CrimA 4596/05

Ze'ev Rosenstein

v.

The State of Israel

The Supreme Court Sitting as the Court of Criminal Appeals
Before Vice President M. Cheshin, Justice E.E. Levy, Justice E. Rubinstein

Appeal of the decision of the Jerusalem District Court on 19 April 2005 in CrimApp 4023/05, given by the Honorable Judge Y. Tsaban

For Appellant: Devorah Chen; Ariel Bendor; Shlomo Nissim; Benny Nahari
For Respondent: Gal Levertov; Yitzhak Bloom; Yuval Sasson (State Attorney's Office)

JUDGMENT

Justice E.E. Levy

An Israeli citizen is wanted in the United States, for the crime of conspiracy to import a dangerous drug and to distribute it within its borders. The prosecution authorities there wish to put him on trial. The State of Israel, in which he is present and in which the conspiracy was made, is being asked, on the basis of the extradition treaty between the two states, to extradite him. Israeli penal law allows putting him on trial here. Is it legal to extradite him? That is the question which stands before us in this appeal.

Factual Background

1. On December the 27th, 2004 the United States Government relayed a request to the Government of the state of Israel, for the extradition of appellant Ze'ev Rosenstein to the US. The request included a detailed account of appellant's alleged crime, which – according to the prosecution authorities in the US – conspired in Israel to import a dangerous drug into the US and to distribute it there.

The extradition request was supported by evidence which seems to be the fruit of a considerable investigative effort. The request is detailed and comprehensive. The picture which arises from it – *prima facie*, one must emphasize – is grim. It contains suspicions of a worldwide criminal conspiracy, whose consummation was made possible by activating agents, and agents' agents, from afar. The conspiracy, which allegedly brought forth its evil fruit for a long time, led to the penetration of about one and a half million pills of the drug known as methylenedioxymethamphetamine (MDMA, known also as "ecstasy"). Appellant is suspected, in addition to his general involvement in the conspiracy, of personally funding the purchase of approximately one third of the pills. There is no need to expand upon the severity of the charges, the wide scope of the alleged acts and, especially, the damage to society and health which they involve. American society,

which was the main target of the activity, suffered the lion's share of the damage, and would have had to suffer results even more severe, had the plan been carried out fully.

2. The essence of the allegations in the extradition request is as follows: in 1996 or 1997, appellant first met a person by the name of Baruch Dadush (hereinafter: Dadush), and they became friends. Two years later, the allegedly began to participate together in criminal activity. One day in 1999, the two met in the Tel Aviv "Hilton" hotel with a man by the name of Zvi Fogel (hereinafter: Fogel). Appellant apparently suggested that Dadush and Fogel deal drugs, and even informed Fogel that Dadush would be his representative in any future drug deals. After this meeting, Dadush began trafficking in drugs for appellant, including the deals at the center of this case.

3. The extradition request claims that appellant was involved in three drug deals of wide scope. The first took place in 1999, when 135,000 MDMA pills were bought in Holland and brought to their destination via Germany, hidden in motor vehicles. According to the American prosecution authorities, appellant funded the purchase of 32,000 of these pills. After selling the drugs in the US, Fogel transferred part of the profits to Dadush, $90,000 of which Dadush gave appellant, keeping the same amount for himself (clause 15a of affidavit of Benjamin G. Greenberg, Assistant United States Attorney for the Southern District of Florida, hereinafter: the Assistant US Attorney affidavit; and clauses 2-7 of Dadush's affidavit, which is attached to the extradition request).

In the same year an additional drug deal was allegedly carried out. That deal led to the distribution of 305,000 pills of the drug in the US, 50,000 of which appellant purchased for a total of $50,000, which he paid Fogel via Dadush. This time the drug was transported while hidden in copper scrap and computer parts. Dadush intended to travel to the US, accompanied by his brother Alain, in order to coordinate the distribution of the drug, but he was refused entry and returned to Israel. As for Alain, he entered the US, and followed Dadush's instructions in order to distribute the pills in New York City. When the job was finished, the profits were transferred to Fogel in Israel. The latter transferred the relevant part of the profits to Dadush, out of which appellant's share was paid to him (clause 15b of *the Assistant US Attorney Affidavit*; clauses 8-9 of *the Dadush affidavit*; and clauses 2-5 of the affidavit of Alain, which was attached to the extradition request).

According to the prosecution authorities, an additional shipment of drugs was arranged in 2001. In **one** deal during that year, appellant invested an amount of $125,000. For unclear reasons, the shipment of the drug to the US was delayed. Dadush asked Fogel about this, and relayed the answers to appellant. As the delay continued, appellant lost his patience, and in a meeting of the three which was arranged at his request, he pressured Fogel and demanded his profits. A few days later, it became clear that the problem had been solved (clause 15c of the *Assistant US Attorney affidavit*; clauses 11-12 of *the Dadush affidavit*). In a **second** deal, appellant's share was 250,000 drug pills, for which he paid between $150,000 – 200,000 (clause 13 of *the Dadush affidavit*). Dadush made travel arrangements to the United States for two people: Israel Ashkenazi (hereinafter: *Ashkenazi*) and David Roash (hereinafter: *Roash*). They rented an apartment in Manhattan, in which they stored the drugs, but the group experienced difficulties in locating buyers. At this point an additional person entered the picture – Shemtov Michtavi (hereinafter:

Michtavi), an acquaintance of appellant, who met in the United States with a man named Mordechai Cohen (hereinafter: *Cohen*), and told him that appellant, whom he called "the strongest man in Israel", for whom he works, needs help in distributing a large quantity of ecstasy pills in the United States. Cohen lent a hand (clauses 15d-15e of *the Assistant US Attorney affidavit*; clauses 13-16 of *the Dadush affidavit*). He contacted his friend, Patricio Vives, who was in Colombia at the time, and asked his help in locating buyers. The effort was successful, and two buyers were found for the drugs. Appellant relayed their contact information to Dadush, and instructed him regarding the scope of the deals and the amounts of money he expected to receive. Dadush then instructed Roash and Ashkenazi, according to the instructions he had received from appellant (clauses 16-17 of *the Dadush affidavit*). After the first sale, Cohen spoke on the telephone with appellant, who promised him that he "is behind" the deal. Appellant also gave Cohen his phone number, and told him to call him directly in case anything goes wrong (clause 15f of *the Assistant US Attorney affidavit*; clauses 2-7 of Cohen's affidavit, which was also attached to the extradition request).

After the successful completion of the deal, Vives contacted Cohen and told him about his friend in Miami, by the name of Juan Carlos, who was also interested in buying drugs from the outfit. What they did not know, was that Carlos was an informant of the Miami police and of the Drug Enforcement Agency (hereinafter: *DEA*), and his activity was part of an intensive American effort to expose the affair and to arrest those involved in it (clause 7 of the affidavit of Robert Dick, DEA Mission Team Officer (hereinafter: *Dick*). Cohen called appellant directly, and informed him of the offer he had received. After a discussion, it was decided that the offer would be accepted, and that the deal would go down in New York. Carlos informed Cohen that he or one of his people would come to the city, and gave him the phone number of a man named George – also an undercover police informant, who played the role of the buyer's agent. Cohen updated appellant regularly regarding the progress of the deal (clauses 15j-15h of *the Assistant US Attorney affidavit*; clauses 8-11 of *the Cohen affidavit*; clauses 19-20 of *the Dadush affidavit*; clauses 8-12 of *the Dick affidavit*). On July 16 2001, Roash gave George a sample of the pills. Investigators followed him to the apartment building in Manhattan, and searched the apartment. There, they found 700,000 ecstasy pills (total weight 182.8 kg) and $187,000 in cash. Roash and Ashkenazi were immediately arrested for conspiracy and possession of a controlled substance. On the day of the arrest, Dadush tried to make contact with them, in order to find out whether the deal had been successfully completed. When his call was not answered, he informed appellant accordingly, and the latter called Cohen and instructed him to find out what had happened (clauses 15i-15m of *the Assistant US Attorney affidavit*; clause 12 of *the Cohen affidavit*; clause 21 of *the Dadush affidavit*; clauses 14-16 of *the Dick affidavit*; clauses 2-4 of the affidavit of Luis Alvarez, New York police detective, which was attached to the extradition request).

After it became clear that Roash and Ashkenazi had been arrested, Dadush met with appellant and told him that they need to raise money for their legal representation. Appellant allegedly called Cohen, and told him he suspects that the buyers and their agents were undercover agents (clause 15n of *the Assistant US Attorney affidavit*; clause 13 of *the Cohen affidavit*). During an additional meeting in the Tel Aviv "Hilton", between appellant, Dadush, and Alain, Dadush confirmed to

appellant, that the buyer had turned out to be an undercover agent. Appellant was very angry, and in a telephone conversation with Cohen, who was in Spain at the time, told him that he (appellant) had "lost a lot of money" and that "someone would be responsible" (clause 23 of *the Dadush affidavit*).

The Trials of the Syndicate Members

4. The exposure of the syndicate was made possible by great and extended covert and overt investigation efforts on the part of American law enforcement agencies. On the basis of the evidence gathered during the investigation, most of the people involved in the affair were tried in American courts. Roash and Ashkenazi were tried and convicted. Michtavi was extradited to the United States from Bulgaria, and was tried and convicted in September 2004. Cohen was extradited to the US from Spain, and was convicted in a plea bargain; Vives, a Colombian citizen, was also tried in the United States (clause 15e of *the Assistant US Attorney affidavit*).

The Dadush brothers, however – Baruch and Alain – were tried in Israel. They were convicted in the Tel Aviv-Jaffa District Court, but while their appeal was pending in the Supreme Court, they were asked to be state's witnesses in the United States. Having agreed, the two were released from prison and extradited to the US. In permitting their release, Beinisch J. ruled:

> "There is no doubt that the agreement has been made for a purpose which is in the public interest, to the highest degree. If respondents fulfill all the conditions which they took upon themselves, there is a chance that an important step in will be made the international struggle against serious crime and drug trafficking, a struggle in which the State of Israel is a partner: [CrimApp 10149/04 *The State of Israel v. John Doe*, unpublished decision of November 10 2004].

I might add, incidentally, that Zvi Fogel was tried in Israel, and also convicted, but not in the affair discussed in this case, rather as a result of his involvement in another drug case (*see* CrimA 7463/03 *Fogel et al. v. The State of Israel*, unpublished decision of February 19, 2004).

Regarding Appellant

5. Appellant was arrested in Israel on November 8 2004. On December 17 2004, a Grand Jury in the Southern District of Florida decided to indict him on charges of conspiracy to distribute a controlled substance, an offense pursuant to 21 USC § 841(a)(1), 841(b)(1)(c) and 846, and conspiracy to import a controlled substance into the United States, an offense pursuant to sections 952(a), 960(b)(3) and 963 of that law. The **maximum** penalty prescribed for these offenses in American law is twenty years imprisonment. This penalty "ceiling" becomes a penalty "floor", when the use of the controlled substance caused death or serious bodily injury. In that case, the American court must hand down a sentence of **at least** twenty years imprisonment.

As a result of the indictment, a warrant for the arrest of appellant was issued in the United States on December 20 2004. On December 28 2004, the US Department

of Justice made a request to the Office of the State Attorney of Israel, for the extradition of appellant to the US law enforcement agencies. As a result of the request, and pursuant to The Extradition Law, 1954 (hereinafter: *The Extradition Law*), the Attorney General, per instructions of Acting Justice Minister T. Livni, petitioned the Jerusalem District Court on January 5 2005 for a declaration that appellant is extraditable. The District Court allowed the petition and issued the requested declaration.

The Decision of the District Court

6. The District Court (the Honorable Judge Y. Tsaban) thoroughly examined each of appellant's arguments against his extradition. It first discussed the arguments regarding violation of the rules of natural justice, the inadequacy of the evidence, and the lack of due process, as appellant was not interrogated and was given no opportunity to present his version, and was not allowed to inspect all of the investigation file upon which the extradition request was based. These arguments were rejected, since even if a version completely negating the prosecution's version were presented, and even if additional investigation material would be added to the pool of evidence, that would not undermine the value of the *prima facie* evidence against appellant. In any case, the court ruled, the extradition court does not examine the truth of the indictment, rather only whether there is *prima facie* evidence, and as mentioned, sufficient such evidence was found.

The District Court then progressed to the main argument, which is that extradition of appellant to the United States is unconstitutional. This argument was also rejected. The District Court first ruled that despite the fact that appellant allegedly committed the crimes in Israel, the target of these crimes was the United States. Therefore, ruled the court, Israel and the United States have concurrent jurisdiction to try appellant. In examining the entirety of the considerations in deciding between concurrent jurisdictions, the District Court ruled that strict rules are not to be formulated, and that the decision should be subject to the concrete circumstances of the case. The court emphasized that in crimes involving a prominent international dimension, including drug offenses, the **center of gravity** of the offense should not be identified as the physical place in which it was committed, since that place is likely to be random and unimportant. Instead, weight should be given to the place in which the offense was consummated. The court further stressed that in such offenses, the territorial principle should be given little weight, and the interests regarding the reciprocity of extradition between states, and the need for international cooperation to rout organized crime, should be preferred. The court concluded that appellant's extradition raises no concern of violation of public policy or due process, and does not impair his ability to defend himself against the charges against him.

On this basis, as previously mentioned, the District Court allowed the petition and declared appellant extraditable. It is against that decision that the appeal before us is directed. Appellant wished, in addition, to raise his arguments in a petition he submitted to the High Court of Justice (HCJ 5832/05), but in light of our comments that the issues arising in both proceedings are similar, he agreed to the abatement of the petition, and we ruled accordingly.

The Arguments in the Appeal

7. Appellant asks this Court to change the decision of the District Court. He asks us to see the Attorney General's petition for his extradition as a unique case, which is the first of its kind, since, as he sees it, in circumstances where the extradited person is an Israeli citizen and resident, and the alleged offense was committed entirely in Israel, extradition to another country deviates from the balance required by Basic Law: Human Dignity and Freedom, and by fundamental principles of penal law.

Appellant's first argument is that since the disagreement between the parties is limited to the question of his involvement in the alleged drug deals, as opposed to the question whether the deals took place, the evidence is centered in Israel and not in the United States. Appellant stated that if the trial takes place in Israel, he is willing to waive cross examination of US law enforcement personnel, and he will not object to the presentation of any of the evidence which is to be presented before the US court. He also refers to the state's witness agreements signed with Baruch and Alain Dadush, in which they promised to give testimony in Israel if necessary. Therefore, he contends, no great importance should be given to the fact that the prosecution witnesses are in the United States. However, in the very same breath, appellant complains that the extradition of the Dadush brothers prevents him from cross examining them, should he be tried in Israel. How this contradiction is to be solved, he does not explain.

Appellant further argues that the dominant link of the offenses with which he is charged is to Israel, and not to the United States. According to his approach, since these offenses – conspiracy to import a controlled substance and conspiracy to distribute it – do not contain a **consequential** element, they should be seen as offenses whose elements were all fulfilled in Israel. Considering, further, that the offender is an Israeli citizen and resident, who is not a fugitive from justice in another country and who can be tried in Israel, appellant claims that extradition serves no worthy purpose, and is not proportional. Appellant further contends that the target of the conspiracy to import and distribute controlled substances, and the personal link of the victims of the crime, cannot outweigh the principle of territorial jurisdiction, which is to be given decisive weight. And in any event, in circumstances in which concurrent jurisdiction arises, as in this case, the jurisdiction of the state of the suspect's citizenship – which is Israel – should be preferred.

Appellant's third argument is that his extradition will violate his procedural and substantive rights as a defendant in a criminal case. He will not have the benefit of being judged in his natural environment, and language difficulty and the difference between the Israeli and American legal systems will compromise his defense and his rights to due process. The argument refers mainly to the jury system, which is a different decision making system than the one in Israeli law, but refers also to the scope of the right to inspect the evidence, which is more restricted in the United States; to the admissibility of hearsay in American law in certain circumstances; and to the lack there, as opposed to in Israel, of the requirement that states' witnesses' testimony be corroborated by independent evidence.

Appellant brushes away the contention that his non-extradition will make Israel out to be a state of refuge for criminals. Indeed, he did not even flee to Israel

and did not commit any of his alleged acts outside the borders of the state. He contends that the real purpose of the decision to extradite him is the prosecution's wish to remove evidentiary difficulties, which make trying him in Israel difficult, from their path.

Last, appellant claims outrageous conduct, which requires suspension of the extradition proceedings. He contends that the prosecution's policy on drug offenses has long been to conduct trials in Israel, even if the act was committed outside of Israel. Appellant specifically mentions the trials in Israel – at least in the beginning – of the Dadush brothers. The argument is, in essence, that the decision regarding appellant is discriminatory, and for this reason as well, must therefore be annulled.

The Attorney General's Response

8. The Attorney General supports the decision of the District Court. He asks that we see appellant as a person who, in this case, *de jure* and *de facto*, acted as the head of a crime syndicate. As such, appellant needed not take part in the activity in the target state, rather could instruct his people from afar. There is, therefore, no real importance in the geographical location from which appellant acted.

Respondent further contends that an interpretation capable of realizing the purpose of the extradition law must give considerable weight to the interest of advancing cooperation between states in the fight against organized crime, and specifically against the distribution of dangerous drugs, and that such cooperation requires the extradition of appellant. Such an interpretation also stems from the international obligations which Israel has taken upon herself in agreements she has entered.

Were we to follow appellant's line of argument, contends respondent, we would find ourselves allowing all those acting from within one country against the security of another, to escape justice, or, at least, to choose the law they find more comfortable. Appellant, it is claimed, has no "right" to commit a crime against one state and at the same time, to be judged according to the laws of another state. For this reason, his plea of outrageous conduct is also to be rejected. Respondent emphasizes, on this point, that the term "escaping" should not be constructed narrowly, and it should be recognized that it is not merely "physical escape, as in moving one's residence from one country to another", rather it is "any act intended to or making it possible to distance a person from the law enforcement agencies and justice in the country which wishes to put him on trial and has been harmed by the crime." Any other interpretation would lead to a normative situation in which The Extradition Law would apply only to those members of conspiracies or of crime syndicates who are found at the bottom of the organizational hierarchy – couriers, distributors, manufacturers, and sellers – and not to the leaders. Respondent argues that such a conclusion is at odds with the purpose of The Extradition Law and with the vital interest of routing transnational crime.

Respondent also rejects appellant's arguments regarding a lack of link between his alleged acts and the American law. It is claimed that the United States' reasons for prosecuting appellant are clear and obvious: appellant intended to strike at the rule of law in the United States, at the social values which its law is intended to advance, and

at the security and well being of its citizens. Therefore, there is no basis to the argument that appellant's link to the requesting state is a "technical-formal" one; rather the link should be seen as a substantive one, which makes application of US law to this case appropriate.

Respondent emphasizes that the proper constitutional balance between appellant's rights and the public interest is to be found in his conviction in the United States – that, if he is convicted – and his return to Israel to serve his sentence, which the United States has expressly agreed to.

Last, the Attorney General argues that the "procedural arrangements" suggested by appellant to reduce the scope of the argument should be rejected, as they are at odds with the law and even mistaken on their merits. He also asks that we reject appellant's argument regarding the expected blow to his substantive and procedural rights in the United States, *inter alia* in light of guarantees which can ensure due process there.

Discussion

Outrageous Conduct

9. I shall begin the discussion with those arguments which are not at the heart of the issue, and can be decided prior to delving into the depths of it. The first is the claim of outrageous conduct. In its most common sense, the outrageous conduct doctrine allows the court to annul an indictment, when it is not possible to ensure the accused a fair trial, or when putting him on trial strikes at the principles of justice (CrimA 2910/94 *Yefet v. The State of Israel*, 50 (2) PD 221, 370; HCJ 1563/96 *Katz v. The Attorney General*, 55 (1) PD 529, 543; HCJ 5319/97 *Kogen v. The Military Advocate General*, 51 (5) PD 67, 94; BAA 2531/01 *Chermon v. The Tel Aviv – Jaffa District Committee of the Israel Bar*, 58 (4) PD 55, 77; *and* CrimA 4855/02 *The State of Israel v. Borovitz et al* (yet unpublished decision of March 31 2005).

The central justification for using that authority is the desire to ensure that 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 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, which we recently discussed in *Borovitz*, into account.

The court must "identify the faults which occurred in the proceedings regarding the accused, and measure their intensity, irrespective of the question of his guilt or innocence" (*id.*, at paragraph 21). It must examine whether conducting the criminal proceedings – despite the faults which occurred in them – violates one's sense of justice and fairness. The lens through which the court examines the

justification for employing the outrageous conduct doctrine in a particular case is wider than it was in the past, due to the *Borovitz* case, and is no longer restricted to the narrow reasoning of the *Yefet* rule. That is to say, it is no longer restricted to "insufferable behavior on the part of the authorities", which "shocks the conscience" (*id.*, at p. 370). Instead, a purposive-substantive examination of the entirety of the circumstances is performed (the *Borovitz* case, id.).

10. It is possible to make an argument of outrageous conduct against extradition proceedings as well, due to its justifications and the substantive proximity between an extradition proceeding and a "regular" criminal proceeding (*see* S. Z. Feller *Extradition Law* (Jerusalem, 1980) 24 [Hebrew]; CrimA 6914/04 *Feinberg v. The Attorney General* (yet unpublished decision of March 7 2003, paragraph 39). It seems, however, that its proper place is in the "internal" examination which extradition law requires us to perform, and which I will later discuss. I refer both to the proper balance between the provisions of Basic Law: Human Dignity and Freedom, which includes the right to not be extradited as a basic right (Article 5 of the basic law), and the provisions of The Extradition Law itself; and also to the requirement – which is also in The Extradition Law – that the extradition not violate public policy. "The fundamental principles, deeply held views, and sublime interests," (in the words of my colleague Cheshin J. in CrimA 2521/03 *Sirkis v. The State of Israel*, 57 (6) PD 337, 346), which are wrapped up in this vague concept (German – "ventilbegriff"; Italian – "concetto volvola"), include the principles of justice and legal fairness, as well as the right to a fair trial. And indeed, these are the very same values which are protected by the outrageous conduct doctrine.

