with the development of communications media, accessibility and the opening of borders between countries and areas throughout the world (Rosenstein Case, paragraph 30; Hekesh Case, at 495-496). Under these circumstances, cooperation between legal institutions in the various countries is even more essential in the war on international crime. The extradition laws are one of the means that have acquired unparalleled importance in the war on crime (Rosenstein Case, id.).

34. From the standpoint of domestic law, the extradition proceedings, according to their classification, are considered to be an integral part of the criminal proceeding required to bring a person to justice for his actions. The unique aspect of extradition proceedings is the need to transfer an accused from the territory of the requested country to the territory of the requesting country, for the purpose of bringing him to trial for offenses that have a direct link to the latter country (S.Z. Feller, The Extradition Laws 68 (1980), hereinafter: Feller, Extradition Laws). To wit:

> "A criminal proceeding is any proceeding that is implemented as part of the process of ensuring that the accused is punished for his offense, and extradition is nothing more than a proceeding of this type; the only thing that makes it unique is that the accused is handed over to justice in another country" (S.Z. Feller, "On the Retroactivity of the Extradition Laws and the Impact of Pardon Thereon" [Hebrew], Mishpatim 4 403, 412 (1973), hereinafter: Feller, On Retroactivity).

Extradition is, accordingly, a component in the process of criminal law enforcement, and it is intended, for the establishment of international cooperation, to enable the requesting country to mete out justice to an offender who committed offenses within its territory and to prevent the frustration of criminal law by offenders who flee to the territory of other states. At the same time, it is important to emphasize that the international component that is inherent to the extradition proceeding does not derogate from its nature as a criminal proceeding, which is "a proceeding for the enforcement of the laws of the State of Israel" (HCJ 3992/04, Maimon-Cohen v. Mr. Sylvan Shalom, Minister of Foreign Affairs, IsrSC 59 (1) 49, 57 (2004), hereinafter: the Maimon-Cohen Case). This statement is amply clarified by Prof. Feller in his book:

> "What makes extradition unique, relative to other criminal proceedings, is... that it is an international proceeding; aside from that, however, there is no difference between it and the other measures that are required, in each individual case, as applicable and necessary, in order to try a person for a criminal offense or to enforce the sentence that was passed upon him for that offense" (Feller, Extradition Laws, at 25 and at 71).

In any event, the basic principles of the Israeli legal system, including the protection of the rights of accused persons, on which criminal proceedings are founded, apply to the same extent to extradition proceedings as well.

35. Within the distinction between substantive criminal norms, which establish the framework of criminal liability for an accused, and procedural criminal norms, which have to do with the nature of the criminal proceeding that is designed to enforce the substantive criminal norms, it is customary to classify extradition in the second category. The rules of criminal proceedings establish the patterns for bringing an accused to justice; within those patterns, criminal liability is examined and substantive criminal law is enforced. The extradition laws are part of procedural criminal proceedings (Sheinbein Case, at 659). They govern various aspects related to bringing an offender to justice in the requesting country; the various exceptions to extradition are imposed as part of the requirement for criminal proceedings to ensure fair legal proceedings for the accused (Feller, Extradition Laws, at 67). The extradition laws do not settle the question of a person's criminal liability; rather, they ensure that a proper criminal proceeding will take place, so that it will be possible, within that proceeding, to ascertain the criminal liability, while assisting the international community in its war on crime (Criminal Appeal 3025/00, Harosh v. State of Israel, IsrSC 54 (5) 111, 121 (2000), hereinafter: the Harosh Case; cf. Criminal Appeal 7569/00, Yagodyev v. State of Israel, IsrSC 56 (4) 529, 551-554 (2002), hereinafter: the Yagodyev Case; Rosenstein Case, paragraph 43).

The link between the extradition laws and constitutional law in Israel

36. The right to liberty was recognized as a basic right with a special constitutional status upon the enactment of Basic Law: Human Dignity and Liberty (HCJ 5319/97, Kogan v. Judge Advocate-General, IsrSC 51 (5) 67, 81-82 (1997); Criminal Appeal 4424/98, Silgado v. State of Israel, IsrSC 56 (5) 529 (2002), hereinafter: the Silgado Case; Criminal Appeal 111/99, Schwartz v. State of Israel, IsrSC 54 (2) 241, 272-273 (2000) hereinafter: the Schwartz Case; and, recently, see: HCJ 2605/05, Academic Center of Law and Business v. Minister of Finance, paragraph 20 of the ruling handed down by Supreme Court President Beinisch (unpublished, November 19, 2009)). The prohibition against violation or limitation of liberty, beyond that permitted by the limitations clause, also applies, as set forth above, with regard to extradition proceedings (Articles 5 and 8 of the Basic Law).

37. The right to liberty in the context of extradition proceedings has two principal characteristics. One of these is the right to personal liberty, in the narrow sense of freedom from arrest or imprisonment (Silgado Case, Supreme Court President Barak, at 549). The other is the right to liberty in the broad sense, which extends to a person's freedom of choice, which entitles him to select the environment in which he will live and the social, cultural and legal norms that will apply to him. Liberty, including both aspects, is violated when a person is extradited to another country and subjected to the legal system prevailing in that country (Rosenstein Case, paragraph 37). Criminal law was definitively influenced by the

revolution that took place in the perception of human rights in Israel. This revolution affected the substantive level of criminal law and its pivotal principles, including the principle of legality in criminal matters and the means of punishment; no less importantly, it affected criminal proceedings, the principles of which are closely linked to the protection of individual liberty (Miscellaneous Criminal Motions 537/95, Ghanimat v. State of Israel, IsrSC 49 (3) 355, 421 (1995) (Supreme Court President Barak)). The recognition of the right to personal liberty as a constitutional right has a decisive effect on the interpretation and implementation of the rules of criminal proceedings, with all of the ramifications thereof, including the laws of extradition (Schwartz Case, at 273).

38. Recognition of the constitutional right to individual freedom from extradition has a direct impact on the manner of applying the laws of extradition and the laws that are ancillary to the extradition proceedings:

> "In fact, when we are faced with a norm from the area of extradition law, we must interpret it according to its purpose, as that emerges from the gamut of necessary considerations in the matter. In so doing, we must give consideration to realization of the important public interest embodied in these laws, but also to the fact that freedom from extradition is a basic right which was determined by the Basic Law: Human Dignity and Liberty..." (Sheinbein Case, at 658, 660 (emphasis not in the original); Ghanimat Case, at 412-422).

39. Alongside the constitutional right to individual freedom from extradition is the purpose of the extradition laws, which are founded on Israel's duty to lend a hand in the war on international and transnational

crime, and to comply with the duty of reciprocity in extraditing offenders to the countries in whose territory the offenses were committed.

40. Accordingly, in addition to the important public interest which the laws of extradition are intended to serve – the exercise of active measures toward international cooperation in the area of law enforcement – there is the basic constitutional right of the individual, which is recognized in constitutional law in Israel, to freedom from extradition (Sheinbein Case, at 659-660). Violation of that right, *inter alia* through extradition proceedings, is only permitted insofar as it complies with the test set forth in the limitation clause of the Basic Law – that is: it must be carried out within the Law or pursuant thereto; it must be appropriate to the values of the country; it must be implemented for a proper purpose; and it must not be in excess of that required (Hekesh Case, at 495; Anonymous Case, paragraph 16).

The affinity between the laws of extradition and the overall normative fabric of the law

41. In addition to the necessary link between the laws of extradition and constitutional law, it is also necessary to ensure a harmonious integration of the laws of extradition with the overall normative system of the laws of the State of Israel, including criminal law. The Extradition Law is not "a law that dwells alone"; rather, it lives in its natural environment and constitutes an integral part of the basic values and concepts that underlie the entire legal system:

> "Indeed, presumably the purpose of any piece of legislation is to maintain and promote harmony in the law... The entire system strives to achieve normative harmony" (Aharon

Barak, Interpretation in Law – The Interpretation of Legislation (Volume II) 589-591 (1993), hereinafter: Barak).

Like any piece of legislation, the laws of extradition must also be interpreted and applied with a view to the realization of the basic social concepts and values underlying the legal system. Accordingly, the interpretation of the laws of extradition must be reconciled with the spirit and the basic principles that are common to Israeli society, and which constitute the background for the entire normative method. Accordingly, it has been said that:

> "The general purpose of any piece of legislation is composed of the set of values of the State of Israel. This accounts for the relative nature of the basic principles and the need to create a balance among them, and between them and the specific purpose of any piece of legislation. The Extradition Law must also be interpreted within this framework. The Extradition Law is not a legislative unit that is disconnected from the set of laws and values of the state. Like any law, the Extradition Law is 'a creature that lives in its environment'... It must be interpreted against the background of the values and principles of the legal system in Israel... What is necessary is a balancing and weighing operation, pursuant to which the final purpose and exercise of the Extradition Law in the concrete case will be determined" (HCJ 3261/93, Manning v. Minister of Justice, IsrSC 47 (3) 282, 286 (1993)).

42. In addition to the aim of achieving harmony between the extradition laws and agreements and the entire internal legal system, we must strive to apply the laws of extradition in a way that takes into consideration the international undertakings that Israel has assumed at the level of international law. "A rule of interpretation is that it is necessary and proper to act to bridge the gap between law

and convention, so that the two may live in peace without contradicting each other" (Civil Appeal 1137/93, Eshkar v. Heims, IsrSC 48 (3) 641, 659 (1994), hereinafter: the Eshkar Case; Barak, at 474-477). However, when the two normative systems – domestic and international – cannot be fully reconciled with each other in the area of extradition, preference must be given to the national norm over the international norm. The national norm is the State's source of strength, and its powers and values are derived from it. Its international obligation also results from the national, domestic norm. When the international obligation cannot be reconciled with domestic law and the basic values of the domestic system, the domestic norm will prevail in the conflict between the two systems. Prof. Feller commented on this in his book:

> "It is preferable for the two normative systems to be appropriate to each other, so that, when the second system (the system of norms at the international level – A.P.) is exercised, the obligations and rights of the first (the system of norms at the national level – A.P.) will be fully accomplished. If they are not appropriate in their entirety, the second system will prevail, because the extradition relationship is realized only through the authorities of the states, and they are only subject to the system of norms that are binding upon them, even if the exercise of those norms may give rise to a conflict with undertakings on the level of international relations. ... The origin of the norm with regard to extradition is always national law, even when it draws its content from international law or even from foreign law, because even this drawing itself occurs by virtue of national law. If national law does not enable international law to be fully drawn on it, then, as set forth above, the state authorities must obey the national law, even if this alienates them from an international undertaking" (Feller, Extradition Laws, at 57; emphasis not in the original).

43. Against the background of these "basic guidelines," which define the place and the status of the laws of extradition within the overall normative framework of the law of the country, and against the background of the place and the importance of international extradition treaties to which Israel is a party, and which are intended to integrate Israel into the community of nations of the world in their joint war on crime, we will now go on to analyze the issues that require a response in this proceeding.

The issues for decision

44. Before us are four principal issues that require a decision:

(1) What is the effect of the 2007 Amendment to the Convention of Extradition, from the standpoint of its applicability in time, to offenses that were committed prior to its effectiveness, and that were not included under "extraditable offenses" in the Convention before that time? What is the impact of this on the Appellant in this case?

(2) Should the conduct of the authorities in the United States over the years be viewed as "forgiveness" of the offenses which were committed by the Appellant, in a manner that constitutes an exception to extradition pursuant to the Extradition Law?

(3) Is the Appellant's case subject to the statute of limitations under the laws of Israel, which constitutes an exception to extradition pursuant to the Extradition Law, and does a circumstance which tolls the running of the limitation period apply with regard to him?

(4) Does the extradition of the Appellant, after 22 years have elapsed between the filing date of the indictment against him and the commencement of the extradition proceedings, constitute a violation of "public policy," which is tantamount to a qualification to extradition pursuant to the Extradition Law?

We shall examine each of these questions separately.

The Amendment to the Convention, in terms of applicability in time, and its impact on the Appellant's case

45. The indictment was filed against the Appellant in the United States in 1985, and attributes to the Appellant the perpetration of offenses in the years 1980-1984. At the time when the acts were committed, and at the time when the indictment was filed, the offenses in the indictment were considered to be "extraditable offenses" pursuant to Israel's Extradition Law. However, they were not included under "extraditable offenses" pursuant to the Convention of Extradition between Israel and the United States. Only in 2007 did the Amendment to the Convention become effective, which expanded the definition of "extraditable offenses" to include the offenses that are the object of the indictment in this case. Prior to the Amendment to the Convention, it was not possible to extradite the Appellant from Israel to the United States, because the condition that requires the offenses, which are the object of the extradition, to be "extraditable offenses" under the extradition agreement between the two countries, was not met.

What is the legal effect of the Amendment to the Convention, in terms of its applicability in time, which transformed the offenses attributed to the Appellant into "extraditable offenses" pursuant to the Convention, approximately 23 years after the date on which the acts were perpetrated?

46. The presumption that excludes retrospective legislation is axiomatic in our legal system, as has already been stated: "A major rule in the interpretation of laws is that the provisions of the law are presumed to be directed toward the future and not retroactive, unless a retroactive provision is expressly or clearly implied by the law" (Civil Appeal 27/64, Bader v. Israel Bar Association, IsrSC 18 (1) 295, 300 [1964]; the Harosh Case, at 119; on the presumption and the reasons therefor, see: Barak, at 617-621). The presumption that excludes the retrospective application of a piece of legislation may, therefore, be refuted, insofar as the language and purpose of the law can indicate the retrospective application of the provisions thereof.

47. In the area of penal law, the principle that excludes the retrospective application of a piece of legislation is reconcilable with the principle of legality anchored in Article 1 of the Penal Law, which specifies:

> "No penalty other than according to law
> No offense, and no penalty for an offense, shall exist other than as specified within the Law or pursuant thereto."

The principle of legality in criminal matters is reconcilable with the rule which holds that no retroactive penalties may be applied. Article 3 of the Penal Law states as follows:

> "No retroactive penalty
> 3. (A) Legislation that gives rise to an offense shall not apply to an act that was performed prior to the date of publication of such legislation as a law, or the date it went into effect, whichever is later.
> (B) Legislation that establishes a penalty for an offense that is more severe than the penalty established for said offense at the time it was committed shall not apply to an act that was performed prior to the date of publication of such legislation as a law, or the date it went into effect, whichever is later; however, the updating of the amount of a fine shall not be deemed to constitute the exacerbation of a penalty."

48. How do these general principles affect the question of the applicability in time of the Amendment to the Convention, which led to a change in the definition of "extraditable offenses" pursuant to the Convention, and does it apply to offenses that were perpetrated many years before the Amendment was drawn up and which, at the time they were perpetrated, were not deemed "extraditable offenses" as set forth above?

The answer to this question is a double one:

First, the application of a subsequent amendment to a convention, with regard to offenses that were perpetrated before the amendment was drawn up, does not violate the principle of legality in criminal matters, because that principle, like the principle which dictates "No retroactive penalty," concerns the substantive norms of criminal law

and refers to the aspect of liability in criminal cases, in contrast to proceedings for implementing and enforcing criminal law.

The laws of extradition, including conventions of extradition, constitute part of the set of laws pertaining to criminal proceedings, which establish the rules for bringing an accused to justice in criminal court. They do not pertain to questions of criminal liability. For this reason, the applicability in time of an amendment to a convention, which changes the definition of the concept of "extraditable offenses," to offenses that were committed a long time before the amendment was made, does not conflict with the principle of legality, or to the prohibition against retroactive penalties in criminal cases. Had the laws of extradition affected the criminality of the act, pursuant to the substantive law of the requesting country or the requested country, the application of the amendment to offenses perpetrated in the past might well have violated the principles of legality and of no retroactive penalty. This, however, is not the case with regard to the laws of extradition, which have nothing to do with the level of criminal liability; rather, they concern the procedural process of enforcing criminal law. As a general rule, a pending procedural process that has not yet been completed does not give rise to vested rights or defensible expectations with regard to future changes in the law.

Secondly: the opinion that the laws of extradition may have retrospective application and apply to actions and situations that occurred before they went into effect, has been firmly established for years. In this way, conventions of extradition may apply to accused persons and to offenses that were committed a long time before the conventions were

signed (Yagodyev Case, at 555). The ruling in the Hackstetter Case reads as follows:

> "A well-known rule of international law was that, in the absence of any express provision to the contrary, conventions of extradition are applied retroactively, even with regard to offenses that were committed before they went into effect... We have found various justifications for this in various rulings and books: there are those who say that the duty of extradition is a duty that is incumbent upon the states by virtue of international law, and the conventions are simply intended to determine the ways to perform and uphold that duty; in any event, there is no importance to either the date on which the conventions were signed or the date on which the offenses were committed. There are those who say that, by their very nature, conventions of extradition cannot violate individual rights, because conventions are between states, and their subject matter is nothing more than the reciprocal rights and duties of those states. There are those who say that the prohibition against the retroactive application of the penal laws does not apply to anything other than the legislation of laws that create offenses and impose or increase penalties, and that conventions of extradition, by nature, do not create offenses and do not impose or increase penalties. And some say, that provisions of conventions of extradition are, by their nature,, procedural and not substantive provisions, and a major rule holds that procedural provisions, which have to do with nothing but procedure, apply retroactively even in criminal cases" (Criminal Appeal 557/71, Hackstetter v. State of Israel, IsrSC 26 (1) 241, 244-245 (1972), hereinafter: the Hackstetter Case).

These reasons have been supplemented by the following: "Refraining from a retroactive application of a convention of extradition may damage the core of the extradition laws; on the other hand, applying a convention retroactively cannot in any way harm the legitimate expectations of the states, or

of the individual whom they are seeking to bring to justice" (Yagodyev Case, Justice Heshin, at 556). According to this approach, it was ruled that the Extradition Law and the conventions of extradition apply even to offenses that were committed before the Law was enacted and before the conventions were signed. According to this approach and, *a fortiori*, an amendment to a convention, which changes the definition of an "extraditable offense" in the convention, also applies, from the standpoint of time, to offenses that were perpetrated before the amendment went into force.

