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M. Dennis Gouldman

Ministry of Justice, State of Israel

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Extradition from Israel

M. Dennis Gouldman*

INTRODUCTION

Stated rather crudely, the State of Israel both exports and imports criminals. This is also true of every other country. It is therefore vital that the State of Israel and the law enforcement authorities of other nations work together in order to reduce this two-way traffic. Indeed, one of the main aims of international co-operation in criminal matters is to secure the surrender of fugitive criminals so that they stand trial or return to prison in the countries from which they have fled.

In order to achieve this aim, something must be known of the legal conditions to be fulfilled before a fugitive can be transferred from one country to another. The purpose of this article is to give lawyers outside Israel some idea of the legal issues to be tackled when a request for extradition is submitted to the State of Israel. The fate of the wanted person seeking refuge in Israel will be determined not only by Israel's treaty commitments but also by her extradition legislation, as interpreted by the local courts and implemented by the executive agencies. This article will examine the conditions under which a fugitive offender can be removed from Israel and handed over to the foreign state seeking his return.

Following an introduction, the main part of the article will review the law of extradition from Israel—a subject about which little is known outside this country.¹ The discussion will focus on the decisions and practices of both the judiciary and the executive. The remainder of the article will consider special problems that have arisen in Israel as a country with an “open gate” immigration policy for the Jews of the world and a new unwillingness to hand over its own nationals for trial and sentence abroad.

* The author is Head of The International Section, State Attorney's Department, Ministry of Justice, State of Israel. This article represents only the author's views and is in no way official.

How an Extradition Request Is Handled

So that the points discussed later in this article may be seen against their overall background, the way in which Israel deals with a foreign state's request for extradition will be briefly outlined.

At the request of a state with whom Israel has an extradition treaty, Israeli authorities are empowered to arrest the fugitive offender and hold him briefly in custody to enable the requesting state to prepare and submit a request for his extradition.² The police authorities of the requesting state usually send the request for preliminary arrest by telex to the Interpol bureau of the Israeli police. Once the wanted person has been traced in Israel and detained or released on bail, the embassy of the requesting state will submit a formal request for his extradition to the Claims Division of the Ministry of Foreign Affairs in Jerusalem. The request will be accompanied by all the evidence necessary to show the accused's participation in the crime of which he is accused, or to prove his conviction and sentence by the courts of the requesting state.

From the Ministry of Foreign Affairs, the request moves on to the International Section of the State Attorney's Department in the Ministry of Justice. After examination of the request and its accompanying evidence, the Department's lawyers bring the matter before the Minister of Justice with a recommendation as to what action should be taken. If the Minister of Justice feels that there is a proper case for extradition proceedings, he will order that the wanted person be brought before a District Court³ to determine whether he is subject to extradition.⁴ On receipt of the Minister's order, the Attorney General's representative will draft the appropriate extradition petition and submit it to the District Court.⁵ The Attorney General's representative will also file with the court the foreign state's request and its accompanying documents so that the requested person and his attorney may examine the prosecution's arguments and evidence, and prepare a defense. On the other hand, the requested person need not disclose any lines of defense he may wish to pursue or disclose any evidence he may wish to present at the extradition hearing. Once an extradition petition has been filed, the District Court may order the wanted person to be held in custody until the end of the extradition proceedings against him.⁶

The extradition petition is considered by a single judge of the District Court. The Attorney General's representative opens, explains the written evidence submitted by the foreign state and presents any oral evidence he may wish to produce. This oral evidence could, for example, be expert testimony as to foreign law, incriminating statements made by the wanted person in Israel, or evidence showing that property stolen abroad was found in the wanted person's possession in Israel. The requested person

then presents his arguments and any evidence he may wish to introduce. He is entitled to give evidence himself if he so wishes but cannot be compelled to testify. The Attorney General's representative sums up, followed by the wanted person's counsel.⁷

In an extradition hearing the Attorney General's representative must satisfy the court that the conditions of the Extradition Law have been complied with and that there exists sufficient, admissible evidence to justify bringing the wanted person to trial had he committed the acts complained of in Israel. If the court is convinced that these requirements have been fulfilled, it will declare the wanted person subject to extradition and specify the crimes for which he can be extradited to the requesting state.⁸ Otherwise, the court will dismiss the extradition petition.

Both sides have the right to appeal against the District Court's decision before the Supreme Court of Israel, sitting as a court of criminal appeal.⁹ The Supreme Court hears oral argument from both parties before rendering its decision. If the District Court's decision declaring the wanted person to be subject to extradition is upheld on appeal, or if no appeal is filed, the decision that the wanted person is subject to extradition becomes final.¹⁰

The matter then returns to the executive branch of government and the Minister of Justice must decide—at his discretion—whether or not to order the extradition. If the Minister of Justice signs such an order, Israel will surrender the wanted person to the requesting state.¹¹ After the police forces of the two countries arrange for the transportation of the fugitive, Israeli authorities will hand him over to a police officer of the requesting state.¹²

The Extradition Law

The Extradition Law of 1954 provides the legislative framework for the subject under review.¹³ The statute is directed primarily at the conditions and procedure for the extradition of a requested person from Israel.¹⁴

Section 1 lays down the general principle that a person in Israel shall not be extradited to another state save under the Extradition Law.¹⁵ Israel does, of course, have treaty obligations in matters of extradition. Indeed the existence of an extradition agreement with the requesting state is a prerequisite for the consideration of a request for extradition. But in the final analysis the provisions of the statute will prevail and no court in Israel can allow the extradition of a fugitive offender unless all the conditions laid down by the statute are strictly fulfilled.