Whether one says that the outrageous conduct defense stands on its own in extradition proceedings, or that it is a subset of the "internal" defenses in extradition law, the conclusion is the same: an extradition request which raises real concern of violation of the principles of justice and legal fairness, or of the right to a fair trial, is likely to be refused, merely for that reason. In a situation where extradition proceedings have already commenced, they can be suspended (*compare* the words of my colleague, Cheshin J., in *Feinberg, Supra,* at paragraph 17).

11. However, I can hardly understand what appellant's case has to do with all that. As mentioned, his petition to gain the outrageous conduct defense rests on two claims: one is that the extradition discriminates between him and other accused persons, including those in this very case; the second is that prosecution authorities deviated from the law when they decided to bring state's witnesses Baruch and Alain Dadush to the United States, and later used that excuse to justify the necessity of appellant's extradition to the US, contending that the evidentiary center of gravity of the case is there. I find both claims unfounded. The claim regarding the fault in prosecution authorities' deviation from their long term policy is doomed to failure. The Public Prosecutor – as any other administrative agency – is permitted to change its policy, or instructions which it adopted, as long as there are appropriate reasons for such a change. No person has a vested right that a certain policy will remain standing, even under circumstances justifying its change. Moreover, the rule is that the implementation of a policy – especially an implementation involving the use of discretion – is a specific implementation, which takes into account the specific circumstances of each case:

> "There is nothing preventing an agency, to which the legislature has assigned the performance of a role involving discretion, from coming to the conclusion that the custom, manner, or considerations in the policy of performing the role need to be changed, and there is no fault in such a conclusion, when such a change is required by past experience, change of circumstances, or other factors which relate to or have implications upon the same subject. It is however clear, that alteration of policy must be guided by a consideration of realizing the law and its spirit; therefore, **when dealing with the use of discretion regarding individual persons of different circumstances and traits, one must not form a uniform and inflexible policy, when the very objective of the law is that the discretion actually be used toward the certain person with consideration of his special circumstances"** (HCJ 92/83 *Nagar v. The Workers Compensation Insurance Authority*, 39 (1) PD 341, 353; emphasis added).

The reasons noted by the state, in its response to the question why the discretion in the case of appellant was used as it was, are acceptable, and I found no reason to doubt them. They take into account appellant's alleged central role in the leadership of the conspirators; the fact that the results of the crime appeared overseas; the central purpose of the Extradition Law, which requires international cooperation in the war on organized crime and especially on drug trafficking; and the amendment of the year 1999 of The Extradition Law (which we shall yet discuss), which expands the arc of cases in which a person can be extradited. More importantly, indictments submitted in Israel against other persons suspected of smuggling drugs to other countries have differences, vis a vis appellant's indictment, which are sufficient to justify employing a different policy against him.

12. The argument regarding discrimination between appellant and the other accused persons in this case is also to be rejected. It is uncontroversial that selective enforcement based on irrelevant considerations is forbidden:

> ". . . selective enforcement is enforcement which violates equality, in the following way: it differentiates, for the purpose of enforcement, between similar persons or similar situations, in order to achieve an unlawful goal, or on the basis of an irrelevant consideration, or out of pure arbitrariness. . . such enforcement sharply violates the principle of equality before the law in its basic sense. It is destructive to the rule of law; it is an outrage to justice; it endangers the legal system. The authority to make a criminal indictment is an important and severe one. It can determine a person's fate. So too is the authority to enforce the law in other ways, such as the authority to arrest a person or the authority to confiscate property. It must be used in a relevant, equal, and reasonable fashion" (HCJ 6396/96 *Zakin v. The Mayor of Be'er Sheva*, 53 (3) PD 289, 305).

There may also be cases in which partial enforcement will be found to be unlawful and to justify a defense of outrageous conduct, even if it is not founded upon unlawful considerations, rather is faulty from another standpoint (*Borovitz*, at paragraph 26). However, the relief for which appellant petitions – suspension of the proceedings due to outrageous conduct – requires a factual basis (*see also* CrimApp 4934/98 *Kahane v. The State of Israel*, unpublished decision of October 27 1998, at paragraph 5). Such a factual basis was not provided by appellant. *Inter alia*, he did not prove that anything but relevant reasons served as the basis of the decision in his case. We have not been convinced that the decision is discriminatory. It was not even contended that a request to extradite any of the other accused persons was submitted (including the Dadush brothers, before the decision to try them in Israel was made).

13. Regarding extradition of Baruch and Alain Dadush to the United States: it is uncontroversial that the agreement reached with them was unusual. I am willing to assume that "benefits", in the words of appellant's counsel, were given to the Dadush brothers in the framework of the extradition, in exchange for their agreement to be state's witnesses against appellant. However, study of the documents presented before us leaves no room for doubt that the extradition of the two was not intended to determine the issue of the location of appellant's trial. It was part of a complex process, in which the two agreed to testify against appellant if they would be accepted into the US "witness protection program", whose basic foundation – maybe even more than in other countries – is raising the chances of safeguarding their lives and guaranteeing their security. The making of the agreement with them was, therefore, a legitimate act on the part of the prosecution, in its efforts to ensure that justice will be served regarding all found guilty in the case.

Moreover, appellant cannot hold the rope from both ends. His argument, on the one hand, that the extradition of the Dadush brothers to the United States grants him the defense of outrageous conduct due to its blow to his defense if he is tried in Israel, cannot be heard together with his argument, on the other hand, that the fact that the two promised to return to Israel if their testimony is needed here, reinforces the conclusion that the evidentiary center of gravity is in Israel, and therefore that he is not to be extradited. The claim regarding outrageous conduct, and all the arguments in it, are therefore rejected.

The Procedural Arrangements Suggested by Appellant

14. Appellant's offer to "reduce the scope of disagreement" through his obligation to waive the testimony of witnesses, cannot be accepted. Even considering the adversary character of our legal system, such an offer violates the procedural process, and worse still – the ability to properly discover the truth - in a way that cannot be accepted. Respondent correctly noted that such an arrangement does not take into account the court's discretion to call witnesses. Just recently, dealing with a similar issue, this Court ruled:

> "Experience shows that prosecution in Israel of crimes committed in foreign countries involves so many difficulties – *inter alia,* difficulties in locating witnesses and obligating them to testify – that they can only be solved with great

> difficulty. Appellant's offer to solve these difficulties – *e.g.* by way of changing the regular rules of procedure and evidence – are so difficult to implement and so distort the process, that they are not feasible, *de facto*" (*Feinberg, Supra,* at paragraph 23).

The logic of this reasoning applies to the same extent in our case, and requires that we also reject appellant's offer. Having removed this issue from our path, we can turn to the examination of the issues at the heart of the appeal.

The Normative Framework – Israeli Extradition Law

15. Israeli extradition law is made of three strata. The first is the constitutional right not to be extradited, which is anchored in Article 5 of Basic Law: Human Dignity and Freedom. That right can be restricted under conditions set out in the basic law, which we shall later discuss. The second is The Extradition Law, which, together with the regulations issued pursuant to it – the Extradition Regulations (Procedure and Evidence Rules in Petitions), 1970 – sets out the arrangement in a detailed fashion. Finally, international conventions which arrange Israel's extradition relations with foreign entities, and especially with foreign countries, are conditional to the existence of extradition relations, and are what casts extradition law's substantial content.

The Extradition Law defines a list of conditions, which only if cumulatively satisfied allow a person's extradition. These are related to the normative "atmosphere" of the extradition request, to the identity of the wanted person, to the essence of the charges against him, and to the identity of the extradition requestor. The law contains a list of both procedural and substantive blocks, any one of which will prevent the extradition of a person, including the prescription of the wanted person's alleged offense, the fact that he was tried for that crime in Israel beforehand or served even a part of his sentence here (prevention of double jeopardy), or his pardon for the crime in the requesting state. The law further determines that only a person indicted for a crime which is not minor can be extradited, that is to say "a crime which, had it been committed in Israel, would lead to one year's imprisonment or a more severe punishment" (article 2(a) of the law). It is forbidden to extradite for reasons irrelevant to the fight against crime, including an international relations or security motivation, or to discriminate on the basis of race or religion; and extradition which violates public policy or a vital interest of Israel is not to be permitted (article 2b).

In its current wording – the Extradition Law has been amended a number of times in recent years, to the point that my colleague Cheshin J. compared it to "a price tag on supermarket products during a time of inflation" (CrimA 7569/00 *Yegudayev v. The State of Israel*, 56 (4) PD 529, 542) – the law grants special protection to a person who was an Israeli citizen and resident at the time the crime was committed. Such a person can only be extradited for trial, as opposed to extradition for sentencing or serving a sentence. Allowing an extradition request is conditional upon the requesting state's promise that, to the extent that he is convicted and sentenced to prison, the extradited person will be returned to serve his sentence in Israel (article 1a(a)(2)). It is here that extradition law comes in contact with the provisions of the Serving of

Prison Sentences in the State of the Prisoner's Citizenship Law, 1996, article 10(a1) of which provides that a court in Israel, subject to the existence of a similar provision in a treaty between the two states, is permitted to shorten a sentence handed down outside the country, **and to set it at the maximum period of incarceration determined in Israeli penal law** for the crime for which the sentence was given.

A necessary component of the recognition of a person as extraditable is the existence of *prima facie* evidence of his guilt. Article 9(a) of the law provides that it must be shown that "the wanted person was convicted for an extraditable offense in the requesting state, or that there is evidence which would be sufficient to try him for such a crime in Israel". This Court has repeatedly ruled that the decision in an extradition request is not a decision of the extradition candidate's innocence or guilt. The evidence is not to be examined on its merits in order to determine its weight; nor is the extent to which each piece of evidence fits with others to be examined. All that is examined is "whether the indictment has any support in the evidence" (CrimA 308/75 *Pesachovitz v. The State of Israel*, 31 (2) PD 449, 460; *see also* CrimA 318/79 *Engel et al. v. The State of Israel*, 34 (3) PD 98, 105).

A fundamental condition for extradition is the existence of an **extradition treaty** between Israel and the requesting state, whether it is a treaty exclusively on extradition or a general treaty containing provisions regarding extradition (article 2a(a)(1) of the law). Without an extradition treaty between the State of Israel and the requesting state, there is no basis for the existence of extradition relations between them. From the standpoint of the internal law, each state has the sovereign prerogative – subject to the foundations of its law – to formulate the character of extradition proceedings in the treaty, to determine its conditions, to decide which crimes are extraditable, which people's extradition can be requested, *et cetera.* From the time it is signed, the extradition treaty becomes an inseparable part of our law, assuming that the former does not contradict any of the latter's fundamental principles. So ruled my colleague, Cheshin V.P.:

> "The Extradition Law grants internal legal force to the extradition treaty, and turns it – as the law provides – into an organ in the body of Israeli law. The law refers us directly to the treaty, and this reference grants legal force to Israel's relations with the [state which is party to] the treaty (*Feinberg*, at paragraph 26).

Israel has extradition treaties with a considerable number of states, and on December 10 1962 the extradition treaty with the United States was signed (13 Treaty Series 505, 795). The treaty has been employed a number of times in extraditing suspects from Israel to the United States, and *vice versa*.

16. Extradition proceedings open with an extradition request by the requesting state, through diplomatic channels, to the Minister of Justice (article 3(b) of The Extradition Law). In practice, the request is relayed directly to the Department of International Affairs in the State Attorney's Office (article B(1) of "Procedure for Handling Extradition Requests" *Directives of the Attorney General 4.6000* (October 1 1973)). There it is examined, in light of the question whether it can fulfill all the requirements pursuant to The Extradition Law and the relevant treaty (article B(3) of

said directive). To the extent that it is found that all those requirements are met, the Minister of Justice is asked to use his authority pursuant to The Extradition Law, and instruct the Attorney General to submit a petition to the Jerusalem District Court, in order to examine whether the candidate for extradition is extraditable (article 3(b) of The Extradition Law; articles 3(6) & (7) of the directive). The law provides that the District Court shall declare a person extraditable if it is proven before it that the extradition request fulfills the requirements pursuant to the law (article 9(a) of the law). The District Court's decision can be appealed before this Court (article 13 of the law).

When the decision to declare a person extraditable becomes final, "all the normative conditions for the extradition of the requested person have been fulfilled, and the executive branch is permitted to hand him over to the requesting state" (Feller *Extradition Law*, 442). However, that is not the end of the proceedings. The declaration is valid for 60 days (article 19 of the law), unless there are special circumstances justifying its extension by the District Court (article 20). During this period, the Minister of the Justice is authorized to determine, *inter alia* on the basis of "extra-normative considerations which the judiciary is unauthorized to consider" (*Extradition Law*, at p. 445), that despite all the above, the extradition is not to be carried out (article 18 of the law).

A study of the relevant provisions shows, therefore, that during all stages along the chain of extradition request handling, the authorized officials – the Attorney General, by himself and via the State Attorney, the Minister of Justice, and the Jerusalem District Court – are required to use discretion. Each official in the chain, and each stage of the decision, involves its own unique type of discretion.

17. Regarding the Attorney General and the Minister of Justice – their decisions are administrative decisions, and the rules applicable to any decision of any statutory agency apply to them. The decision must be the product of consideration of all the relevant factors. It must fulfill the rules of natural justice, and be made in good faith. It must be reasonable, and well founded from an evidentiary perspective (HCJ 852/86 *Aloni, M.K. et al. v. The Minister of Justice*, 41 (2) PD 1, 50). It must take into account the purpose of extradition law (HCJ 3261/93 *Manning v. The Minister of Justice*, 47 (3) PD 282, 285).

18. The "administrative" considerations have considerable weight. The District Court, although not sitting as an "administrative" instance, is authorized to take them into account if it finds them relevant. This Court as well, sitting as the Court of Criminal Appeals, will address those considerations to the extent that they arise. However, those are not exclusive considerations. The issue is not restricted to the question of the judicial intervention in the decisions of the executive branch. The administrative aspect is only one of the faces of the extradition issue. Therefore, I am not willing to accept the argument of the state, that we can suffice ourselves with the tests determined in the caselaw of The High Court of Justice for the intervention – the limited intervention - in the discretion of the Public Prosecutor (*see, inter alia,* HCJ 223/88 *Sheftel v. The Attorney General*, 43 (4) PD 356, 368; HCJ 935/89 *Ganor v. The Attorney General*, 44 (2) PD 485; *and* HCJ 806/90 *Hanegbi v. The Attorney General*, 44 (4) PD 797). My view is that, in light of the independent and active role

which The Extradition Law set aside for the judiciary, the extradition courts must themselves consider all the considerations relevant to extradition.

And what are those considerations? Although it seems to me that the list is not exhaustive, the following are among them: the essence of the act for which extradition is requested, including the appropriate enforcement policy regarding it; the extent of the link between the act and the legal systems of the requesting state and the requested state; the fulfillment, in the specific case, of the requirements of extradition law, including those in the conventional law; the possibility of ensuring the extradition candidate a fair legal process in the requesting state; the public interest in the extradition issue and the proper balance between it and a person's constitutional right not to be extradited; and considerations regarding Israel's status, sovereignty, and international relations, including considerations of reciprocity. I shall thus turn to examination of the case before us in light of these considerations, not necessarily in the order I just mentioned them.

The Application of Penal Law

19. One of the elements of penal law, in addition to the element of the act and the application of the law on the axis of time, is the geographical application of the law. I refer both to the application of the local substantive law and to the courts' jurisdiction. In criminal law, the jurisdiction is always a function of the application of the law. It is difficult to accept the possibility that a court in one legal system would apply the substantive penal law of another system to the case before it (*see* CrimA 135/70 *The State of Israel v. Azaiza* 24 (1) PD 417, 419; CrimA 7230/96 *John Doe v. The State of Israel*, 51 (3) PD 513, 521; *and* S. Z. Feller "'Criminal Jurisdiction: Limits and Restrictions' – What and Where They Are" B *Iyunei Mishpat* 582, 586 (1972) [Hebrew]; M. Karayanni *The Influence of the Choice of Law Process on International Jurisdiction* (Jerusalem, 2002) 168 [Hebrew]).

It is but simple that the legal system cannot be applied, and does not intend to be applied, to any act done on Earth. It is thus accepted that a **link** must be found between the legal system and the act being examined, as a condition for its application. This link – "the connecting link" or "the normative bridge", in the words of my colleague Cheshin J. in *John Doe* – is what, as a necessary condition, grants the legal system the power to cast liability pursuant to its penal law.

It is a fundamental rule that any legal system, via its governmental institutions, has the prerogative to choose, for itself, the links which are to bring about its application, and thus to determine the scope of its application. In most systems, if not in all, a dominant status is assigned to territorial link which, in its common form, applies the penal law of the system to every crime committed in the geographic area in which the system applies. "The territorial link is accepted today in most legal systems in the world as the basis of the application of the laws of the state and of the penal norms regarding *locus delicti*" – CrimApp 1178/97 *Kahane v. The State of Israel*, 51 (3) PD 266, 269 (Barak, P.). *See also* the words of my colleague Cheshin J. in *John Doe, Supra*, at p. 521.

20. A principle no less fundamental determines that a legal system can also expand its application to acts committed **outside** of its territory. It stems from the

view of the Common Law, by which the legislature (originally – the Parliament of England) may legislate any law it pleases, without being limited due the possible repercussions of the law upon what will take place outside of the state's territory. Agranat J. discussed this in HCJ 279/51 *Amsterdam et al. v. The Minister of Finance et al.*, 6 (2) PD 945, 965, referring to the work of British scholars Coke ("the power and jurisdiction of parliament is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds") and Blackstone ("that what the Parliament doth, no authority upon earth can undo"). That approach was also anchored in the well known case of the International Court of Justice in *S.S. Lotus (France v. Turkey)* 1927 PCIJ (Ser. A) No. 10, where the connection between the principle of state sovereignty and the authority to expand application of its laws was recognized, to the extent that the state is not restricted by norms prohibiting such expansion.

It was upon this foundation that the approach, by which the legislature may draw the borders of the law as it pleases, including expanding it beyond the boundaries of the state, without it being restricted by foreign law or even the international law, came to be accepted in Israeli law (*see* article 9(a) of *The Penal Code*, and Feller "Penal Jurisdiction", *id.,* at p. 582). In *Amsterdam*, Agranat J. ruled that "in the absence of a constitution containing provisions to the contrary, the principle regarding the legislature's unlimited legislative authority applies also in Israel" (*id.*, at p. 966). This ruling appeared in additional cases (HCJ 100/57 *Weiss et al. v. The Inspector General of the Israeli Police*, 12 (1) PD 179, 184 (Landau J.) *and Azaiza, Supra,* at p. 419 (Sussman J.). It was ruled that the court also may interpret legislation in a way expanding its application beyond state territory (CrimA 123/83 *K.P.A. Steel v. The State of Israel*, 38 (1) PD 813, 820; CA 800/89 *Biton v. Karsal et al.*, 46 (2) PD 651, 655; CA 1432/03 *Yinon Food Products Manufacture and Marketing Ltd. V. Kara'an et al.*, yet unpublished decision of September 1st 2004, at paragraph 5). The condition is that the law must express, through its purpose, a possibility of such expansion.

21. So it is in our law, as in the laws of the United States. It is law in the United States, both in civil and criminal cases (*see United States v. Nippon Paper Industries Co., Ltd.,* 109 F. 3d (1st Cir. 1997), that the law is likely to apply even outside of the state's territory, if such an intent is implied by the purpose of the acts issued by Congress (*EEOC v. Arabian American Oil Co.,* 499 U.S. 244, 248 (1991). Although best if such an expansion sits well with the rules of international law, Congress is not limited in its determination by any foreign law (*Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804); *United States v. Aluminum Co. of America*, 148 F. 2d 416, 443 (2d Cir. 1945) ("Alcoa"); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963); *Federal Trade Commission v. Saint-Gobain-Pont-a-Mousson*, 636 F. 2d. 1300, 1323 (D.C. Cir. 1980); *United States v. Yunis*, 924 F. 2d 1086, 1091 (D.C. Cir. 1991); *United States v. Yousef*, 327 F. 3d 56, 92 (2d Cir. 2003)). Expansion of application, in essence, sits well with the US Constitution (*United States v. King*, 552 F.2d 833, 850 (9th Cir. 1976); *United States v. Felix-Gutierrez*, 940 F. 2d 1200, 1204 (9th Cir. 1991)).

An intention of extraterritorial application can be expressly provided by the statute, but it can also be implied from the "nature" of the statute (*United States v. MacAllister*, 160 F. 3d 1304, 1307 (11th Cir. 1998). There are offenses for which, by

their very nature, criminal liability does not stem from the place they were committed, rather draws from the need to protect important American interests. The Supreme Court of the United States discussed that, through Taft J., in *U.S. v. Bowman,* 260 U.S. 94, 98:

> "[some] criminal statutes are, as a class, not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated. . . . Some such offenses can only be committed within the territorial jurisdiction of the government because of the local acts required to constitute them. Others are such that to limit their locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. **In such cases, Congress has not thought it necessary to make specific provision in the law that the locus shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense"** (emphasis added).

We shall yet return to *Bowman*, as acts of conspiracy to import controlled substances to the United States and distribute them are counted, *par excellence*, among the crimes of the type to which it refers (*United States v. Perez-Herrera*, 610 F. 2d 289, 290 (5th Cir. 1980); *United States v. Wright-Barker* 784 F. 2d 161, 167 (3rd Cir. 1986); *United States v. Vasquez-Velasco* 15 F. 3d 833, 839 (9th Cir. 1994))

Application-Expanding Links

22. The legal system having chosen to apply itself beyond the territory of the state, the geographic element falls, and a gap is created between the system and the act to which it indents to apply itself. A need then arises to replace it with an alternative link, capable of reconnecting the act to the legal system. "The relation is selective, according to the link between the crime and the state which replaces the territorial link" (S. Z. Feller 1 *Foundations of Penal Law* (1974) 240 [Hebrew]). Barak J. also discussed this:

> "When a statutory provision expands the statute's 'jurisdiction' beyond state territory, the general territorial element disappears as an element that determines the scope of local application of the penal norm. In the place of this general territorial element usually comes another normative requirement, which connects the crime committed outside the territory of the state with the state . . . Instead of the general territorial principle, which usually serves as a substantive element of the offense, comes a new substantive element, which determines the boundaries of the penal norm's extraterritorial application" (CrimA 163/82 *David v. The State of Israel*, 37 (1) PD 622, 630).