49. A different approach to examining the applicability in time of amendments to the Extradition Law and to conventions of extradition, with regard to offenses that were perpetrated prior to said amendments, applies the general presumption against retrospective application of the law to the matter, unless they include a clear and unequivocal provision with regard to the applicability. According to that approach, the presumption excluding retrospective application of the law is a general principle of interpretation, which applies not only to questions of criminal liability, but also to matters of a procedural nature, when the processes in question have already come to an end. As long as the procedural process has not begun, or is pending and has not come to an end, the application of the new law from the standpoint of time is active and not retrospective. Accordingly, in this reality, the existing presumption regarding the exclusion of retrospective application does not apply. Applying the Amendment to the Convention to procedural situations that have not yet come to an end is not retrospective application; rather, it is active application and is not subject to the presumption that negates the application of an amendment to a law or to a convention with regard to offenses committed before the time of the amendment. On the other hand,

applying the amendment to situations that ended before it took effect is, by its nature, retrospective, and – like any other law – requires the existence of an express provision specifying the retroactive application of the amendment, as a precondition for its application in that way. In fact, "the applicability of the Extradition Law, or of the conventions of extradition, is immediate and, therefore, immediately upon taking effect, they enable the initiation of proceedings pursuant thereto, even with regard to offenses that were committed previously, and this does not mean that their applicability is 'retroactive'" (Feller, On Retroactivity, at 410; Harosh Case, at 119-120). This matter was clarified in the Harosh Case (Supreme Court President Barak):

> "In order to succeed in the argument that the new law is retrospective with regard to extradition proceedings – rather than with regard to criminal liability itself – Harosh would have had to indicate that the extradition proceedings before the courts had concluded under the previous law, and that the new law now enabled them to be reopened. He cannot do this, because no extradition proceedings whatsoever were opened before the courts – and, in any event, such proceedings certainly did not come to an end – regarding to Harosh. What we have here is an extradition proceeding that was opened after enactment of the new law. Accordingly, the application of this new law to the extradition of Harosh will not be a retroactive application, but rather, an active one" (id., at 119; emphases not in the original; see also: Yehuda Blum, "On the Question of the Retroactive Application of Extradition Agreements" [Hebrew], Hapraklit 22 316, 317 (1966); and his article on the subject: "Retroactivity of the U.S.-Israel Extradition Treaty," Isr. L. Rev. Vol. 1 356-357 (1966); M. Cherif Bassiouni, *International Extradition – United States Law and Practice* (5th edition, 2007) 141, hereinafter:

Bassiouni; see also: *In the Matter of the Extradition of Ernst* (S.D.N.Y. 1998) U.S. Dist. Lexis 710).

From the general to the specific

50. The object of the Amendment to the Convention on Extradition between the United States and Israel referred to the reclassification of "extraditable offenses." This Amendment was also in line with the provision of the Extradition Law which, as a precondition for extradition, required the accused to have been charged or convicted, in the requesting country, of an "extraditable offense" (Article 2A (A) (2) of the Extradition Law).

An "extraditable offense," for the purpose of the matter at hand, is primarily defined in the Extradition Law itself, which specifies, from the standpoint of domestic law, the offenses that enable extradition under the Israeli legal system. This, however, is not sufficient. Within this framework, it is necessary to attribute concrete significance to the classification of offenses as "extraditable offenses" in the specific convention of extradition between Israel and the other country that signed the convention. As long as an offense has not been defined as an "extraditable offense" in the convention, no extradition can be carried out for said offense, even if it is defined as an "extraditable offense" in the Extradition Law. This means that, in order for an "extraditable offense" to exist, two cumulative criteria are required: the definition of the offense as an "extraditable offense" pursuant to Israel's Extradition Law; and its definition as an "extraditable offense" pursuant to the relevant convention. In this way, the Extradition Law determines the broad "outer circle" for the definition of "extraditable offenses," and the conventions may narrow that circle by specifying, in the "inner circle," which offenses

will be classified as "extraditable offenses" for the purposes of the convention.

51. The Extradition Law was amended in 2001 and established, in Article 2 (A), a broad definition of an "extraditable offense," as "any offense which, had it been committed in Israel, would be punishable by one year's imprisonment or a more severe sentence." This amendment replaced the previous definition that specified certain types of offenses for the purpose of the definition in question. Pursuant to the definitions in the Extradition Law, both originally and following the amendment, the offenses attributed to the Appellant constituted "extraditable offenses." Nonetheless, until the Amendment to the Convention in 2007, the offenses in the indictment against the Appellant did not comply with the definition of "extraditable offenses" pursuant to the Convention. The definition in the "outer circle" complied with the condition, but the definition in the "inner circle," within the confines of the Convention, did not. The 2001 amendment of the Extradition Law did not affect the definition in the Convention, and it was not possible, by way of interpretation, to deduce that, from that time forth and thereafter, the offenses in the indictment also constituted "extraditable offenses" under the Convention. Only in 2007, as a result of the Amendment to the Convention, was a correlation created between the definition of an "extraditable offense" in the Extradition Law and the definition of an "extraditable offense" in the Convention, and only from that stage onward did the initiation of the extradition proceeding become possible.

52. The 2007 Amendment to the Convention, which reclassified the "extraditable offenses," directly concerns the process of enforcement of the criminal norm with regard to the wanted person, but has no impact

on the actual criminal liability attributed to him. Therefore, the effects of the Amendment, from the standpoint of its applicability in time, do not clash with the interpretive presumption that excludes retroactive penal legislation and prohibits violation of the principle of legality in criminal matters. The Amendment to the Convention, in this case, applies actively to an extradition proceeding which, in actual fact, was only initiated as a result of the Amendment, and which waited for the Amendment for many years.

53. It is true that the request for extradition, which was filed in 2007, was not the first measure taken by the United States government, in an attempt to bring about the extradition of the Appellant to its territory. Nonetheless, the first proceeding initiated by the United States in 1985 was a preliminary procedure to extradition, which did not mature into a formal extradition proceeding due to the non-fulfillment of the condition regarding classification of the offenses in the indictment, with which the Appellant was charged, as "extraditable offenses" at the time. Only as a result of the Amendment to the Convention, in 2007, was an extradition proceeding initiated. In this state of affairs, the Amendment to the Convention applies actively, from the standpoint of time, and does not present any difficulty regarding a possible violation of the rights of the accused in this specific context.

54. For the aforementioned reasons, there is nothing wrong with the extradition proceedings, with regard to the Amendment's applicability in time to the offenses in the indictment which are attributed to the Appellant.

An exception to extradition: the "forgiveness" of the requesting country – is that condition fulfilled in this case?

55. Article 2B (A) (7) of the Extradition Law specifies the following:

> Exceptions to extradition
> 2B. (A) A wanted person shall not be extradited to the requesting country in any of the following cases:
> ...
> (7) If the request for extradition was filed as a result of an offense for which the wanted person was pardoned or forgiven in the requesting country.

Is the exception to extradition, with respect to "forgiveness," fulfilled in this case?

56. The obvious answer to this question is in the negative. In order for the exception of "forgiveness" to be fulfilled, the requesting country must clearly and unequivocally make a statement to the effect that it has waived the option of bringing the wanted person to trial, and that it is no longer waiting for an appropriate time to do so. Admittedly, "forgiveness" does not have to be expressed in terms of a declared, overt and explicit act; it may also be learned from the behavior of the requesting country, such as the cancellation of an indictment, the cancellation of arrest warrants, the closure of files, and the avoidance of any action with regard to the investigation and the indictment for many years. The very fact of the filing of an extradition request does not necessarily constitute an indication of the absence of "forgiveness" which, as set forth above, may be learned from the behavior of the requesting country prior to the initiation of the proceeding; otherwise,

there would have been no reason to establish the exception of "forgiveness" in the Extradition Law, which is applicable precisely in cases where a request for extradition has been filed. However, in order for the exception of "forgiveness" to exist in the context of extradition laws, the requesting country is required to exhibit clear and unequivocal behavior, which is not subject to any doubt whatsoever (Criminal Appeal 3439/04, Bazaq (Bouzaglo) v. Attorney General, IsrSC 59 (4) 294, 303-304 (2005), hereinafter: the Bazaq Case; Criminal Appeals 739/07, Efrat v. Attorney General, paragraph 11 (unpublished, June 7, 2007), hereinafter: the Efrat Case).

57. In the case before us, the exception of "forgiveness" was not fulfilled for the purpose of the Appellant's extradition to the United States. No express "forgiveness" was ever given by the United States authorities in the Appellant's case. As for the behavior of the United States – that behavior was composed of various measures taken over the years. True, in 1995, the authorities gradually began to close their pending files. Thus, in January 1995, the New York police file was closed; similarly, in February 1995, the federal arrest warrant was canceled; and in June 1995, the Red Notice was canceled as well. However, the original arrest warrant and the indictment itself have remained pending to this very day and were never canceled.

The circumstances described above do not amount to "forgiveness" for the purpose of the extradition laws. While the United States authorities took measures toward closing files against the Appellant, they nonetheless left certain parts of the criminal procedure untouched – apparently in the expectation that, once the impediment to extradition had been eliminated by means of an appropriate amendment

to the Convention, it would be possible to resume the process. Under those circumstances, the exception of "forgiveness" is not applicable against extradition, and the argument in this regard is denied.

An exception to extradition: the lapsing of the limitation period for the offenses under the laws of the State of Israel – is that condition fulfilled in this case?

58. The Appellant's principal argument is that, because 22 years have passed since the filing of the indictment against him in the United States, the offenses for which his indictment is sought have expired under the statute of limitations pursuant to Israeli law. As such, the request for extradition should be denied, due to the statute of limitations exception, pursuant to Article 2B (A) (6) of the Extradition Law.

59. The Extradition Law states as follows:

> "Exceptions to extradition
> 2B. (A) A wanted person shall not be extradited to the requesting country in any of the following cases:
> ...
> (6) If the request for extradition was filed as a result of an offense or penalty for which the limitation period has lapsed, pursuant to the laws of the State of Israel."

In specifying the lapsing of the offenses or the penalties pursuant to the laws of the State of Israel as an exception that precludes extradition, the Israeli legislators clarified the great importance they attribute to the passage of time between the date of perpetration of the criminal act and the date on which the accused is brought to trial before a criminal court, as a cardinal consideration in protecting the rights of

persons accused in a criminal proceeding within the Israeli legal system. As a value of special constitutional importance, it was applied by Israeli law within the framework of extradition proceedings as well. In so doing, the Israeli legislators emphasized the superiority of the consideration of protecting the rights of accused persons – within the institution of the statute of limitations – even relative to the important values that the institution of extradition seeks to accomplish: international cooperation in the extradition of offenders, as part of the worldwide war on crime. In specifying the exception to the statute of limitations under Israeli law, the Israeli legislators emphasized the existence of the duty of protecting the rights of persons accused in criminal proceedings, according to the values of the domestic legal system, even in the case of an extradition proceeding, which is designed to enable cooperation between countries in enforcing the criminal laws against perpetrators of grave crimes. In the view of the Israeli legislators, not even the importance of the extradition proceedings for the purpose of enforcing criminal norms at the international level, nor the importance of cooperation between the convention member states to achieve the purposes of the extradition laws, has diminished the need to take pains to protect the rights of accused persons from belated law enforcement, which extends beyond the criminal limitation period as defined under Israeli law; in this context, the Israeli legislators have kept in mind the constitutional right to freedom – not only from arrest and imprisonment, but from extradition as well. In this regard, the Israeli legislators gave clear expression to the superiority of the values of the domestic legal system, even relative to Israel's international undertakings vis-à-vis the convention member states, in light of the nature of those values as basic concepts of human rights under prevailing law in Israel. Accordingly, in examining the question of the lapsing of offenses attributed to a person for whom extradition is sought,

it is necessary to clarify whether the offenses have expired according to the concepts of domestic Israeli law, and to accomplish, in interpreting the Extradition Law, the principal purpose for which the exception to the statute of limitations was enacted – the purpose of protecting the right to liberty of a person for whom extradition is sought, after the lapsing of the limitation period between the date of the offense attributed to him and the commencement of the extradition proceedings.

60. The subject of the statute of limitations as an exception to extradition appeared even in the original version of the Extradition Law, in which a "double" test was imposed regarding the statute of limitations. According to that test, the extradition of a wanted person to a requesting country was not possible if the limitation period for "that offense or the penalty imposed upon him has lapsed, under the laws of the requesting country or under the laws of the State of Israel" (Article 8 (2) of the Extradition Law as it was then worded). In 2001, the provision in question was amended; the amendment clarified that, from that time forth, it would not be possible to extradite a wanted person in cases in which the limitation period for the offense attributed to him, or the penalty imposed upon him, had lapsed under the laws of the State of Israel, irrespective of the question of the statute of limitations in the requesting country. The reason for this change was explained in the explanatory note to the Extradition Bill (Amendment 8), 5761-2000, which stated as follows: "It is proposed to establish that the laws of the statute of limitations of the State of Israel alone are what shall prevent the extradition of a wanted person to the requesting country; the legal assumption is that an enlightened state does not demand the extradition of a person unless there is no impediment to the application of its laws to

that person, once he has been extradited" (Bill 154, at 158; Efrat Case, paragraph 4).

61. The exception regarding the statute of limitations has been linked, in the legal literature, to the basic condition for extradition concerning the requirement of "double criminality," i.e.: that it would be possible to bring the wanted person to justice before a criminal court in Israel, had the criminal laws of the State of Israel applied to him. This has been expressed as follows:

> "This basic condition is also reflected in the fact that, if the limitation period for the offense or the penalty has lapsed under Israeli law, the person will not be extradited, although under the laws of the requesting country, the limitation period has not yet lapsed. And the reason for this is that the state should not and cannot extend legal assistance in the form of extradition unless there is complete and simultaneous symmetry, from the standpoint of the right to bring the accused to justice, between the requesting country and the requested country, with the exception of the special factor that conferred jurisdiction for the offense upon the requesting country alone. The conditions for extradition concerning the requested country are no less important than those that concern the requesting country; in fact, quite the opposite is true – they are more important" (Feller, On Retroactivity, at 417; emphases not in the original).

The author further noted:

> "A major rule holds that the authority of the requested country for extradition is subject to its authority with regard to direct adjudication, were the matter in question adjudicable within the state. … The adjudicability of the matter in this country means that an act was an offense in the

> requested country at the time it was committed, and no legal entity has yet intervened that might to expropriate the right to bring the accused to justice for that offense and in that country, were it to have jurisdiction over the act, whether because it was perpetrated within the territory of the country or for any other reason" (id., at 418-419).

The lapsing of the limitation period for the extraditable offenses, or their penalties, pursuant to the concepts of Israeli law is, therefore, an exception to the extradition of the person to the requesting country, which affects the very crux of the judiciary power to institute the extradition proceedings.

62. The question in this case is, therefore, whether, according to the concepts of the Israeli legal system, the limitation period for the offenses in the indictment against the Appellant lapsed prior to the initiation of the extradition proceedings against him in 2007.

More precisely: in examining this question, we may assume that there is ostensibly no procedural barrier, with respect to the statute of limitations, to trying the Appellant in the United States and according to its laws. This may be because of his having evaded the law in the United States, which, according to American law, may toll the running of the limitation period and may not constitute a procedural barrier to bringing the fugitive to justice, even after many years; or it may be because the filing of the indictment in the United States, in and of itself, tolled the running of the limitation period. Given that assumption, we must examine whether the statute of limitations applies to the offenses in the indictment against the Appellant under Israeli law, as this is the meaning of the exception imposed by the statute of limitations on extradition under the

Extradition Law, which requires examination of the statute of limitations under the laws of the State of Israel.

The statute of limitations in criminal cases under the laws of the State of Israel – the law and its purposes

63. The subject of the statute of limitations in criminal cases is governed, under Israeli law, by the provisions of Articles 9 and 10 of the Criminal Procedure Law; Article 9 deals with the lapsing of the limitation period for offenses, and Article 10 deals with the lapsing of the limitation period for penalties. The provisions relevant to this case are those in Articles 9 (A), (C) and (D) of that Law, which state as follows:

> "Lapsing of the limitation period for offenses
> 9. (A) In the absence of another provision in this matter in any other law, a person shall not be tried for an offense if the following periods have lapsed since the date on which it was committed:
>
> (1) For a felony for which the penalty is death or life imprisonment – 20 years.
> (2) For another felony – 10 years.
> (3) For a misdemeanor – five years.
> (4) For a transgression– one year.
> …
>
> (C) For a felony or a misdemeanor, for which, within the periods set forth in subsection (A), a statutory investigation was held, or an indictment was filed, or a proceeding was conducted on behalf of the Court, the counting of the periods shall begin on the last day of the proceeding in the investigation, or on the date of filing of the indictment, or on the last day of the proceeding on behalf of the Court, whichever is later.

> (D) The provisions of subsection (C) shall apply to an extraditable offense for which a request for extradition was submitted to the State of Israel, and any of the actions set forth in said subsection, which was carried out in the requesting country, shall extend the counting of the limitation period for said offense pursuant to this Article, as if it had been carried out in Israel.

64. In Israeli law, the arrangements governing the statute of limitations in criminal matters are characterized by a great degree of rigidity. Criminal law establishes defined periods of limitation for offenses, in accordance with their classification on a scale of severity. Upon the lapsing of these periods, the possibility of enforcing criminal law on the offender is absolutely negated, and the court has no further discretion in this regard: "The lapsing of the limitation period for the offense, as an exception to the realization of criminal liability, blocks any proceeding that is intended to impose criminal liability for an offense that has expired" (S.Z. Feller, Elements of the Penal Laws [Hebrew], Volume II, 637-638 (1987), hereinafter: Feller, Elements of the Penal Laws). The date on which the limitation period for the offense lapses is razor-sharp. On the day before the limitation period lapses, the accused is liable for a criminal offense; on the day thereafter, he is exempt from criminal liability (Criminal Appeal 347/07, Anonymous v. State of Israel, paragraph 8 of the ruling rendered by Justice J. Alon (unpublished, November 18, 2007), hereinafter: the Anonymous Case 2). However, a generally accepted opinion is that the effect of the statute of limitations in criminal matters is "procedural" and not "substantive," and that, as a general rule, an accused may waive the argument, and such a waiver is legally valid (Criminal Appeal 6629/98, Heller v. State of Israel, IsrSC 56 (4) 346, 352-353 (2002)).