The Extradition Treaty

Section 2(1) of the Extradition Law stipulates that Israel may extradite only if there is an agreement between Israel and the requesting state, providing for reciprocity as to the extradition of offenders. One idea behind the treaty requirement is that Israeli authorities will have carefully checked the legal system of the other state to preclude the extradition of a person from Israel to a country in which a fair trial is not ensured or in which penal conditions fall short of reasonable standards. In interpreting section 2(1) the question arises as to whether the law requires a full blown extradition treaty or whether the provisions of the statute would be complied with if Israel acceded to a note of agreement with a requesting state concerning a particular fugitive offender. Since section 2(1) requires that the agreement be reciprocal and that it relate to the extradition of *offenders* it seems clear that the legislature intended a general agreement as the only basis for the extradition of a fugitive offender from Israel.

Section 2(1) refers to an agreement "between Israel and the requesting state." Israel has negotiated, signed and ratified bilateral extradition agreements with nine countries.¹⁶ In 1967, Israel acceded to the European Convention on Extradition. Through the medium of the Convention, Israel now has extradition relations with fourteen other countries.¹⁷ In some cases¹⁸ the provisions of the Convention supersede bilateral treaties.¹⁹ In others, new extradition relations were automatically created with states that were parties to the convention at the time of Israel's accession, but with whom Israel had not previously signed extradition accords. The creation of new extradition relations then became a continuing process as additional countries joined the Convention.²⁰ As a result of the Convention, Israel today has extradition relations with several countries with whom she had never entered—and possibly never envisaged entering—into a bilateral extradition agreement.

The contracting parties to the European Convention have undertaken to surrender fugitive offenders to one another in accordance with the provisions of the Convention.²¹ By acceding to the Convention, Israel entered into a reciprocal agreement for the extradition of offenders with each of the other parties to the Convention. There can be little doubt that in 1954, when the legislature enacted section 2(1) of the statute, it envisaged that Israel would be signing bilateral extradition agreements with individual countries. Since that date the treaty-making technique has changed. The essential requirement of section 2(1) is, however, still satisfied by the reciprocal obligations for the extradition of fugitive offenders assumed by all the states who are parties to the multilateral convention.

Although the existence of a treaty is a prerequisite for extradition proceedings in Israel, the treaty as such does not become part of Israel's

internal law.²² Treaty provisions—while binding between states at the international level— will be effective in court to regulate the conflict between the State of Israel and the requested fugitive only in so far as the Extradition Law gives the force of law to the treaty provisions.²³ Moreover, in the event of any conflict between the provisions of the statute and the treaty (for example, where an offense is extraditable under the treaty but is not included among the extradition offenses set out in the schedule to the Extradition Law), the statute will prevail.

THE LEGAL FRAMEWORK FOR EXTRADITION FROM ISRAEL

The Wanted Offender

Under section 2(2) of the Extradition Law, Israel may extradite a person only if “he is charged or has been convicted in the requesting state” of an extradition offense. The Minister of Justice may direct that a wanted person be brought before a District Court to determine whether he is subject to extradition where that person is “charged or convicted” in a foreign state of an extradition offense.²⁴ To what stage must the proceedings against the wanted person have advanced before he can be said to be charged with an extradition offense? This question may be difficult where the wanted person has managed to reach Israel before the authorities in the requesting state could interrogate him or formally charge him with an offense.

Criminal procedure in Israel carefully distinguishes a person charged with an offense²⁵ from a suspect.²⁶ A person is said to be charged with an offense only after the filing of a formal indictment against him. Since the Extradition Law refers to a person charged with an offense, some fugitives have argued that a wanted person against whom an indictment has not yet been filed in the requesting state cannot be a person charged within the meaning of the Extradition Law, and therefore cannot be subject to extradition.

This point was considered by the Supreme Court of Israel in *Merguerian v. State of Israel*,²⁷ after the government of Switzerland had requested the extradition of the appellant in order to bring him before the courts of the Canton of Tessin, where he was suspected of murder and manslaughter. The Swiss authorities had not filed an indictment against the appellant since this was not yet possible under local rules of criminal procedure. Evidence as to this procedure had been brought before the Israeli District Court hearing the extradition petition. It appeared that the prosecutor in the Swiss canton had ordered the accused’s arrest and then referred the matter to the investigating judge of the canton. It was the latter’s duty to collect all the evidence, including that of the suspect if he wished to make

a statement. The matter then returned to the prosecutor who had to decide, in light of the evidence gathered by the investigating judge, whether or not to file an indictment. In *Merguerian*, the investigating judge had not been able to complete his task since he could not take a statement from the appellant, who had fled from Switzerland to Israel; therefore no indictment had been filed against the appellant in Switzerland.