American caselaw similarly ruled that –

> "…the territorial concept of jurisdiction is neither exclusive nor a full and accurate characterization of the powers of state to exercise jurisdiction beyond the confines of their geographical boundaries" (*United States v. King*, *Supra,* at p. 851),

and therefore -

> ". . . the Congress may pick and choose whatever recognized principle of international jurisdiction is necessary to accomplish the purpose sought by the legislation" *United States v. Rodriguez*, 182 F. Supp. 479, 491 (1960)).

Despite our having said that expansion is not subject, in principle, to the rules of international law, there are four main accepted application-expanding links recognized by it: **a protective link,** relating to acts done outside the country which harmed, or were intended to harm, the vital interests of that country or the functioning of its institutions; **a passive personal link**, between the legal system and the **victim** of the crime; **an active personal link** (or national link), between the legal system and the **perpetrator** of the crime; and **a universal link**, which covers especially severe crimes, whose prevention is in the interest of all of humanity, such as crimes against international law, war crimes, and piracy.

This categorization, based on the 1935 work of Harvard scholars ("Harvard Research in International Law, Jurisdiction with Respect to Crime" 29 *Am. J. Int'l L.* 435, 445 (Supp. 1935)), is accepted today in many legal systems (*see* Y. Dinstein "Criminal Jurisdiction: Boundaries and Limitations" A *Iyunei Mishpat* (1971) 303; **In Israeli caselaw** – *David, Supra,* at p. 628; *John Doe, Supra,* at p. 521; **In American caselaw** – *Rocha v. United States*, 288 F.2d 545, 547 (9th Cir. 1961); *Rivard v. United States* 375 F.2d 882, 885 (5th Cir. 1967); *United States v. King*, *Supra,* at p. 851; *United States v. Yousef*, *Supra,* at p. 91).

The differentiation between the types of links is not always clear, and the attempt to draw a line between them is likely to be artificial. An interest is likely to be protected by more than one link (*see, e.g., Chua Han Mow v. United States,* 730 F. 2d 1308, 1312 (9th Cir. 1984); *United States v. Yousef, Supra,* at p. 97; Feller *Foundations of Penal Law*, pp. 241, 246). What is important, is that all the links are used together to improve the fight against crime, especially transnational crime. There is "complementary relationship between the different types of local application of the penal norm, in order to advance a common objective of serving the war on crime" (*id.,* at p. 247).

The four extraterritorial links I have discussed relate to one of the elements constituting the crime, which is not the geographic element. In Israeli law, these links are found in articles 13-16 of The Penal Code, 1977, which, with certain restrictions, apply Israeli criminal law to crimes

committed anywhere, against Israeli citizens or residents or by them, on crimes committed against Jews outside of Israel, on crimes against the interests of the state and on crimes against humanity.

23. However, significant expansion of the law's application to extraterritorial acts is found within **the territorial link** itself. Penal law today grants dual meaning to that link. Beside the common meaning, relating to acts committed inside state territory ("narrow" or "subjective territorial link"), the law recognizes an additional meaning, regarding the place where the effect of the crime was felt, or intended to be felt ("wide"; "objective" – that is, the object of the crime; or "derivative territorial link"). Concisely: the narrow territorial link relates to the place where the **physical facts** of the act took place, whereas the expansion regards its geographical **purpose**. Both territorial principles – the narrow and the wide – were anchored long ago in Israeli law. Article 7 of The Penal Code, whose title is "The Offenses According to their Location", provides:

> (a) "**Internal offenses**" –
>
> (1) an offense committed entirely or partly within the territory of Israel;
>
> (2) an act of preparation to commit an offense, an attempt, an attempt to solicit another, or **conspiracy to commit an offense, which were committed outside of Israel, if the offense, entirely or partly, was intended to be committed inside of Israeli territor**y (emphasis added).

Article 7(a)(2) has virtually not been discussed at all in our caselaw. In CrimApp 9022/96 *Sheet v. The State of Israel* 50 (5) PD 597, 599, Strasberg-Cohen J. ruled that an act of **solicitation to import a drugs into Israel**, which was committed entirely in Lebanon by a Lebanese citizen, is an "internal offense". As is well known, a statutory arrangement is also interpreted in light of the rationale behind it and the circumstances at the time it was passed. Article 7(a) was added to The Penal Code in amendment 39 in the year 1984, and the term "internal offense" was coined by scholars Feller and Kremnitzer, who worded the amendment draft. In his book, Feller wrote: "The Israeli legislature tended to refer to crimes committed outside the borders of the state, as 'external offenses', as the object of extraterritorial application of the state's criminal law. **We shall accordingly add the opposite expression, 'internal offense', as the object of the territorial application of this law"** (*Foundations of Penal Law,* at p. 236; emphasis added).

Professor Feller further wrote:

> "One can imagine **territorial application** of the state's penal law, even when **no element of the elements of**

> **the offense actually took place in the territory of the state.** I refer to a consequential offense [an offense of the type which includes a consequence as an element], whose conduct took place outside the territory of the state, and whose consequence, which the offenders intended to take place within this territory, they did not have time to cause or did not succeed in causing. . . . an additional step [is] territorial application, derivative of course, of the state's criminal law upon the attempt to commit **an offense which requires only conduct, not consequence,** which was committed outside the borders of the state, whose completion was supposed to take place within it, or an attempt, done outside the borders of the state, to solicit a person to commit an offense within its territory. Those are examples of derivative territorial application of the state's criminal law even on acts of preparation . . . and the final step: **a criminal conspiracy made outside the territory of the state, whose objective is the committing of an offense inside its territory, is also likely to result in the derivative territorial application of the state's penal law**" (*Foundations of Penal Law*, at p. 259; emphases added).

In the explanatory notes of the amendment 39 bill, Feller and Kremnitzer discussed the rationale for assigning penal responsibility on the basis of the territorial link, saying "these characteristics of territorial application stem from the main purpose of penal law, which is protection of order inside the sovereign territory of the state" (S. Z. Feller & M. Kremnitzer "The Bill for a Preliminary Part and a General Part for the New Penal Code and Concise Explanatory Notes" 14 *Mishpatim* (1994) 127, 201 [Hebrew]).

Indeed, the roots of the approach which recognizes the territorial link are planted deep in the fundamental attitudes of penal law and jurisprudence, regarding the role of social incorporation, and in its modern form – of the state, as a means of protecting the security and welfare of the public which finds shelter in it. The modern garb of this principle is the concept of "state sovereignty", in whose name the sovereign is given authority over the goings on in its geographic territory. This is the "power inherent in sovereignty" referred to by the Supreme Court of the United States in *Blackmer v. United States*, 284 U.S. 421, 437 (1932). In implementing this purpose, the state is authorized to determine a system of norms regarding the permitted and the forbidden in the territory under its control, and to enforce them. This system of norms covers both acts which took place inside the borders of the state, and also acts intended to undermine public order in its territory.

All this shows that Israeli law after amendment 39 recognized the objective territorial link, not only for consequential offenses, but also in offenses requiring only conduct, and not only for substantive offenses, but also for the offense of conspiracy and other acts of preparation. All these

fulfill the requirements of the expanded link, to the extent that they caused, or were intended to cause, an effect within the borders of the territory.

24. American law has adopted a similar approach since the beginning of the twentieth century. The guiding rule was laid down by Holmes J. in *Strassheim v. Daily*, 221 U.S. 280, 285 (1911):

> "Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power."

Although this statement referred, at the time it was written, to the application of one US state's law to acts which occurred inside the borders of another US state, in later cases the *Strassheim* rule was also implemented upon acts committed outside the United States (*see Ford v. United States*, 273 U.S. 593, 620 (1927); *Rocha v. United States*, *Supra,* at p. 548; *Marin v. United States*, 352 F. 2d 174, 178 (5th Cir.-OLD 1965)). The American Assistant-Secretary of State (and later, Judge) J.B. Moore discussed this, in his essay on the *Cutting* case (in which an American was put on trial in Mexico in 1887 for an essay he published in a Texan newspaper against a Mexican). Referring to the necessity of such an approach in an era in which developing methods of action make the committing of international offenses easier, Moore said:

> "The principle that a man who outside of a country **willfully puts in motion** a force to take effect in it is answerable **at the place where the evil is done,** is recognized in the criminal jurisprudence of all countries. And the methods which modern invention has furnished for the performance of criminal acts in that manner has made this principle one of constantly growing importance and of increasing frequency of application" ("Report on Extraterritorial Crime and the Cutting Case" 2 *Moore's International Law Digest* 244; emphasis added).

In later decisions, United States courts began to use express language in referring to objective territoriality (*see United States v. Cotten,* 471 F. 2d 744, 749 (9th Cir. 1973); *United States v. King, Supra,* at p. 850; *Chua Han Mow v. United States*, *Supra,* at p. 1311; *United States v. MacAllister*, *Supra,* at p. 1308). In *Rivard*, Judge Dyer ruled:

> "There are, however, two views as to the scope of the territorial principle. Under the subjective view, jurisdiction extends over all persons in the state and there violating its laws. Under the objective view, jurisdiction extends over all acts which take effect within the sovereign even though the author is elsewhere" (*id.*, at p. 886).

25. Since the 1980's, an additional loosening of the territorial element has been noted, first in the legal literature (*see* Restatement (Second) of Foreign Relations Law of the United States § 402 (1981), *and* C. L. Blakesley "United States Jurisdiction over Extraterritorial Crime" 73 *J. Crim. L. & Criminology* 1109, 1112), and later in the caselaw. In the background stood, *inter alia*, offenses of conspiracy to import and distribute drugs (which are also the subject of the appeal before us). These conspiracy offenses – controlled by particular statutory provisions in the Controlled Substance Act (21 USC § 963, 21 USC 846), as opposed to the **general** conspiracy offenses in American Law (18 USC § 371) – do not require, as a condition for criminal liability, that the conspiracy was accompanied by an additional act necessary for its consummation. It is sufficient to prove that the conspiracy offense involved a planned effect inside the United States (*see United States v. Bermudez,* 526 F. 2d 89, 94 (2d Cir. 1975); *United States v. Thomas,* 567 F. 2d 638, 641 (5th Cir. – OLD 1978); *United States v. Littrell,* 574 F. 2d 828, 832 (5th Cir.-OLD 1978); *United States v. Marable*, 578 F. 2d 151, 153 (5th Cir.-OLD 1978); *United States v. Rodriguez*, 612 F. 2d 906, 919 (5th Cir. 1980); *United States v. Bey*, 736 F. 2d 891, 894 (3rd Cir. 1984).

That, however, created a problem regarding conspiracies made outside of the state. According to *Strassheim*, liability in such a case was conditional upon the existence of an act performed within the borders of the United States (*see also United States v. Winter*, 509 F. 2d 975, 982 (5th Cir.-OLD 1975). This disharmony was solved by United States courts by a revision in Justice Holmes' rule. It was held that for those offenses which do not require, by their very definition, the existence of an act toward realization of the desired consequence, the law will apply whether the act led, *de facto*, **or was merely intended to lead**, to a consequence in the United States. And so it was held:

> "It seems somewhat anomalous, however, that Congress intended these statutes to apply extraterritorially, but that jurisdiction attaches only after an act occurred within the sovereign boundaries. Thus, even though the statutes were designed to prevent one type of wrong ab initio, under the traditional approach, the courts were without power to act. This dichotomy directly contravenes the purpose of the enabling legislation.
>
> . . .
>
> **As a result, it is now settled in this Circuit that when the statute itself does not require proof of an overt act, jurisdiction attaches upon a mere showing of intended territorial effects**. The fact that appellants intended the conspiracy to be consummated within the territorial boundaries satisfies jurisdictional requisites" (*United States v. Ricardo*, 619 F.2d 1124, 1128 (5th Cir.-OLD 1980); emphasis added).

See also United States v. Mann, 615 F.2d 668, 671 (5th Cir.-OLD 1980) □ *United States v. Noriega*, 746 F. Supp. 1506, 1513 (D. Fla. 1990) □ *United States v. Wright-Barker*,

Supra, at p.168 □ *United States v. Yousef*, *Supra,* at p. 91; *and compare United States v. Postal*, 589 F. 2d 862, 886 (5th Cir.-OLD 1979). For an exhaustive treatment of the subject *see also* the judgment of *United States v. Best*, 172 F. Supp. 2d 656, 660 (D.V.I. 2001).

Last, it should be mentioned that the courts in the United States have not seen a justification to make a differentiation between a criminal, acting by himself outside the country to commit criminal acts on the territory of the United States, and a person **who instructs, from his place of residence outside the country, agents** who are "his long arm" within it (*see United States v. Aluminum Co. of America, Supra,* at p. 444).

26. **In sum:** The Israeli legal system and the American legal system both apply their penal law to a person who acted outside the country, even merely by conspiring to commit a crime within the country, whether his plan was consummated or not, and whether he acted alone, or via another person. They do so on the basis of the territorial link, with no need to turn to other application expanding links. These legal systems do so by somewhat loosening the inflexible rules of application, in order to ensure preservation of public order in the geographic territory which they control. In the background lies the understanding, that such loosening is made necessary by the need to fight crime, especially crime spread over a number of states.

Expansion of Application and the Right to Due Process

27. That last conclusion raises the question of the link between the expansion of the state's law and the right to due process. Does application of the principles of a legal system outside its usual radius of application, while trapping a person in its net who usually would not be caught in it, violate that right? That question arose in US law in a number of cases, and I shall quote a few passages on the way they dealt with it there, as we can adopt some of them into our own law.

American law prohibits the expansion of application when that would violate the basic rights of a person, including the right to due process provided in the Fifth Amendment to the American Constitution. So ruled an American court:

> "As long as Congress has indicated its intent to reach such conduct, a United States court is bound to follow the Congressional direction **unless this would violate the due process clause of the Fifth Amendment" (***United States v. Pinto-Mejia*, 720 F.2d 248, 259 (2d Cir. 1983); emphasis added).

The links which expand application of the state's law are the principled basis of the constitutionality of that expansion. They create the "sufficient nexus" between the criminal act and the state, required by American case law in order for the application of the law outside the territory to meet the requirement of due process:

> "in order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, **there must be a sufficient nexus between the**

> **defendant and the United States, so that such application would not be arbitrary or fundamentally unfair**" (*United States v. Davis*, 905 F.2d 245, 248 (9th Cir. 1990); emphasis added).

American courts have discussed the meaning and definition of the term "sufficient nexus" in a number of cases, dealing mainly with wide scale **drug smuggling.** Examination of them does not reveal full uniformity. In one of the cases the court ruled that the basis of this requirement is the principle of state sovereignty and a person's expectation that he will not be exposed to foreign law. The expansion is justified, therefore, only when a link exists between the criminal activity and the United States, to the extent which justifies protection of American interests (*United States v. Caicedo*, 47 F. 3d 370, 372 (9th Cir. 1995). In contrast to that relatively wide definition, which apparently allows application of American law to a very wide gamut of acts taking place outside its territory, another court ruled that proof of a "sufficient nexus" requires showing that the criminal activity had, or was supposed to have, repercussions inside the borders of the United States (*United States v. Kahn,* 35 F. 3d 426, 429 (9th Cir. 1994); *United States v. Klimavicius-Viloria*, 144 F. 3d 1249, 1257 (9th Cir. 1998).

28. Between the wide definition and the narrow one lies the requirement of a "sufficient nexus" based on the criminal's "voluntary assumption of risk". At its foundation lies the assumption that a person whose evil acts had an effect in a foreign country has exposed himself to trial according to its laws, and can no longer claim that trying him there is unfair. An American Court of Appeals wrote in the same vein, discussing the appeals of foreign citizens who had been convicted of involvement in the explosion at the World Trade Center in New York in 1993, and of conspiring to crash an American passenger airplane in the Philippines:

> "Applying… [the sufficient nexus] standard, it seems clear that assertion of jurisdiction over the defendants was entirely consistent with due process. . . . Given the substantial intended effect of their attack on the United States and its citizens, it cannot be argued seriously that the defendants' conduct was so unrelated to American interests as to render their prosecution in the United States arbitrary or fundamentally unfair. As a consequence, we conclude that prosecuting the defendants in the United States did not violate the Due Process Clause" (*United States v. Yousef*, *Supra,* at p. 112).

American caselaw further shows (*see Caicedo* and *Klimavicius-Viloria*), that even in cases involving a conspiracy to commit a crime inside of the United States, where no act to consummate the crime occurred on American soil, it is possible to try the conspirators in an American court without it being considered a violation of their right to due process. To complete the picture, we note that there was not unanimous agreement about that. It was contended that over-expanded application of the law to acts which occurred outside of the territory of the state is liable to become a potential tool for the aggressive advance of American foreign policy. A restriction of the

"sufficient nexus" rule was thus suggested, by which, when the locus of the consequence of the crime is unexpected, or the accused has no control or prior knowledge of his coconspirators' acts in the state requesting extradition, application of the law of the state will be considered unfair (C. Norchi & L. Brilmayer "Extraterritoriality and Fifth Amendment Due Process" 105 *Harv. L. Rev.* 1217, 1223, 1260).

29. So far we have discussed the theoretical aspect, but, first and foremost, the issue has practical ramifications. The question which arises is whether the expansion of application of the law of the state makes it more difficult for the accused to properly manage their defense, whether it denies them access to evidence and to witnesses outside the country, whether it makes it more difficult for them to bear the cost of arranging their defense, *et cetera.* This issue arose for examination in *Yousef*. The American Court of Appeal's ruling was unequivocal: a general claim is insufficient. A person claiming damage to the fairness of the process must point out a specific impediment. In that case, the argument of violation of due process was rejected, as it was found that access to all relevant evidence had been preserved, that the state itself had provided part of the material, that the American court had funded the defense's efforts to collect material in the country of origin, and that the accused himself had not used all the tools at his disposal for collecting evidence (*id.,* starting at p. 112).

Transnational Offenses – Dealing with a new Criminal Reality

30. All we have said so far is especially relevant for crimes which, inherently, are not restricted to the borders of a single state. Such are, for example, international terror, crimes of human trafficking, money laundering, drug trafficking, and computer and internet crimes, which usually involve extraterritorial characteristics *par excellence*. Also listed among them are acts of conspiracy in one state to commit crimes in another state. The elements of these acts are likely to be spread over the territory of a number of states, as are their repercussions. Take, for example, a plan to distribute a dangerous drug, formed by conspirators located in all four corners of the earth, involving purchasing the drug in one country, transferring it to another, and selling it in a third country, whereas the money financing the purchase also crosses continents, as do the proceeds from the sale of the drugs.

Transnational crime has, from the criminal point of view, considerable advantages. The financial potential in these crimes is great. They provide the local criminal with a much wider field of action than the one at his disposal when he limits his actions to the territory of a single state. That allows him to direct his criminal activity to the place which yields the highest profits. He attains the ability to act from afar, via agents, with minimal exposure to personal danger. He attains power to choose the law which will apply to him in case he is caught. International crime even often brings about the establishment of a worldwide criminal infrastructure, which is likely to be used, in addition to its original purpose, as a convenient field for developing new and various channels of crime.

Transnational crime has existed since the dawn of history. However, the phenomenon grew stronger with the development of means of communication and commerce between states. The more the world became a "global village", the

criminal craft, which needs convenient means of communication, transportation, and shipping, became easier. Today, it is easy for a person to sit, say, in a hotel by the beach in Tel-Aviv, and to plan acts whose repercussions will be felt thousands of miles away from there. That situation brought about a considerable increase in the dimensions of international crime, and in the scope and severity of the acts, which are spread over the width and breadth of the globe. My colleague, Cheshin J., discussed this, regarding drug crime in Israel:

> "There is no doubt about it: Israel has jumped up a league in the trafficking of dangerous drugs. In the past, small time drug dealers, mid-size drug dealers, and even big time drug dealers would come before this Court. However, in recent years we are witness to a phenomenon which our forefathers did not know. We now speak of Israelis involved in international drug trafficking, and in amounts which the ancients didn't even imagine" (CrimApp 3179/03 *The State of Israel v. Fogel*, unpublished decision of April 7 2003).

This criminal reality requires legal systems all over the globe to enhance their fight against crime. The methods of the past, which were even proved efficient, are no longer sufficient. A need has arisen for new statutes, which confront phenomena which were not previously known. A renewed examination of the rules of application in the internal law is needed, in order to confront acts taking place outside of the state's territory. It is now necessary to make new interpretations of existing law, which will fit their updated objectives. There is now a greater importance to international cooperation in the fight against crime, and no state should treat its fellow's request for assistance stingily. Thus, extradition of criminals has become a most important means in the fight against crime. Bach J. discussed this point:

> "There is a prevalent interest in granting assistance to the prosecution and legal authorities of other countries, in bringing those suspected of committing serious offenses to justice. At a time when the world of crime is becoming more organized and sophisticated, and when means of modern communication have made distances and borders almost insignificant, the conclusion is that international cooperation on the part of the legal institutions of different countries is vital, if we want to successfully confront serious criminal phenomena. Extradition of fugitive criminals is one of the means by which this cooperation is expressed" (CrimA 74/85 *Goldstein et al. v. The State of Israel*, 39 (3) PD 281, 285).