65. Setting "razor-sharp" deadlines on the lapsing of limitation periods for offenses may involve a certain degree of arbitrariness. However, it has already been stated that: "This is the fate of times, dimensions, weights, distances and various other measurable concepts, the outermost edges of which are somewhat arbitrary. And this is a known fact" (Bazaq Case, at 307). This rigidity has a clear component of protection of the substantive right to liberty of accused persons, who are entitled to expect that the sword of being brought to justice, hanging over their heads for many years, will be lowered upon the lapsing of a long limitation period, and that they will not be forced to live in fear of being brought to trial for an unlimited period of time.

66. The reasons for setting limitation periods for criminal offenses are complex.

First, from the general public standpoint, the lapsing of the limitation period leads to forgetting and forgiveness, the roots of which are implanted in the passage of time. The more time elapses, the more likely public interest in trying the offender will fade. Time dulls the pain and blunts the significance of the offense (HCJ 1618/97, Sachi v. Municipality of Tel Aviv-Yafo, IsrSC 52 (2) 542, 574 (1998)).

Second, from the standpoint of the accused's interests, it is preferable for the criminal procedure being conducted against him to end quickly. Having the status of a suspect or an accused disrupts a person's life, subjects him to a social stigma and requires him to invest vast resources in conducting his defense. The right of an accused to a rapid

conclusion of his trial has been recognized as a basic right for persons accused in criminal procedures, as part of the constitutional right to liberty. According to the concepts of Israel's legal system, the conclusion of a criminal procedure within a reasonable period of time is considered to be one of the aspects of the constitutional right to a fair criminal proceeding.

Third, another reason for the statute of limitations stems from the interest in clarifying the truth, in view of the fear that, as time passes, evidence is lost and witnesses' memories fade, the ability to clarify the facts will decline. The effect of this reason is palpable vis-à-vis both the accused and the entire public; after all, clarifying the truth in a criminal trial – which means refraining from convicting an innocent person and convicting the person responsible for committing the offense – is a public interest of supreme importance. It is certainly also in the interests of the person who is facing trial.

Fourth, the value of the statute of limitations in criminal cases also involves the aspect of the system-wide benefit, which is derived from the importance of rapid, efficient enforcement of criminal law, as well as from the wish to provide the enforcement authorities with an incentive to conclude the handling of the offenses relatively quickly, in order to clear the way and free up time for the next matters in line (for the entire set of considerations, see: HCJ 6972/96, The Movement for Quality Government v. Attorney General, IsrSC 51 (2) 757, 769-773 (1997), hereinafter: The Movement for Quality Government Case; HCJ 4668/01, MK Yossi Sarid v. Prime Minister, IsrSC 56 (2) 265, 286 (2001); Civil Service Appeal 9223/02, Zaarur v. Civil Service Commission, IsrSC 57 (2) 77, 82 (2003); Criminal Appeal 9657/05,

Anonymous v. State of Israel, paragraph 24 of the ruling handed down by Justice Levy (not yet published, March 3, 2009)).

67. The arrangement governing the statute of limitations for criminal offenses, as established under law, reflects a balance among various considerations that pertain to the public interest as well as to the offender's private interest: "The balancing point is between the basic interest in bringing offenders to trial, the strength of which diminishes over time, and the need for rapid proceedings. The balancing point is also influenced by the effect of the interest in clarifying the truth, which may strengthen or weaken the recognition of the statute of limitations" (The Movement for Quality Government Case, at 774). By virtue of this balance, the law also recognizes various situations that are capable of tolling the running of the limitation period in criminal cases. In fact, the usual starting point in time for the limitation period is the date on which the offense was committed (Article 9 (A) of the Criminal Procedure Law). However, as set forth in Article 9 (C) of that Law, a statutory investigation, the filing of an indictment or a proceeding on behalf of the court may toll the running of the limitation period and to start it running again, whereby these points in time serve as "later starting points for restarting the running of the limitation period" (The Movement for Quality Government Case, Justice Strasberg-Cohen, at 777). With regard to these causes for tolling the running of the limitation period, the following has already been clarified:

> "What interests us is halting the running of the limitation period and absolutely wiping out the period that elapsed,

> and not just delaying the count. Each time one of the 'events' set forth in the article occurs, the counting of the limitation period begins anew. Accordingly, a person who committed an offense will not be able to take shelter under the wings of the statute of limitations unless a limitation period has lapsed which began with the latest of the proceedings set forth in Article 9 (C). A direct result of that is that many more years than those set forth in Article 9 (A) might elapse between the date on which the offense was perpetrated and the filing of an indictment – if investigative procedures are conducted from time to time in the course of those years. All this, of course, applies as long as the time interval between one procedure and the next does not exceed the limitation period" (id., at 765-766).

68. The lapsing of the limitation period under the laws of the State of Israel, for offenses in an indictment for which the extradition of a person located in Israel is sought, blocks the extradition. "The argument of the lapsing of the limitation period is an argument that blocks extradition" (Bazaq Case, Justice Heshin, at 304).

69. The exception to extradition due to the lapsing of the limitation period for the offenses under Israeli law, is not only rooted in the concept that it is necessary to protect the accused's right to a fair criminal proceeding. Rather, it is also compatible with the principle of "double criminality," which is a basic principle of the laws of extradition. As set forth above, one of the conditions for extradition is that a person must have been charged or convicted of an "extraditable offense" in the requesting country (Article 2A (A) (2) of the Extradition Law), and an "extraditable offense" is defined as an offense which, had it been committed in Israel, would have been punishable by one year's imprisonment or a more severe sentence (Article 2 (A) of the Law). The principle of "double criminality" is not realized in its entirety when, in the requested country – Israel – it is not possible to try the person in a

criminal court, due to the lapsing of the limitation period for the offenses attributed to him, even if the presumption is that the lapsing of the limitation period does not wipe out the offenses, but merely constitutes a barrier to trying him for them. The principle of "double criminality" is not limited solely to the existence of the accused's dual criminal liability according to the laws of the requesting country and the requested country. It is also necessary for there to be, under both legal systems, a real ability to try him before a criminal court in each of the two countries. Thus, if it is not possible to bring an accused to trial before a criminal court in Israel, he must not be extradited to the requesting country, even if there is no limitation on the ability to hold his trial in that state. This applies, *inter alia*, to the lapsing of the limitation period for offenses. Prof. Feller comments on this as follows:

> "A minimal basic condition, which exists in any normative system with regard to extradition, is that a person must not be extradited unless it would have been possible to try him in Israel, had the criminal laws of the State of Israel applied to him; ... A direct result of this is that, if there were any impediment to the initiation of criminal proceedings against the wanted person, were he to be brought to justice for the same offense under the laws of the State of Israel, the state is not entitled to lend a hand, through the use of extradition proceedings, to another country, thereby enabling the other country to initiate criminal proceedings against him. The scope of the authority of the requested country for extradition is subject to the scope of its authority with regard to direct adjudication, if the wanted person was subject to adjudication in that country for the offense for which the extradition is sought" (Feller, On Retroactivity, at 417; emphasis in the original).

70. Hence, in cases where the limitation period has lapsed under Israeli law for the offenses in an indictment that are attributed to an

accused, and those offenses are no longer punishable under that law, Israel is not entitled to initiate extradition proceedings for such a wanted person. This is because there is an impediment that prevents Israel itself from initiating a criminal proceeding on Israeli territory against such a person, and the impediment originates in the lapsing of the limitation period for the offenses under the statute of limitations. In any event, the requirement of "double criminality," which is a precondition for extradition, is not met.

Actions that toll the running of the limitation period in criminal cases

71. Article 9 (C) of the Criminal Procedure Law enumerates various causes that toll the running of the limitation period for offenses under Israeli law. These causes are a statutory investigation, the filing of an indictment or a proceeding on behalf of a court. Article 9 (D) of the Criminal Procedure Law specifies that these causes also apply with regard to extradition, insofar as they apply with regard to the requesting country. The law creates an equivalency, for the purpose of extradition, between actions that toll the running of the limitation period in a criminal procedure in Israel and identical tolling actions that take place in the requesting country. From this point of view, the public interest in enforcing criminal law on the accused is given priority over the interest of such an accused in the rapid completion of the proceeding in his case; this priority is based on recognition of the need to give law enforcement authorities effective tools for taking measures aimed at bringing offenders to justice, and on the understanding that, at times, the authorities encounter difficulties in solving crimes and collecting the evidence required for the purposes of the trial, and that time – occasionally, even a

long time – is required for the completion of these actions. This is the case with regard to trials in Israel, and also with regard to extradition proceedings, when the actions involved in the investigation and the trial are carried out in the requesting country. The situations that toll the running of the limitation period pursuant to Article 9 (C) of the Criminal Procedure Law are intended to give law enforcement authorities the possibility of doing their work unhampered by the constraints of the statute of limitations throughout the police investigations, throughout the actions implemented by the prosecution for the purpose of filing an indictment, and throughout the legal proceedings thereafter. To enable the authorities to enforce the law, priority was given to ensuring that the accused are prosecuted to the full extent of the law, over the value of preventing a delay in justice for the accused. All this applies as long as such actions are being implemented and proceedings are taking place in a manner that justifies the delay. However, when the investigative actions have been completed and an indictment has been filed, and no further investigative actions are performed, and yet no judiciary proceedings are taking place, the limitation period begins anew on the date of filing the indictment.

72. The interpretation of the term "investigative actions", for the purpose of tolling the running of the limitation period, calls for adherence to the true purpose for which the authorities were given an extended period of time to act, without the fear that the limitation period for the offenses would lapse. This interpretation does not allow the term in question to be stretched beyond its boundaries, in order to obtain an improper extension at the expense of the basic right of the subject or the accused to

a rapid and proper criminal proceeding which will fully examine the question of his criminal liability.

73. The meaning of the term "a statutory investigation," as an act that tolls the running of the limitation period in criminal cases pursuant to Article 9 (C) of the Criminal Procedure Law, has been discussed extensively in case law. It has been emphasized that an investigative action as set forth above must be a genuine action, rather than a pointless proceeding, which is solely intended for the purpose of tolling the running of the limitation period, and an administrative procedure that amounts to no more than preparation for an investigation is not sufficient. The proceeding that must take place is one that reflects a genuine act that prepares the future criminal action (Criminal Appeal 207/56, Sawitat v. Attorney General, IsrSC 11 (1) 518, 523-524 (1957); Criminal Appeal 309/78, Barami v. State of Israel, IsrSC 33 (1) 576, 577-578 (1979), hereinafter: the Barami Case; Criminal Appeal 211/79, Gazit & Shaham Construction Co. Ltd. v. State of Israel, IsrSC 34 (1) 716, 720-722 (1979), hereinafter: the Gazit & Shaham Case; Leave for Appeal 268/85, Habasha v. State of Israel, IsrSC 39 (2) 335, 336 (1985); Leave for Appeal 1596/98, Halil v. State of Israel (unpublished, May 5, 1998); Criminal Appeal 4745/97, Bonei Habira Ltd. v. State of Israel, IsrSC 52 (3) 766, 786-787 (1998); Anonymous Case 2 and references id.). The various aspects of case law in this regard were recently summarized by Kedmi in his book; the highlights of that summary are as follows:

> "A statutory investigation, in this context, may be an investigation by the police, and it may be by any person or entity with the statutory power to conduct an investigation

> for that offense, provided that the investigation in question is intended to prepare the criminal action in connection with that offense. The filing of the complaint, in and of itself, does not constitute an investigative procedure, nor does it entail the opening of an investigation; an investigative procedure must be "an official, substantive and practical proceeding, rather than mere 'preliminary clarifications' or 'collection of information', which do not entail the performance of true investigative actions" (Jacob Kedmi, On Criminal Procedure [Hebrew], Part II 1322 (2009) and references id.; for a review of case law on this subject, see also: Zalman Yehudai, The Laws of the Statute of Limitations in Israel [Hebrew], Volume I 364-370 (1991); cf. Bazaq Case, at 306-307; Criminal Appeal 7014/06, State of Israel v. Limor, paragraph 50 (unpublished, September 4, 2007), hereinafter: the Limor Case).

74. An investigative action, which can toll the running of the limitation period, is therefore characterized by a real action that prepares and promotes the criminal action. It consists mainly of the collection of evidence. In most cases, this is implemented prior to the filing of an indictment. The performance of investigative actions after the filing of an indictment is a non-routine procedure, which is intended to complement an investigation that was already performed, when new material is discovered or new channels for investigation are opened, which had not been known previously, or when witnesses are discovered who had not been available at an earlier stage. Various actions on behalf of the prosecution following the completion of the investigation, which are not related to the investigation and are not intended to promote it, will not be considered investigative actions for the purpose of tolling the running of the limitation period. Various actions performed by the prosecution following the filing of an indictment, which are intended to locate the offender or to bring him to justice, are not defined as investigative actions. Should new investigative actions be performed in the course of

the legal proceeding, they are, in any event, encompassed within it, in view of its nature as an act that tolls the running of the limitation period, whereby a new limitation period begins only upon the conclusion of the judicial proceeding.

75. The statute of limitations in criminal cases is one of the important procedural rights of the accused, within the framework of his constitutional right to liberty, granted to him by constitutional law. The tolling of the limitation period, following one of the aforementioned events, enables an extension, and at times a considerable extension, of the period within which criminal proceedings may be initiated against the accused. By its very nature, it violates his constitutional right; therefore, it must be proportional and must serve a proper purpose. Interpretation of the question of the concrete existence of events that toll the running of the limitation period is cautious and tends to be restrictive, in light of the impact of those events on the accused's basic right to liberty. The burden of proof for the existence of such events is incumbent upon the prosecution, and doubt in these matters works in favor of the accused:

> "Once the limitation period set forth under law had lapsed, ... the state was required to prove that, within that period, the running of the limitation period was tolled by the opening of an investigation... and because it did not meet that burden, the accused is entitled to benefit from the passage of time" (Barami Case, at 578, emphasis not in the original; see also: Gazit & Shaham Case, at 721; Anonymous Case 2; Articles 34U and 34V of the Penal Law).

From the general to the specific: application of the provisions governing the statute of limitations, pursuant to Article 9 of the Criminal Procedure Law, to the Appellant

76. The offenses attributed to the Appellant in the indictment that was filed against him in the United States are felonies. Accordingly, pursuant to Article 9 (A) (2) of the Criminal Procedure Law, the limitation period for them is 10 years. The indictment attributes to the Appellant sexual offenses committed during the years 1980-1984; on the other hand, the request for extradition on behalf of the United States was filed in 2007. In actual fact, two limitation periods had lapsed, one after the other, between the time the offenses were committed and the initiation of the extradition proceeding, without the Appellant having been brought to trial. The first period began in 1984, at the time the last of the offenses was committed, and ended in 1994; thereafter, an additional limitation period lapsed between 1995 and 2005. After the end of the second limitation period, two more years went by before the initiation of the extradition proceedings in 2007, which opened a third limitation period in this case.

During this long period of time, since the offenses attributed to the Appellant were committed, was the limitation period tolled by one of the tolling actions set forth in Article 9 (C) of the Criminal Procedure Law?

77. It appears that the only action that may be defined as tolling the running of the limitation period is the action related to the filing of the indictment in the United States in 1985, following the conclusion of the investigations by the American investigative authorities. Following the filing of the indictment, various actions were implemented by the American authorities in connection with trying the Appellant before a criminal court. These actions, however, were not investigative procedures or proceedings on behalf of the court, as these terms are used in Article 9

(C) of the Criminal Procedure Law, which may postpone the running of the limitation period to a date later than the date of filing the indictment in 1985, after which a new counting of the period since perpetration of the offenses began.

78. The extradition proceedings in the Appellant's case were actually blocked due to non-fulfillment of the condition under extradition law, whereby the offenses in the indictment must constitute "extraditable offenses" pursuant to the Convention, until the Convention was amended. During the resultant period of the impediment to extradition, various actions were, in fact, implemented by the United States authorities with a view to bringing the Appellant to justice before a criminal court; these, however, do not constitute actions that toll the running of the limitation period pursuant to Article 9 (C) of the Criminal Procedure Law, nor do they comply with the concept of "statutory investigation" or "proceeding on behalf of the Court," which toll the running of the limitation period, pursuant to the aforementioned provision.

79. Thus, the issue of the original warrant for the Appellant's arrest, along with the filing of the indictment, does not constitute an "investigative action"; rather, it is an outcome derived from a completed investigation. The Red Notice, which was issued by Interpol, is not a "statutory investigation"; rather, it is a request to the various countries to arrest the Appellant in order to enable his extradition to the United States and his trial on United States soil. This is not an investigative action; rather, it is an action by an international law enforcement authority aimed at achieving the arrest of the Appellant and bringing him to trial in the United States. Giving a broad interpretation to the Red Notice as an action that constitutes a "statutory investigation" cannot be reconciled

with the purpose of the provision, nor is it in line with the duty of restrictive interpretation of the causes that toll the running of the limitation period pursuant to Article 9 (C) of the Criminal Procedure Law, in their capacity as exceptions that extend the limitation period, and thereby violate the accused's right to freedom from criminal proceedings and extradition. In fact:

> "Giving a broad interpretation to the expression 'investigation' for the purpose of setting a starting date for the running of the limitation period, in such a case, would give rise to a situation where society would 'place a person in the dock' approximately a decade after the perpetration of the offenses attributed to him, although his trial had not yet begun. It is difficult to imagine a greater distortion of justice" (The Movement for Quality Government Case, at 788).

And if this was said of a period of approximately 10 years, it must apply *a fortiori* when the period in question is more than two decades, as in the present case.