The Supreme Court of Israel found that even though the Swiss authorities had not filed an indictment, the appellant was nevertheless a person charged within the meaning of the Extradition Law. In interpreting the word charged, the Court did not feel bound by the meaning given to this term in the Israeli Criminal Procedure Law²⁸ since the wanted offender was not going to be tried in Israel. For the purpose of the Extradition Law, all that was required was that appropriate criminal proceedings had been commenced in the requesting state with the eventual aim of bringing the wanted person to justice for an extradition offense. The grant of extradition did not depend on those proceedings having reached the stage of filing an indictment.

In *Hanauer v. State of Israel*,²⁹ the United Kingdom requested the appellant's extradition. The magistrates Court in London had taken depositions from the prosecution witnesses and issued a warrant for the appellant's arrest, but no indictment against him had been filed. As in *Merguerian*, the appellant argued that he could not be considered as a person charged in the requesting state, within the meaning of section 3 of the statute.

In dismissing this argument, the Supreme Court noted that neither the Extradition Law nor the extradition treaty between Israel and the United Kingdom³⁰ defined the expression charged. The Court interpreted the term in accordance with its everyday meaning, taking into account the purpose of the statute in which the phrase appeared. The English court had seen evidence of the appellant's alleged fraud and forgery, and had issued an order directing the police to arrest him and bring him before the court. Given these circumstances, the Court regarded the appellant as a person charged with an extradition offense, even though no indictment had yet been filed against him.

The Court was correct in taking a broad view of "a person charged." In using this term the legislature probably intended that the phrase be interpreted according to its use in Israeli criminal procedure in 1954, rather than according to the narrow, special meaning later given to the word charged in the Criminal Procedure Law of 1965.³¹ In 1954, the term was used in a much broader sense to include any person against whom criminal proceedings had been initiated even though no indictment had been filed.³² In any event, the test propounded in *Merguerian* still stands: the term a person charged is interpreted in accordance with the law of the requesting state. This means that the Attorney General's representative will have to

adduce evidence as to the requesting state's criminal procedure in cases where the authorities have not yet filed an indictment against the wanted person.

Israel will also grant extradition when the fugitive has been convicted of an extradition offense in the requesting state. In such a case, the court in Israel must find that the wanted person has been duly convicted³³ but need not examine the evidence against him in order to determine whether it justifies binding him over for trial. Unfortunately, even where a conviction has already been obtained, it is not always clear that extradition is appropriate.

The question arises as to whether a fugitive offender who has been duly tried and convicted in his absence in the requesting state should be extraditable as a convicted person, or whether the evidence test applicable to a person merely charged in the requesting state must still be met. This problem is especially acute because, in Israel, the Extradition Law does not specify the conditions for extraditing a fugitive convicted *in absentia*.³⁴ Moreover, the matter has not yet been addressed by Israeli courts.³⁵

On the one hand, both the Extradition Law and the treaties with continental countries refer simply to persons convicted in the requesting state. They impose no limitation on the way that conviction is secured. Since the statute requires a conviction under foreign law, any conviction duly obtained under the law of the requesting state should serve as a basis for extradition. The Extradition Ordinance³⁶ that preceded the Extradition Law of 1954 provided specifically that the terms "conviction" and "convicted person" were not to include or refer to a conviction which, under foreign law, is a conviction for contumacy (obtained in the accused's absence). The Israeli legislature included no such limitation in the 1954 statute and may therefore have intended that any conviction in a foreign state could serve as a basis for extradition.

On the other hand, there is something in this argument repugnant to the sense of justice of the Israeli lawyer trained to regard the presence and participation of the accused in his trial as an essential condition for his conviction. Some would argue that when the Israeli legislature referred to the extradition of a person convicted of an offense in the requesting state, it envisaged an offender who had been convicted after a trial in his presence and then fled to Israel. A person who fled to Israel before his trial in the requesting state is at most a person charged with an offense and the evidence requirement must be met before his extradition can be ordered. It is not equitable to convert him into a person convicted of an offense and to dispense with the evidence requirement simply by trying him in his absence after he fled to Israel.

Extradition Offenses

Not every offense is sufficiently serious to merit the drastic consequences of removing a person from one country and transferring him against his will to another state. Israel will extradite a fugitive only if the requesting state has charged or convicted him of a crime amounting to an "extradition offense."³⁷

In *Engel and Friedman v. State of Israel*³⁸ the Supreme Court of Israel explained that three cumulative conditions must be fulfilled before the crimes with which a fugitive offender is charged can be extradition offenses. First, the acts attributed to the accused in the extradition request must be criminal offenses under the law of the requesting state. Second, these same acts must amount to a criminal offense under the laws of Israel. Third, such an offense must be one of the extradition offenses set out in the schedule to the Extradition Law and must also be found in any list of offenses prescribed in the extradition agreement between Israel and the requesting state.