Crime in the Framework of a Criminal Organization

31. And just as the dimensions of crime have grown more intense, so has the organizational infrastructure which carries them out developed. Worldwide criminal networks, more or less established, have become a necessary means for such crime. This is no longer *ad hoc* cooperation for the joint perpetration of a single crime, rather the creation of a crime syndicate, working in a systematic way, again and again, via criminals spread over different places all over the world, who take part in the criminal

activity, each one according to his mission. Conducting the operation above them is the leadership of the organization, which takes part in outlining and funding the activity, and, usually, its members are the main beneficiaries of the activity (*see* M. Amir "Organized Crime" 4 *Plilim* 189 (1994) [Hebrew]. Technology aids the organization leadership in controlling the execution of the acts "by remote control" from where it sits, with no need to travel to the target country, like an octopus sending its tentacles – those are the network members – overseas.

Criminal networks grow slowly out of sporadic criminal activity, and the more they continue working together, the greater the chances that they will adopt behavior patterns of a crime organization. The term "crime organization" does not refer merely to the high level of development of criminal networks, which is unfortunately well known from mafia stories in different countries in the world. Usually, the system is less organized, yet fulfills a number of characteristics which set it apart from such "regular" criminal activity. This was expressed in article 1 of The Fight against Crime Organizations Law, 2003, which defines a **"crime syndicate"** as follows:

> "A group of people, incorporated or unincorporated, which acts according to an organized, systematic, and ongoing plan to commit offenses which, pursuant to Israeli law, are felonies or crimes listed in the first schedule, excepting felonies listed in the second schedule; for these purposes, it makes no difference –
>
> (1) whether the organization members know the identity of the other members or not;
>
> (2) whether the makeup of the organization is constant or varies;
>
> (3) whether the offenses mentioned above are committed or intended to be committed in Israel or outside of Israel, as long as they constitute offenses both according to Israeli law and according to the law of the place where they were committed, or, whether according to Israeli law, the Israeli penal law is applicable to them even though they are not offenses according to the law of that place;"

The concern about all the various levels of organized crime should not be taken lightly (*see, e.g.* CrimApp 8793/04 *The State of Israel v. Kakun*, yet unpublished decision of October 20 2004, at paragraph 7 (Procaccia J.), and CrimApp 8331/05 *Gabbai v. The State of Israel*, yet unpublished decision of September 7 2005, at paragraph 6 (Chayut, J.). Considerable effort – both on the national and international level – is invested in the struggle against criminal networks spread all around the world. Against this background, the United Nations Convention against Transnational Organized Crime, 2000 came into being, and on its heels the said Israeli Fight against Crime Organizations Law was passed, whose purpose is to make dealing with this new danger more efficient. The statute sees activity in the framework of a crime network, in and of itself, as a criminal offense leading to a severe punishment which varies, according to the nature of the activity, between 10 and 20 years

imprisonment (article 2 of the law). Thus, **in addition** to the criminal liability pursuant to any other law, which takes on a dimension of additional severity when an offense was committed in the framework of a crime organization (article 3 of the law). Article 1(3) of the law, quoted above, once again anchors the principles of application of Israeli penal law, including the expansion of that application in the appropriate situations, even to acts committed outside the territory of Israel.

Drug Offenses

32. As I have already noted, offenses of international distribution of and trafficking in dangerous drugs are listed among the most prominent transnational offenses. The unique characteristics of these offences led to wide recognition of the need to intensify the war against them and to employ special means in doing so. It has been determined, a number of times, that it will not be possible to rout the plague "if states restrict themselves merely to punishment of offenses which take place within their borders. The commerce in drugs is a phenomenon which all must fight together, and separately" (CrimA 401 *Elkayel v. The State of Israel* 38 (1) PD 354, 357 (Shamgar P.). Türkel J. also discussed this point:

> "Crime is rising and crossing borders. It is becoming transnational. Especially in the drug business, in which great quantities of drugs are transferred from one state to another, and it is impossible to fight this phenomenon except through international cooperation" (CrimA 10946/03 *Issa v. The State of Israel*, yet unpublished decision of June 23 2005, at paragraph 8).

See also Y. Zilbershatz "Dangerous Drugs: International Law and Israeli Law" 13 *Mechkarei Mishpat* 461 (1997) [Hebrew] *and* CA 9796/03 *Shemtov et al. v. The State of Israel*, yet unpublished decision of February 21 2005, at paragraph 24.

Not only is Israeli law forced to deal with Israel being turned into a central target for drugs originating abroad; it also must deal with the growing involvement of Israelis in drug offenses all over the world. A particularly grim expression of this is found in the report of the American Office of National Drug Control Policy (ONDCP) of February 2004, according to which:

> "The majority of the MDMA produced in other countries is trafficked to the United States by Israeli and Russian organized crime syndicates that have forged relationships with Western European drug traffickers and gained control over most of the European market".

Against this background, a provision was added to the Dangerous Drugs Ordinance, 1973, expanding its application even beyond the geographic area of Israel. I refer to article 38 of the ordinance, which provides that Israeli law will apply, by force of the active personal link (national link), upon drug offenses committed **anywhere** by an Israeli citizen or resident (article 38(a)); Israeli law will further apply, by force of the severity of the offenses (universal link), upon the main drug

offenses, which will be seen – even if committed outside of Israel and by a person who is in no way Israeli – as if they were committed in Israel (article 38(b)). On this matter, *see and compare* CrimA 4002/01 *Korakin v. The State of Israel*, 56 (4) 250, 256; CrimA 7303/02 *Hekesh v. The Attorney General*, 67 (6) PD 481, 502; *and* CrimA 4479/03 *Oyko v. The State of Israel*, yet unpublished decision of March 10 2004. The deviation from the "narrow" principle of territorial application stems from the recognition that the drug epidemic is no longer an internal Israeli phenomenon, and that its elimination justifies a loosening of the boundaries of application of national penal law (*see also Alkayel*, *Supra,* at p. 357, and *John Doe*, *Supra,* at p. 532).

Drug trafficking offenses are also among those recognized in The Israeli Penal Code as offences against international law, in light of the convention prohibiting drug dealing, to which Israel has been party since June 18 2002: The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) (49 Treaty series 1388, at p. 1). The Penal Code prior to amendment 39 expressly listed drug offenses along with "crimes against humanity" (article 4 of the code. Regarding the relationship between The Penal Code and The Dangerous Drugs Ordinance in this context, *see John Doe, Supra,* at p. 536). Inclusion of the trafficking offense in this grouping of offenses, then as now, also testifies to drug offenses' great severity in the eyes of the law, and to the awareness of the need for international cooperation in legal confrontation of them.

One of the practical applications of the principles we have outlined above is the power to order the extradition of drug offenders from the State of Israel and to it, to the extent circumstances justify it and the law allows it. Bach J. discussed this, in dealing with an Israeli crime network which attempted to smuggle a great quantity of drugs into the United States:

> "Organized crime gangs become more sophisticated every year; using telexes, faxes, and other means of communication, distances and borders are losing their meaning and importance. Therefore, there is a need for an awareness of the danger that a lack of cooperation [between states] is liable to bring about the failure and frustration of the preventative action and of the war against international crime. One way such cooperation can be expressed is through reciprocal extradition of criminals (CrimApp 3547/93 *Zalmonovitch v. The State of Israel*, unpublished decision of July 15 1993, at paragraph 5).

And indeed, the recognition of the severity of these offenses led to their inclusion in the list of extraditable offenses in the conventions to which Israel is party. The bilateral treaty between Israel and the United States provides, in article 2(31), that "offenses against the laws relating to dangerous drugs" are extraditable offenses.

33. Examination of American law reveals a similar picture. It should be mentioned at the outset, that it is not by chance that many conspirators direct their acts especially toward the borders of the United States. That country is a preferred target for drugs smuggled in from the outside. This is a drug "market" which, it turns out, is

large, and in which the profits are huge. The demand for the "ecstasy" drug there, as we have seen in various cases which have come before this Court, is high.

Drug crimes, like the conspiracies to commit them, are clearly listed in American law as acts which allow the application of the law on acts done outside US territory, according to *United States v. Bowman*, 260 U.S. 94 (1922) referred to above. These are acts in which, for the purposes of the application of the law, the decisive element is not the place they are committed, rather the place where their effect is intended to be felt. American caselaw has repeatedly emphasized that. Abovementioned *United States v. Wright-Barker* discussed the case of conspirators who conspired, outside the borders of the United States, to import controlled substances and distribute them within that country. The Court of Appeals ruled that the American law has clear application upon these offenses, as United States law –

> "...undoubtedly intended to prohibit conspiracies to import controlled substances into the United States, and intentions to distribute such contraband there, as part of its continuing effort to contain the evils caused on American soil by foreign as well as domestic suppliers of illegal narcotics" (*Id*, at p. 167).

In another case, the court ruled that restricting the application of the law only upon acts committed inside the United States would to a considerable extent undermine the ability to fight drug crime and the effectiveness of that fight (*United States v. Vasquez-Velasco*, *Supra,* at p. 839; *see also Brulay v. United States*, 383 F. 2d 345, 349 (9th Cir. 1967); *United States v. Perez-Herrera*, *Supra,* at p. 290; *United States v. MacAllister*, *Supra,* at p. 1307).

I might add, that this Court only recently handed down a judgment, in HCJ 3315/04 *Shitrit et al. v. The Jerusalem District Court et al.*, yet unpublished judgment of September 15 2005, in which it ruled that in American Law, conspiracy to possess a controlled substance is not to be seen as "a regular conspiracy offense", in the words of my colleague Cheshin J., rather as an offense which digs its foundations deep in the field of drug offenses:

> "The offense of conspiracy draws its essence, usually, from the offense which is the objective of the conspiracy and from the value protected in that offense, even more so regarding the offense pursuant to article 846 [of American federal law] – an offense which is a drug offense *par excellence* . . . the center of gravity of the offense is to be found in the 'drugs' part of it, and not in the 'conspiracy' part of it" (*id.,* at paragraphs 28-29).

Thus, Israeli law, like American law, has recognized the need to invest considerable efforts in routing the drug epidemic. Positioned at the center of the legal activity is the ability to expand the application of the internal law of any state outside its territory, alongside the persistence in international cooperation. In the framework of these activities, a central role is set aside for the ability to extradite criminals from

one country to another, to the extent that is called for by the law and the circumstances.

Conspiracy Offenses

34. Offenses of conspiracy were created out of the recognition that it is better, in the war against crime, to frustrate criminal plots before they are consummated (*compare with Issa,* at paragraph 2 (Barak P.)). An American court discussed this in the *Wright-Barker* case -

> "The purpose of these provisions is to halt smugglers before they introduce their dangerous wares into and distribute them in this country" (*Id.*, at p. 168).

The very preventative purpose in this idea is actually liable to make it more difficult to enforce the criminal prohibition. Many times there is likely to be a gap between the formulation of a criminal plan and the taking of action to carry it out. It is possible that the prior planning will remain an agreement "on paper", and no act to consummate it will take place. Alternately, it is possible that acts to consummate the conspiracy will take place far away from the place it was first formulated. Indeed, many times the efforts to conspire, as well as the formulation of a completed and final criminal plan, happen in places totally different than the one where the plan's evil fruit will appear. The conspirators can make their plans without ever setting foot on the target soil. They are liable to enjoy the protection of the borders between various states and legal systems, at the same time that their plans were intended to undermine those very borders. The result is that the conspirators are liable to take advantage of the geographical gap in order to immunize themselves against exposure to the legal system of a certain state, despite the fact that they chose that very state as the field for their criminal plot. It is difficult to accept a situation in which, just by choosing to conspire in a certain state and not in another, the conspirators will be safe from the legal system of the state in which the conspiracy is intended to be carried out.

The law offers two solutions to this problem, which dovetail together. **The first** is seeing the conspiracy as an offense that stands on its own, independent – in terms of the fulfillment of its elements – of the acts it is intended to bring about. In Israeli law, this is expressed in article 499 of The Penal Code, which recognizes a conspiracy to commit a felony or misdemeanor as an independent offense. That is also the case regarding the other particular offenses which The Penal Code defines for a person who conspired to commit the main offense (articles 92, 121, 133, 440, and 500 of the code). This is the case, regardless of the question whether these acts of conspiracy led, *de facto*, to the offense for which the conspiracy was plotted (*see Issa*, at paragraph 3 (Barak P.). A similar idea is found in American law, by which the offense of conspiracy, listed in the set of independent, inchoate crimes, stands on its own, even if it did not lead to the carrying out of the planned offense (*see United States v. Rabinowich,* 238 U.S. 78, 86 (1915); *Williams v. United States,* 179 F. 2d 644, 649 (5th Cir-OLD 1950); *United States v. Carlton*, 475 F. 2d 104, 106 (5th Cir.-OLD 1973). And as I have already mentioned, in such conspiracy offenses regarding

dangerous drugs, there is not even any requirement that any action to carry out the conspiracy be taken. In that context, the extradition treaty between Israel and the United States recognizes conspiracy as a cause for extradition, beside the extraditable offenses listed in article 2 of the treaty.

The second solution – upon which I expanded above – is recognition of the ability to try conspirators **in the country in which the consequences of the conspiracy were to take place**, on the basis of the objective territorial link. In Israeli law, this is anchored in the definition of conspiracy made abroad, whose purpose is carrying out the act in Israel, as an **"internal offense"**, in article 7(a)(2) of The Penal Code.

35. I wrote above, that the basis of objective territorial application is the state's ability to protect its sovereignty, even against external acts intended to strike within it. In conspiracy offenses, this idea becomes clearer against the background of the correlative character of the offenses (*see Issa*, at paragraph 3 (Barak P.)). These offenses, despite their being separate and independent offenses – a principle resting, as mentioned, upon the purpose of stopping the evil before it occurs – have a strong link to the offenses planned to be committed through them. The conspiracy is merely "a material meeting between two or more people, with the same intent to commit a prohibited act, **and turning it into a common plan, while making a pact to carry it out**" (S. Z. Feller "Criminal Liability with no Act, on What Basis?" 29 *HaPraklit* 19, 22 (□□4-□□□) [Hebrew]; emphasis added). The goal of the conspiracy – the offense which has been agreed to be carried out – is what grants the prior agreement its criminal character. It is what motivates the actions of the conspirators. Elsewhere, Professor Feller added:

> "At the stage of the creation of the conspiracy, the aspiration of each of the conspirators is to attain the agreement of the others to act in the future to advance the unlawful mission for which the conspiracy is created. If the pact with said content is indeed made between them, then this *actus reus* – the making of the conspiracy – joins the accompanying *mens rea*, and the offense is complete, as it has been outlined at that point by the conspirators.
>
> . . .
>
> The offense of conspiracy is correlative, in that it does not arise unless the object of the conspiracy is to carry out another offense, felony or misdemeanor. The correlativity of the conspiracy is expressed through its link to another offense, as a goal to be achieved (S. Z. Feller "Criminal Conspiracy versus Complicity" 7 *Mishpatim* 232, 240 (1967) [Hebrew]; *see also* M. Kremnitzer "On the Essence of Criminal Conspiracy and the Relation between it and Solicitation" 14 *Mishpatim* 231, 236 (1984) [Hebrew]).

Thus, from the substantive point of view, the differentiation between the agreement by the conspirators to commit an offense – that is, between the conduct of making contact itself – and the circumstance regarding the content of that conspiracy, is an artificial one. These two parts of one entire conduct – the plan and its execution

– affect each other, *inter alia* regarding the question which law shall apply to each of the two.

In CrimA 84/88 *The State of Israel v. Aberjil*, 44 (2) PD 133, a person conspired in Israel to deal in dangerous drugs outside of her borders, and the conspiracy was carried out. The state wished to try the accused in Israel for the acts which he had committed. There was no doubt that he could be tried for **the offense of conspiracy**, as the elements of that offense were completed within the borders of Israel. The disagreement was restricted to the question whether the State of Israel was authorized to try him, by force of territorial link, for **the offense which was the object of the conspiracy** – trafficking in dangerous drugs, which had taken place entirely outside the borders of the state. So ruled this Court, through Bach J.:

> "Every conspirator should be seen as a person who solicits and entices the other conspirators to commit the planned offenses . . . the result is that one can see respondent, regarding the conspiracy in Israel, as a person who solicited . . . to commit the offense of export of the drug . . . a person can be tried in Israel for an offense committed abroad by another person, after the latter was solicited to commit it by the accused in Israel, since the act of solicitation should be seen as "part of the complete offense" . . . **a result, by which a person who solicited a person in Israel to commit an offense abroad can be tried in Israel, but there is no parallel jurisdiction [to try] the member of the criminal conspiracy [for the main offense resulting from the conspiracy], is completely unacceptable**" (*id.,* at p. 143; emphasis added).

American law has expressed a similar stance:

> "The smuggling of heroin into the United States was the object of the conspiracy. It is inconceivable that the Court could have jurisdiction over a defendant to try him for a conspiracy formed outside the United States, whose object was to smuggle heroin into the United States, but not have jurisdiction to try him for the smuggling itself, which was the very object and fruition of the conspiracy" (*Rivard v. United States*, *Supra,* at p. 887).

Indeed, due to the special link between the offense of conspiracy and the main offense, one can see each of the conspirators as a person who "solicited" his fellow conspirators, as well as the people who committed the offense *de facto*, to carry out the conspiracy. Thus, each of the conspirators is likely to be considered to have motivated his fellows to carry out the main offense, even if he did not commit any of its elements. As the main offense was committed in a certain country, the laws of that country apply not only upon those who committed it, but also upon the conspirators.

The conclusion is that, for the purposes of the application of the law, there is no longer any basis for the differentiation between the conspiracy and the offense for which it was made. From the moment the conspirators plan to "export" their actions beyond the territory in which the conspiracy was made, its link is no longer to be restricted to the place where their plot was made; rather, that place is now to be seen as transferring itself over to the territory where the main offense was to be carried out, which is also the place where the conspirators intended to make their profit. Logic plainly demands that when the conspirators have decided to commit the main offense in a certain country, they shall be seen as having voluntarily exposed themselves to the law of that country, independent of the question where the conspiracy was made, or whether it was, in the end, brought to fruition.

A Linkage to More than One Legal System

36. From the discussion thus far, the conclusion that it is indeed possible for one offense to have a link to a number of legal systems is beginning to arise and take form. In the words of Professor Dinstein:

> "It appears, from the very [existence of the principle granting] a state criminal jurisdiction according to links to the offense or the offender *et cetera*, that competing criminal jurisdiction between two or more states, over one person, is possible. Competing jurisdiction exits when, for example, a citizen of country A commits an offense in country B: the latter may employ its jurisdiction by force of the territorial principle, whereas country A may employ jurisdiction by force of the allegiance principle.
> . . .
> Occasionally the competition between jurisdictions becomes a clash between them, as each state (having legal jurisdiction) wishes to employ it despite the existence of a competing jurisdiction" (Dinstein, at p. 312).

The following question naturally arises: which system shall prevail, and on what basis shall the competition be decided? Only in unusual cases does international law provide norms for deciding between competing jurisdictions. Such is the case, for example, for offenses carried out on the high seas (see articles 6, 8, 9 & 19 of the Convention on the High Seas (1958)). However, in most cases, conventional international law is expressed in bilateral or multilateral extradition treaties. These usually provide that it is forbidden to expose a person to double jeopardy. That prevents the possibility that both legal systems, one after the other, might act to try the accused. Thus, once the law of one system is applied to the offense, the law of the other can no longer do so. The fundamental principle of international law instructs each state: *aut dedere aut judicare* – either extradition or prosecution. International law is uninterested in the result of the "competition" between legal systems which have a link to a certain offense. It has but one objective: that the accused stand trial, and it makes no difference if that happens in the requesting state or, alternately, in the state receiving the request.

The rationale at the basis of this rule is liable to be frustrated, when there are no extradition relations between the states, or when there is a concern, for any reason, that even if there are such relations, the choice is not a true choice, as the person's trial in the state receiving the extradition request will be but a farce. In such a case, the competition between legal systems might be solved practically in a number of ways: attaining custody of the accused without extradition (which is extremely controversial in international law); bringing the competition before an international tribune (as was done in the *Lotus* affair); or other forms of intervention of the international community (as happened in the affair regarding the downing of the Pan-Am airplane over Lockerbie in 1988). But in none of these solution alternatives does international law offer a **rule of decision**, to decide which of the involved legal systems is to prevail.

International law even refrains from adopting a hierarchy between the application links it recognizes, even though that, it would seem, would assist in deciding the competition. International law so refrains, out of concern that the determination of a strict hierarchy would lead to unjust or arbitrary results, whereas a more flexible rule, involving discretion, would be unfeasible without a neutral and objective party authorized to employ it (M. Plachta "The Lockerbie Case: The Role of the Security Council in Enforcing the Principle Aut Dedere Aut Judicare" 12 *European Journal of International Law* (2001) 125, 130).

The conclusion is that, lacking an obligatory external norm, the competition can be solved only on the basis of the internal law of the states, or, more precisely, by the rules – including the extradition law – of the state requested to extradite the accused. I shall therefore now discuss the foundations of Israeli extradition law.

Extradition Law – A Substantive Examination

The Right not to be Extradited

37. Article 5 of Basic Law: Human Dignity and Freedom, titled **Personal Freedom**, states:

> "A person's freedom is not to be taken or restricted by imprisonment, detainment, **extradition**, or any other way."

The right not to be extradited is, therefore, a constitutional right in Israeli law, and the caselaw has so ruled in the past (CrimA 6182/98 *Sheinbein v. The Attorney General*, 53 (1) PD 625, 658; *Hekesh, Supra,* at p. 495; HCJ 3992/04 *Maimon-Cohen v. The Foreign Minister et al.*, 59 (1) PD 49, 56; *and Issa*, at paragraph 7). All governmental authorities – including the Judicial branch – are commanded to protect it (Article 11 of the basic law).