80. As for other actions that were implemented by the authorities in the United States from the filing of the indictment to the opening of the extradition proceedings – these, too, do not come under "investigative actions" that are capable of tolling the running of the limitation period. They are actions by the American law enforcement authorities that were intended to lead to the implementation of the criminal proceeding by extraditing the Appellant to United States territory. These actions are not "investigatory," nor are they a "proceeding on behalf of the court," both of which toll the running of the limitation period. The extradition proceeding that was initiated in 2007 might have halted the limitation period as a tolling event, had it not been initiated after two – and even

more than two – cumulative limitation periods had lapsed, whereby the event that begins the counting is the date of filing the indictment, in 1985. In any event, a considerable part of the actions that were performed by the American administrative authorities in the Appellant's case, even were they to be considered as investigative actions, were conducted after February 1995, i.e., after the first limitation period for the offenses had come to an end. Under these circumstances, these actions obviously could not extend a limitation period that had expired even before they were implemented.

81. That set forth above indicates that the limitation period in criminal law, which began running on the date of perpetration of the offenses attributed to the accused, was tolled by the filing of the indictment against him, which followed the completion of the investigative actions. Starting on the date of the filing of the indictment, a new limitation period began to run. After the filing of the indictment, no additional investigative actions were implemented and no legal proceedings were conducted in the Appellant's case – because no extradition proceedings against him were possible, due to the definition of "extraditable offenses" in the Convention at the time, which did not extend to the offenses in the indictment against the Appellant. All the measures taken by the United States authorities and by Interpol after the filing of the indictment – including the arrest warrants that were issued, some of which were canceled – did not constitute "investigative" measures that toll the running of the limitation period; rather, they were actions that were intended "to keep the Appellant's case alive," based on the expectation that, at some future time, his extradition would become possible, if and when the Convention was amended.

The starting date for the running of the limitation period, in this case, following the completion of the investigative actions, therefore occurred on the date of the filing of the indictment against the Appellant in 1985. Since then, no tolling events have taken place. Meanwhile, more than two limitation periods of 10 years each have lapsed.

82. Ostensibly, this conclusion would be sufficient to conclude this Appeal with the outcome that the charges in the indictment against the Appellant are subject to the statute of limitations pursuant to the laws of the State of Israel and that, accordingly, an exception to extradition exists, which prevents extradition under law, and the requirement for "double criminality," which constitutes a precondition for extradition, is not fulfilled.

However, the events that toll the running of the limitation period under Article 9 (C) of the Criminal Procedure Law have been supplemented, pursuant to the ruling rendered by the lower court, by additional tolling causes, one of which is a cause in case law, and the other is a statutory cause. These additional causes led the Court to the conclusion that the limitation period was halted due to an "inability to act," until 2007. The first cause is drawn from general law and dictates the suspension of the limitation period in cases where an impediment in law or in fact precludes the exercise of criminal law. The second, statutory, cause concerns the tolling of the running of the limitation period by virtue of Article 94A of the Criminal Procedure Law, which deals with the suspension of criminal procedures in cases where an accused has evaded the law, until it is possible to bring him to the continuation of his trial and to resume the procedures against him.

We shall discuss these cases, one after the other, and examine whether they are capable of tolling the running of the limitation period under Israeli law, in such a way as to rule out the existence of the exception based on the statute of limitations with regard to the Appellant's extradition.

The principle of "inability to act" as a cause that tolls the running of the limitation period in criminal cases

83. A detailed statutory arrangement is provided in the Statute of Limitations Law, 5718-1958 for the statute of limitations in causes of action under civil law. That law sets forth various situations in which the limitation period is tolled and then restarted: deception and fraud (Article 7); uninformed limitation (Article 8); admission of the existence of a right (Article 9); minority (Article 10); mental illness (Article 11); guardianship (Article 12); marriage (Article 13); an action that was denied (Article 15); time spent outside of Israel (Article 14); and the closure of the courts (Article 17).

84. Unlike the statute of limitations under civil law, the statute of limitations in criminal cases, which is principally founded on Article 9 of the Criminal Procedure Law, does not have an all-inclusive arrangement, which takes into account various situations of impediment that prevent the law enforcement authority from acting for the promotion of the criminal proceeding, for the purpose of calculating the limitation period, over and above the three tolling actions which are specifically mentioned in Article 9 (C) of the Criminal Procedure Law.

85. There is an opinion, which has been expressed in various contexts, that it is possible to supplement the statute of limitations arrangement, which appears in Article 9 (C) of the Criminal Procedure Law, and which deals with tolling events, through the application of a general principle, which has not yet been set forth in written law. According to that principle, in cases where the competent authority has no possibility of promoting criminal proceedings due to an impediment beyond its control, this will have the effect of tolling the limitation period, the counting of which will resume when the impediment is eliminated. Prof. Feller commented on this in his book:

> "These are situations in which, whether by virtue of the law or by virtue of an uncontrollable event, the competent authorities have no possibility of conducting proceedings to promote the realization of criminal liability – in which there is no possibility of conducting an investigation or a trial, or of taking measures toward the enforcement of the penalty. The consideration of passivity on the part of the authorities, which did not do what was incumbent upon them to do at the proper time to promote the criminal proceedings, including the proceedings for the enforcement of a penalty – a consideration that is included among the considerations for recognition of the statute of limitations as an exception to the realization of criminal liability – is not present in those situations. Therefore, the law requires that the limitation period be impeded for the interval of time throughout which the situation in question prevails. The statute of limitations does not work against those who are incapable of acting – *contra non valentem agere non currit praescriptio*" (Feller, Elements of the Penal Laws, at 640).

This idea was mentioned in the Amitai Case, in which President Barak pointed out that, by contrast to the statute of limitations under civil law, no comprehensive arrangement governing the statute of limitations has been enacted in criminal law, and stated that, along with

the statutory provision on limitations in Article 9 of the Criminal Procedure Law, general situations have been recognized in which the running of the limitation period in criminal cases is suspended:

> "Unlike the statute of limitations under civil law – which is anchored in the Statute of Limitations Law, 5718-1958 – the Criminal Procedure Law contains no general provisions with regard to the laws governing the statute of limitations. It would be appropriate, in the future, to develop a general doctrine of limitation in criminal cases, in which it will be possible to draw inferences, in similar matters, from the civil laws governing the statute of limitations. Be that as it may, situations have been recognized in which the running of the limitation period is suspended. These include situations that, for one reason or another, preclude the possibility of conducting an investigation, filing an indictment or holding a proceeding on behalf of the court. The rule is that the statute of limitations is suspended against those who are incapable of acting: *contra non valentem agere non currit praescriptio*... A typical case in such situations is one in which a person is entitled to procedural immunity, which does not allow for an investigation or filing an indictment and, in any event, also does not allow for a proceeding on behalf of the court. This, for example, is the situation with regard to the president of the state (see Article 14 of Basic Law: the president of the state). This is the situation with regard to a member of Knesset" (HCJ 3966/98, Amitai – Citizens for Proper Administration and Integrity v. Knesset Committee, IsrSC 52 (3) 529, 545 (1998)).

86. Criminal law in Israel recognizes express statutory arrangements that toll the running of the limitation period due to an inability to act on the part of the authority. Arrangements are recognized that confer immunity upon officeholders, on whom criminal law cannot be enforced throughout their term in office (Basic Law: the President of the State; Immunity, Rights and Duties of Members of Knesset Law, 5711-1951; with regard to the statutory immunity to trial of the

president of the state, see: HCJ 962/07, Liran v. Attorney General, paragraphs 26-49 (unpublished, April 1, 2007); HCJ 5699/07, Anonymous (A.) v. Attorney General, paragraphs 21-24 of the ruling rendered by Justice Levy (unpublished, February 26, 2008)). The Extradition Law itself also suspends the limitation period according to Israeli law for the purpose of hearing a petition for extradition if the person wanted for extradition is serving a sentence in Israel for another offense (Article 11 of the Extradition Law; see also: Article 41 of the Military Jurisdiction Law, 5715-1955).

87. However, according to the position expressed by Prof. Feller, there is no need for a statutory provision to toll the running of the limitation period in criminal cases, when there is an impediment that prevents the authority from acting (Feller, Elements of the Penal Laws, at 642). The causes of impediment also include factual situations of force majeure, which prevent the state from acting to bring a suspect to trial for offenses. As he says:

> "The statute of limitations does not act against a society, the organized strength of which is paralyzed; or at least, not at the level of realization of criminal liability, when it is not capable of enforcing its penal laws on those who have violated them" (id., loc. cit.)

In this context, examples are cited that include the takeover of the state by a foreign power, the occurrence of natural disasters, which prevent the administration from acting, the long-term hospitalization of a person for mental illness, and the like. This approach is accompanied by a warning (id., at 643):

> "Because these are factual situations, there is no possibility of drawing up an exhaustive list. It is, however, fitting and proper to consider them conscientiously, so as not to make a mockery of the statute of limitations, by defining any event or any factual obstacle that delayed the procedures as a cause for tolling the limitation period. Acting in such a way could eliminate the statute of limitations entirely. Only weighty factual situations, which paralyze the activity of the state mechanism as a whole, or with regard to a certain type of cases, and which cannot be overcome except by postponing the procedures – only such exceptional situations should be considered as causes for tolling limitation periods by the interval of time during which the mechanism was not capable of coping with them" (emphasis not in the original).

88. The principle of the "inability to act" – whether under law or as the result of a factual situation in the realm of force majeure – has not been extensively applied in Israeli law, insofar as it transcends the express statutory arrangements in these matters. The reason for this is clear: the application of a general principle of this type, with no express arrangement under law, would mean giving law enforcement authorities the means to significantly expand the extent of the limitation period in criminal cases, while directly violating a person's legitimate expectation not to be brought to trial following the lapsing of the statutory limitation period. The application of the principle of "inability to act" following the enactment of the Basic Law: Human Dignity and Liberty – which recognized the supreme status of the human right not to be arrested or imprisoned, and not to be extradited, other than in accordance with law, whereby the harm inflicted by said law complies with the tests of the limitation clause – is fraught with difficulties. There is an obvious difficulty in imposing a general theory of "inability to act" in order to toll the running of the limitation period, when that theory is not anchored in

law, no clear criteria for imposing it have been formulated, it involves uncertainty and can be predicted only with difficulty and, in any event, it is prejudicial to the accused. I believe it is highly questionable whether the principle of "inability to act," as an extra-statutory factor that tolls the limitation period in criminal cases, complies with the test of constitutionality in the limitation clause of the Basic Law, as long as that principle is not directly governed by law and its legality has not been examined on the merits. In this context, the question even arises as to how it is possible to reconcile the arrangement that governs the statute of limitations under civil law – regarding which, although it does not involve the violation of human rights and liberty, the legislators listed each and every one of the causes for delaying the limitation period – with the arrangement that governs the statute of limitations under criminal law. The latter directly affects the human right to freedom from trial, for which causes for delay, which are not mentioned anywhere under law, have been claimed, although the application of such causes would constitute a real violation of an accused's expectation of release from the fear of being brought to justice. Is it even conceivable, in a constitutional regime, to exercise a general and undefined principle that is not anchored in law, in order to significantly expand the limitation period in criminal cases, while thereby directly harming the suspect or the accused?

89. What ever the answer to this question may be – and we are not required to answer it in this case – the circumstances of the Appellant's case do not constitute an "inability to act," either under law, by virtue of the facts, or by virtue of force majeure, and are, therefore, not capable of tolling the running of the limitation period in order to bring him to trial before a criminal court or to extradite him. This is certainly the case when the general principle of "inability to act" is implied by way of the narrow

interpretation required by its inherent violation of the right of suspects and accuseds not to be subjected to the "sword of Damocles" of criminal procedures for periods longer than the limitation period, as the latter is defined in Article 9 of the Criminal Procedure Law, including the events defined therein as tolling events.

90. What is the nature of the true impediment in this case, which caused the criminal proceedings against the Appellant to be frozen for 22 years, since the filing of the indictment against him? The direct and clear answer to this is the phrasing of the Convention of Extradition between the United States and Israel, in which, prior to its amendment, the definition of "extraditable offenses" did not include the offenses in the indictment against the Appellant.

91. As set forth above, pursuant to the Extradition Law, one of the preconditions for the extradition of a wanted person from Israel to the requesting country is that the person must have been charged or convicted in the requesting country of an "extraditable offense" (Article 2A (A) (2) of the Extradition Law). The Extradition Law, in its original format, dating from 1954, and following the amendment thereto in 2001, provided a broad definition of the term "extraditable offenses," thereby creating a general framework of offenses from which the signatory states were required to select the specific "extraditable offenses" and to define them in an agreement between them for the extradition of offenders. Throughout the entire effective period of the Extradition Law, the definition of "extraditable offenses" thereunder included the offenses in the indictment against the Appellant.

The Convention of Extradition between Israel and the United States is the only thing that gave rise to a legal impediment that precluded the extradition of the Appellant, until 2007. Under Article 2 of the Extradition Law in its original version, an extraditable offense was any offense that "is not of a diplomatic nature and which, had it been committed in Israel, would have been one of the offenses included in the Addendum to this Law." Pursuant to the Addendum to the Law, any offense for which it was possible to impose the death penalty or imprisonment for a period greater than three years was considered an extraditable offense (subject to exceptions that are not relevant to this case; Article (A) of the Addendum). Also considered as extraditable offenses were specific offenses pursuant to the Amendment to the Penal Code Law (Bribery Offenses), 5712-1952, and pursuant to the Criminal Law Ordinance, 1936, which were expressly listed in the Addendum, although the penalties therefor are lighter than those set forth above (Article (B) of the Addendum). Because the sexual offenses attributed to the Appellant are offenses for which the maximum penalty set forth in the Penal Law is more than three years' imprisonment (for example, the penalty prescribed for an act of sodomy is 14 years' imprisonment), the offenses in the indictment against the Appellant, even according to the original version of the Extradition Law, were considered "extraditable offenses" under that Law. This situation remained unchanged following the amendment of the Extradition Law in 2001, when the Addendum to the Law was rescinded and the definition of an "extraditable offense" was rephrased as "any offense which, had it been committed in Israel, would be punishable by one year's imprisonment or a more severe sentence." The only impediment to the extradition of the Appellant, throughout the years, lay in the phrasing of the Convention of Extradition between Israel and the United States, which, until the

Amending Protocol went into effect in 2007, included a list of only about 30 offenses for which extradition was possible. These included the offense of rape, but did not include the offense of sodomy.

The definition of "extraditable offenses" in the version of the Convention of Extradition between the United States and Israel that was valid until 2007 therefore did not include the offenses in the indictment against the Appellant. For this reason, the United States did not file a formal request for extradition with the Israeli authorities until the Convention was amended, and Israel, for its part, did not comply with the request by the United States in 1985 to arrest the Appellant. Both parties recognized the fact that the Convention, in its format at the time, and as long as it remained unamended, did not fulfill a substantive condition for the extradition of the Appellant to the United States.

92. For the purposes of this case, it may be assumed that the 1988 amendment to Israel's Penal Law did not change the legal situation, whereby it was still not possible to extradite the Appellant to the United States, as long as the definition of "extraditable offenses" in the Convention had not been amended. The aforesaid amendment did not establish complete equivalency between offenses of sodomy and offenses of rape, and as long as offenses of sodomy were not included among the "extraditable offenses" pursuant to the Convention, the impediment to extradition remained in force.

Only in 2007 did the Amendment to the Convention go into effect, thereby comprehensively changing the definition of "extraditable offenses" in the Convention to include, from that time forth, the offense of sodomy. From that point onward, the path had ostensibly been cleared

for the extradition of the Appellant to the United States, with regard to the classification of the offenses in the indictment against the Appellant as "extraditable offenses."

93. As shown by the circumstances described above, no amendment to the Extradition Law was required in order to include the offenses in the indictment against the Appellant within the set of "extraditable offenses" pursuant to the Law. All that was needed, in order to make the extradition possible, was an amendment to the Convention of Extradition, so as to change the definition of an "extraditable offense" therein. Does the impediment to extraditing the Appellant pursuant to the Convention, prior to its amendment, constitute a recognized cause, by virtue of general law, which is capable of tolling the running of the limitation period in criminal cases and restarting it as of the Amendment to the Convention in 2007? The obvious answer to this question is in the negative.

94. The governments of the United States and Israel are sovereign governments, which have the ability and the power to formulate extradition agreements between them, and to modify and amend such agreements as required and dictated by the reality of life. Modifications and amendments to extradition agreements are implemented by the relevant governments, and those governments do not depend on any other entity for that purpose. Furthermore, in this case, no argument has been raised, or even alluded to, with regard to the existence of any objective impediment that kept the governments from amending the Convention prior to 2007. The Amendment to the Convention of Extradition between Israel and the United States, for the purpose of expanding the definition of "extraditable offenses," which was enacted in 2007, could have been enacted at a much earlier stage, and even within the limitation period of

10 years, which applies in Israel to criminal cases, as soon as the countries involved realized that offenses of sodomy – which are considered grave crimes – were not included in the definition of "extraditable offenses" in the Convention. It is difficult to attribute to the governments of Israel and the United States any "inability to act" that tolls the limitation period, when the ability, the power and the authority to eliminate the impediment, by means of a proper amendment to the Convention of Extradition, were in their hands, and in their hands alone. Let us imagine that the countries that were parties to the Convention in question had decided to amend it 50 years after the date the indictment was filed against the Appellant. Would anyone have dared to argue that the limitation period was tolled for 50 years due to "inability to act," and that it would be possible to extradite the wanted person, as an elderly man, half a century after the filing of the indictment against him? Even the 22-year period that elapsed between the filing of the indictment against the Appellant and the filing of the request for extradition cannot be reconciled with the existence of an "inability to act" pursuant to "the law of the Convention" – which is basically a law of a contractual nature, which was created according to the wishes of the counties and could be changed according to their wishes. Furthermore, it was not argued that any "factual impediment" or impediment of the "force majeure" type existed, which could have explained or excused the passage of nearly a quarter of a century, which elapsed between the date of filing of the indictment and the initiation of the extradition proceedings in this case.