Offense under Foreign Law

The whole purpose of the extradition process is to compel the accused to answer for his deeds before the courts of the requesting state. There would be no reason to extradite him without the assurance that the acts attributed to him were indeed offenses under the law of the requesting state. In *Engel*, the Attorney General's representative argued that for this requirement to be satisfied it was sufficient that an indictment had been filed in the requesting state. He claimed that the Israeli court did not need to enquire into questions of foreign criminal law, since the requesting state would not have asked for the extradition of the wanted offender unless it was satisfied that the acts attributed to him were offenses under its internal law. The Supreme Court of Israel found, however, that it must make this decision itself. An Israeli court can declare the wanted person subject to extradition only if it is satisfied, after hearing arguments as to foreign law, that the acts complained of amounted to an offense in the requesting state.

Double Criminality

The second condition referred to in *Engel and Friedman* embodies the principle of double criminality: the accused's acts must be criminal under the laws of both the requesting and requested state. The idea behind this rule is that Israel will not extradite a person, thereby depriving him of freedom of movement and freedom to choose the place in which he wishes to live, unless he is charged with or has been convicted of acts that are also crimes under Israeli law.

While the acts attributed to the wanted offender must be criminal

offenses under the laws of both states, they need not necessarily amount to the same offense under the two jurisdictions. In *Ross v. State of Israel*,³⁹ U.S. authorities had charged the appellant with interstate transportation of a person who had been unlawfully kidnapped. Although Israel has no direct equivalent to the interstate transport offenses, the acts attributed to the accused—if committed in Israel—would have amounted to the offense of wrongfully concealing or confining an abducted person⁴⁰ and also to the offense of receiving or harboring a child unlawfully taken from its parent.⁴¹ Both of these offenses were felonies under Israeli law and as such extradition offenses as defined in the Schedule to the Extradition Law. Therefore, the Court in *Ross* held that the double criminality requirement was satisfied.

The rule of double criminality is satisfied even when the Israeli offense is different by its nature and definition from the offense with which the accused is charged in the requesting state. In noting that a demand for complete identity between the criminal offenses in the requesting and the requested states would deprive extradition treaties of any real effectiveness, the Supreme Court of Israel quoted with approval the following statement made by Justice Brandeis of the United States Supreme Court in *Collins v. Loisel*:⁴²

The law does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of liability shall be coextensive, or, in other respects the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions.⁴³

Extradition Offense under Law and Treaty

The third condition laid out by the court in *Engel and Friedman* requires that the crime with which the fugitive is accused must amount to an extradition offense both under Israeli law and under the provisions of the relevant extradition treaty. An extradition offense is defined in the Schedule to the Extradition Law. It includes all felonies, which in Israel are offenses punishable by imprisonment for a period exceeding three years, together with a number of other offenses set out specifically in the Schedule. These latter offenses, while not classified as felonies under Israel's criminal law, are considered sufficiently serious to justify extradition (for example, simple theft the punishment for which is three years imprisonment).

The extradition treaty itself may restrict the comprehensive list of offenses set out in the Schedule to the statute. Section 21 provides that where an extradition treaty stipulates that only a part of the offenses set out in the Schedule shall be extradition offenses, then that limitation shall be followed.⁴⁴ Thus, for an offense to be extraditable, it must appear both

in the Schedule to the Extradition Law and in any list of offenses contained in the treaty.

A recent case illustrates the difficulty of applying this third requirement. In *Attorney General v. Cohen*⁴⁵ a fugitive from the United States had been charged in Nevada with committing an act of oral sex with a girl of fourteen. The double criminality test was satisfied since under Israeli law such conduct amounted to an indecent act against a minor, one of the offenses set out in the Schedule to the Extradition Law. This crime did not, however, appear in the list of offenses set out in the Convention on Extradition between Israel and the United States. The Convention list included the crime of unlawful carnal knowledge of a girl under age, but the Jerusalem District Court held that such an offense was limited to sexual intercourse with a minor and could not be extended to include other forms of sexual contact. The wanted person could not therefore be extradited on the oral sex charge.⁴⁶

In *Engel and Friedman* the Supreme Court explained that in determining whether a particular crime amounts to one of the offenses set out in the extradition treaty, the court will be guided by two principles. First, a court need not interpret an international treaty in accordance with the same criteria by which the court would interpret local criminal legislation. In particular, there is no need to give terms appearing in the treaty the same technical and limited meaning that might be attributed to them under local law. The court should rather aim at realizing the purpose for which the treaty was signed—international cooperation in the war against crime.⁴⁷

Second, the formal name given to a crime in the list of offenses set out in the extradition treaty is not dispositive as to whether a given offense was included in the treaty. The test should be practical rather than formal and mechanistic. The court should consider the basic, essential elements of the offense rather than the naming technique adopted by the legislature.

Engel and Friedman demonstrates the proper application of these principles. There, the appellants were wanted in Canada on a charge of rape. The victim's consent to the intercourse had been obtained by threats and intimidation.