This right has two faces. First, it draws its strength from the right to freedom in its simple sense. Just as putting a person in detention or imprisoning him impinges upon his freedom, so does his extradition to another country, especially assuming that there he will be exposed to a similar risk. The second face of the right is the harm a person is exposed to as a result of his disconnection from his familiar environment, and his exposure to the risks of a foreign legal system, including its substantive law,

its evidence and procedural law, and the sentencing policy it employs. In this sense, an individual's "personal freedom" also includes his freedom to choose his environment and the system of norms, including legal norms, to which he is subjected. Barak P. explained that in *Sheinbein*:

> ". . . it would not be just to try a person in a country of whose laws he is unaware, with whose culture he is unfamiliar, and whose language he does not speak. It is not good to detach a person from his country, his family, his witnesses, and his people . . ." (*id.*, at p. 637).

However, as any right, the right not to be extradited is not absolute. Against it stand contrasting interests, on the basis of which the law is likely, in certain cases, to allow impingement upon it (*see Hekesh*, *Supra,* at p. 495). The constitutional apparatus which arranges the issue is our well known "limitations clause" – Article 8 of Basic Law: Human Dignity and Freedom – with its four cumulative conditions. Pursuant to those conditions, in order for the impingement to be legal, it must be shown that it is enacted in a statute or by force of one, that its purpose is worthy, that it sits well with the values of the State of Israel as a Jewish and a democratic state, and that it is proportional.

The question is, therefore, what is the quality and content of the public interest which stands opposite the right not to be extradited, and what is its weight when put on the scales against that right? The public interest for extradition or against it is formed out of a fusion of the various interests – those in favor and those against. These are found in the interpretation of the statute dedicated to the issue of extradition – The Extradition Law; in the provisions of the relevant extradition treaty; and in additional sources.

The Public Interest as Seen through the Extradition Law and the Treaties

38. In *Goldstein*, Bach J. discussed the need to interpret the terms in The Extradition Law "liberally" (*id.,* at p. 284). In *Engel*, Barak J. expressed a similar approach, ruling that "the clear tendency of the courts [is] to grant the extradition treaties a liberal interpretation (*id.*, at p. 103). Barak P. repeated this stance, in his dissenting opinion in *Sheinbein*, stating that "The Extradition Law (and the extradition treaties) is interpreted liberally" (*id.*, at p. 640). In contrast, Or J. ruled, in the opinion of the Court, that it is not possible "to determine, as a sweeping rule, that the law set out in The Extradition Law is to be interpreted 'liberally'" (*id.,* at p. 660).

In my opinion, the question is not the extent of liberality in the interpretation of the law. Extradition law, like any other law, is interpreted according to its purpose, while balancing between the values embodied in it (*see Aloni, M.K.*, *Supra,* at p. 42; CrimA 600/88 *Davis v. The Attorney General*, 43 (2) PD 645, 647; HCJ 3806/93 *Manning et al. v. The Minister of Justice*, 47 (3) PD 420, 425; and CrimFH 8612/00 *Berger v. The Attorney General*, 55 (5) PD 439, 449). This purpose or more precisely, these purposes, are the key to understanding the public interest in the extradition question in each particular case.

Before discussing all of the purposes, I will further comment that extradition law is not made in a vacuum. They are woven into the general tapestry of the laws of Israel. The ways they are interpreted is affected by the fundamental principles of law in general, and by the purposes of statutes adjacent to the extradition issue (*see Manning, Supra,* at p. 285 (Barak J.).

Cooperation in the Fight against Crime

39. The first and central purpose of extradition law is the creation of an effective instrument for international cooperation in the fight against crime, particularly transnational crime. Barak P. discussed this in *Sheinbein*:

> "This purpose is the creation of a legal instrument for international cooperation in the war on crime . . . a tool for assisting the legal authorities of the requesting state, as a part of the international community's fight against crime" (*id.,* at p. 639).

In *Hekesh*, Mazza J. added:

> "At the head of the interests standing against the right not to be extradited is the interest of the State of Israel – which is a common interest to all civilized countries – in the existence of a common international fight to rout crime. The signing of extradition treaties expresses the joint interest of the signing states to create a legal and practical infrastructure which will allow cooperation between them.
> . . .
> The need for cooperation between states has only grown stronger as the years have gone by. The increase in criminal activity which crosses national borders, the establishment of sophisticated crime frameworks, based on cooperation between criminals in different countries, and the common phenomenon of citizens who move to other countries, and then, after having committed crimes there, return to the state of their citizenship, all require increasing cooperation between all civilized states" (*id.,* at p. 495).

Bach J. also wrote:

> "At a time when crime is getting more sophisticated every year, when distances and borders have become almost unimportant, and when telecommunication between criminals has also become easy, efficient, and immediate, the success of the authorities fighting crime, be it international terror, drug trafficking, or severe financial offenses, will be in danger of frustration if efficient cooperation between law enforcement authorities in different countries is not ensured. The arrest of crime suspects in every country, and their extradition to the requesting country, are part of the means to

> realize that cooperation (CrimApp 4655/95 *Livkind v. The Attorney General*, 49 (3) PD 640, 646).

The need for international cooperation is the result of the changing times. In the past, the dominant approach drew exclusively from the principle of state sovereignty. The state was thought of as the only body permitted to enforce the law upon acts which took place on territory under its control. No external body was allowed to intervene in the way it did so, needless to mention doing so instead of it. However, "such an understanding of the issue has long since ceased to be a part of the legal consciousness of the enlightened world" (S. Z. Feller *Foundations of Penal Law*, at p. 240). Professor Feller adds:

> "The period in which we are living is characterized by the fast and easy movement of people in the free world from one state to another. A person's presence all over the world, as a temporary resident, a tourist, or just a traveler, is a routine thing. Moreover, a person is liable to create danger and strike at vital interests of the state while being beyond national borders – even by taking advantage of the fact that he is beyond them. The ease and speed of travel in the world, and the possibility of undermining public order and vital interests of the state even from a distance, grant foreign criminal activity importance which does not fall from that of domestic criminal activity. This is a dangerous phenomenon for the state, which requires response and ammunition on the penal plane" (*id.*).

The attitude today is that the penal law no longer looks solely upon what is done inside the country. It has an important role in the constant interrelations which each legal system maintains with its fellows. The legal system does not act in a vacuum. It has some level of responsibility toward other systems. Indeed, as the Supreme Court of Canada wrote in *Libman v. Queen*, [1985] 2 S.C.R. 178, 214: "In a shrinking world, we are all our brother's keepers". Such responsibility has apparently not yet been internalized by customary international law, but it is reflected in the conventional law between the states, and should also simultaneously serve among the internal principles which guide each state in interpreting its laws. Not only is it inappropriate for a state, as a society in the community of civilized nations, to seclude itself within the narrow boundaries of its sovereignty; such behavior is likely to lead to severe consequences from the standpoint of its internal interests as well.

Preventing Flight from Justice

40. One of the central objectives of international legal cooperation is preventing criminals, who committed a crime in one country and fled to another which has no link to the crime or cannot bring them to justice for other reasons, from avoiding justice. Adiel J. discussed this in *Maimon-Cohen*, *Supra,* at p. 58:

> "The process of extradition, being a component of criminal law enforcement, is intended to establish international cooperation which will allow the state requesting extradition

> to apply its criminal law in light of all the purposes at its foundation, and ensure that fugitive criminals will not frustrate the goals of criminal law by fleeing to the territory of other states".

Wise & Bassiouni also discussed this in their book:

> "Extradition is a means for making sure that the purposes which are thought to be served by having a system of criminal law are not frustrated by the ability of putative wrongdoers to slip out of the country and obtain asylum abroad. It helps to ensure that criminals do not escape the punishment they deserve, that the preventive, educative, or expressive uses of the criminal law are not diluted by the recurrent spectacle of offenders managing to avoid trial by fleeing to a foreign sanctuary. It serves to close one kind of potential bolt hole" (M.C. Bassiouni, E.M. Wise *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Dordrecht,1995) 26).

It should be emphasized that flight from justice is a complex concept. It should not be viewed through a narrow lens. It embodies not only the question of the state's jurisdiction, but also the ability to convict a person who has committed a crime and punish him as he should be punished (*R. v. Godfrey* [1922] All E.R. Rep. 266). I need not conduct here an exhaustive characterization of the concept of flight from justice. It will suffice to say that when the evidence which can be collected in the state being asked to extradite is weak since most of the evidence is abroad, or when there are real difficulties in bringing witnesses, that may help a person flee – *de facto* – from justice, even if he is tried in that country. These words of Barak P. in *Sheinbein* exemplify this:

> " . . . Our evidence law, which, in general, does not allow hearsay, and is based upon the right to cross examination, makes trial in Israel of an accused person most [difficult], when all the evidence in his case is outside of Israel. It is not by chance that the Common Law countries – to which the State of Israel is close, regarding criminal proceedings – do not prosecute their citizens who committed crimes outside their territory, rather, extradite them. Their evidence law requires such a result" (*id.,* at p. 640; *see also Feinberg*, *Supra,* at paragraph 23).

41. If the State of Israel were to grant, in one way or another, asylum to criminals, who cling to her legal system as if they were "grasping the horns of the altar" (1 Kings 2: 28) – in the words of M.K. C. Porat in a debate before the Knesset on the amendment of 1999 (Knesset Transcript, 1999 20, 4212), it would lead to severe consequences. **First**, that would harm the international war effort against crime. **Second**, that might endanger security and public order in Israel: "the state will cause severe damage to itself, if it allows international criminals to safe harbor here"

(*Pesachovitz*, *Supra,* at p. 456 (Landau J.)). **Third**, that would cause damage to Israel's image in the eyes of the nations of the world, as Israel would be seen as not doing enough to fight crime (*see Pesachovitz*, id., *and Sheinbein*, *Supra,* at p. 641). The words of Mazza J. are appropriate here, by way of analogy:

> "Needless to say, when a state refrains from extraditing its citizens – and when circumstances require it, refrains from prosecuting them – it raises suspicion that it is an uncivilized state which gives cover – heaven forbid – to criminals. Thus, not only is its image in the eyes of other states damaged, but also – no less worrisome – its image in its own eyes" (*Hekesh*, *Supra,* at p. 498).

An additional negative result is likely to be the loss of motivation by the requesting state's law enforcement agencies, to the extent that its efforts wove the tapestry of evidence for which extradition is requested. It is clear that the requesting state's expectation, after having invested resources to collect evidence against a person, is that this person will be brought to justice. A deep gap between this expectation and the consequence of refraining to extradite him is liable to dampen the requesting state's willingness to act in the field of detection and investigation of criminals in the future, in light of the chance that they will be rescued from the vise of the law only because of the unwillingness to extradite them. This is likely to damage both the requesting state and the requested state, as well as their common fight against crime, and in the words of the Supreme Court of Canada in *United States v. Cotroni* [1989] 1 S.C.R. 1469, 1494:

> ". . . what initiative would law enforcement agencies in one country have to investigate a crime that could not be successfully prosecuted?"

A Person is to be Tried by his "Natural" Legal System

42. A main purpose of the legal institution of extradition is related to the principle by which it is best to allow the "natural judge" of the accused to decide his case. Extradition law is not indifferent to the special interest of a legal system with a tight link to the crime – as opposed to any other system – in prosecuting its perpetrators. That is the type of link about which Barak P. said, in *Sheinbein*, that "by the force of such a link, the judges of Israel can be seen as a persons "natural judges" (*id.*, at p. 641).

What is that link, which grants a certain legal system its character as the "natural" system which is to prevail among all legal systems that have a link to the crime? The answer to that question requires returning to the issue of the competition between systems, and to the question of "conflict of applications", which, as I mentioned above, is an issue for the internal law of the requested state to decide. Many times, the requested state is willing to waive the application of its law. This is the source of the Israeli prosecution authorities' authority to petition the District Court for a declaration that a person is extraditable. However, the question arises again in full force, since this waiver has been put up for the examination of judicial review – which requires reconsideration of the prosecution authorities' position; and all the

more so, since the requesting state has not waived the opportunity to apply its own law.

43. This is an issue, some of whose characteristics are reminiscent of the issue of conflict of law (and *see* A. Levontine *Conflict of Law – A Bill* (1987) A). The legal realm of conflict of laws is usually categorized as part of private international law, and it is usually mentioned in the context of civil issues. In conflict of law, a choice must be made between different legal systems, which would apply themselves upon the same case by force of a number of links. This choice must be made in light of rules of choice of law, set out in the law of the forum hearing the issue. Each legal field has its own unique rule of choice of law. Thus, for example, Israeli law provides that the law applying to a tort which has links to more than one legal system will usually be the law in the place it was committed (*lex locus delicti*) (*Yinon*, at paragraph 9); the law applicable in inheritance is the law of the testator's residence at the time of his death (articles 137-140 of The Inheritance Law, 1965), *et cetera.* The engine powering the rules of choice of law is the preference of one link over another and, accordingly – the preference of one legal system over its competitor.

The situation is different when dealing with a criminal issue, as in the case before us (*see also* Levontine, *Conflict of Laws,* C). First, as I mentioned at the beginning, in criminal law the substantive law is not separated from jurisdiction, and both are bound together. The choice between competing systems is therefore not a "choice of law", rather a "choice of application" of the law and of jurisdiction together. And it seems easier for a legal system to "waive" only one of those two components, than to waive both. Second, and more importantly, criminal law has unique characteristics: **one** is that penal law is bound to the question of state sovereignty, and thus belongs to the "nucleus" of issues, upon which the legal system especially wishes to apply its values. **The second aspect** is that in the criminal process, the accused is exposed, more than the parties to a civil case, to the risks that his stance will be rejected and the stance of the opposite side will be accepted. **Finally**, extradition law, which is adjacent to criminal law, does not deal only with the question of the relationship between the links. It tries to look at the issue with a broad view, while considering many various considerations, of which the relationship between the application links is only one.

Therefore, in the penal field there should be no talking of a "rule of decision", rather a "rule of preference". Such a rule is a station along the way. It is not a final station. As I noted, a judicial forum asked to decide a question of extradition, needs more than a rule of decision. Thus, for example, when it is found that, according to the rule of preference which has been adopted – be its content as it may – that the foreign law is to be applied, the court will still have to examine whether the foreign state will give the accused a fair trial, and, alternately, whether the law of this state is likely to "rescue" the accused, to the extent that justice will not be done. It may be that in the end, the legal system chosen will not be the one determined by the rule of preference, rather the one which fulfills most of the other rationales which the legal system wishes to consider.

I have discussed these rationales, and I will further discuss them. At this point, I shall try to locate the rule of preference in our extradition law, and in our search for that rule, we must return to the basics of criminal law.

44. "The criminal norm is legislated, first and foremost, in order to ensure the proper functioning of society within its political boundaries, including all the values upon which its existence and development depend, according to the views of the political force leading it. Thus, the offense's territorial link to the state is of the highest degree" (S. Z. Feller *Foundations of Penal Law*, at p. 245). Feller recognizes the hierarchy between the different application links. In his words:

> "These links have a value-based hierarchy between them, according to the state interest embodied in each of them. Indeed, the state's interest requiring the application of its penal law upon **every** offense committed in the territory of the state is not the same as the interest in applying its law in an undiscerning fashion upon offenses committed outside of the territory of the state. Regarding extraterritorial offenses, the interest in applying the law of the state due to an offense which endangers its security, is not the same as the interest in punishing any crime whatsoever committed by a citizen of the state . . . " ("Criminal Jurisdiction", at p. 594; emphasis in original).

The territorial link is thus the link of highest "rank", and its application is central. The other links are listed after it in the hierarchical order, and each one has residual application in relation to the one before it (*see* Feller *Foundations of Penal Law*, at p. 246). About the meaning of the hierarchy of links, Professor Feller adds:

> "The same value-based hierarchy is also manifest in the characterization of various types of application as **main** on the one hand, or subsidiary on the other hand, in terms of **conflict of laws**; that is to say, between the law of the state and the foreign law" (*id.*; emphasis added).

In The Penal Cod, the hierarchy of links is partially manifested after amendment 39. Thus, article 14(b) of the Code, which establishes application of criminal law by force of the passive personal link, provides that Israeli law shall retreat when the offense was committed in the territory of a foreign state, and is not an offense according to that state's law, or its law restricts criminal liability for it, or when the foreign legal system has already exhausted its power – by force of the territorial link – to prosecute the accused, and he was acquitted, or convicted and served his punishment. Article 15(b) and 16 apply a similar hierarchy between the active personal link or the universal link according to Israeli law, and the link of the foreign law.

However, as Professor Feller himself notes, the hierarchy relates only to **conflict of laws**, and – would I add – does not have anything to do with the choice between legal systems competing about **application.** Its meaning is that where the laws of a foreign state provide that an offense committed in its territory is not an offense, the Israeli law can no longer apply itself to that act by force of links which are inherently inferior to the foreign state's territorial link. That is also the case where the foreign country has exhausted justice in the case of the accused. In fact, the

implementation of the hierarchy does not lead to decision in a competition between legal systems, rather makes competition unnecessary in the first place. However, where such competition actually exists, for instance when all the conditions in abovementioned article 14(b) are met, or when the involved legal systems fail to properly integrate the hierarchy of links in their internal law (and *see Foundations of Penal Law*, at p. 247), the question of decision returns.

An alternative solution is likely to be found in *a priori* granting of higher status to the link of a certain kind, so that it will always prevail. In the past it was thought, for example, that the nationality of a person makes that nation-state the most proper forum for his prosecution. That was the intention of my colleague Cheshin J., when he wrote that-

> "Walking back into the depths of history will show us that the source of the laws preventing extradition of citizens was, *inter alia*, the spring of nations (*printemps des peuples*) in the 19th century. . . . a citizen is a son of his country – if you will, a son of his fatherland – and it is thus worthy that before judges in his country – before them and not before judges of another country – he shall stand trial, as they are his 'natural' judges" (*Yegudayev*, *Supra,* at p. 558).

This anachronistic approach is no longer in force. Its voice, wrote Barak P. in *Sheinbein*, "seems like a voice from a distant and strange past" (*id.,* at p. 641). And Cheshin J. added:

> "the reasons given in the past for preventing the extradition of citizens to other countries – the injustice of trying a person in a country with whose law he is not familiar and whose culture is foreign to his, the state's duty to protect its citizens from the foreign system of law, the lack of trust in the fairness of the foreign legal system toward people who are not its citizens – have lost their force in a world which has become a 'global village' . . . " (*Yegudayev*, *Supra,* at p. 544).

45. The approach which has taken the highest status is the one which claims that the preferred link is the territorial link, and therefore that it is preferable to prosecute a person **in the place where the crime was committed**. There is logic to this result. A person who chose to commit a crime in a certain place can certainly be seen as a person who voluntarily subjected himself to the legal system in that place. Professor Feller also discussed this:

> "By committing a criminal offense, the offender accepts, in advance, the jurisdiction of the state in whose territory he committed the offense" (*Extradition Law*, at p. 3).

Barak P. was also of the opinion that the "'natural judge' of the accused is the judge of the country in which he committed the crime" (*Sheinbein*, *Supra,* at p. 637). And in *Hekesh*, Mazza J. wrote:

> "Justice demands that a person who chose to commit an offense in a country of which he is not a citizen or permanent resident stand trial before the authorized court in the country in which he committed the offense, according to its laws and system" (*id.,* at p. 499).

And Adiel J. added:

> "The committing of the offense violates, first and foremost, the sovereignty and order of the state in whose territory the offense was committed. It is logical, therefore, that the state's interest be focused, first and foremost, on what takes place within its borders, and only after that on acts committed in other countries which have no direct effect on the goings on in its territory" (*Maimon-Cohen*, *Supra,* at p. 64).

46. But what shall the law be when the offense is committed in a number of different places? The rule relating to *locus delicti* gives no solution in such circumstances. Moreover, even if a case came before us, in which the competition is between two states who do not wish to prosecute on the basis of the **territorial link**, even then the "*locus delicti* rule" would not be relevant. Moreover, and this is what is important in our case: how shall the competition be decided when the offense is conspiracy in one country to commit an offense in another country? Indeed, according to the view I expressed, both states are to be seen has having territorial application, and in such a case the "*locus delicti* rule" is useless.

I am therefore of the opinion that as far as criminal law is concerned, a person's "natural" legal system is the system to which the alleged crime has the most links. This approach, sometimes called the "majority of links" or "center of gravity" approach, is the one which best expresses the relationship between the criminal conduct and the legal system which should apply. It offers an efficient rule of preference, able to assist – along with the other considerations which the court must consider – in solving most cases of competition.

Such an approach is also implemented in civil law. It is the approach accepted in Israeli law for examining the convenience of the judicial forum (*See* CApp 4716/93 *The Arab Insurance Company, Nablus v. Zariqat*, 48 (3) PD 265, 269; *and* CApp 851/99 *Van Doosselaere et al. v. Depypere et al.*, 57 (1) PD 800, 813). However, it has also been criticized. It has been claimed that such an approach is liable to impinge upon legal certainty, and even be used as a manipulative mechanism in the hands of the court (*see* Karayanni, at p. 53; *and Yinon*, *Supra,* at p. 375). However, these contentions are unfounded when dealing with criminal law. Indeed, as I noted, the principle of legal certainty is one of the foundations of penal law. But its meaning is merely that a person shall not be exposed to criminal liability if he is unable to know about the criminal prohibition and its nature (CrimA 534/78 *Kovillio v. The State of Israel*, 34 PD (2) 281, 287). The principle of certainty also relates to the right of the accused to due process and to have the charges against him be clarified on the basis of fair and clear rules of evidence. However, the principle does not include a criminal's certainty that he will be able to evade justice if only he is wise enough to commit his unlawful acts in a place, or in a manner, which will prevent bringing him to justice.

Nor does it include the certainty that he can produce his profits in a certain place, but not be exposed to the jeopardy of the legal system of that place. Nor does it include a person's certainty that he will be able to claim that he is not familiar with the law in the place in which he chose to commit the offense (*see*, on this issue, the verdict of an American court in Washington D.C. *United States v. Yunis,* 681 F. Supp. 896, 902 (D.D.C. 1988)).