The laws governing the statute of limitations in criminal cases in the Israeli legal system, in combination with the constitutional concept of the right of the accused to a fair criminal proceeding under criminal law,

cannot be reconciled with a delay of this type as a recognized cause for tolling the limitation period.

95. The ruling by the lower court also implies that an "inability to act" may also exist by virtue of the very fact that the person wanted for extradition fled from the requesting country to the requested country, and by virtue of the need to initiate extradition proceedings against him. I do not accept this argument as an "inability to act" which is capable of tolling the running of the limitation period. Extradition laws and extradition proceedings, by their very nature, are based on the initial assumption that the wanted person does not make himself available to the requesting country, and that he even flees beyond its borders and moves to the requested country since, otherwise, no extradition proceedings would be necessary. Extradition proceedings, by their very nature, are founded on the assumption that the wanted person perpetrated offenses in the territory of the requesting country and fled to the requested country. Against the background of that assumption, the laws of extradition state that no person shall be extradited from Israel if the offenses attributed to him have expired pursuant to the laws of the State of Israel. This exception to extradition rests on the assumption that the wanted person, who is residing in Israel, is not available for legal proceedings in the requesting country. Had this reality, in and of itself, been sufficient to constitute an "inability to act," which tolls the running of the limitation period, the exception to extradition, which is founded on the statute of limitations, would have been rendered utterly devoid of any content whatsoever. The fact that the wanted person fled beyond the borders of the requesting country, where he had committed the offenses, is not an "inability to act" that is capable of tolling the running of the limitation period in criminal cases, according to Israeli law. The situation is

different with regard to a wanted person who flees from an extradition proceeding that is being conducted in Israel; the latter, under certain circumstances, may constitute such an impediment, under Article 94A of the Criminal Procedure Law, which will be discussed below.

I would therefore reject the reasoning of "inability to act" as a cause, by virtue of a general legal principle, that tolls the running of the limitation period in the Appellant's case.

The tolling of the limitation period pursuant to Article 94A of the Criminal Procedure Law

96. In 1995, a provision was added to the Criminal Procedure Law with regard to the "suspension of proceedings." According to that provision, at any time after an indictment is filed and before sentencing, the court may suspend criminal proceedings, if it learns that the accused can not be brought for the continuation of his trial. The same provision established that there would be no impediment to the resumption of the trial, even if the limitation period in criminal cases has expired, as long as the reason for the suspension of the procedures resulted from the accused having evaded the law. The wording of the provision is as follows:

> "Suspension of procedures
>
> 94A. (A) At any time after the filing of an indictment and before sentencing, the court may suspend the proceedings, whether at its own initiative or at the request of a prosecutor, if it learns that the accused can not be brought for the continuation of his trial.
>
> (B) If the procedures are suspended pursuant to subsection (A), and it later becomes possible to bring the accused for the continuation of his trial, the prosecutor may notify the

> Court in writing of his wish to resume the proceedings, and once he has done so, the court shall resume the proceedings, and may continue them from the stage it had reached prior to the suspension thereof.
>
> (C) Notwithstanding the provisions of Article 9, the proceedings may resume with the approval of the attorney general, for reasons that shall be recorded, even if the periods set forth in Article 9 have elapsed, between the date of suspension of the proceedings and the date on which the accused can be brought for continuation of his trial, provided that the proceedings were suspended because the accused evaded the law."

97. In the explanatory note to the bill, the need for the aforesaid legislation was explained as follows:

> "It is proposed to determine a new proceeding for the suspension of proceedings, pursuant to which the court, as long as it has not sentenced an accused, will be able to suspend a criminal proceeding at the request of a litigant, when it is not possible to locate the accused. This suspension will not constitute the acquittal of the accused.
>
> It is further proposed to establish a provision with an exception to the existing provisions in Article 9 of the Law regarding the lapsing of the limitation period for an offense under the statute of limitations, and to determine that the period between the suspension of the proceeding and the date on which it is possible to request its resumption will not be taken into account in the limitation period. This is because the absence of an accused from his trial constitutes improper behavior on the part of the accused, and there is no justification for his benefiting therefrom" (Explanatory note to the Criminal Procedure Bill (Amendment No. 16) 5753-1993, 274, 277).

Article 94A of the Criminal Procedure Law is designed to address, *inter alia*, situations in which it is difficult to locate accused

persons who evade the law and do not appear at hearings in the course of their trial (see also: Attorney General's Guideline No. 4.3011 (2001), "Suspension of proceedings due to the impossibility of locating a defendant" (http://www.justice.gov.il/NR/rdonlyres/8C1711F7-0FD8-4639-B1AA-36A0C03C8CBD/0/43011.pdf).

98. Might this provision constitute a factor that tolls the running of the limitation period that applies to the offenses attributed to the Appellant in this case? My answer to this question is in the negative, for the reasons set forth below:

The provision in Article 94A of the Criminal Procedure Law is meant to provide a response, in domestic law, to a situation in which an indictment is filed against an accused in Israel and it is not possible to bring him for the continuation of his trial, for various reasons, *inter alia*, due to his having evaded the law. As such, it becomes necessary to suspend the legal proceedings. Under these circumstances of evasion of the law, the suspension period for the proceedings does not detract from the possibility of resuming the legal proceedings even if the limitation period has expired for the offenses that are the object of the criminal proceeding. The meaning of this provision is that, within the framework of criminal law enforcement in Israel, evasion of the law by an accused will not prevent the resumption of the proceedings, even if the limitation period for the offenses that are the object of the proceeding has lapsed in the meantime. The rationale for this is that anyone who evades the law is not entitled to benefit from the statute of limitations and, therefore, the suspension of proceedings that was caused by his fleeing will not prevent the resumption of the proceedings even if the limitation period for the

offenses has lapsed in the meantime. Article 94A expressly refers to Article 9 of the Criminal Procedure Law, which is the article governing the statute of limitations in criminal cases, whereby Article 9 (D) applies the principle of the statute of limitations in criminal cases, and the causes for tolling the running of the limitation period, to extradition proceedings as well.

99. What is the significance of the connection between the provisions of Article 94A with regard to suspending proceedings and delaying the limitation period as a result of the accused's evasion of the law, and the rules governing the statute of limitations in criminal cases in Article 9, which are also applied to extradition proceedings? Can it be said, for the purposes of extradition, that a wanted person's evasion of the law in the requesting country is equivalent to evasion of the law in Israel for the purpose of the applicability of a cause for delaying the limitation period pursuant to this provision? Or, on the other hand, should it be said that the provision applies only to flight from proceedings that are under way in Israel, including extradition proceedings that are initiated in Israel? The proper interpretation of these combined provisions is as follows: the legal provision that governs the delaying of the limitation period due to the "suspension of proceedings," as set forth in Article 94A of the Criminal Procedure Law, refers solely and exclusively to evasion of the law by an accused, with regard to proceedings that are under way in Israel – either criminal proceedings or extradition proceedings held before an Israeli court. This provision cannot be exercised with regard to evasion of the law by an accused who has fled from the country requesting his extradition, as long as he is available for the extradition proceeding in Israel and has not fled from Israel as well. The laws governing the statute of limitations, as set forth in Article 9 of the

Criminal Procedure Law, cannot be circumvented by the creation of a fiction, whereby evasion of the law in the requesting country is equivalent to evasion of the law in Israel and, therefore, the filing of an indictment in the requesting country and the flight from that country by the accused should be deemed to have fulfilled, by way of analogy, the conditions set forth in Article 94A, which enable the holding of extradition proceedings even after the limitation period has lapsed under Israeli law. Giving such an interpretation to the provisions of Article 94A, whereby the data that exist in the requesting country (i.e., the filing of an indictment and the evasion of the law in that country by the accused) are implanted into that provision for the purpose of extradition, renders the Israeli statute of limitations exception devoid of any content whatsoever. After all, with regard to extradition, the person involved will always have evaded the law in the requesting country and the indictment will always have been filed against him there. If these data are interpreted as tolling the running of the limitation period under Israeli law, the exception based on the statute of limitations loses all of its real content and substance.

There will be those who ask: if that is the case, what is the validity of Article 94A with regard to extradition? The answer is that it applies to situations in which an accused has fled from Israeli law, when an extradition proceeding has been initiated against him in Israel. In such a situation, the proceeding may be suspended, and the suspension period will not be taken into account for purposes of the statute of limitations – provided that, on the opening date of the extradition proceeding, the limitation period for the offenses that are the object of the extradition has not yet expired.

100. An attempt was made, in the ruling rendered by the lower court, to create a construction, whereby a "data conversion" technique would be used in applying Article 94A of the Criminal Procedure Law to the extradition proceeding before us. This technique refers to the replacement of the actual circumstances that occurred outside Israel, in corresponding hypothetical Israeli circumstances, while assimilating the data that actually occurred in the other country into corresponding hypothetical data in Israel (Further Criminal Hearing 2980/84, Avico v. State of Israel, IsrSC 60 (4) 34, 45 (2005); Further Criminal Hearing 532/93, Manning v. Attorney General, IsrSC 47 (4) 25, 35 (1993); Efrat Case, paragraph 7). In the Efrat Case, Justice Vogelman referred to the "data conversion" technique in a similar context. He stated as follows:

> "In order to provide a response to the question of whether the limitation period for the offense has expired under Israeli law, we must accordingly perform a 'data conversion' procedure, "by replacing 'the actual factual circumstances [which took place outside Israel] with corresponding, hypothetical Israeli circumstances' " ... This conversion will be conducted against the background of the reason underlying the legal rule. ...
>
> Under the law of the State of California, the aforementioned question does not arise. The laws governing the statute of limitations apply only up to the filing of an indictment, and not thereafter. In other words, the public interest prevails in any case where an accused has evaded the law, and no additional action involving the exercise of discretion is required. We should further note that, in the case before us, an arrest warrant was issued against the Appellant and is still valid, and the investigative efforts continued over the years, until he was located. These facts indicate the repeatedly expressed position of the law enforcement authorities in the United States with regard to the interest in bringing the Appellant to justice,

> notwithstanding the passage of time. We will convert these data to Israeli law, and we will find that, had the event taken place in Israel, then, in light of the gravity of the offenses of which the Appellant was convicted, his evasion of the law, and the continuation of the search for him over the years, the proceedings would have been suspended and then resumed when the accused was located, pursuant to Article 94A of the Criminal Procedure Law. ...
>
> Once we have found that, had the Appellant been convicted in Israel of two counts of rape, and had he escaped the fear of justice, the legal proceedings against him would have been suspended, and would have been resumed upon his capture, the conclusion is that, in light of the provisions of Article 94A of the Criminal Procedure Law, the offenses perpetrated by the Appellant did not expire under Israeli law, as was – rightly – ruled by the District Court" (Efrat Case, paragraph 7; emphases not in the original).

The exercise of the "data conversion" technique, by way of a hypothetical application of Article 94A of the Criminal Procedure Law to the filing of an indictment in the requesting country and the evasion of the law by the accused in the country requesting extradition – in contrast to his evasion of a criminal proceeding (including an extradition proceeding) that is being conducted against him in Israel – and the application of this hypothesis as a factor that tolls the running of the limitation period under Israeli law, seems to me to be fraught with difficulties.

101. Extradition laws under the Israeli legal system – including the exceptions to extradition, which, in turn, include the lapsing of the limitation period – are not affected by the fact that an accused fled from the territory of the requesting country. As a general rule, such flight is the

motive for the extradition request. The fact that the wanted person fled from the territory of the requesting country does not affect the applicability of the laws governing Israel's statute of limitations. Israel is obligated to examine whether, according to its own laws, the limitation periods for the offenses in the indictment had expired at the time of filing the request for extradition. Accepting the theory of "data conversion" for the purposes of the statute of limitations would mean that, in any case in which a wanted person flees from the requesting country to Israel, and an indictment is filed against him there, the limitation period would be tolled under Israeli law, and it would be possible to initiate extradition proceedings with no time limitation, in the spirit of the provisions of Article 94A of the Criminal Procedure Law – but this is not the case. Such an approach would render the exception of the limitation period under Israeli law, which prevents extradition under the Extradition Law, meaningless. It would enable the law enforcement authorities in the convention member states to tarry endlessly in initiating extradition proceedings, on the basis of the mistaken assumption that, notwithstanding the exception of the limitation period in the Extradition Law, the limitation period in force in Israel, for the purpose of extradition, is unlimited in time, merely because the wanted person fled from the requesting country – a typical and natural phenomenon in any extradition proceedings. It must not be assumed that the Extradition Law and the Criminal Procedure Law intended to give the state such freedom of action, from the standpoint of the protracted period of time involved. Moreover, such an interpretation is not reconcilable with the existence of the exception of the limitation period, which rules out extradition under the Extradition Law. The purposive interpretation leads to the obvious outcome that the applicability of Article 94A of the Criminal Procedure Law was intended for the purpose of domestic law within Israel, and for

that purpose only, and that it is not possible to adopt an interpretive procedure of "data conversion" with regard thereto, by viewing the filing of an indictment in the requesting country and the flight by the wanted person from that country as if they had taken place in Israel, for the purpose of delaying the running of the limitation period. "Data conversion" in the proposed manner is not consistent with the determination of an independent exception of limitation under Israeli law, as a factor that prevents extradition, which requires examination of the internal Israeli experience, for the purposes of determining when the offenses attributed to the wanted person expire according to the concepts of the Israeli legal system. The answer to this question is given in Article 9 of the Criminal Procedure Law, which defines the limitation period for the offenses in question and the series of actions that may impede the running of the limitation period. An additional reason for delay is set forth in Article 94A of the Criminal Procedure Law – when the accused evades a legal proceeding that is being conducted against him in Israel (including an extradition proceeding). Another cause for tolling the running of the limitation period is the cause set forth under the circumstances mentioned in Article 11 of the Extradition Law, when the extradition proceeding is delayed because the wanted person is in the process of being tried in Israel, or is serving a sentence in Israel, for another offense. The factor of the limitation period is, therefore, examined according to all the relevant data that exist in Israel, with no need for the "data conversion" theory in this context. As Bassiouni states in his book:

> "The question of whether the offense exists and is prosecutable goes to the requirement of whether an extraditable offense exists, and if so, whether double criminality is satisfied; …

> The manner in which the treaty or national law provision is applied varies from country to country. *The requested country may consider the case as if the offense had been committed in the requested country and apply* ***its own statute of limitation*** *to determine whether prosecution would be barred. If so, extradition will be refused*" (Bassiouni, at 769; emphases not in the original).

102. Hence, if an accused evades the law in internal legal proceedings in Israel (including extradition proceedings that are being conducted in Israel), it is possible to apply the provisions of Article 94A of the Criminal Procedure Law and, subsequently, by resuming the procedures, including extradition proceedings, to overcome the limitation period that has lapsed. This is not the case when the accused did not evade the law in Israel and was available for the purposes of the extradition proceeding, both to the enforcement authorities in Israel and to the American authorities, for the purpose of filing the request for extradition. The fact that the wanted person escaped from the requesting country should not affect the domestic laws that apply to the statute of limitations in the requested country.

103. It should be noted that the Convention of Extradition between Israel and the United States also specifies that the lapsing of the limitation period, according to the laws of the party receiving the request, also blocks extradition, as if the offense had been committed within its own territory. Thus, Article 6 of the original version of the Convention set forth various circumstances under which extradition would be excluded. One of said circumstances applies in cases where:

> "The criminal action or the enforcement of the sentence for the offense was blocked due to the lapsing of the limitation period, according to the laws of the requesting party, or would have been blocked due to the lapsing of the limitation period, according to the laws of the party receiving the request, had the offense been committed in its national territory" (Article 6.3 of the original version of the Convention; emphasis not in the original).

In the 2007 Amendment to the Convention, Article 6 was canceled and an additional Article 8 was inserted, with the heading "The passage of time." The article specifies that a state receiving a request for extradition may deny it in cases where, had the offense subject to extradition been committed in its territory, the statute of limitations would apply, according to its laws, to the wanted person's trial or to his sentence.

Hence, both before and after the Amendment, the Convention considered the lapsing of the limitation period under the laws of the requested country as a barrier to extradition. In order to examine whether the statute of limitations applies under the laws of the requested country, the elements of the offense are transposed, in a hypothetical manner, from the requesting country to Israeli territory, and the question is whether, assuming that the offense had been committed in Israel, it would have been subject to the statute of limitations under Israeli law. The wanted person's escape from the requesting country is not transposed from the context of the requesting country to the context of the requested country, within the context of the statute of limitations. The wanted person's escape from the requesting country is external to the offense and is not included among its constituent elements. Accordingly, the evasion of the law is relevant to the statute of limitations under Israeli law only when it

actually takes place in Israel, and this, in the present case, refers to the evasion of extradition proceedings, which are under way in Israel. On the other hand, the wanted person's flight from the requesting country, in and of itself, neither adds nor detracts in this regard.

104. In this case, the Appellant left the United States in November 1984 and did not return, nor has he made himself available to the United States authorities since then. He may be considered a fugitive from justice in the requesting country – the United States. However, he cannot be considered a fugitive from justice vis-à-vis the Israeli authorities, whether for the purpose of his trial before a criminal court in Israel or for the purpose of the proceeding for his extradition to the United States. Throughout all those years, the Appellant lived in Israel, and his identity and place of residence were known to, and were not concealed from, the authorities. He was within reach of the Israeli law enforcement authorities all the time for the purposes of the extradition proceedings. He cannot be deemed a fugitive from justice with regard to the extradition proceedings, or with regard to other proceedings that might have been initiated against him in Israel. Therefore, the provisions of Article 94A of the Criminal Procedure Law do not in any way apply to this case. The fact that he evaded the law in the United States, as set forth above, neither adds nor detracts with regard to the matter before us.