The status of this offense was complicated because Israel's criminal law regarding rape contains two separate offenses which in other jurisdictions might be treated as one. Unlawful sexual intercourse against the will of a woman by use of force is punishable by fourteen years imprisonment and is known as rape.⁴⁸ Where the victim has consented to the intercourse but that consent has been induced by deception or by threats, the perpetrator is subject to ten years imprisonment and the offense is referred to by the generic name of "rape by deception."⁴⁹

The list of offenses in the Israel-Canada extradition agreement referred simply to rape.⁵⁰ The appellants therefore argued that only unlawful

intercourse by force (the first of the two Israeli offenses) could amount to rape within the meaning of the treaty. Those who drafted the extradition treaty presumably knew the distinction made by Israeli law between the two offenses. Had they intended to include "rape by deception" they would have said so specifically.

The Supreme Court firmly rejected this argument. In its view the formal name given to the offense was not dispositive. The courts must examine the offenses listed in the treaty by reference to their essential elements. The essence of rape is unlawful intercourse with a woman against her wish. Whether her consent is negated by force or merely by threats is immaterial. Both forms of conduct amount to the generic offense of rape. The fact that the crime had been divided by Israel's penal law into two separate offenses was a matter of legislative convenience and could not affect the essence of the crime. Therefore, the Court held that conduct that would be classified under Israeli law as rape by deception was nevertheless rape within the meaning of the extradition treaty.

Death Penalty

Section 16 of the Extradition Law provides that a wanted person shall not be extradited for an offense punishable by death in the requesting state, but not so punishable in Israel, unless the requesting state agrees not to impose the death penalty and to commute any death penalty that has been or may be imposed. In Israel the offense of murder is not punishable by death but by imprisonment for life.⁵¹ Any country in which the death penalty still remains a possible punishment for murder would have to undertake that this penalty would not be imposed or carried out before a fugitive wanted for murder could be extradited from Israel.

Place of Commission

The Extradition Law allows the extradition of a person charged or convicted in the requesting state of an extradition offense without stipulating where that crime must have been committed. Where the courts of the requesting state have extraterritorial jurisdiction, there would seem to be no bar to the extradition from Israel of an offender charged in the requesting state with the commission of an offense in a third country.⁵² However, Israeli courts have not yet encountered requests for extradition from Israel with respect to offenses committed outside the territory of the requesting state.⁵³

Political Offense

Under section 2(2) of the Extradition Law, only "an offense of a nonpolitical character" can be considered an extradition offense. Israel will not entertain a request for the extradition of a person charged with a political

offense. The Minister of Justice is not even empowered to order such a person brought before a District Court to determine whether he is subject to extradition. In addition, section 10 provides that a District Court considering an extradition petition shall not declare the wanted person subject to extradition, if it finds that there are reasonable grounds for believing that the accusation or the request for extradition arises from racial or religious discrimination, or that the request for extradition aims at prosecuting or punishing the wanted person for an offense of a political character, even though on its face the request is not made in connection with such an offense.

Section 2 of the statute relates to the pure political offense, an offense which by its very nature is political, such as sedition. The initial decision as to whether a particular offense is of a political character is the responsibility of the Minister of Justice, since he is authorized to order the filing of an extradition petition only with respect to a non-political offense. His decision in this matter could also be challenged before the court, since before declaring a person subject to extradition, the court must be satisfied that all the conditions of the statute have been complied with, and the non-political character of the offense is one of these conditions.

Section 10(2) of the Extradition Law refers to the relative political offense. An act that on its face amounts to an ordinary crime may be committed in circumstances which change it into a political offense. The question as to whether the connection with political events is sufficiently close to convert the crime into a political offense is a matter to be decided by the courts. Although this kind of problem has occupied the courts of many countries, it has not yet arisen before the courts of Israel.⁵⁴

As to the pure political offense—the burden of proving the issue appears to be on the prosecution to show that the offense in question is not political, since this is a condition precedent to the filing of an extradition petition. As to the relative political offense—the burden appears to be on the defense, since the court will dismiss an extradition petition because of the political offense exception only if it is satisfied that the wanted person is to be prosecuted for an offense of a political character despite the non-political nature of the crime itself.

Arrest and Detention

The extradition process usually begins when the Interpol Unit at Israel Police Headquarters receives a request telegraphed from a foreign police force for the preliminary arrest of a fugitive offender. The Interpol Unit consults with the International Section of the State Attorney's Department, in order to ensure that there is a proper legal basis for initiating extradition proceedings against the wanted person.⁵⁵ The Interpol Unit

then instructs the appropriate unit of the Israel police to locate and arrest the wanted person.

Once the police have found the wanted person, a senior police officer may order his arrest provided that there is reason to believe that the wanted person is subject to extradition, that the requesting state will submit a formal request for his extradition, and that detention is necessary to ensure the suspect's eventual extradition.⁵⁶ To satisfy these conditions for arrest, the crimes attributed to the wanted person must be set out in detail in the request and the requesting state must clearly agree to ask for the fugitive's extradition.