The "center of gravity" approach, as a rule of preference in extradition law, was also adopted by the courts in Canada, first in the words of a Queen's Bench judge in the District of Manitoba, Judge Hanssen, in *United States v. Swystun* [1987] 50 Man. R. (2d) 129. In that case, the court listed the considerations to be taken into account in the question whether to extradite to the United States a Canadian citizen suspected of conspiracy to distribute drugs in the latter country. The accused had allegedly performed all his acts exclusively in Canada. Among the considerations listed by the court as relevant were: the place where the effect of the conspiracy was intended to be felt; which of the competing legal systems has a stronger interest to prosecute the accused; which country's law enforcement agencies discovered the crime; which place is the evidentiary center of gravity, *et cetera.* At the end of its examination, the court ruled:

> ". . . it is apparent from an examination of the factors listed above that although a fugitive may not have personally performed any act in the foreign jurisdiction in furtherance of the crime with which he is charged, **that jurisdiction, for a variety of reasons may still be the most effective place for him to be prosecuted" (***Id.*, at p. 134; emphasis added).

This approach was examined soon after, in two similar cases in which the extradition of two Canadian citizens to the Unites States was requested, for the crime of conspiracy to commit drug crimes there. Their conspiring and their acts to advance the plot did not go beyond Canada's borders, and the acts committed in the United States were done solely by their agents. The prosecution's evidence was mostly in the United States. The discovery of the conspiracy would not have been possible without the efforts of United States law enforcement. Pursuant to the law, it was possible to try the suspects either in Canada or in the United States. The trial court ordered their extradition. The appellate court overturned the decision and ruled that the extradition violates their constitutional right not to forcedly leave the country, beyond the extent necessary. After that, the Supreme Court heard the case. In its decision, given by La Forest J., by a majority of five against two – *see United States v. Cotroni* [1989] 1 S.C.R. 1469 – the Supreme Court of Canada adopted *Swystun*, ruling:

> "It is often better that a crime be prosecuted where its harmful impact is felt and where the witnesses and the persons most interested in bringing the criminal to justice reside and . . . where the . . . evidence [is] located" (*Id*, at p. 1488).

It was thus decided that in light of the entirety of the considerations, extradition to the United States is constitutional (*compare also Re Federal Republic of Germany and Rauca* (1983), 4 C.C.C. (3d) 385, 405).

Support for the "center of gravity" principle as the appropriate rule of preference for questions of conflict of application might also be found, by way of analogy, in article 403 of the American Restatement (Restatement (Third) of Foreign Relation Law (1986)). That article, which deals with both civil and criminal cases, provides a rule of choice of application, when two states see it as reasonable to apply their laws to one act, but the legal systems contradict each other. The foundation of this rule is the need to prevent a situation in which a person is subject to two contradictory legal rules which cannot be reconciled. In such a situation, states the Restatement, each of the competing states must examine – on the basis of the all the relevant variables – which state has the clearly greater interest. A state which finds that the other state has a clearly greater interest must waive the application of its own law. It appears to me, that one can adopt that rule even for situations in which the legal rules do not contradict each other but the question is: which of the states, with similar laws, shall apply its law to the case, when they cannot both do so jointly?

Last, we can make an analogy from a similar situation of competition, which arises when two states concurrently request the extradition of a person from a third state. The solution in such a case is often provided in the particular provisions of the extradition treaty. Article 17 of the European Convention on Extradition, Paris 13.XII. 1957, for example, whose title is "conflicting request", provides:

> "If extradition is requested concurrently by more than one State, either for the same offence or for different offences, **the requested Party shall make its decision having regard to all the circumstances** and especially the relative seriousness and place of commission of the offences, the respective dates of the requests, the nationality of the person claimed and the possibility of subsequent extradition to another State" (Emphasis added).

In other words, the state asked to extradite has the right to decide the competition according to its discretion, in the framework of which it is to consider all of the relevant circumstances (in other words – all of the links). A similar rule of decision according to all of the circumstances is provided in article 14 of the bilateral extradition treaty between the United States and Israel. On that subject, Professor Feller wrote "I haven't even a shadow of a doubt that the flexible approach taken by the European Convention and by the other treaties which take it, is preferable to any inflexible approach, whatever test it may have chosen "(*Extradition Law*, at p. 405). With that I can only agree.

In conclusion, to the extent that a person's act, regardless of the physical place in which it was committed, is especially linked to the legal system of the requesting state, the particular purpose of extradition law, which is the subject of our present discussion, determines that it is appropriate to extradite him to that state. I will,

however, re-emphasize what I have said: location of the offense's center of gravity is merely a rule of preference, which discovers which of the legal systems has a preferential link to the offense. It is not a rule of decision, and its results merely join the rest of the parameters examined regarding the extradition question, which together form the fabric of considerations in the decision.

Manifestation in the Conventional Law

47. As previously mentioned, states may form their extradition interrelations in a treaty, constrict their scope or expand them, and stipulate various conditions in them. Study of extradition treaties to which Israel is party reveals that many of them include requirements, regarding the offense which is the cause of the request, relating to the physical place in which the elements of that offense came about.

Such is article 1 of the Agreement for the Reciprocal Extradition of Criminals between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the State of Israel (Treaty Series 360, vol. 11, 65), which requires, as a condition for extradition, **that the offense took place in the requesting state**. In the original language:

> "The Contracting Parties agree to extradite to each other, in the circumstances stated in the present Agreement, those persons who, being accused or convicted of any of the offences enumerated in Article 3 and committed within the territory of the one Party, or on the high seas on board a vessel registered in the territory of that Party, shall be found within the territory of the other party".

It seems that this provision is an artifact from the "narrow" territorial view, which was, until recently, the fundamental view in English law. For many years, the dominant approach in Britain was that only when the gist of the offense took place on British soil does local criminal law apply, even if the offenses are inherently transnational. The foundation of this view, which in Britain is called the "last act rule", or the "terminatory theory", is *Reg. v. Ellis* [1899] 1 Q.B. 230, which was reinforced in *Reg. v. Harden* [1963] 1 Q.B. 8. The rule greatly constricted the willingness to apply English law to acts performed outside of the country, and assumed, as a fundamental axiom, that the state's interest ends where its physical borders lie.

In light of the gap between the results of this approach and the reality of the changing world, it was criticized in caselaw and in the legal literature (*see* Judge Rose's speech in *R v. Smith* [1996] 2 BCLC 109; *and* L. Hall "Territorial Jurisdiction and the Criminal Law" 1972 *Crim L. Rev.* 276; L. Collins *Fraudulent Conduct* 1989, at p. 258. Professor Feller also criticized the approach:

> "According to this approach, the 'location of the offense' has such a restricted role that it creates an ad hoc concept of 'criminality for the purposes of extradition' – as opposed to the regular and true criminality – which stems from the

> offense's link to the state, even if it is extraterritorial. Indeed, this approach was once employed in order to determine regular criminality, since each state's isolation and isolationism were reflected, *inter alia*, by the fact that only conduct that took place in its territory was worthy of interest and reaction . . . [but it is] **an artifact from the days when the application of the criminal law was exclusively territorial, and has therefore become obsolete**" (*Extradition Law,* at p. 187; emphasis added).

Professor Feller gives an example:

> "if, for example, a robbery or attack against an 'El Al' agency should take place in some country, and the criminals flee to England, the extradition treaty with Great Britain will lead to the rejection of any request to extradite them to Israel, since only the state in which the offense was committed has the right to take the criminals into its custody" (*id.).*

It has become clear, though, in recent years, that English law wishes to distance itself from that constricted approach. First, regarding some types of offenses, primary legislation has adopted an expanded approach regarding application (*see* Criminal Justice Act 1993, which took effect in 1999). Second – and this is the main thing – English caselaw has recently recognized the possibility of adopting an expansive approach, regardless of the type of offense at hand. I refer to the judgment of the Court of Appeals of March 2004, *R v. Smith (No. 4)* [2004] EWCA Crim 631. In that case, Lord Woolf recognized a Common Law rule of application, which does not draw exclusively from the place where the "heart" of the offense took place, rather also relates, *inter alia*, to the place where its consequences appeared.

In any event, regarding offenses of **conspiracy**, British law had already taken an approach different from the "last act rule". British law had adopted the principle, parallel to the objective territorial link, by which the law is chosen according to the place where the **effect** of the conspiracy took place (*see Reg. v. Doot* [1973] A. C. 807, 816, 818; *Liangsiriprasert v. Government of the United States of America* [1990] 2 All ER 866; *Reg. v. Sansom* [1991] 2 Q.B. 130.

48. The extradition treaty between the State of Israel and France (Treaty Series 308, vol. 10, 379) contains a "territorial restriction" of another sort. Article 7(1) of the convention excludes from the states' extradition relations cases in which the offense **took place within the borders of the state asked to extradite**. At the foundation of this provision is the view that when the offense was committed in the territory of the state asked to extradite, the application of that state's law – which is territorial application – has a dominant status.

49. On the other side of the divide are the treaties in which, out of a desire to intensify international cooperation, extradition relations have been expanded to include situations in which the entire offense was committed outside the territory of the requesting state. **Such is the extradition treaty between Israel and the United States.** Article I of the extradition treaties between these two countries provides:

> "Each contracting Party agrees, under the conditions and circumstances established by the present Convention, reciprocally to deliver up person found in its territory who have been charged with or convicted of any of the offenses mentioned in Article II of the present Convention committed within the territorial jurisdiction of the other, or outside thereof under the conditions specified in Article III of the present Convention."

Article III of the treaty provides:

> "When the offense has been committed outside the territorial jurisdiction of the requesting Party, extradition need not be granted unless the laws of the requested Party provide for the punishment of such an offense committed in similar circumstances.
> …."

Thus Israel and the United States intended to expand the list of situations in which criminals can be extradited from one country to the other, to include cases in which the extradition offense was committed outside of the borders of the requesting state, if the requesting state's penal law would apply to the act if the roles between the states were reversed.

If one remembers the discussion of the rules outlining the application of penal law according to the American system, the roots of the difference between the Israeli-US treaty and the other mentioned treaties becomes clear. The idea at the heart of US-Israeli extradition relations is that the application of a state's criminal law can and should be expanded beyond the requesting state's geographic borders, in those cases in which there is a clear link between it and the offense.

Reciprocity in Extradition Relations

50. The extradition issue is umbilically tied to the idea of reciprocity, according to which, when state A agrees, under certain circumstances, to extradite a person to state B which wishes to prosecute him, the chances increase that state B will also agree to similarly extradite when the roles are reversed, even though it has no duty by law to do so (*Pesachovitz*, *Supra,* at p. 452). The interest of the state being asked to extradite is that when the time comes, it will not be denied the opportunity to apply its penal law upon offenses which it is obligated by common sense and a sense of justice to prosecute; and to implement its law and fundamental principles, including its interest that fugitives from its law will be returned to it in order to face justice. Wise & Bassiouni discussed this:

> "Each state has an interest in getting back fugitives from its own law who flee to a foreign country. But to secure their return on a regular basis, a state is likely to have to agree to extradite in its own turn. This is the

> main motive for concluding extradition treaties" (*Aut Dedere Aut Judicare*, 37).

The principle of reciprocity is very important. It is an important component of a state's ability to plan ahead. It contains a synergetic element, which empowers states working together against crime. It ensures that such joint activity will continue; and it is a fundamental element in the ability to maintain bilateral relations. In the words of Mazza J.:

> "…Extradition treaties are based on reciprocity. A state which refrains from extraditing its citizens cannot expect that its requests to extradite criminals who violated its laws and fled will be met with willingness" (*Hekesh*, *Supra,* at p. 498).

And these were the instructive words of my colleague, Cheshin J.:

> "One side will not do for the other – not in the long term, at least – unless the other also does the same . . . always, or – almost always, will the 'something' rule hang over us: something for something. So it was in interrelationships between individuals before law existed, and so it is now beyond the law's scope, and since humans society is made up of individuals, so it was – and is – after the creation of law. And knowing that the state is run by humans, so it also is in the interrelationships between states" (*Yegudayev*, *Supra,* at p. 565).

Professor A. Shapira added, on the same subject:

> "States, being aware of their interdependence, cannot allow themselves the luxury of isolationism within the four walls of their unique interest. The needs of the modern international community require reciprocal consideration of national interests. Every state may have a real interest in advancing its own policies and principles of justice, as they are embodied in its laws. Systematic ignoring of foreign states' legitimate interests undermines the foundations of a comprehensive world order" (A. Shapira "The Nature of Conflict of Law Rules" 10 *Iyunei Mishpat* (5744) 275, 286)[Hebrew]).

51. This talk of the reciprocity principle is not merely lip service. It is concretely manifest in Israel's extradition relations with various countries. Especially noteworthy are those cases in which the State of Israel requested – and was granted – the extradition to Israel of persons suspected of committing crimes outside of her borders, which had an effect within her territory. Thus, in 1995, Israel asked the United States to extradite the head of the "political wing" of "Hamas", Mousa Abu Marzook, to Israel. In the petition request it was contended that as a high ranking member of a terrorist organization, Abu Marzook was responsible for terrorist attacks committed in Israel. It was not contended that any of his alleged acts were committed in Israel, or

that he physically participated in committing terrorist attacks in Israeli territory. All of Abu Marzook's alleged acts were committed by him outside of the borders of the State of Israel, from where he was at the time, in the United States. On May 7 1996, the District Court for the Southern District of New York declared that Abu Marzook is "extraditable" to Israel, and it was only an internal Israeli reason that prevented the extradition in the end.

In October 2004, Israel asked Russia to extradite Shote Shmallshvilli, who allegedly served as a key figure in a crime syndicate which trafficked in women for prostitution. According to the allegations in the extradition request, Shmallshvilli was responsible for the "purchase" of women in Russia and their "sale" to Israeli pimps. The offenses of which he was suspected were all committed outside of Israel, and the lion's share of them within Russia. It was alleged that in Russia he held women, dealt with their sale to Israelis, and also arranged their transportation to Israel, through Egypt. Russia granted Israel's request, and Shmallshvilli was extradited.

Only recently, Israel asked the United Kingdom to extradite to Israel a person allegedly involved in the affair known as "the Trojan horse" – a case of industrial espionage by hacking into Israeli companies' computers. An intensive Israeli Police investigation led to suspicion that an Israeli couple living in London was involved in the development and distribution – all exclusively within British borders, without any act whatsoever by them or on their behalf being committed in Israel – of a computer program used to penetrate computers. On August 28 2005, the Magistrates' Court of the Southern District of London decided, on the basis of the fact that the couple had allegedly committed "**conspiracy** to defraud", to extradite them to Israel.

It is but obvious that just as the State of Israel expects that the extradition requests which it directs to foreign countries will not fall on deaf ears, it is best, out of recognition of her vital interests, that she treat other states' requests similarly.

Preserving Public Policy

52. At the beginning of this opinion, I discussed the "vague principle" in The Extradition Law, pursuant to which a person is not to be extradited, if, under the circumstances, it would violate "public policy" (article 2b(a)(8) of the law). The decided case law is that this "public policy" is merely "external public policy". When the extradition - that is to say, the allowing of the foreign law's application – involves a violation of the fundamental values of the local legal system, such extradition is no longer worthy, as it violates public policy. That is the law regarding "external" public policy, as opposed to "internal" public policy - which merely means that the local law was likely to provide a different solution to the issue than that set out in the foreign law - which is not sufficient, in and of itself, to prevent extradition (CA 1137/93 *Ashkar v. Haims* 48 (3) PD 641, 651; *Yegudayev*, *Supra,* at p. 585; *Sirkis*, *Supra,* at p. 346; HCJ 3439/04 *Bezeq v. The Attorney General*, previously unpublished decision of December 29 2004, at paragraph 15; *Feinberg*, *Supra,* at paragraph 16).

It is possible to fit many of the interests found in The Extradition Law, which are related to this case, under the wing of public policy; and I would like to discuss two of them: one is the duty to ensure that the person whose extradition is requested will not suffer injustice in the requesting country, and that his trial will not be a

miscarriage of justice. The second relates to the connection between extradition and the sovereignty of the country being asked to extradite.

Extradition and the Right to Due Process

53. The right of a person accused of a criminal offense to due process is a constitutional basic right. It stems from the right of the individual to freedom and dignity. Dorner J. discussed this point:

> "Basic Law: Human Dignity and Freedom . . . granted the status of constitutional basic right to a person's right to criminal due process, especially pursuant to Article 5 of the basic law, which determines the right to freedom, and pursuant to Articles 2 & 4, which determine the right to human dignity" (Criminal Retrial 3032/99 *Baranes v. The State of Israel*, 56 (3) PD 354, 375).

The right to due process is a multifaceted right. A number of different principles are employed in order to safeguard it. Ensuring that these principles are employed "is a precaution of the highest importance for doing substantive justice and for preserving the rights of suspects, accused persons, and witnesses, in criminal proceedings (HCJ 6319/95 *Chachmi v. Levi*, 51 (3) PD 750, 755). Their role is to balance the unequal power relations between the accused and the prosecution, which usually enjoys an advantageous procedural status and additional advantages, and to ensure that the accused is given a full opportunity to make a case for his innocence, and to act in order to prove it. Against this background, the rationale behind rights and guarantees such as the presumption of innocence, the right to inspect the prosecution's evidence, the right to remain silent and the right to not incriminate oneself, the right to counsel, the right to cross examination and the right to present evidence, *et cetera*, becomes clear. Some of these rights are expressly anchored in statutes (*see, e.g.,* articles 15, 74 & 126 of The Criminal Procedure Law [consolidated version] 5742 – 1982; *and* articles 32 & 34 of The Criminal Procedure Law [Enforcement Authority – Detention], 5756-1996). The opinion that these rights are now principles which are "on the books" has even been sounded (CrimApp 537/95 *Ganimat v. The State of Israel*, 49 (3) PD 355, 375; HCJ 1437/02 *The Association for Civil Rights in Israel v. The Minister of Public Security*, 58 (2) PD 746, 764; A. Barak "The Constitutionalization of the Legal System as a result of the Basic Laws and its Implications for (Substantive and Procedural) Criminal Law" 13 *Mechkarei Mishpat* 21 (5756) [Hebrew].

54. The right to due process covers extradition law as well. Its manifestations, as seen in The Extradition Law, are many: the principle preventing "double jeopardy"; the prohibition of extradition on a political basis or discriminatory extradition; the requirement that *prima facie* evidence be shown; the return of Israelis convicted abroad to Israel, to serve their sentences; and the prohibition of extradition to a country where the extradited person may face the death penalty, unless he could be so punished in Israel as well. These principles are also anchored in extradition treaties, including the treaty between the United States and Israel (*see* articles 5 & 6 of the treaty).

The principle regarding due process does not contradict the other purposes of The Extradition Law. It fits in with them. It can ease the concern about exposing the accused to a legal system to which he is unaccustomed. It serves as a counterweight against the prosecution principle of nationality. The following words of S. Weiss, M.K., in the debate on the first call of the 5759 amendment, are fitting:

> "The principle according to which Israel is a member of the family of civilized and democratic nations is a good principle; these laws reflect the tradition and law of Israel, and complement them. We shall extradite criminals to political and legal cultures in which they will get a fair trial. Reciprocally, they will extradite criminals to Israel; and here humaneness and the fact that we are members of the international human community come before the national principle, since we assume that justice against crime will be done in both places: just trial, and just procedure (Knesset Transcript, 5758 25, 7086).

55. Legal systems may use different means to achieve the same objective. Such is also the case regarding the right to due process. This right is recognized in most democratic countries, but its realization may involve different means. One state may ensure it using certain procedural rights and guarantees, and another state's laws may adopt other rights and guarantees. Against this background, it is clear that the argument that differences between legal systems violates, in and of itself, the right to due process and therefore justifies refraining from extradition, cannot be accepted. Legal systems which are absolutely procedurally and substantively identical have yet to be found, even among countries with a common legal tradition.

However, it may be possible that gaps between one legal system and another, regarding the quality of guarantees employed in order to ensure due process, will be so fundamental and irreconcilable, that one must inevitably conclude that the legal system in the requesting country cannot be seen as allowing due process. Just as the difference, in and of itself, does not justify a sweeping conclusion regarding non-extradition, it can also not be relied on in order to prevent subjecting the extradition to judicial review (and *compare Maimon-Cohen*, *Supra,* at p. 66).

56. What kind of difference between legal systems, then, would justify the conclusion that a person is not to be exposed to the law and legal system of the requesting state? Answering this question requires two separate stages of examination. **At the first stage**, the court must examine the alleged due process violation which characterizes the law of the requesting state, in light of the fundamental principles and basic views used in Israeli law in order to identify due process and the rights and guarantees without which, according to our view, its existence is impossible. **At the second stage**, one examines how the alleged violation fits into the requesting state's legal system's set of criminal law balances. A claim that a certain right or guarantee is not realized, or realized in a faulty fashion, is not sufficient to support a conclusion regarding non-existence of due process; one must prove that in the entirety of rights and guaranties which the foreign system provides to a person defending himself against criminal charges, there are no elements capable of "setting off" the alleged violation and of ensuring that in the when all has been taken into account, the right to due process has been preserved. Adiel J. discussed this,

addressing the argument that the right to due process is violated since a foreign legal system does not allow inspection of the prosecution's evidence:

> "With no comprehensive familiarity of criminal procedure in the [foreign] legal system, we are not willing to determine, merely on the basis of the material before us, that the legal system **in its entirety** will not allow petitioner a fair trial. In order to reach such a conclusion, we must examine **the entire system**, including its principles and rules, in order to see how it balances between the rights of the accused and guarantees his ability to prove his innocence, and the powers and advantages granted to the prosecution. An examination of one sole institution of a legal system does not allow us to reach such a far reaching conclusion" (*Maimon-Cohen*, *Supra,* at p. 68; emphasis added).

Extradition and the Sovereignty Question

57. A state's decision not to apply its law to an event, despite its ability to do so, and to extradite those involved in it, is liable to be understood as discharge of sovereignty and as an expression of a lack of confidence in the local legal system and in its ability to handle the case with its own tools. Such a thing surely violates the public policy of that state, which requires that the legal system not be deterred from applying its own fundamental views and from dealing with crimes in its own way.