105. It should be noted that the circumstances in the Efrat Case were completely different from those of the matter before us, because the person for whom extradition was sought in that case – who had been convicted in the United States and had disappeared before being sentenced – evaded the law in Israel as well, and not only in the requesting country. Moreover, he was located for the first time only about

six months before the request to extradite him was filed, after having been in hiding, throughout those years, under an assumed name, and after the investigative efforts in the United States had continued throughout the years until he was located (see: id., *inter alia* in paragraphs 1, 7 and 12). The statements cited above with regard to the application of the "data conversion" technique to that case were, therefore, made against the background of an entirely different context.

106. Parenthetically, and although it is not strictly necessary, it should be noted that the attempt to utilize the provisions of Article 94A of the Criminal Procedure Law encounters further difficulties, each of which alone, and certainly all of which together, rule out any possibility of relying on it as a means of overcoming the lapsed limitation period in the Appellant's case.

First, the provisions of Article 94A were enacted in 1995, after the first limitation period in the Appellant's case had lapsed. As such, the enactment of said provisions, following the lapsing of the limitation period, did not revive offenses for which the limitation period had lapsed before the provisions went into effect. The active effect of the provisions in question applies to all the issues for which the limitation period has not yet lapsed, and this is not one of those issues. The point raised above, whereby the limitation periods for offenses attributed to the Appellant had not lapsed prior to Article 94A of the Criminal Procedure Law going into effect due to an "inability to act," which resulted from the content of the Convention prior to its amendment, cannot be accepted, for the reasons set forth above. Nor is it possible to accept – again, for the reasons listed above – the argument that the issuance of the Red Notice by Interpol had the effect of delaying the running of the limitation period,

pursuant to Article 9 (C) of the Criminal Procedure Law, and that, accordingly, the limitation periods for the offenses in the indictment had not yet lapsed at the time of enactment of Article 94A.

Second, Article 94A discusses the suspension of legal proceedings by the Court when it is not possible to bring the accused to justice. The provision discusses the suspension of legal proceedings and their resumption for the purpose of bringing the accused "for the continuation of his trial." Under the circumstances before us, no legal proceeding, for which "resumption" is ostensibly now being sought, has taken place in the Appellant's case. In the past, preliminary measures were taken by the United States government, with a view to extraditing the Appellant. These measures remained fruitless and did not give rise to legal proceedings, up to the date of the Amendment to the Convention in 2007. For the difficulty in viewing this situation as the "continuation of a trial" that ostensibly began after the reading of the indictment and was interrupted as a result of the accused's evasion of the law, see: Criminal Appeal 4690/94, Avi Yitzhak v. Justice Tzemach, IsrSC 48(5) 70, 85 (1994); Article 143 of the Criminal Procedure Law; Criminal Appeal 1523/05, Anonymous v. State of Israel (unpublished, March 2, 2006), hereinafter: the Anonymous Case 3; and cf. Criminal File 60/94 (Tel Aviv District Court), State of Israel v. Gil (unpublished, November 30, 1995). The circumstances of this case are also not consistent with the specific conditions for the application of Article 94A of the Criminal Procedure Law, and it cannot be viewed as a source that might give rise to the tolling of the limitation period in the Appellant's case.

Summary on the question of expiry under the statute of limitations

107. On the basis of all the above, the obvious conclusion is that the Appellant's extradition to the United States is subject to the exception of the limitation period under the laws of the State of Israel. Two cumulative limitation periods, plus an additional two years, have lapsed in the Appellant's case since the date of filing of the indictment against him in 1985. Under criminal law, the limitation periods must be counted from that time until the opening date of the extradition proceedings in 2007. I believe that no circumstances that toll the running of the limitation period have occurred in the Appellant's case – whether according to various statutory alternatives pursuant to Article 9 of the Criminal Procedure Law and Article 94A of the Criminal Procedure Law, or according to a general principle pertaining to an "inability to act," as argued.

An exception to extradition for reasons of "public policy" violation

108. Even if there were no exception regarding the limitation period which prevented the Appellant's extradition, I believe that it would be possible to rule out his extradition to the United States for reasons of "public policy" in Israel, due to the fact that 23 years have elapsed between the time the offenses attributed to the Appellant were committed and the extradition proceedings in his case were initiated in 2007; while the Appellant was within reach of the Israeli enforcement authorities throughout that entire time, his location in Israel was not concealed, and the governments of the United States and Israel had the possibility of

amending the Convention and bringing about his extradition many years before it was actually done.

109. One of the exceptions to extradition, pursuant to the Extradition Law, states that a person shall not be extradited to a requesting country if the extradition might violate "public policy." In the words of the Law:

> Exceptions to extradition
> 2B. (A) A wanted person shall not be extradited to the requesting country in any of the following cases:
> ...
> (8) If compliance with the request for extradition might violate public policy or an essential interest of the State of Israel.

The idea embodied in this provision is intended to prevent the extradition of a wanted person from Israel to the requesting country, when the act of extradition might violate "public policy," as this term is used within the generally accepted framework of social and legal concepts in Israeli society. The principle of "public policy" encompasses the entire realm of law, including all its branches; in view of its nature as an "open fabric," it embodies various types of content, according to the subject and context of the matter to which it refers. "Public policy" is a supreme principle, which reflects basic values and value-related concepts of the legal system and the social order, indicating the proper mode of conduct for Israeli society in a wide variety of contexts. The concept of "public policy" has become established as an exception to extradition in cases where, under the circumstances of a particular case, extradition may conflict with recognized legal and social principles in Israel's legal system. The concept of "public policy" extends to the entire Extradition Law (Further Criminal Hearing 612/00, Berger v. Attorney General,

IsrSC 55 (5) 439, 459 (2001), hereinafter: the Berger Case). It is "a supreme principle, an umbrella principle with regard to the extradition or non-extradition of a certain person from Israel into the hands of a requesting country" (Criminal Appeal 2521/03, Sirkis v. State of Israel, IsrSC 57 (6) 337, 346 (2003), hereinafter: the Sirkis Case). It has been said, for good reason, that many of the interests related to Extradition Law may be gathered under the wings of this principle (Rosenstein Case, paragraph 52; Criminal Appeal 8010/07, Haziza v. State of Israel, paragraph 68 (unpublished, May 13, 2009), hereinafter: the Haziza Case).

110. The significance and importance of the principle of "public policy" within the extradition laws have been acknowledged by this Court in a broad range of consistent case law. "It is a universal doctrine that a person shall not be extradited if the act of extradition violates the public policy of the extraditing state" (Bazaq Case, at 300). This doctrine concerns the "basic principles, profound outlooks and supreme interests of society and the state – principles, outlooks and interests that are so fundamental and so basic as to be worthy of taking priority over an act of extradition" (Sirkis Case, at 346; Yagodyev Case, at 585; Rosenstein Case, paragraph 52; HCJ 1175/06, Israel Law Center v. Minister of Justice (unpublished, February 13, 2006); cf. Eshkar Case, at 653). The principle of "public policy" shelters beneath its wings various values, the common factor being their place at the very crux of the foundations of Israel's legal system. One of these values is the basic right of a person accused of criminal charges to a fair criminal proceeding. Also encompassed within this right is the doctrine

of "abuse of process", which has developed in recent generations and has increased the strength of the defense of an accused's right to a proper criminal trial (Haziza Case, paragraph 69; Efrat Case, paragraph 12). These values are implemented, according to Israel's legal system, even with regard to the gravest crimes attributed to a person accused of criminal offenses.

The right to a fair criminal proceeding under criminal law

111. A person's right to a fair criminal proceeding under criminal law has been recognized as derived from his basic right to liberty and dignity. As such, it benefits from a supreme legal status. "The Basic Law fortified the accused's right to a fair criminal proceeding. It did so by virtue of Article 5 of the Basic Law, in which a person's right to liberty was established, and by virtue of the constitutional recognition of human dignity, of which the right of an accused to a fair criminal proceeding is a part" (Criminal Appeal 1741/99, Yosef v. State of Israel, IsrSC 53 (4) 750, 767 (1999); Retrial 3032/99, Baranes v. State of Israel, IsrSC 56 (3) 354, 375 (2002); HCJ 11339/05, State of Israel v. Be'er-Sheva District Court, paragraphs 24-25 of the ruling rendered by Justice Levy (unpublished, October 8, 2006)). A substantive violation of the right to a fair criminal proceeding may be tantamount to a substantive violation of the constitutional right to liberty and human dignity. This was pointed out by President Beinisch, who stated:

> "Many authorities are of the opinion that when the Basic Law: Human Dignity and Liberty was enacted, the right to a fair criminal proceeding obtained a constitutional super-legislative status. This position makes much sense. An illegal violation of the right to a fair criminal proceeding in criminal

> proceedings may violate the constitutional right of the accused to liberty under s. 5 of the Basic Law. It may also harm the accused's self-image and give him a feeling of degradation and helplessness, as if he is a plaything in the hands of others, to the extent of a violation of his constitutional right to dignity under ss. 2 and 4 of the Basic Law … In the case before us, we do not need to decide the question whether the right to a fair criminal proceeding and the specific rights derived therefrom have acquired a constitutional status for their whole scope. We can rely merely on the ruling that was recently confirmed in the case law of this court with an expanded panel of eleven justices, according to which '… in appropriate circumstances, a substantial violation of the right to a fair criminal proceeding will amount to a violation of the constitutional right to human dignity (see HCJ 1661/05 Gaza Coast Loval Council v. Knesset (not yet published), at para. 173; emphasis supplied – D.B)" (Criminal Appeal 5121/98, Issacharov v. Chief Military Prosecutor, paragraph 67 (unpublished, May 4, 2006)).

112. The right to a fair and proper criminal trial applies to every accused, with regard to every offense, and in the context of all stages of criminal proceedings, including extradition proceedings. The expressions and characteristics of the right to a fair criminal trial are varied and multifaceted:

> "The right to a fair criminal proceeding is a right with many aspects. Various principles contribute to securing it. The upholding of those principles 'is a safety factor of supreme importance in doing substantive justice and safeguarding the rights of suspects, defendants and witnesses in criminal proceedings' (HCJ 6319/95, Hakhami v. Levy, IsrSC 51 (3) 750, 755). Their role is to balance the unequal power relationship between the accused and the prosecution, which ordinarily benefits from a superior procedural status and from additional advantages, and to ensure that the accused is given a full opportunity to present a version of innocence and to act to prove it. ...

> The right to a fair criminal proceeding also extends over the laws of extradition. Its expressions, as indicated in the Extradition Law, are many: the principle that precludes 'double jeopardy'; the prohibition against extraditing a person for political or discriminatory reasons; the requirement for the presentation of *prima facie* evidence; the return to Israel of Israelis who were convicted abroad in order to serve their sentences; and the prohibition against extraditing a person to a country in which he would be executed, unless he would have been so punished in Israel. These principles are also anchored in extradition conventions, including the Convention between the United States and Israel (see Articles 5 and 6 of the Convention)" (Rosenstein Case, paragraphs 53-54).

113. The right of an accused in a criminal case to a fair criminal proceeding also encompasses the expectation that he will not suffer a delay in justice. This means, *inter alia*, that he will not be subjected to the "sword of Damocles" represented by the opening of criminal proceedings against him for many years, and that, once a criminal proceeding has been initiated against him, it will be completed within a reasonable amount of time:

> "An accused is entitled not to be placed in a protracted situation involving a delay of justice. This is a substantive right, and the efficient and rapid conducting of the proceedings contributes to its realization. The right not to be subjected to a delay of justice, along with other rights available to the accused, find shelter within the sound structure of the right to a fair criminal proceeding. The exercise of the right not to be subjected to a delay of justice is an essential component, albeit not a sufficient one, in realizing the right of the accused to a fair criminal proceeding..." (Anonymous Case 3, paragraph 22 of the ruling rendered by Justice Arbel).

114. Assimilating the "public policy" principle in Israel into the laws and conventions of extradition requires a complex and cautious balancing act. The laws of extradition are designed to promote the important objectives of enforcing criminal law on offenders who are not within the reach of the requesting country, in which they committed their offenses. They are intended to foster cooperation between countries in the war on international crime which, in turn, requires reciprocity among convention member states in providing assistance with the extradition of offenders. In view of the important national and international interests embodied in the laws of extradition, it is essential that the exception to extradition founded on "public policy," be exercised in a prudent and restrained manner and restricted to extreme situations in which the fear of harm to the accused as a result of the extradition is of such strength and power as to prevail over the important public interest in conducting the extradition. In fact, "The major principle is that the extradition must be conducted in accordance with principles formulated under law, and the duty of fulfilling the legislative purpose of the extradition laws will only recede in the face of extraordinary circumstances, which give rise to a substantive violation of a basic principle that tips the scales definitively in the opposite direction" (HCJ 852/86, Aloni v. Minister of Justice, IsrSC 41 (2) 1, 47 (1987), hereinafter: the Aloni Case). This means that exercising the exception to extradition for reasons of "public policy" is an extremely exceptional event (Anonymous Case, paragraph 31 and references id.; Yagodyev Case, at 585). This will be done only in exceptional cases, in which – notwithstanding the fact that, from every other standpoint, it would be proper and justified to extradite a certain wanted person to the country requesting his extradition – "this exception to public policy comes and informs us that, nevertheless, now that it has

been found that the act of extradition will violate one of the fundamental outlooks of the state, one of the basic principles of ethics, justice, decency, or one of the values of Israel, the Court will not lend its hand to the extradition" (Sirkis Case, at 346).

115. The principle of "public policy" is, therefore, reserved for extraordinary circumstances, in which there is a real fear of violating the basic values of society, ethics and conscience and, when consenting to the request for extradition, will be "a blatantly improper and unjust act" (Berger Case, at 459). in this context, a blatantly improper and unjust act does not merely refer to causing the wanted person to suffer as a result of the proceedings involved in his extradition; after all, the extradition proceedings are *a priori* intended to enable the enforcement of the law upon him, and this enforcement involves trial before a court of law and may end in imprisonment, and possibly even lengthy imprisonment. The suffering sustained by a wanted person as a result of the extradition proceedings and all that they involve is one of the natural results that accompany a criminal proceeding, including an extradition proceeding. That suffering, in and of itself, does not contradict the basic values of the State of Israel and Israeli society, which the doctrine of "public policy" is meant to protect (Sirkis Case, at 347). A violation of "public policy" is a violation that transcends the generally accepted and foreseeable result that accompanies an extradition proceeding (Aloni Case, at 46-47).

The doctrine of "Abuse of Process"

116. A person's right to a fair criminal proceeding under criminal law according to the concept of "public policy" in Israel is consistent with the doctrine of "abuse of process," which has developed in Israeli law in the last few decades and has become an important value in protecting the rights of defendants in criminal proceedings.

The doctrine of "abuse of process" has long since been anchored as a preliminary argument after a trial begins, pursuant to Article 149 (10) of the Criminal Procedure Law. By virtue of that provision, a defendant is entitled to claim that the filing of an indictment or the conducting of a criminal proceeding against him is "in substantive contravention of the principles of justice and legal fairness".

117. The argument of "abuse of process" may also be available to a wanted person in extradition proceedings, whether as part of the principle of "public policy," which constitutes an exception to extradition, or as an independent defense, by analogy to the preliminary argument afforded to him in an ordinary criminal proceeding. The argument of "abuse of process" may be available to the accused, if only for the reason that the basic principles that are embodied in the principle of "public policy" also extend to the protected values that are encompassed by the doctrine of "abuse of process," and which are based on the principles of justice, legal fairness and the right to a fair criminal proceeding (Rosenstein Case, paragraphs 9-10; Yisgav Nakdimon, Judicial Stays of Criminal Proceedings [Hebrew], at 73-74, 101 (2nd ed., 2009), hereinafter: Nakdimon). The role of the doctrine of "abuse of process" in criminal procedures, and the criteria for exercise thereof, was extensively discussed by this Court in the Rosenstein Case (in the ruling by Justice Levy):

> "The central justification for using that authority is the desire to ensure that the law enforcement agencies behave properly, as required by their status as governmental bodies. It is intended to serve as a check on unbridled enforcement activity, which is blind to all other interests and denies the rights of the accused and the values of the rule of law. This is an unusual power, as are the circumstances that would justify its use. It integrates a complex interweaving of competing values: advancing the public interest in putting criminals on trial, beside recognition of the role of the rights of the accused; the desire to find the truth, but not at any price; protection of public security, beside the duty to uproot abuse of governmental power. A court examining whether the accused is to benefit from a ruling of outrageous conduct in a particular case must take this delicate and complex balance...into account" (id., paragraph 9).

118. In the past, the applicability of the doctrine of "abuse of process" was limited to situations of "intolerable behavior on the part of the authority," "outrageous conduct that entails persecution, oppression and maltreatment of the accused," and situations in which "conscience is shocked and the sense of universal justice is assailed; things before which the Court stands open-mouthed and incredulous" (Criminal Appeal 2910/94, Yefet v. State of Israel, IsrSC 50 (2) 221, 370 (1994)). These restrictive criteria, however, were replaced over the years by more extensive tests, whereby it was found that the defense may apply in any case where "the conducting of a criminal proceeding genuinely violates the sense of justice and fairness, as perceived by the Court" (Criminal Appeal 4855/02, State of Israel v. Borowitz, paragraph 21 (unpublished, March 31, 2005), hereinafter: the Borowitz Case; a petition for a further hearing was denied:

Additional Criminal Hearing 5189/05, Ayalon Insurance Co. Ltd. v. State of Israel (unpublished, April 20, 2006)). In the Borowitz Case, a three-stage test was established for examining the nature and role of the argument of "abuse of process" under the circumstances of a certain case. In the first stage, we must identify the flaws that occurred in the proceedings and ascertain the strength of those flaws; in the second stage, we must examine whether conducting the criminal proceeding, notwithstanding the flaws, constitutes an acute violation of the sense of justice and fairness. In so doing, the Court must balance the various interests while applying them to the concrete circumstances of the case. While doing so, importance must be ascribed to the gravity of the offense attributed to the accused; the strength of the evidence; the personal circumstances of the accused and the victim of the offense; the degree to which the accused's ability to defend himself is impaired; the severity of the violation of the accused's right to a fair criminal proceeding and the circumstances that caused it; the degree of culpability imputable to the authority; and the question of whether the authority acted maliciously or in good faith. Each of the aforesaid considerations must be given the proper weight, in accordance with the circumstances of the concrete case. In the third stage, if the Court is convinced that conducting the proceeding entails an acute violation of the sense of justice and fairness, it must examine whether it is impossible to cure the flaws that have come to light by moderate and proportional means that do not require setting aside the indictment (Borowitz Case, paragraph 21).