The police must bring a person arrested pursuant to such a request before a Magistrates Court within forty-eight hours.⁵⁷ It is customary for him to appear in court within twenty-four hours of his arrest. The magistrate may, at his discretion, order the requested person to be held in custody for any period not exceeding fifteen days.⁵⁸ The magistrate may also order the wanted person's release on bail, on such conditions as he sees fit, or discharge him unconditionally. If the wanted person is charged with a non-violent crime and the court concludes that there is no real danger of his fleeing from Israel, the court will often order his release on bail. To assure that the wanted person will appear in court when requested, the magistrate may require him to deposit substantial securities, to hand over his passports or other travel documents and to present himself at fixed intervals at the local police station.

Where a judge of the Magistrate's Court orders the wanted person to be released on bail, the conditions of bail will remain in force for a period of 180 days.⁵⁹ Release of the suspect on bail or even his absolute discharge from custody do not prevent the later consideration of a formal request for his extradition.

If the wanted person has not been released on bail, and if the circumstances so warrant, the Magistrate may extend the wanted person's arrest for an additional period of fifteen days.⁶⁰ If the filing of an extradition petition has been delayed, the Attorney General may file a special application requesting a longer period of detention. The Magistrate may then continue the wanted person's arrest for additional periods of fifteen days.⁶¹ Under no circumstances can the wanted person be detained for a total period of more than sixty days prior to the filing of the extradition petition with the District Court.⁶²

The position of a wanted person arrested at the request of a foreign state is similar to that of a person suspected of committing a crime in Israel. Both the detainee and the prosecution have an automatic right of appeal to the District Court against the magistrate's decision and from the District Court a further appeal is possible before one judge of the Supreme Court.⁶³

Once the Attorney General's representative files the extradition peti-

tion, the District Court may order the wanted person to be detained in custody until the termination of the proceedings.⁶⁴ When considering an application for the detention of a wanted person, the court will take into account the usual considerations relevant to the detention or release on bail of an accused person (for example, the seriousness of the offense). In addition to these factors, the courts will also consider the additional element of Israel's treaty obligation to deliver the wanted person to the requesting state if and when that person is finally declared subject to extradition.

*State of Israel v. Pollack*⁶⁵ highlights the factors involved in a decision to grant bail after the filing of the extradition petition. There, charges of larceny and fraud were pending against the respondent in Massachusetts. The District Court of Tel Aviv had declared the respondent subject to extradition but had ordered him released on bail pending the hearing of his appeal to the Supreme Court. The District Court felt that under the circumstances it was not likely that the respondent would try to flee from Israel. The State of Israel appealed against the respondent's release on bail and the President of the Supreme Court ordered the respondent to be returned to custody.

The President of the Supreme Court noted that Israel's obligations under the extradition treaty with the United States require extra caution regarding the release on bail of a person wanted for extradition. The State of Israel must be able to honor its obligation to the requesting state and hand over the wanted person if and when he is finally declared extraditable. This does not mean that the District Court will never release a person declared subject to extradition pending the outcome of his appeal. The Court will however grant a request for release on bail only in exceptional circumstances. In *Pollack*, the Court found the fact that the requested person was sixty-one years of age and had a completely unblemished past did not amount to such a reason for his release on bail.⁶⁶

The *Pollack* decision was followed by Justice Barak of Israel's Supreme Court in the case of *Orenstein v. State of Israel*.⁶⁷ In that case the appellant had been convicted in Canada for drug offenses and sentenced to a long prison term. The Canadian Court of Appeal released him on bail pending his appeal. Following his flight to Israel the Canadian Government asked that Israel either return him to Canada or require him to serve the Canadian prison sentence in Israel. The District Court of Tel Aviv ordered him detained in custody pending the outcome of the proceedings against him. In his appeal against this decision, the appellant argued that the Israeli courts should not be stricter than the Canadian Court of Appeal and that his client should be freed on bail pending the outcome of the case.

In dismissing his appeal, Justice Barak attempted to define the tests that an Israeli court should apply when considering how to exercise its powers

of arrest under the Extradition Law. In Justice Barak's view, the court is required to take into account the special nature and purpose of extradition proceedings. Thus, sometimes it would be proper to detain a requested person in custody even though, under the usual rules pertaining to a suspect brought before the courts in Israel, it would be proper to release him.

In addition to the usual grounds for ordering a person to be detained in custody, the Court must consider the State of Israel's obligation under the extradition treaty. This does not mean that the Court will ignore a wanted person's fundamental right to liberty. Depriving a person of his freedom is a most serious matter, even where he is wanted for extradition. The Court must weigh the wanted person's right to freedom against the danger that the State of Israel might not be able to honor its treaty obligation if the wanted person is allowed to go free while the proceedings are pending against him. This latter consideration, while appropriate to all stages of the extradition process, gathers greater force as the proceedings move toward their conclusion and a final finding that the wanted person is subject to extradition.