However, as I have already noted, public policy in extradition law is "external" public policy. Not every decision not to apply local law is to be seen as a waiver of sovereignty. *Au contraire:* to the extent that the decision to extradite a person is an expression of the purposes I discussed above, the decision not only sits well with the fundamentals of the legal system; it advances them. The very waiver of application of the law in certain circumstances reinforces the principle of state sovereignty. The power to withdraw the law, where it is justified to do so, flows directly from this principle. Indeed, it is done out of free will, and with no external coercion. Landau J. discussed this:

> ". . . reciprocity in extradition is not – or is not yet – a duty cast upon states by international law, **rather it is a policy issue, dependent upon the state's desire, and this desire can be legally expressed** in the provisions of a bilateral convention, or in a multilateral convention it joined" (*Pesachovitz*, *Supra,* at p. 452; emphasis added).

Professor Feller adds:

> "There is no rule in international law which obligates states to extradite criminals in their sovereign territory to other states. There is no duty to extradite when the state has not expressed a willingness to do so . . . the conclusion is that one cannot really speak of 'the right to extradition', nor of 'the right to extradite', pursuant to international law. No state is entitled to demand of its fellow, pursuant to this law, that the

> latter extradite a criminal which the former is interested in receiving, as international law has not formulated – has not yet formulated, at least – any such general duty of states to extradite criminals at the request of another state . . . **as a result of this, each state is sovereign to decide, without any restriction or unstipulated limitation, if it will extradite criminals at all, and if it will do so – on what basis . . . the state is further sovereign to decide on a case by case basis, according to its discretion . . . as such, extradition is an act of sovereignty *par excellence*, toward other states as well** (*Extradition Law,* at p. 22; emphasis in original).

Moreover, on the basis of the principle of reciprocity discussed above, respect of state sovereignty will also be ensured in the future, when it requests extradition. So ruled Landau J. in *Pesachovitz:*

> "From the very start, the principle of reciprocity was not created for the accused or convicted citizen, rather for the state, as the holder of rights and duties in international law, whether we see this principle as **recognition of states' sovereignty**, or whether we see it – as do most current international law scholars – as a tool for making the war against international crime more efficient" (*id.*, at p. 455; emphasis added).

One of the purposes of The Extradition Law is, therefore, to grant the state the possibility**, on the basis of its sovereign power**, to waive the application of its law, when it sees justification to do so.

Special Protection for Israeli Citizens and Residents

58. I noted previously, that the extradition of a person who was an Israeli citizen and resident at the time he allegedly committed his offense, is today dependent upon the obligation of the requesting state, that to the extent that he is convicted and sentenced to prison, he will return to Israel to serve his sentence here (article 1a(a)(2) of The Extradition Law). It is clear, therefore, that The Extradition Law intends to grant special protection to a person whose extradition is requested and who maintains an active personal link to the State of Israel.

One can learn of the essence of this protection, and of its scope, from the transformations which The Extradition Law underwent in recent years. The protection was added to the law in the year 1978, however was originally of much larger scope. Article 1a of the law, in its wording at that time, states: "**an Israeli citizen is not to be extradited, except for a crime which he committed before he became an Israeli citizen**". The rationale on which that qualification to extradition was based was the concern that Israeli citizens would be abandoned to confront unjust trial in foreign countries, especially in light of their race and national identity. M. Begin, M.K., who stood at the head of those proposing the qualification, explained this:

> "One cannot ignore the fact that the Jewish people is unique in history. And one must not forget what happened to the Jewish people, especially in the last generation . . . we cannot forget that this sick phenomenon, which devours every last bit of good in people and their culture, whose artificial name is anti-Semitism and whose meaning is hatred of Jews, has not passed from the world . . . we must be very careful that we do not cause injustice even to a person who has committed a crime" (Knesset Transcript, 1977 16, 1452).

This normative situation, which stood for more than two decades until the amendment in the year 1999, created serious problems. The main problem was that Israel became a refuge for criminals who for various reasons could not be prosecuted here, and who, after attaining Israeli citizenship, were no longer extraditable. The provision also led to Israel's breach of extradition treaties to which she was party, including the treaty with the United States, in which it was expressly provided that nationality is not a cause for non-extradition (article 4 of the treaty). These problems appeared in their sharpest form in *Sheinbein*, the case of an American youth with Israeli citizenship, who was suspected to have committed murder and conspiracy to commit murder and fled to Israel. Formally speaking, he could have been tried here, but that was practically difficult, or even impossible. The decision in that case, handed down in February 25 1999, in which this Court ruled that Sheinbein is not to be extradited to the United States, reinforced the recognition of the need to amend The Extradition Law.

The law was indeed amended soon after (amendment no. 6, April 19 1999). The protection for Israeli citizens was greatly restricted: the amendment provided that it was no longer forbidden to extradite, rather that a person who was an Israeli citizen and resident at the time the extradition request was relayed, and was convicted abroad after extradition, will return to Israel to serve his sentence. The process was completed in the year 2001, when the law was once again amended, providing, according to its wording, which is the current wording, that the protection is given only to a person who fulfilled the requirement of citizenship and residency **at the time the offense was committed.**

59. The new wording of the law expressed a substantial change of attitude. The law distanced itself from the "citizenship approach", which, as I mentioned, is no longer appropriate. Instead of recognition of Israeli criminals' interest not to stand trial abroad, as "Jews pursued to the very neck" (in the words of M.K. Begin during the debate on the amendment of 1978 (Knesset Transcript, *id.*)), the amended law emphasized the prevention of "the cynical use which certain Israelis make of the special status of citizenship" – in the words of Justice Minister T. Hanegbi in presenting the 1999 amendment to the Knesset (Knesset Transcript, 1998 25, 7084). The change reflected Israeli extradition law's distancing itself from "the citizenship qualification", which was rooted in the law of the Continent (*see Sheinbein*, *Supra,* at p. 641 (Barak P.)), and moving toward the approach dominant in Common Law countries, according to which the nationality link has but a weak status, secondary in comparison to the need for effective enforcement (*see also* the explanatory notes to the amendment of 1999 – The Extradition Law (Amendment no. 6)(Qualification for Extraditing a Citizen) Bill, 1998, Proposed Bills 2707).

The balancing point, at which the law bases its decision between the need to cooperate in fighting international crime and protecting the interests of the extradition candidate, has changed. The law no longer focuses on the trial stage, nor on the moment of conviction. Regarding those, and despite the difficulty involved in it for the accused, the law grants a higher status to international cooperation, that is – to extradition. The interest of the accused – an Israeli citizen and resident – comes to bear only at the stage when the criminal proceedings have come to a close: the punishment stage. B. Elon, M.K. touched precisely upon this differentiation between easing the burden of serving a sentence in a foreign country, and the question of the place where the trial will take place, that is – extradition, in the debate on the second and third calls of the amendment in the year 1999:

> "As Israelis who have respect for our citizenship – non-Jews as well – and as Jews who are sensitive to the issue of being in a foreign prison, we are sensitive to the issue of where the sentence is served. On the other hand, regarding the trial, we cannot allow ourselves to be a refuge state for organized bands of criminals, even if they are Israeli bands" (Knesset Transcript, 1999 20, 4214).

The Normative Balance

60. Now that we have considered the essence of the public interest in the extradition issue, it should be put to a balancing test against a person's constitutional right not to be extradited. This balance is always a result of weighing the particular circumstances of each case. Shamgar P. discussed this:

> "The guiding principle is that extradition is carried out according to the principles formulated in the law, and that the duty to fulfill the statutory purpose of extradition law retreats only in unusual circumstances, when there is a substantial violation of a fundamental principle which tips the scales decisively to the other direction. Each case is of course examined in light of the entirety of its circumstances" (*Aloni M.K.*, *Supra,* at p. 48).

The first part of the constitutional examination requires finding the relationship between the act of extradition and the public interest. To the extent that they are at odds with each other, there is no longer a need to continue, since an extradition act which does not serve the interest of society is baseless anyway. However, if it is found that the extradition serves the public interest, the way opens to the second stage of the examination, in which the act of extradition is stood in front of the constitutional mirror. As noted, at this point we use the tools of examination in the "limitations clause". To the extent that the act of extradition fulfills the requirements set out in that clause, it can be approved despite its impingement upon a basic right. If, on the other hand, it is found that the extradition does not fulfill the requirements of the "limitations clause", there is no choice but to reject it, or, at least, to change it so that it will fit those requirements. This is the "vertical" balancing, used in the constitutional examination of acts which stem from the public interest (*see* HCJ 2481/93 *Dayan v. Vilk et al*, 48 (2) PD 456, 473 (Barak P.); *and* HCJ 1514/01 *Gur Arieh v. The Second Television Authority*, 55 (4) PD 267, 284 (Dorner J.).

Having discussed the law, we shall proceed to the facts of this case.

From General Principles to Specific Implementation

61. Is appellant's extradition, under the circumstances before us, and in light of the normative framework laid out above, legal? **My answer to that question is in the affirmative.** Before explaining my reasoning, I emphasize that the evidence which serves as the basis for the case before us is merely *prima facie* evidence. The decision is limited, of course, to the issue of extradition alone, and makes no factual finding whatsoever regarding appellant's guilt or innocence, which will be clarified separately.

Appellant's case fulfills the procedural and substantive requirements listed in The Extradition Law. The act he is accused of fulfills the "double criminality" rule and has not yet reached prescription; appellant is not exposed to double jeopardy, and the offense with which he is charged carries a penalty of more than one year's imprisonment. The background to the extradition is not political or security related, and, as I have shown, appellant is not being discriminated against by it. I have been persuaded that the *prima facie* evidence presented in the extradition request and in the response of the Attorney General are sufficient for the purposes of extradition. The United States has agreed that if the appellant is convicted, he will be returned to Israel to serve his sentence, and the extradition is subject to that obligation.

Regarding the question of application, appellant's alleged acts lead to application of the law of both Israel and the United States. The offenses for which the United States wishes to prosecute him, by their nature and according to the principles of law there, allow expansion of the application of that country's law even upon acts which were committed outside of its territory. This is not the United States' attitude alone. Were the situation opposite – a conspiracy plotted in the United States to import drugs into Israel – the basic attitude of Israeli law also supports the law's expansion beyond national territory. Israeli law therefore sees the question of extraterritorial application in this case eye to eye with American law. As stated above, this attitude is also clearly expressed in the extradition treaty between the two countries.

Both countries have a **territorial** link to the alleged acts: Israel, due to the fact that the elements of the alleged conspiracy occurred here (narrow territorial link), and the United States, on the basis of the fact that the conspiracy's effect was felt there (wide territorial link). Simultaneously, the acts are linked to the Israeli legal system due to the fact that the appellant is an Israeli citizen and resident, and to the American legal system due to the fact that the victims are the American public and the vital interests of that country. Both countries have an interest in bringing a person suspected of drug offenses to justice. Seeing as it is clear that the two states cannot both apply their laws to appellant (article 2b(4) of The Extradition Law; article 6(1) of the extradition treaty), the question arises, which of their applications is preferable. True, appellant is Israeli. The conspiracy was made in Israel. However, as I have explained, conspiracy, in essence, requires a wide gaze, which views not only the place where the plot was made, but also the chain of acts which stemmed from its implementation. The main thing, in my opinion, is that the place where the conspiracy was meant to be consummated, and indeed was consummated, is the United States. Its would-be victims are Americans. Public order in the United States

is the main victim of this conspiracy. The United States is the main bearer of the social and financial burden involved in confronting it. American law enforcement initiated the comprehensive, transnational investigation and policing steps which led to its discovery.

The conclusion which arises and crystallizes from the entirety of these circumstances is that the conspiracy and its fruits, as a unit, are linked mainly to the United States, and it is uncontroversial that the center of gravity of the affair is in that country. The geographical location from which appellant allegedly acted – the place upon which he now wishes to rely – lacks real importance. The conspiracy could have been made anywhere in the world. The fact that it was made inside the borders of Israel's territory is, in the circumstances of the case before us, an almost neutral fact, which carries but technical-formal meaning. At most, it was intended to benefit the conspirators, who refrained from exposing themselves physically to the danger of their acts on American soil. The American legal system has therefore attained a dominant status, by force of the "rule of preference" which we discussed. This is the "natural system" for clarifying the charges against appellant. Decisive weight should be given to the damage suffered by the United States as a result of the criminal activity. Preference should be given to the United States' clear interest in employing its sovereignty, an interest which is realized by its prosecution of those responsible for that damage within its borders. The concrete expression of this is the granting of the extradition request.

This conclusion becomes even clearer in light of the essence of appellant's alleged crimes. The offenses in which he allegedly took part are especially serious. The charges in this case involve distribution of a very large amount of drugs, in a constant and repeated manner, which was halted only when it was discovered. As the criminal outfit persisted in its activity and gained experience, it began to recall, more and more, an organized cartel, and its members became specialized in their roles. The acts have an international dimension *par excellence*. They illustrate the necessity of international cooperation in the fight against crime. In this case, the only sufficient meaning of that cooperation is generosity toward the request of the United States.

62. One must not deny the hardship which extradition is liable to cause appellant. He is not accustomed to the law of the United States, its language is foreign to him, and some of his potential witnesses are in Israel. However, this hardship is to be viewed as inherent in many extradition cases. Had the target of the acts not been the United States, the argument that such hardship can tip the scales against extradition might not have fallen on deaf ears. However, the suspicion is that appellant wished to reap his reward there, and thus he exposed himself to the danger that the laws of the United States would apply to him. In this state of affairs, not even a doubt should be left standing, regarding a criminal suspect's ability to choose the law he finds most comfortable.

Moreover, in weighing the evidentiary difficulty faced by appellant against the opposite difficulty which non-extradition will cause the prosecution, extradition, in the circumstances described, prevails. That conclusion is necessitated by the rationale of not allowing a person to escape justice, even if he is only a suspect, since, indeed, the evidentiary center of gravity of this affair is in the United States. The central witnesses are in the United States; not only appellant's alleged coconspirators, but also American law enforcement personnel. Bringing them to Israel to testify, including

cross-examination, even if not impossible, involves great difficulties. It is not at all clear that it will be possible to guarantee their security here. It seems, therefore, that the prosecution stands before difficulty greater than the damage which will be caused to appellant due to the fact that he will have to bring his witnesses from afar.

We have discussed the realization of the public interest in extraditing appellant, and shall now proceed to the alleged damage to this interest, should the extradition be carried out. In appellant's first argument, according to which extradition violates his right to due process, I found no basis. First, it is worth emphasizing that which is in any event well known: that the American legal process fulfills the principle of fairness, including the scope of substantive and procedural rights which stem from that principle. That principle is expressly anchored in the Constitution of the United States of America (in the Fifth, Sixth, and Fourteenth Amendments), and it is also reflected in the caselaw of the United States.

Second, even if I assume, as per appellant's counsel's argument, that there indeed are differences between the criminal procedure and evidence law of the United States and that of Israel, I am not of the opinion that this difference is so substantive and deep that it negates the fair character of the legal process which takes place there. It is inherent to extradition that it involves a foreign legal system, with legal rules which are unique to it. It is doubtful that any example could be found where the law of the requesting state and the requested state are absolutely identical. Differences between criminal procedure and evidence rules are not, in and of themselves, sufficient to support a determination that the right to due process has been violated.

As I emphasized above, the question of fairness is to be examined against the background of the foreign criminal law in its entirety, while considering the comprehensive system of constitutional balances in it. Examination of the legal system of the United States shows, *inter alia*, that the accused enjoys the presumption of innocence, that he has the right to remain silent and the right not to incriminate himself, that he has the right to counsel, that he has the right to bring evidence of his own and to examine those who testify against him, by way of cross examination, and that, as mentioned, he enjoys the general constitutional right of due process. All this is sufficient to ensure that appellant will not be exposed to a process which is unfair.

63. Appellant's argument is also to be rejected, to the extent that it bases itself upon the alleged limited scope of the right to inspect evidence. True, the accused has a basic right to inspect the evidence used against him. That is "the center beam of the right to a fair trial" (CrimApp 3152/05 *Ben Yaish v. The State of Israel*, yet unpublished decision of May 10 2005 (Arbel J.). However, it is not sufficient to make an unsubstantiated claim that "the scope of the duty of discovery of evidence in the United States is restricted compared to that duty in Israel". One must show how that restricted scope is liable to hurt the defense of the accused. That was not done by appellant, whose extradition request, as well as other proceedings which took place, displayed before him in great detail the list of witnesses and the evidence against him, including affidavits, a state's witness agreement, transcripts of phone conversations which are evidence in the case, and the protocol of witness Roash's testimony in a trial in the United States. What evidence was held from him? That, appellant does not explain.

64. Finally, even said difficulty in bringing defense witnesses does not provide a basis for the argument regarding violation of due process. This issue was addressed before the lower court. Pursuant to its decision, appellant's counsel clarified with United States Attorney General personnel what options appellant has, according to American law, to bring these witnesses to the trial. In the answer, which was put before us in respondent's argument summary, it was explained that the Sixth Amendment to the Constitution of the United States grants the accused the right to obligate others to testify in his trial. So it is, naturally, regarding witnesses within the borders of the United States, but it was emphasized that to the extent that the direct testimony of defense witnesses is not possible, he can take their testimony via a letter rogatory or via closed circuit television. That answer satisfied the lower court, and it is also satisfactory to my mind. There is no reason that the right to access to evidence and the effective ability to bring witnesses - which is an inseparable part of the right of the accused to due process in the United States, and which the courts there are obligated to safeguard – will be denied to appellant, of all people.

65. The conclusion is similar regarding appellant's arguments about Israel's waiver of her sovereignty, which his extradition involves. As stated above, non-application of local law does not, in all circumstances, mean waiver of sovereignty. In the circumstances before us, extradition of appellant sits well with the public interest. It is a manifestation of purposes of extradition. It is done not under coercion, or as surrender to pressure, rather on the basis of the position of the prosecution officials and the courts of Israel. It is nothing other than a clear expression of Israel's sovereignty, and to the extent that it fulfills the element of reciprocity in relations with the United States, it is to be expected that it will even reinforce the principle of sovereignty, when Israel relays a similar request to law enforcement personnel in the United States in the future.

66. All that has been said thus far forms the public interest in the extradition. This interest also succeeds in passing the constitutional test. My view is that all four cumulative conditions of Article 8 of Basic Law: Human Dignity and Freedom are fulfilled in the extradition of appellant. Of those four, I see fit to expand on the latter two – the worthy purpose, and the extent which does not surpass the necessary extent. It is clear, first of all, that after having been found to fulfill all the rationales in The Extradition Law, and to have been decided upon within the framework of the discretion of the prosecution without irrelevant considerations, the extradition fulfills the requirement of **worthy purpose.** The existence of *prima facie* evidence against appellant, at the level necessary for the District Court to declare him extraditable, also contributes to this conclusion.

67. Regarding **proportionality**: first, it cannot be claimed that appellant's extradition to the United States has nothing to do with the purposes of The Extradition Law. There is no doubt that there is a fit between those purposes and the means chosen to realize them. The requirement of **rational connection** is therefore fulfilled. The second subtest – **the proportion between the benefit from the extradition and its "price"** – also supports the extradition. The extradition of suspects like appellant to foreign countries indeed has a "price tag". It impinges, as I have noted, upon Israel's legal system's ability to apply its principles, even when it could otherwise do so. It impinges – absolutely – upon the fundamental right of an Israeli to be judged in his own country. It is liable to become a precedent for Israeli law enforcement to

distance itself from its duty to enforce the law. However, the benefit from the extradition, which is done for a worthy purpose and fulfills the principles behind our extradition law, is tens of times greater than this damage. It is a substantial contribution to the international fight against crime. It advances the ability of the State of Israel to bring suspects who acted against her in foreign countries to justice, in Israel. It contributes to Israel's legal relations with foreign countries. Accordingly, the price of non-extradition, when extradition was called for, is also high, and in this regard it is sufficient to glance back at the atmosphere at the time of *Sheinbein*.

Moreover, the damage involved in the extradition is balanced, to some extent, by the statutory provisions regarding the return of the convicted extradited person to serve his sentence in Israel, and regarding the local legal system's ability to intervene in the sentence he is given. And there is no more fitting a place than this to comment, that it is by no means necessarily the case that appellant's trial in the United States will expose him to conviction and sentencing which are more severe than those customary in Israel. Indeed, as I have mentioned, a judgment upon the very same offense with which appellant is charged was recently given in the United States. I refer to *Shitrit*, which dealt with Israelis who were convicted in the United States of an offense of conspiracy to posses a controlled substance with intent to distribute it – an offense pursuant to article 841(a)(1), together with article 846, of the previously referred to American Law. The Court ruled that the Israeli "parallel" to this offense **is not** the offense of **conspiracy to commit a felony**, whose sanction is more minor (article 499 of The Penal Code), rather the offense of **making a drug deal of another kind** – an offense pursuant to article 13 of The Dangerous Drugs Ordinance, whose maximum punishment is 20 years imprisonment (*see* paragraph 37 of that judgment). This, it seems, speaks for itself.

68. Last, one must employ the **least damaging means** test. This test requires that out of all the means capable of achieving the desired objective, the means whose impingement upon a basic right is most minor is the one chosen. Indeed, as we are dealing with extradition, it is not relevant to speak of a "ladder" or "stairway", where each higher rung or stair intensifies the infringement upon the right (CA 6821/93 *United Mizrachi Bank Ltd. et al. v. Migdal et al.*, 49 (4) PD 221, 468 *and* HCJ 1715/97 *The Israel Investment Managers' Bureau v. The Minister of Finance*, 51 (4) PD 367, 389). Indeed, there is no such thing as partial extradition. Moreover, it seems that one cannot even speak of extradition which is restricted by conditions which lessen the intensity of the impingement. Such conditions were taken into consideration during the stage of formulating the public interest according to The Extradition Law, and without their existence, extradition would never reach the stage of constitutional examination. It is therefore difficult to think of a means to achieve the purposes I discussed, whose impingement is lesser than that embodied in the act of extradition pursuant to law. Non-extradition is not, of course, listed among these means, since, as clarified, it does not achieve these purposes. The conclusion is, therefore, that in the case before us, the decision to extradite, which fulfills all the other parameters which we examined above, does not impinge upon the constitutional right to an extent greater than the necessary extent.