119. As we have seen, the question of when a person's extradition is liable to violate "public policy," and thereby to violate the wanted person's right to a fair criminal proceeding, and when conducting the criminal proceeding under the precepts of the Israeli legal system

conflicts substantively with the principles of justice and fairness in law, requires a complex balance of a range of considerations and interests. The core of that balance can be found in the tension between the public interest in enforcing criminal law upon the offender, in order to secure public welfare and safety and, in so doing, to create an efficient system of international cooperation that will enable the extradition of offenders from one country to the other, in which the offenses were perpetrated; and the basic duty, even in extradition proceedings, of protecting the fundamental principles of the legal system, which recognizes, in all situations and all contexts, a person's basic right to a fair criminal proceeding under criminal law, as part of his constitutional right to liberty. Also included within the act of balancing these contrasting values are considerations related to the nature, severity and extent of the offenses in the indictment; the anticipated harm to the victims of the offense if the wanted person is not extradited; the conduct of the enforcement authorities in the relevant country; the harm to the extradition relations between Israel and the requesting country, which is anticipated from denial of the extradition request; and the nature and intensity of the violation of the wanted person's right to a fair criminal proceeding under criminal law, if the extradition proceeding is implemented.

120. For the sake of comparison, let us refer to Articles 14 and 82 of the English Extradition Act of 2003, which extend protection to an accused against extradition under circumstances in which he may be exposed to "injustice" or "oppression," due to the time that has elapsed since the offenses were allegedly committed, or since he was convicted. The terms "injustice" and "oppression" may be congruent; they group together all the cases in which the extradition of the accused would be

unfair (*Kakis v. Government of the Republic of Cyprus* [1978] 1 WLR 779, 782-783). The complexity of the considerations that must be taken into account in this context, and the need to balance them against the background of the entire set of circumstances of the case and, *inter alia*, in view of the great delay in initiating the extradition proceeding, are reflected in the following statement:

> "Ss 14 and 82 reflect long-standing principles of extradition law and have historically been held to cover situations where, by virtue of delay, the passage of time inhibits, by dimming recollection or otherwise, proper consideration of trial issues or inhibits the tracing of witnesses still able to recollect specific events, or cases where witnesses, materials or certain lines of defense are no longer available, even in cases of relatively short delay. 'Culpable delay' on the part of the Requesting country, will be a relevant factor in 'borderline cases'. Delay on the part of the applicant, i.e. by fleeing the country, concealing his whereabouts, or evading arrest, cannot – save in the most exceptional circumstances – count towards making his return 'unjust' or 'oppressive'. 'Oppression' may arise where a defendant has lived openly and established family ties in the UK and to remove him would be oppressive. Oppression can also arise in circumstances where the inaction of the Requesting country, or its positive conduct, has caused in the defendant a legitimate sense of false security. Oppression can attach to persons for whom the defendant has responsibility. The onus is ultimately on the defendant to demonstrate, on the balance of probabilities, that it would be unjust or oppressive, because of the delay, having regard to all the circumstances, to return him. In seeking to discharge the onus on him, a defendant must produce cogent evidence of injustice or oppression. It is not sufficient to offer mere assertions or speculations" (David Young, Mark Summers and David Corker "*Abuse of Process in Criminal Proceedings*" 268-269 (Tottel Publishing, Third edition, 2009)).

From the general to the specific

121. The weighing of the contrasting values in this case requires the attribution of a proper relative weight to each of the following considerations:

At the level of the general public interest, there is a definitive interest in the extradition of the Appellant to the United States so that he can be brought to trial there. His extradition is intended to enforce criminal law upon a person who is accused of grave sexual offenses against a number of minor victims. There can be no doubt as to the extreme gravity of those offenses. In this case, extradition complies with the value of preserving the rule of law and aims to ensure that an offender will not benefit, if it is proved that he committed the offenses attributed to him.

Furthermore, extradition, in this case, is particularly important to the cooperation between the governments of the United States and Israel in the extradition of offenders, based on the principle of reciprocity. The role and status of Israel as a member state in the family of nations are determined, *inter alia*, by the degree to which it is willing to cooperate in the extradition of offenders to the requesting countries and thereby to ensure their subjection to the full rigor of the law in the countries in which the offenses were committed. The importance of Israel's response to a request for extradition by a requesting country extends beyond the field of extradition itself. It affects Israel's status on the international level and its relations with other countries, with which it has engaged in binding agreements of any kind.

122. Opposite this are the constitutional rights of the Appellant, as an individual, to a fair criminal trial, which are drawn from the basic concepts of law and society in Israel. While the Appellant left the United States in 1984 and has not returned since, nor has he made himself available to its adjudication and may be deemed to have evaded the law in the United States, since he left the United States he has been in Israel throughout the entire time; he did not flee or hide from the law enforcement authorities in Israel, he was constantly within their reach, and even within the reach of the American extradition authorities. He remained in Israel, living overtly, from 1984 to 2007, when the extradition proceeding was initiated against him. Up to that time, no less than 23 years passed, during which he has been free and at large, and no criminal proceedings whatsoever – including extradition proceedings – have been initiated against him within the borders of the State of Israel.

123. The impediment against opening criminal proceedings in the Appellant's case, throughout all those years, resulted solely and entirely from the definition of an "extraditable offense" in the Convention, which did not include the offenses in the indictment against the Appellant. Until the amendment of that definition in the Convention, the extradition could not be pursued.

124. The authorities in both countries delayed for many years in eliminating the impediment to extradition, which was rooted in the wording of the Convention, although they were capable of eliminating it many years before the Amendment to the Convention was actually enacted. Some 23 years elapsed between the perpetration of the acts attributed to the Appellant and the Amendment to the Convention and the opening of the extradition proceeding. The extradition of a person from

Israel to the requesting country, approximately 23 years after the perpetration of the offenses attributed to him within the territory of the requesting country, when he has been living in the requested country throughout that entire time and could have been reached with no difficulty by the authorities, and when the impediment to his extradition could have been removed within a reasonable period of time – all these amount to a grave substantive violation of the wanted person's right to a fitting and proper criminal proceeding. Within the framework of the "public policy" principle we do not deal with formal arguments regarding the lapsing of a limitation period; however, one possible criterion for the scope of the violation of the accused's right to a proper trial is the statutory limitation period that applies in Israel to felonies, a period of 10 years. In this case, extradition is being sought after a period of time twice the length of the limitation period, plus an additional two years, which preceded the initiation of the extradition proceeding. In the overall balance of conflicting values and considerations, the prejudice to the fair and proper nature of the criminal proceeding against the wanted person prevails over the important public interest of international cooperation in the extradition of offenders, in which Israel is a partner by virtue of the extradition convention that it signed.

125. According to the concepts and values of Israel's legal system, waiting 23 years for an extradition proceeding from the time the alleged offenses were committed in the United States, under circumstances in which the wanted person did not evade the extradition proceedings in Israel, is tainted with a delay so great as to be intolerable, even in view of the complex public interest involved in implementing the extradition proceeding. Extraditing the Appellant after so many years of waiting is not only a substantive violation of his right to a fair criminal proceeding

under criminal law. It represents an extreme deviation from the basic values and principles that underlie Israel's legal system, and the entire system of criminal proceedings. In the overall balance, reasons of "public policy" and "abuse of process" justify refraining from extraditing the Appellant to the United States.

126. Case law in Israel has recognized the factor of extreme delay in initiating extradition proceedings as giving rise to the "public policy" exception to extradition. A ruling rendered with regard to a requesting country that did not seek a person's extradition for a period of 20 years held that its omission might be so exceptional and so extraordinary that granting its belated request might well constitute a violation of the basic sense of justice and of "public policy" in Israeli society (Bazaq Case, at 302; Sirkis Case, at 346-347; Efrat Case, paragraph 12; Feinberg Case, at 73). Under certain circumstances, the delay by the requested country may also give rise to protection against extradition – for example, in cases where a request for extradition, which was filed at a reasonable time, was neglected by the requested country for many years, due to an error (Feinberg Case, id.). As a general rule, a considerable delay in the initiation of criminal procedures has been recognized as a matter that may give rise to an argument of "abuse of process," even when the procedure was begun within the statutory limitation period. Nakdimon discusses this point in his book:

> ."... In cases where too much time has elapsed between the perpetration of the alleged offense and the trial, this may harm the accused's defense. Throughout such a long period of time, evidence may be lost. Witnesses who are capable of proving his innocence may leave Israel, to become ill or to die. The memory of the witnesses who are still available may be blurred. Under such circumstances, there is concern that

> the suspected individual will not be granted a fair criminal proceeding, if it is eventually decided to file an indictment against him. In fact, conducting the trial after such a long period of time may conflict substantively with the principles of justice and fairness in law, even if the statutory limitation period for the offense attributed to the accused has not yet lapsed. The doctrine of 'abuse of process' – whose purpose is to protect the individual from an indictment that was filed in substantive contravention of the principles of justice and fairness in law, or from a proceeding that is in contravention as stated – can prevent these grave outcomes" (Nakdimon, at 351; for a review of the law on this issue in Israel and throughout the world, see id., at 351-388).

And if a violation of the right to a proper criminal trial may be caused by delay, even before the statutory limitation period has lapsed, how much more strongly will this apply when the limitation period set forth under law has lapsed, along with an additional period of the same length as the limitation period, and even longer.

127. In our legal system, the argument of "abuse of process" has been recognized in the context of long years of delay in the initiation of a disciplinary procedure in a professional organization against a person who had been convicted of murder and had been sentenced to many years of imprisonment. Bar Association Appeal 2531/01, Hermon v. Tel Aviv District Committee of the Israel Bar Association, IsrSC 58 (4) 55, 78-79 (2004) included the following statement:

> "One of the situations that may give rise to an argument of abuse of process for an accused is considerable delay in the filing of an indictment, even if the statutory limitation period has not lapsed, in cases where conducting a trial after a long period of time may, under the circumstances of the case,

> cause great harm to a person's ability to defend himself, or may conflict profoundly with the duty of justice and fairness, which is required of a proper criminal proceeding... Recourse to this argument will be limited to extreme and exceptional cases only, and will not be available on an everyday basis. ... A proper balance will be required between the intensity of the harm to the accused as a result of the defective proceeding and the weight of the public interest in ensuring that the full rigor of the law is applied."

128. In this case, there was a delay of many long years – estimated at twenty-two years – prior to the initiation of the extradition proceeding against the Appellant. This delay could have been avoided through vigorous action on the part of the Convention member states, by amending the Convention many years before the actual Amendment was enacted. The extradition of the Appellant to the United States, under these circumstances, borders on indecency, and violates the accused's substantive right to a fair criminal proceeding. In this exceptional and extraordinary case, the long period of time that elapsed before the start of the extradition proceedings, under circumstances in which the delay could have been avoided, calls for a negative decision on the request for extradition.

For the reasons set forth above, the "public policy" exception as defined in the Law, is upheld in this case, and also prevents the Appellant's extradition to the requesting country.

Conclusion

129. This case is one of the more difficult cases in the field of extradition between countries. It reflects the acute tension that exists between the public interest in enforcing criminal law on offenders and

rendering assistance to other countries in enforcing their own law vis-à-vis accused persons who committed offenses in their territory – and the enforcement of constitutional norms in Israel, which require protection of the rights of accused persons to a fair criminal proceeding under criminal law, including a fair extradition proceeding. The solution to the dilemma in question is not an easy one. Nonetheless, in this case, the delay that took place in the Appellant's extradition proceedings – which is estimated at 23 years since perpetration of the offenses, and 22 years since the filing of the indictment, and which could have been avoided – imposes a legal and ethical barrier against carrying out the extradition. The violation of the right to a fair criminal proceeding is grave, egregious and exceptional in this case, in view of the passage of the years, and given the duration of the statutory limitation period in criminal cases, which is 10 years with regard to felonies in Israel. The lapsing of the limitation periods for the offenses under Israeli law, as well as the aspects of "public policy" and "abuse of process," should prevent the extradition and justify the denial of the extradition request by the United States.

130. The state's obligation to its constitutional and democratic values is examined, at times, in hard cases in which the defense of human rights involves grave harm to other important public, national and social interests, including the defensible rights of other individuals. As an enlightened society, Israel has a legal system that safeguards human dignity and human rights even when the person in question has been accused and even convicted of the gravest of offenses – because, after all, human rights apply even to such a person:

> "A civilized country is not merely judged by how it treats its faithful citizens, but also by how it treats the criminals living in it, including the most despicable criminals who wish to

> undermine its ethical foundations. In a proper constitutional system, the umbrella of human rights extends over every human being, including the criminal..." (HCJ 2245/06, Dovrin v. Prison Service, paragraph 23 (unpublished, June 13, 2006)).

131. The legal and ethical basis of the extradition proceeding pursuant to Israel's Extradition Law is not restricted to its nature as an important weapon in the war on international and intra-national crime. At the same time, it also represents a procedure that shows consideration for human rights, in both the requesting country and the requested country. The fear of frustration of the extradition proceeding, as such, cannot overshadow the need to examine its impact on human rights and on the basic values of the intra-national system adopted by the state of which extradition is requested; therein lies the moral and legal strength of the extradition process (Miscellaneous Criminal Applications 501/09, Attorney General v. Mayo, paragraph 13 of the ruling handed down by Justice Levy (unpublished, May 10, 2009)).

132. In this case, the Appellant's right to a fair criminal proceeding will be violated if the requested extradition proceeding is carried out. This is due to the lapsing of the limitation period under Israeli law, with regard to the offenses in the indictment that are attributed to him, the length of which is more than double the statutory period. Extradition under these circumstances also violates "public policy" and the principle of "abuse of process," as these terms are defined in the concepts at the foundation of Israel's legal system, because of the protracted waiting period and the fact that the competent authorities were in control of the actions required to eliminate the impediment to extradition.

Therefore, the exceptions to extradition, pursuant to the Extradition Law, in regard to the lapsing of the limitation period and "public policy," as these terms are used in the Israeli legal system, are upheld in this case.

133. In light of all that set forth above, I will propose to my colleagues that we allow the appeal, that we overturn the judgment rendered by the District Court, and that we rule that the petition for the extradition of the Appellant to the United States be denied.

Justice

Justice E. Rubinstein:

Foreword

A. After no small amount of hesitation, I have decided to concur with the conclusion reached by my colleague, Justice Procaccia, in her comprehensive and interesting opinion, even though, with regard to some of the reasoning, my opinion differs, and even though, in my opinion, there is an additional reason, on which I will elaborate. My hesitation stemmed from value-related considerations – from the fact that, apparently, the Appellant may not be brought to justice for the grave offenses with which the United States Government is seeking to charge him. Nonetheless, I will also state here that I am distressed by the fact that, at a certain stage, the United States Government, seeing that the matter of the extradition had gotten "stuck" – initially because of problems with the definitions in the law, and subsequently because of the issue of the Convention, as described by my colleague and, before her, by the lower court – did not decide to request to try the Appellant in Israel,

as the law in Israel enabled; and Israel could also have advised the United States government of that possibility. Indeed, there can be no doubt that the appropriate place – the natural place – to try the Appellant would have been the United States, where he allegedly committed the offenses, and where the complainants and the balance of the evidence are located. Of this, there can be no dispute; see our ruling in Criminal Appeal 4596/05, Rosenstein v. State of Israel, IsrSC 60 (3) 353; and if this was true with regard to that case – where the accused, resided in Israel and deployed the fortress of his criminality in the United States – it is true *a fortiori* in this case. But is there not a stage at which it becomes necessary to decide whether to allow the case to dissolve because of the problems connected with the extradition – or to try it in Israel? In my opinion, the answer to this is in the affirmative, and the solution of holding the trial here, even if it is quite a cumbersome one, was ostensibly attainable.

B. The District Court, and now my colleague, have given extensive coverage to the factual and historical aspects of this exceptional case, which concerns bringing to trial, after a quarter of a century, of a person who fled the United States, undoubtedly because of the case in which he had become embroiled, and for which he should have been brought to justice – and who, since his arrival, has nonetheless resided in Israel under his own name, without going into hiding. I would like to note that, except for the amended legislation that was implemented in 1988, the principal obstacle to his extradition was the need for an amendment to the Convention of Extradition, which took place only in 2007 (for a description of some of the history in question, see my opinion in the Rosenstein Case, at 439-441).

C. We are dealing with a constitutional right, as my colleague correctly described. Article 5 of Basic Law: Human Dignity and Liberty includes extradition, along with imprisonment and arrest, among the prohibitions that are designed to safeguard liberty. Procedural rights – and extradition is usually defined as such – and certainly constitutional procedural rights, bear considerable weight in proper law enforcement. The conduct of the authorities, whose strength and power are great, is subject to restraint, so that they will not transcend the boundaries of those rights; the Court must be convinced that the proceeding before it is a fair one. On the other hand, the interest in bringing [an accused] to trial is obvious, as otherwise "each of us would have swallowed up his neighbor alive" (Mishnah, Avot, 3:2).

D. My opinion tends toward that of my colleague, Justice Procaccia, with regard to the limitation period, at least with regard to the first period – the years 1984-1994. Document A/1 and the appendices thereto indicate how the United States authorities essentially despaired of the case at the end of that period, and my colleague, in fact, mentioned (paragraph 7) the gradual closure of the files by the United States authorities between 1993 and 1995, in several stages. At the beginning of that process of closure, at the very least, and, in my opinion, perhaps years earlier, it should have been clear to all that the chances of extradition in the near future were slim. Accordingly, insofar as the United States authorities wished to try the Appellant, and in principle they certainly did wish to do so, it would have been appropriate to consider doing so in Israel. For the sake of integrity, I should note that I served as Attorney General between 1997 and 2003, but I have no recollection of the issue ever having been brought before me.