The Evidence Required

Under section 9 of the Extradition Law, the Attorney General's representative must satisfy the court hearing an extradition petition that there is sufficient evidence to justify committing the wanted person for trial in Israel had he committed the acts complained of in this country. The court must therefore consider the evidence against the fugitive before it can order his extradition.

The Extradition Law does not prescribe what formal test the courts should use in assessing the sufficiency of the evidence. When the Extradition Law was enacted in 1954, a preliminary enquiry procedure was in operation in Israel in connection with the trial of the more serious offenses.⁶⁸ Under this procedure, a magistrate would hear the prosecution witnesses, explain the nature of the charge to the accused and consider any statement made by the accused and any witnesses he might wish to call at that stage. At the conclusion of his enquiry, the magistrate had to decide whether or not there was sufficient credible evidence to justify bringing the accused to trial. When the legislature enacted the Extradition Law it probably intended a test similar to that applied by a magistrate at a preliminary enquiry.

Preliminary enquiry by a magistrate was, however, later abolished.⁶⁹ Under present day criminal procedure, the results of a police investigation into a felony are forwarded to the District Attorney and it is he who must decide whether there is sufficient evidence to justify bringing the accused

to trial.⁷⁰ It could therefore be said that today the evidence test in an extradition case should be whether the evidence supplied by the requesting state would persuade a reasonable District Attorney to file an indictment against the wanted person had the crime been committed in Israel.

While the Supreme Court of Israel has not formally adopted either of these tests, it has interpreted the evidence requirement in more general terms. In *Kamiar v. State of Israel*,⁷¹ the Court explained that a decision that the evidence is sufficient for extradition means only that the material justifies the hearing of the charge against the accused. Such a decision does not amount to an expression of the court's opinion that the evidence, if uncontradicted, is sufficient to convict the accused. The extradition court in Israel will not take a stand regarding the preference of one piece of evidence over another and will not consider credibility unless the evidence appears on its face to be wholly worthless.⁷²

Although a court hearing an extradition petition will not examine the evidence against the wanted person in great detail, it must be satisfied that the evidence would be admissible in a court in Israel trying the case against the accused. Hearsay evidence cannot therefore be relied upon, since it is not admissible under Israel's rules of evidence. Nor, for example, could the case against the wanted person be based on statements made by his spouse, parent or child since such evidence is not admissible under Israeli law except in the case of crimes of physical violence.⁷³

There is one exception to the rule that evidence must be admissible in a domestic criminal case in order to be admissible in an extradition hearing. In a criminal trial in Israel all witnesses must normally appear before the court to give their evidence from the witness box and to be cross-examined by counsel for the opposing side. Obviously, this is not possible in an extradition case. Section 12(2) of the Extradition Law therefore provides that a court dealing with an extradition petition shall not reject any document or testimony designated in an agreement between Israel and the requesting state as admissible in evidence for the purpose of extradition. The extradition treaties to which Israel is a party provide that evidence taken in the requesting state in the manner prescribed by the treaty (for example, before a judge or official of the requesting state) and duly authenticated shall be admitted into evidence in the examination of the request for extradition. In this way, written depositions and witness statements made abroad may be admissible in an extradition hearing in Israel.⁷⁴

Under the rules of evidence applicable to a criminal trial in Israel, certain evidence must be corroborated if it is to serve as a basis for conviction. The most common forms of evidence requiring corroboration are the testimony of a complainant in a sexual offense and the evidence in any criminal case of an accomplice to the crime. In Israel, there can be no conviction without corroboration.

The issue of corroboration arose in *Engel and Friedman v. State of Israel*,⁷⁵ where the wanted fugitives had been charged in Canada with sexual offenses. They argued that the evidence of the complainant was not corroborated and that therefore the evidence was insufficient to commit them for trial in Israel had the alleged sexual offenses been committed here. The Supreme Court of Israel found that absence of corroboration did not prevent the appellants from being declared subject to extradition. It based its conclusion in this matter on the nature of corroboration on the one hand and on the nature of an extradition hearing on the other.

As to corroboration, experience has shown that certain types of evidence are not sufficiently reliable to serve as the sole basis for a conviction. The law therefore requires corroboration. Corroboration must be evidence from an independent source relating to an essential point at issue between prosecution and accused. It must strengthen the prosecution's evidence by being inconsistent with the accused's version of the facts. Lies made by the accused on a material point at issue and, following a 1976 amendment,⁷⁶ the accused's unwillingness to give evidence may both amount to corroboration. Therefore, a court can decide whether the corroboration requirement has been fulfilled only immediately prior to judgment. It may well be that a prosecutor will not commence proceedings unless he knows in advance that there exists some corroborative evidence. This, however, is a matter of prosecution policy and does not mean at law that without corroboration there is insufficient evidence to commit an accused for trial.