69. In sum, my conclusion is that the lower court lawfully declared appellant extraditable to the United States. That conclusion is called for, by the recognition of the United States' natural prerogative, in the circumstances of this case, to defend

itself against those who rise up against it from beyond. It is also necessary for the worthy cooperation between the two countries. Thus requires the public interest in Israel, as does the proper balance between it and appellant's rights. So Israel asked the United States to act in the past. So shall we act in the case of appellant.

I therefore propose to my colleagues that we reject the appeal.

Vice President M. Cheshin

I concur in the judgment of my colleague, Justice Levy.

It is common knowledge that inflexible and formal tests which characterized legal systems of old have begun to turn, today, into substantive and flexible tests, which adapt themselves to the circumstances of each and every case, or, at least, to the circumstances of different types of cases. It is through the spectacles of that quiet development, which is a reflection of societal life in our world – no more inflexible etiquette, no more people mummified in top-hat-vest-tuxedo *et cetera* – that we must examine the issue of appellant's extradition to the United States. A comprehensive and all-encompassing glance leaves not the slightest of doubts in my mind, that the United States has the moral right to judge appellant. The United States is the country which was hurt by the evil acts which were committed – those very acts which originated in appellant's alleged conspiracy - and how just and right it is, that it should be the United States which judges him and sentences him (should he be convicted). As for Israel, her place and status in the whole picture of the indictment are but marginal ones.

Moreover, most of the people who committed the evil acts in the United States were judged by the United States, and the United States sentenced them to various punishments. So it was with Roash and with Ashkenazi, and so it was with Michtavi, with Cohen, and with Vives. It is uncontroversial that it was proper for all of these people to be judged in the United States – and indeed they were judged, and their sentences were given them – and whatever makes appellant different from all of them, is beyond me. Indeed, appellant was not physically in the United States. He was in Israel. Yet from his place of residence he pulled the strings, and motivated the others to do his bidding. I of course agree that the others were not like marionettes, which the puppeteer – and he alone – moves at his will, right and left, up and down. And yet, according to the evidence which supports the extradition request, it was appellant who controlled – at least partially – the deals which went through; his people in the United States were his representatives and his agents; and the appropriate conclusion is that appellant's physical absence from the United States was but a marginal and minor event, at least for the purposes of the extradition issue. Appellant "was" in the United States, and acted in the United States, through others who were his long arm. From the substantive perspective, and for the purposes of jurisdiction and the application of the United States' legal system upon appellant's acts, appellant's status was no different – not morally, and not legally – from the status of the others; his status was no different – and it is not right that it should be any different.

Justice E. Rubinstein

1. I concur in the comprehensive opinion of my colleague Justice Levy, as well as in the comments of my colleague the Vice President. In my opinion, the foundation of the balance between the considerations in this case - which was not simple from the legal point of view at first glance, and there was good reason for appellant's counsel to so extensively and skillfully argue, leaving no argument unargued - is the component of values and morals. Were the scales balanced from the formal legal standpoint – and they are not, as Justice Levy discussed – that component would undoubtedly be the one to tip them. According to the *prima facie* evidence, it was the residents of the United States which appellant intended to harm; he apparently thought that in the land of unlimited opportunities, the opportunities for crime are also unlimited. The fact that he was in Israel does not cancel the fact that his net was spread over the United States as well. The law allows him to be tried here, yet also allows trying him in the United States, and the question is fundamentally one of discretion. It seems that morals and values all point in the direction of prosecuting appellant in the place at which he aimed his arrows. It would not be proportional, under the circumstances, if appellant's agents were to be prosecuted in the US, but he himself, who, *prima facie*, was the "mind" behind them, was to be prosecuted here. Indeed, these days are not like ancient days, and in a number of areas in our lives, with technological advance which our forefathers didn't even imagine, things will not continue to be as they were. However, the "global village" is not only a technological term regarding the expansion of communications and travel possibilities, which no one doubts; it is also a term of values, even if its pendulum has not yet found its resting point, and even if it has areas which are unclear, lest we say distorted, in the international criminal legal system as well. An example (which is not the only one) is the attempts to employ "universal jurisdiction" in unjustified circumstances; but this is not the place to expand on that subject. In any event, our case falls clearly into the category in which the law is interpreted according to what is worthy, which is, in this case, also what is efficient. Indeed, globalization includes questions of terrorism on the one hand, and those of economics on the other, and beside those – environmental and many other issues; and the law occasionally lags behind new technology, and has to catch up, substantively and morally. *See*, regarding law and technology, S. Lavi (ed.) *Technology of Justice, Law, Science, and Society*; and the various issues that are discussed there.

2. (A) I must deal, first, with the issue of reciprocity: long ago, when The Extradition Law was amended in the framework of the Law Amending External Offenses Law, 5738-1978, a substantial and embarrassing gap, which remained for more than two decades, was created between Israel's obligations in its extradition Treaty with the US in 1962 (effective since 1963) and the provisions of The Extradition Law. According to the Treaty, Israel has a duty to extradite her citizens, pursuant to the conditions stipulated in the Treaty: see article 1 of the treaty: "Each contracting Party agrees… reciprocally to deliver up persons found in its territory who have been charged with or convicted of . . . offenses . . . committed within the territorial jurisdiction of the other . . ."; and article 4 provides that "[a] requested Party shall not decline to extradite a person sought because such person is a national of the requested Party." However, the law as amended in the year 5738-1978 provides (in article 1a, titled "Qualification of Extradition of Citizens") that "an Israeli citizen shall not be extradited, except for an offense he committed before he became an Israeli

citizen". Indeed, this provision came with necessary complementary provisions: article 4a of the Penal Law (External Offenses) Law (consolidated version) 5733-1973 provided that "the courts of Israel have jurisdiction to judge, according to Israeli law, an Israeli citizen or resident who committed an act abroad which, were it committed in Israel, would be an offense in the schedule of The Extradition Law, 5714-1954", subject to certain conditions. And, indeed, in the explanatory notes to the Amendment to External Offenses Law Bill, 5737-1977 (Proposed Bills 5737, 258), it is written that in a minority of extradition treaties in the world (approximately 5%) there are no qualifications to extraditing citizens of the requested state, whereas all the rest have such qualifications. Thus it was proposed, on the one hand, to prevent extradition of citizens, yet on the other hand, to add to the jurisdiction of Israeli courts, so that they could judge citizens for offenses committed outside of the country, "in order to prevent the state from turning into a city of refuge for criminals". There is no denying that behind the amendment stood an historic-ideal position, associated especially throughout the years with the name of then Prime Minister Menachem Begin, may he rest in peace, relating to the history of the Jewish people and the persecutions it suffered. However, the amendment did not sufficiently take into account, and in any event did not anticipate, the reality of criminal life; that stood out especially in extradition relations with the US, where quite a few Israelis live for long periods. Not only was Israel in breach of the Extradition Treaty with the US from the legal standpoint; the solution which was provided – prosecution in Israel – was practical only in part of the cases in which enforcement was necessary. Indeed, *de jure*, it was possible for a person who had committed offenses in the US and fled here, to be tried in Israel. But in practice, the great expenses of doing so, and the numerous difficulties, including the inability to force witnesses to testify, did not allow such prosecution in every case, *de facto*. Naturally, in the situation which was created, Israeli citizens, including those who had emigrated from Israel long ago, could commit offenses in the United States, and escape justice by fleeing to Israel soon after committing the offense. Israel did not want that, and needless to say, the US, who had continued to extradite pursuant to its obligations in the Treaty, didn't either; reciprocity, the necessary and vital foundation of extradition relations discussed by Justice Levy, was not preserved. For example, in 1981 Israel and then US Secretary of State Alexander Haig discussed the extradition of the terrorist Ziyad Abu Ayin, who committed murder in Tiberias, and despite pressure on the part of various elements in the Arab world, he was indeed extradited (it appears that he was later released in one of the prisoner release "deals").

(B) Attempts to repair the lack of reciprocity were made for almost two decades, since the beginning of the 1980's. I had the opportunity to accompany these attempts; the great difficulty in repairing the situation, the need for which was understood by all, involved a moral question regarding extradition of Israeli citizens, which was the legacy of the amendment of 5738 (1978). The *Sheinbein* affair (CrimA 6182/98 *Sheinbein v. The Attorney General*, 53 (1) PD 625) was one of the severe manifestations of this issue, as the "regular" anomaly of prosecuting people in Israeli courts for offenses which had no Israeli link in and of themselves, and the said difficulties in presenting evidence, were joined by Sheinbein's extremely weak link to Israel, which was akin to mountains hanging only by a string. As he was accused of a murder which was brutal from every standpoint, there was tremendous complaint from Washington, in whose Maryland suburbs the murder was committed (the hypothetical opposite, which could not have actually happened, as the US continued

to extradite citizens after the 5738 (1978) amendment despite the lack of reciprocity, would arouse rage here as well); as a result of Sheinbein's flight to Israel, a certain high ranking member of Congress even sounded words of warning regarding aid to Israel, and it was necessary to explain that in Israel, like in the US, no extradition could take place without orderly judicial proceedings. The affair ended when in the year 5758 (1998), The Extradition Law (Amendment no. 6)(Qualification of Extradition of a Citizen) Bill was submitted, proposing to allow extradition of a citizen who committed an extraditable offense abroad at the time he was an Israeli citizen and resident, if **the requesting state promises to return him to Israel to serve his sentence, should he be sentenced to prison.** The explanatory notes (Proposed Bills 5758, 330) described the difficulties mentioned above: the legal and practical difficulty in bringing witnesses, including the financial question, as well as the changes in the world, the great volume of international travel, and international crime. The submitting of the bill was accelerated in no small part by *Sheinbein*, even if it didn't apply to that case, and regarding Sheinbein himself, this Court ruled, in a majority opinion, that Sheinbein was not to be extradited, due to his Israeli citizenship, despite the questions regarding his links to Israel. A petition for a Further Hearing was rejected (CrimFH 1210/99, S. Levin V.P.). Note that according to the bill, the decisive date for determining the suspect's status as an Israeli citizen and resident is the date that **the offense was committed.**

(C) The amendment to the law (Amendment no. 6 to The Extradition Law, in 5759-1999) which was actually passed was different than the original amendment bill regarding the decisive date for the citizenship and residency conditions, which was set at the date **on which the extradition request was made**. It was presented as an achievement for Israel which "shall not turn into a state of refuge, neither for organized crime nor for unorganized crime" (Chanan Porat M.K., Chairman of the Constitution, Statutes and Law Committee of the Knesset, session of 3 Iyar 5759 (19 April 1999)). Yet again difficulties resurfaced, as it was possible for a person who is not a citizen and resident to flee to Israel **after** committing the offense, and then become naturalized and claim residency. Thus The Extradition Law (Amendment no. 8) Bill 5761-2001 was submitted, proposing to move the determinative date to the time the offense was **committed**, instead of the time the request was made. It was explained that according to the previous wording, a person who is not an Israeli citizen can "flee to Israel after committing the offense, attain Israeli citizenship, and even claim Israeli residency, if time – even a short time – has passed from the day he came to Israel to the time the extradition request is made" (Proposed Bills 5761, 154), and, indeed, in amendment no. 7 to The Extradition Law (5761-2001), in which additional substantial amendments to the law were made, it was provided that the determinative date is the date the offense was committed.

(D) The result, in any event, is that today it is possible to extradite a person who was an Israeli citizen and resident at the time the offense was committed, for prosecution in the requesting state, and if sentenced to imprisonment he is returned to Israel to serve his sentence. I described that at length, as the amendments to the law in 5759 (1999) and 5761 (2001), and the provision that the sentence is served in Israel, greatly blunted a substantial number of the rationales behind the moral difficulty which the legislature confronted in the 5738 (1978) amendment and afterward. The return of the extradited person to serve his sentence in Israel (if he is

convicted), leads to the result that he will spend his period of incarceration in his national and lingual environment, close to his family.

3. (A) I shall briefly discuss appellant's arguments, which were discussed at length by my colleague. Those arguments certainly are not to be taken lightly, in light of the precedents regarding extradition: appellant's counsel discussed the "classic" approach, found in many extradition cases, by which it is best that a person be prosecuted in the place where the offense was committed, which is the "natural place" for him to be tried, as well as in the place familiar with his culture and language. However, that statement does not fully confront the situations in which a person commits an offense in a country which is not his own. Indeed, in *Sheinbein*, Barak P. – albeit in a dissenting opinion – opined that despite the reason given for the citizenship qualification (such as in the law from 5738 (1978) - that a person's natural judges are those in his own country and not a in country of whose laws he is unaware – the "natural judge" is actually the judge of the country in which he committed the offense (p. 639). However, as we see, the very fact that it is possible to decide either way regarding the "naturalness" of the judge speaks for itself. In this case, we expand the definition of "committing of the offense", saying that in the modern world, the place where the offense was directed can be considered the place it was committed.

The other side of the coin – or, the small consolation to appellant – is that he will be returned to serve his sentence in Israel if he is convicted in the United States and sentenced to prison.

(B) I shall emphasize my point: according to the wide view proposed by my colleague, which includes that "wide territorial link" which seems acceptable also to me, it is worthy to define the *locus delicti* in the global village through the lens of the target of the offense; the place toward which it was directed; and the place of residence of the victims; and *see* articles 13-14 of The Penal Code, 5737-1977. Indeed, there's no denying that this is a change in thinking and a certain deviation from the practice up until now, but we have arrived at this point due to international developments. It is but elementary that the Attorney General and, of course, the courts, are presumed to always consider the character of the requesting state; and in this case we are dealing with the United States, a country with a legal system about which there is no concern in general, that it will not conduct a fair trial, or that appellant's rights will not be preserved. Thus, even though there is no denying that US law is not exactly Israeli law; however, even if there is a basis to appellant's claims regarding the difference between evidence law and procedure – and I shall not rule on the question – they do not reach the level which would establish a concern for a fair trial or of violation of appellant's rights. The calculated balances point in the direction of my colleague's judgment.

(C) Appellant's learned counsel emphasized his constitutional rights, pursuant to Article 5 of Basic Law: Human Dignity and Freedom, which provides that "A person's freedom is not to be taken or restricted by imprisonment, detention, extradition, or any other way". However, the basic answer to that is found in Article 8 of the basic law, and The Extradition Law is indeed a statute, with the worthy purpose of enforcement and international cooperation, and in any event, in the situation resulting from the amendments to that law, it fits the values of the State of Israel as a Jewish and democratic state. Regarding the values of the State of Israel, I

shall not refrain from saying that in my opinion, they also include the human dignity of the potential victims – for our purposes, victims of drug trafficking. The modern approach to criminal enforcement includes the rights of crime victims (The Rights of People Harmed by Offenses Law, 5761-2001), and those rights should be affixed upon our consciousness. In sum, appellant's rights are given weight within the framework of The Extradition Law and in the caselaw, and as my colleague Justice Levy has shown, his rights according to the basic law are not violated by this extradition decision.

4. (A) Appellant's counsel contended that, from the point of view of **Jewish Law**, prosecution of a person suspected of offenses is vital, but prosecution in Israel is preferable. On the other side, state's counsel contended that according to Jewish Law, extradition is appropriate. Both sides supported their arguments with the same caselaw: HCJ 852/86 *Aloni M.K. v. The Minister of Justice*, 41 (2) PD 1, 76-98, in the opinion of Elon, V.P.; *Sheinbein*, in the opinion of Justice Ilan, at pp. 668-669; and in the opinion of Judge Drori in his decision in this case, in the motion for detention till completion of proceedings (CrimApp (Jerusalem) 4024/05). Elon, V.P. concluded that Jewish Law rules out a persons flight from justice, and requires putting him on trial before an authorized court, and therefore it is appropriate to extradite, especially considering that it is an act under the supervision of a sovereign Jewish state; he expressed his principled stance that the provisions of The Extradition Law (as they were at that time) are valid also according to Jewish Law; *see* also the summary of his opinion in his article "Extradition Law in Jewish Law" 8 *Techumin* 263 (5747)[Hebrew]. Rabbi Shaul Yisraeli criticized it ("Extraditing a Criminal to Foreign Jurisdiction", *id.*, at p. 287), opining, first, that the prohibition against going to foreign courts remains in effect; second, that extradition is permissible when Israel herself has no possibility of trying the suspect; and that incarceration abroad, beyond detaching a person from his family, distances him from the Jewish experience, from holy days and festivals, and from all that is Jewish . . . and indeed, that is spiritual death" (pp. 292-293). In sum, according to Rabbi Yisraeli "it is prohibited to deliver up any Jew to the courts of the gentiles, and it is a duty to give him a just trial in the State of Israel (*see also* Rabbi D. Bleich "Extradition of a Criminal to a Gentile People", *id.,* at p. 297). *See also* Justice Elon's responses to his critics, *id.* At p. 304, among which he said that "in the issue under discussion, there is an additional relevant consideration. In my opinion, it is to be taken into account also from the purely *halachic* standpoint[1]: that a sovereign state, especially in the circumstances of Israel, fighting for her existence and well being, needs extradition treaties with other countries, so that the latter will extradite terrorists and murderers who have fled to their jurisdictions. Thus, for example, the State of Israel demanded the extradition of the terrorist Abu Ayin from the United States, for committing acts of terrorism in Tiberias . . . such extradition is important and vital to the State of Israel, and it increases her security and her ability to wage war on terrorists; yet such extradition cannot take place without an obligation on the part of Israel to extradite criminals who are wanted by The United States. This consideration, of enhancing the security of The State of Israel, is an *halachic* consideration *par excellence*." Note that all the participants in that debate were writing regarding the situation prior to the amendments to The Extradition Law in 5759 and 5761.

[1] The standpoint of Jewish Law.

Various opinions have been voiced, and all are important and all are clear. Indeed, without the claim to be deciding *halacha*[2], it seems to me that the approach expressed by (then) Justice Elon in *Aloni* also fits, in the contexts relevant to this case, what former Great Rabbinical Court Judge Eliezer Waldenberg wrote in his *responsa, Tzitz Eliezer* 18, b, regarding extradition involving death: "and I should also add this, that in the case that prosecution is being requested only for incarceration, and not for death, and even if there is some doubt about it, that has nothing to do with 'deliver up one of you to us' [the case of a besieging enemy who demanded that one of the besieged be delivered up, otherwise he would kill them all – E.R.] *et cetera* . . . and it is permitted to deliver him up for the good of all . . . and especially when the accusation is a true one." *See also*, regarding the approach of the Jerusalem Regional Rabbinical Court, Rabbi E. Batzri "The Good of the Individual versus the Good of the Public" 9 *Techumin* 63 (5748)[Hebrew], and his conclusion that the concern of *aginut* [wives who cannot remarry, as divorce is infeasible] (as was the claim in *Aloni*) trumps an extradition order. *See also* S. Rabinowitz "'And You Walked His Paths', on Mercy in Law", 89 *Parashat HaShavua* (A. HaCohen & M. Vigoda eds.). In sum, there is no denying that Jewish Law's position is complex, and that the preference in interpretation is to limit extradition when there is another option. However, even according to the position of those opposed to extradition, a large part of the difficulties, like those raised by Rabbi Yisraeli, have been substantially softened by the amendment to the law by which the sentence is served in Israel. Joining that is the issue of reciprocity, which is also recognized by Jewish Law, as Justice Elon and Judge Drori noted.

(B) And regarding reciprocity, it is worthwhile to remember that law inherently involves moral norms, and that sometimes morals rise to the level of legal obligations. See C. Pizam *Charity as a Legal Norm, Charity Child Support in Jewish and Israeli Law* 1 (5736). Law is thought of as one of the traits of G-d, in addition to benevolence and truth (R. Yerucham Levovitch, *Mashgiach* (spiritual teacher) of the Mir Yeshiva in the 1920's and 1930's, *Da'at Chochma u'Musar* A 239). As for relations with people who are not Jewish, the *Darkhei Shalom* (paths of peace) bylaw, based also upon a moral approach, obligates the People of Israel with various duties toward non-Jews (supporting their poor, visiting their sick, burying their dead, comforting their bereaved; *see Tosefta Gitin* 3 13; *Bavli Gitin* 61, 1: "the gentile poor are supported along with the poor of Israel, and the gentile sick are visited along with the sick of Israel, and the gentile dead are buried with the dead of Israel, as those are the paths of peace [darkhei shalom]." *See also Rambam Matnot Ani'im* 7, 50, *Evel* 14, 12; *Shulchan Aruch Yore De'ah* 345, 9; 367, 1. Thus, in order to prevent discrimination and to avoid enmity and fighting; on this point, note Rabbi Moshe Feinstein's *responsa* (*Igrot Moshe, Orach Chaim* 4, 79) in which he discussed the permission that a Jewish doctor has to desecrate the Sabbath to heal non-Jews in order to prevent enmity, saying that the danger of that enmity is greater – in his words – "due the immediate publication of news by newspapers regarding news all over the world," and that therefore such desecration should be permitted. *See also* Rabbi Dr. A. Hilevitz "Clarifying the Issue of '*Mipnei Darkhei Shalom*' Regarding Gentiles" 100 *Sinai* 328, 331, 355, *and the sources referred to therein*, and in his words, "when gentiles see that the People of Israel take care of these issues for those Jews who are in need, but that they are discriminated against, the gentiles will be full of enmity

[2] A ruling in Jewish Law.

toward the People of Israel . . . enmity should be avoided not out of fear, rather in order to establish an order of peace in the world" (at p. 355), and below ". . . in order not to cause enmity and fighting between any son of Noah and a Jew, that too is *tikkun olam* [repairing the world]" (at p. 357). In this context, the "paths of peace" with the United States *are* reciprocity, and that reinforces the conclusion which has been reached.

5. As mentioned, I enjoin my opinion to that of my colleagues.

Appeal Denied.

November 30 2005