On bringing to trial in Israel as the default option

E. I will add a few words about the possibility of trying [the Appellant] in Israel. I believe, as I will explain below, that, notwithstanding the "inability to act" that was raised by the District Court in the context of extradition, there was no "inability to act" in the local criminal context against the Appellant – i.e., even if extradition could not succeed, there was no barrier to trying the case in the State of Israel, as a residual default option. There can be no dispute, as my colleague stated in paragraph 88 [sic – actually paragraph 91], that "Throughout the entire effective period of the Extradition Law, the definition of 'extraditable offenses' thereunder included the offenses in the indictment against the Appellant," and especially following the amendment to the Penal Law in 1988. While it is true that that amendment did not cure the difficulty involved in the issue of extradition, at the very least it reinforced the possibility of trying the case here. And after all, for more than two decades, since 1978, this was the only possibility where Israelis were involved who, pursuant to the amendment to the Extradition Law in 5738 [1978] and the addendum to Article 1A, could not be extradited, and both the countries in question were well aware of this. Under the circumstances, the Appellant's status *de facto*, albeit not *de jure*, resembled that of Israelis – not because he eventually became a citizen, which would not have exempted him from extradition, but due to the impediment to extradition because of the Convention.

F. Let us briefly elaborate. Article 15 of the Penal Law, 5737-1977, became even more important after the enactment of Article 1A of the Extradition Law (in the Offenses Committed Abroad (Amendment) Law, 5738-1978), under which a citizen may only be extradited for offenses

that he committed before becoming a citizen. In the case before us, the Appellant was not a citizen of Israel before he committed the offenses attributed to him and, therefore, in principle, he would have been subject to extradition, and Article 1A would not have applied – but other legal issues stood in the way. Nonetheless, the enactment of Article 1A of the Extradition Law must be viewed concurrently with the enactment of Article 4A (A) of the Penal Code (Offenses Committed Abroad) (Consolidated Version), 5733-1973, which stated that: "The courts in Israel are competent to judge, according to Israeli law, an Israeli citizen or a resident of Israel who has committed an offense outside Israel which, had it been committed in Israel, would have been among the offenses set forth in the Addendum to the Extradition Law, 5714-1954..." Up to that point in time, the competence of Israeli courts with regard to extraterritorial offenses was much more limited (pursuant to Chapter B of the Penal Law, 5737-1977, in the version that prevailed at the time, which specifies individual offenses). Obviously, the purpose of enacting Article 4A (A) was to restrict the situation created by Article 1A of the Extradition Law – i.e., the transformation of Israel, in various cases, into a "refuge" for offenders.

G. Amendment 39 to the Penal Law, 5754-1994, established – pursuant to Article 4A (A) – the present version that is currently to be found in Section 15 (A) of the Penal Law, under which:

> "The penal laws of Israel shall apply to a felony or misdemeanor committed abroad by a person who, at the time he committed the offense or thereafter, was a citizen of Israel or a resident of Israel."

The explanatory note (Bills 5752, 121) stated that: "The proposed Article governs the personal – active applicability (emphasis in the original – E.R.)...." Its necessity was explained by the multiplicity of offenses that are committed by citizens and residents of the state outside its borders, and "the Israeli citizen is not deportable and is not extraditable" (according to the situation that prevailed following the 5738 [1978] amendment to the Extradition Law – E.R.) and, therefore, it is fitting and proper "for the state not to be transformed into a refuge for the offenders who are its citizens."

H. As stated, my colleague, Justice Procaccia, pointed out that the offenses which were defined in the Extradition Law as "extraditable offenses" also included the offenses in the indictment against the Appellant. It is sufficient for me to note that the Addendum to the Extradition Law included "any offense for which it was possible to impose the death penalty or imprisonment for a period greater than three years…," with exceptions that are not relevant to the case before us.

I. Indeed, the district court examined this point in great detail and – correctly – pointed out, in the words of President Barak, in Criminal Appeal 6182/98, Sheinbein v. Attorney General, IsrSC 53 (1) 624, 648, that "the 'natural judge' of the accused is the judge of the country in which he committed the offense." The court concluded – and here, too, its words are apt – that Israel has no connection to the offenses, and emphasized the young age of the complainants (9-10 at the time the offenses were committed, and 10 and 12 when they gave their version to the United States investigative authorities). The court further pointed out that "even if, theoretically, it would have been possible to order that the Respondent be tried in Israel, doing so would have been pointless,

because, from the practical, effective, point of view, the court here would not have had 'the ability to convict the offender'" (per Justice Levy in the Rosenstein Case, at 409). In this last matter, with all due respect, my opinion differs, in view of the circumstances.

J. The Appellant argued, in this matter, that pursuant to Article 15 (A) of the Penal Law, he could have been tried in Israel; in so stating, he relied, *inter alia*, on case law in instances where this was actually done (such as Criminal File (Tel Aviv) 360/96, State of Israel v. Bashan (unpublished) and the Sheinbein Case). It was argued that the evidence could have been brought to a trial that would have been held in Israel, including, as required, by means of a closed-circuit television system.

K. On the other hand, in the state's summarized argument it was argued that, *inter alia*, such trials in Israel had been held in only a few cases and that, in the present case, there were also difficulties due to the fact that the complainants were minors. It was further argued that even the 1988 amendment to the Penal Law would not have been of assistance in trying [the Appellant] here, because of the absence of overlapping between the offenses. The state's supplementary pleadings emphasized that the "center of gravity" of the case was in the United States. It was further argued that trying the Appellant here would give him an unfair advantage over other wanted persons and would harm the victims, over and above the harm done by the actual offense.

L. I have not overlooked the fact that the chronology appended by the United States Department of Justice to its letter A/1 dated December 11, 2007 stated that, in February 1987, the prosecuting attorney's office

of Kings County examined the possibility of adding charges against the Appellant "or considered approaching Israel, to request that he be tried in Israel," but decided that, "from the legal standpoint, it could not support either of the alternatives." Nonetheless, no reasoning for this was given and, therefore, it is not appropriate, on this basis, to reach conclusions with regard to the practical possibility, which, in my opinion, existed under the circumstances.

M. To summarize up to this point: as stated, in practical terms, in view of the impossibility of extradition, the Appellant's situation, to a great degree, resembled that of accused Israelis whose extradition was not enabled by the 5738 amendment to the Extradition Law. The obvious solution, in order to prevent Israel from being transformed into a refuge for the offender, would have been – with all of the difficulty involved – to bring him to trial in Israel, as a residual solution (see Feller, Penal Laws (1984), Vol. I, 293.

N. I will emphasize again: there can be no dispute that holding a trial in Israel for a person who allegedly committed offenses in a foreign country is not a desirable or preferable option – it involves various types of difficulties. (See the Rosenstein Case, at 433, in the opinion by Justice Levy; see also the statement by Justice Adiel in HCJ 3992/04, Maimon-Cohen v. Minister of Foreign Affairs, IsrSC 59 (1) 49, 60, 64, which emphasizes that bringing [a person] to trial within the framework of personal – active applicability is exceptional.) Holding a trial in a location that is not the natural location of the case is a solution that should be adopted only in grave cases – and in the words of the Respondent in the supplementary pleadings (paragraph 39), "the main road is extradition." Nonetheless, I cannot agree with the remainder of

her argument, that holding a trial in Israel can be ordered only if "the 'center of gravity' of the case is in Israel, or when the state in which the offense was perpetrated does not request his extradition." The interest in enforcement dictates the additional situation in which there is an impediment to extradition, but trial in Israel is possible. While the offenses in question were – *prima facie* – committed by a United States citizen while he was in the United States, against American victims; and bringing witnesses to Israel, and prosecutors along with them, is no simple matter, and is also expensive (although it would have been possible, in some of the matters, to make use of an judicial inquiry and, eventually, of videoconferencing). In my opinion in the Rosenstein Case (at 439), I pointed out that the solution of holding a trial in Israel "would have been possible in only some of the cases in which enforcement was required. True, in theory, it would have been possible to try in Israel persons who committed offenses in the United States and fled here – but in practice, however, the considerable expenses for that purpose and the difficulties encountered, including the inability to require witnesses to testify, did not enable the holding of such trials in each and every case" (see also Criminal Appeal 6914/04, Feinberg v. Attorney General, IsrSC 59 (6) 49, 72). Under no circumstances, then, was this a desirable or preferable option. Nonetheless, where there is an interest in bringing [the offender] to trial, in view of the severity of the offenses, and as the years went by with no elimination of the legal-procedural obstacles that precluded the extradition of the Appellant, the balancing point shifted, in my opinion, and it would have been appropriate to seriously consider, and even to conduct, the trial in Israel. The minors who accused him have grown up, but they have obviously not forgotten their complaint, and it would have been possible to bring them to testify, even if it involved an expense for the United States authorities and, to a certain

degree, for the Israeli authorities as well, and I do not dismiss that expense lightly. Moreover, in this case, the question of requiring the witnesses to testify, which might have constituted an obstacle, does not, in fact, arise, because, an examination of the file, including requests by some of the victims in this matter (see paragraph 26 of the ruling by my colleague), it emerges that they – or at least some of them – are still interested in having him brought to trial. Therefore, as I see it, as the years went by and in view of the stagnation that occurred, there would have been a reason to choose this as the lesser of two evils; the procedurally exceptional nature of the case, in the absence of any other alternative, would have overcome the desire to hold the trial in the "natural" location. All of the pertinent statements in Justice Adiel's review in the Maimon-Cohen Case, in the context of holding the trial here, are apt in that case – but what happens when there is no alternative? That is apparently true of the case before us.

O. The ticking clock of the limitation period reminds us of the deceptive nature of passing time. Rabbi Moshe Haim Luzzatto, the 18th-century author of the book on ethics entitled *Mesillat Yesharim* [The Path of the Righteous] (Chapter G, in the explanation of the role of expeditiousness), writes with regard to religious precepts – and, by inference, this also applies to the precept of criminal enforcement and trial – that expeditiousness precedes action:

> "So that the person does not miss fulfilling the precept, but rather, when its time comes or when he has the chance to do so or when it enters his mind, he should hasten and act quickly in order to seize it and accomplish it, and should not allow time to drag out in the meantime, because there is no danger as great as that danger, because, at any moment,

> something may arise which will impede the performance of the good deed."

And subsequently:

> "But rapidity after the deed is begun is also important; once he has grasped the precept, let him hasten to complete it – and let him not dismiss it from his mind, as one who wishes he could throw his burden down; rather, [let him be guided by] his fear that he will not have the privilege of completing it."

And in this case – as time passed, the difficulties increased and a solution was required (and I will not speak of the difficulties involved in holding a trial, whether in the United States or here, after many years, and the difficulties of human memory, as they are well known to us all).

P. With regard to the passage of years, I admit that I had a bit of difficulty due to the ruling in the Bazaq (Bouzaglo) Case (Criminal Appeal 3439/04, Bazaq (Bouzaglo) v. Attorney General, IsrSC 59 (4) 294), in which the Appellant was declared to be extraditable to France, 23 years after having committed the alleged offenses (murder and mayhem). The Appellant in that case was *a priori* a citizen of Israel; the obstacle to extradition was Israeli law (the 1978 amendment to the Extradition Law), until the law was amended in 1999 and the extradition of citizens was made possible, subject to the undertaking to return them to Israel to serve out their sentence in cases of imprisonment. However, when we examine both cases closely, we see that there is a difference between them. In the Bazaq (Bouzaglo) Case, the "fault" was entirely that of Israel – i.e., it lay in the legal situation that Israel created in the 1978 legislation. In the present case, both countries are to blame, as

the principal impediment involved the need for an amendment to the Convention of Extradition, which was a reciprocal act. Furthermore, in the Bazaq (Bouzaglo) Case, the Appellant had already been convicted in France (albeit *in absentia*, after he fled the country, and there was an undertaking to reopen the trial following the extradition). Therefore, I do not believe that the two cases are equivalent.

Q. In its Response, the state mentioned Miscellaneous Applications (Jerusalem) 5462/08, Attorney General v. Silverman. That matter has meanwhile been decided in the District Court, and in this Court as well (Criminal Appeal 3680/09, Silverman v. State of Israel (unpublished)), and the Appellant was declared to be extraditable. True, there is a background similarity between the two cases – sexual offenses committed against minors by a psychologist. The difference, however, lies, *inter alia*, in the fact that, in that case, the Appellant had already pleaded guilty in the United States and had been convicted and sentenced, but before the sentence could be reviewed following the ruling on appeal, he fled to Israel; in the case before us, no trial has yet taken place. But that is not the most important thing: the principal difference is that, even though, in that case, time passed between the Appellant's escape to Israel (November 2000) and the filing of the extradition request (October 9, 2007), it is impossible to compare seven years to twenty-two years in the present case.

R. In the hearing before us, counsel for the state pointed out that "we are not talking about the question of whether it is possible to conduct the procedure in Israel, or whether it is proper, but rather, about whether the case justifies being heard… in the requesting country." However, she pointed out that, even according to the former law – the Extradition Law,

in the version that was in force between 1978 and 1999 – the offenses attributed to the Appellant were extraditable offenses. In its response, the state also gave a negative answer to the question by the presiding judge, with regard to holding the trial in Israel, which counsel for the Appellant was prepared to allow, which is also regrettable

S. To conclude: I believe that the option of holding a trial in Israel existed under the circumstances, even before the amendments to the Extradition Law and the Convention (amendments which, to a great degree, were intended to settle the question of extradition for Israeli citizens who were citizens at the time of perpetration of the offense). It is not by any means an enticing option; nonetheless, under the circumstances of a legal "bottleneck" that required the amendment of the Convention, and when the "bottleneck" had persisted for many years, the alternate route to the best solution for extradition should have been holding a trial here.

T. In summary, I will state that I regret the fact that no indictment was filed against the Appellant in Israel. It would have been fitting and proper to do so, and to hold the trial on a date that was relatively close to the events, and thereby to do justice with the complainants by giving them their chance to testify. Anyone right-minded person will understand that the Appellant did not immigrate to Israel for Zionist or Jewish reasons, but rather, for fear of being brought to justice. By not bringing him to trial in Israel when the hope of extradition failed, the authorities played unintentionally into his hands. His non-extradition resulting from our decision is not a certificate of acquittal or of honesty; far from it. It results from a legal analysis of the relevant material, which

culminated in a decision that was uncomfortable, but which was apparently correct from a legal standpoint.

Public policy?

U. I will add that I have difficulty in concurring with the position expressed by my colleague, Justice Procaccia, with regard to public policy and equitable defense, to which she devoted an interesting and comprehensive survey. A great deal of ink, as we know, has already flowed on this issue (see e.g. Criminal Appeal 2521/03, Sirkis v. State of Israel, IsrSC 57 (6) 337, 345-348; (then) Justice M. Cheshin). The balance does not necessarily tend to assume violation of public policy through non-extradition, and I am close to saying that the scales are evenly balanced. President Shamgar stated, in the past, that "public policy reflects the basic foundations of the social order" (Civil Appeal 661/88, Haimov v. Hamid, IsrSC 44 (1) 75, 84). In this case, the basic foundations of the social order include, on the one hand, bringing a person to trial for grave sexual offenses, and, on the other, the proper functioning of the enforcement authorities in both countries. I am not certain that public policy – and, for that matter, equitable defense – indicate that a matter be decided one way or the other. Some will say that equitable defense is often appropriate when other considerations favor holding a trial, but when the conduct of the authorities acted against them. While this is true, I see no need to decide what will tip the balance in this case, and I would leave this issue for further study, in view of the outcome that we have reached on the basis of other contexts.

Conclusion

V. As set forth above, I concur with the finding of my colleague, Justice Procaccia.

Justice

Justice M. Naor:

1. I concur in the result of the opinion by my colleague, Justice A. Procaccia, on the basis of some of the reasons she cited, even though I do not support all of the reasoning on which she bases her conclusion. As my position is very close to that of my colleague, Justice E. Rubinstein, I shall be brief.

2. I accept the position of my colleague, Justice A. Procaccia, that the starting date for the running of the limitation period, in the case before us was the date the indictment against the Appellant was filed in 1985 and that, since that time, no events have taken place that could toll the running of the limitation period. This means, as my colleague showed, that more than 10 years elapsed between the filing of the indictment and the date on which Article 94A of the Criminal Procedure Law [Consolidated Version], 5742-1982 (hereinafter: the Criminal Procedure Law) went into effect. That provision was enacted after the "first" limitation period had lapsed and, therefore, that provision has no implications for the case before us.

3. The way to "overcome" the "first" limitation period (if there is any way at all) is, therefore, by applying the principle of "inability to act." Although this is not a principle that appears in statute, I tend to think that it has its place in the judiciary toolbox in general, and also in the case that is now before us. Thus, if we change the facts slightly for the

purposes of the discussion and assume that the Appellant had been, for a long period of time, in a country with which the United States does not have extradition agreements, and that the Appellant arrived in Israel 20 years later, it appears to me, *prima facie,* that, as a result of the principle of "inability to act," it would have been possible to extradite him to the United States even after a period of time as long as that in the case before us.

4. This, however, is not the situation in the case before us. In this case, there was no absolute inability to act. As the first period of 10 years drew to a close, and despite the discomfort involved, the right thing to do would have been to try the Appellant in Israel for the offenses of which he was accused. My colleague, Justice Rubinstein, pointed this out and I agree with his opinion. There is no absolute inability to act here and, accordingly, I have also reached the conclusion that the appeal should be allowed. Although it is not strictly necessary to do so, I shall briefly state that I do not believe that the decision to extradite the Appellant would constitute a violation of public policy; furthermore, in my opinion, it is also inappropriate to hold that there was abuse of process in the circumstances of the case. As set forth above, I believe it would have been right and just to bring the Appellant to trial, in order to adjudicate the question of his guilt or innocence.

5. In conclusion, I concur that the appeal should be allowed.

Justice

The decision is therefore as set forth in the ruling by Justice Procaccia.

Given this day, 28 Tevet 5770 (January 14, 2010).

Justice Justice Justice