On the other hand, the purpose of an extradition hearing is to determine whether there is evidence which is not altogether worthless and which would justify committing the wanted person for trial. Such a hearing ends at the point where an ordinary criminal trial begins and precedes the stage at which corroboration must be considered. Prima facie corroboration does not, therefore, have to be shown in an extradition case. The purpose of section 9 of the Extradition Law is to prevent extradition where the prosecution does not have sufficient evidence to commit the wanted person for trial. It is not the purpose of section 9 to prevent extradition where the evidence is sufficient for committal but the prospect of an actual conviction is in doubt because of uncertainty as to whether the corroboration requirement is going to be met. The Supreme Court therefore decided in *Engel and Friedman* that even in the absence of any corroborating evidence the appellants could be declared extraditable to Canada in order to stand trial there on sexual offenses.

Rule of Specialty

Section 17 of the Extradition Law provides that Israeli authorities may not extradite a person unless it has been ensured, by agreement with the

requesting state that he will not be detained, tried or punished in that country for any offense committed prior to his extradition other than the one for which extradition has been requested. This provision embodies the rule of specialty.⁷⁷

*Cowen v. State of Israel*⁷⁸ required strict compliance with the rule. There, the Republic of South Africa had requested the appellant's extradition in order to bring him to trial on charges of stealing trust money. The extradition treaty between Israel and South Africa⁷⁹ contained no provision regarding the rule of specialty, despite the fact that an undertaking to act in accordance with this rule was required by section 17 of the Extradition Law and was in fact included in every other extradition agreement to which the State of Israel was a party. Since the conditions of section 17 had not been fulfilled, the Supreme Court of Israel found that the wanted offender could not be extradited.

Under section 2 of the South African treaty, each country agreed to extradite fugitive offenders subject to its law of extradition. Section 19 of South Africa's Extradition Act of 1962⁸⁰ provided that no person extradited to that country should be detained or tried for an offense committed prior to his surrender other than for the offense with respect to which extradition was sought. The Attorney General's representative argued before the Supreme Court that section 2 of the treaty combined with section 19 of the South African law were sufficient to ensure compliance with the requirement of section 17. The Supreme Court held, however, that it was not sufficient that the specialty rule be enshrined in the domestic law of the requesting state. Section 17 requires that it be guaranteed by an obligation on the international level—i.e., by a clause in the extradition treaty itself.

The Court also rejected the argument that section 2 of the treaty incorporated section 19 of the South African law into the treaty itself. All that section 2 meant was that the Republic of South Africa could extradite a fugitive from its shores only according to its own internal extradition laws. It did not comprise any undertaking as to what was to be done with a person extradited to South Africa from Israel.

The Court's conclusion was given extra weight in view of the difference between section 17 of the Extradition Law and section 7(b) of the Extradition Ordinance⁸¹ that had preceded it. Under the provisions of the ordinance the requesting state could satisfy the specialty requirement in one of two ways: either by an undertaking in the treaty or by a provision in its laws. The Extradition Law, however, requires that compliance with the specialty rule be ensured by agreement with the requesting state. In the absence of such agreement, there can be no extradition.

Finally, the Supreme Court would not accept the argument that the undertaking did not have to be expressly spelled out, since the rule of

specialty was a recognized and accepted principle of international law and could therefore be regarded as an implied term of the agreement. The Court found that although it was customary for most countries to act, in one form or another, in accordance with the specialty rule, its scope was not yet clearly defined as a rule of international law and it could differ from state to state. Moreover, the Israeli legislature preferred not to rely on general international practice in this matter, but to insist on an undertaking being set out in the extradition agreement.⁸²

The Supreme Court has also interpreted the specialty clause in the extradition agreement between Israel and France.⁸³ That agreement provides that a person extradited from one country to the other should not be "tried in his presence" for an offense other than the one for which he was extradited. In *Azen v. State of Israel*,⁸⁴ the appellant argued that this clause did not satisfy the requirements of section 17 since an extradited person could still be tried in his absence for an offense other than the one for which he was extradited. In dismissing this argument, the Supreme Court of Israel noted that the words "tried in his presence" only serve to emphasize what is in any case taken for granted: that the rule of specialty has nothing to do with the trial of a person in his absence, since for such a trial there is no need for extradition proceedings. Thus, the phrase "he shall not be tried for another offense committed prior to his extradition" in section 17 of the Extradition Law refers to a trial which the accused is compelled to attend in person and not to any proceeding held in his absence.

The rule of specialty was again a focus of argument in *Hanauer v. State of Israel*.⁸⁵ The appellant in that case did not deny that the undertaking required by section 17 appeared in the Israel-United Kingdom extradition treaty. He argued, however, that this was not sufficient since—under section 19 of the English Extradition Act of 1870⁸⁶ and English case law⁸⁷—the courts in England could try an extradited person for offenses other than those for which he was extradited, provided that the other offenses were based on the facts which served as grounds for extradition.

The Court did not find it necessary to decide whether this state of affairs conflicted with the rule of specialty as set out in section 17 of the Extradition Law. All that the Court required under this section was that its conditions be guaranteed by treaty. This guarantee was contained in Article 7 of the Israel-United Kingdom extradition agreement. It is not, therefore, the duty of the court to enquire whether the internal law of the requesting state and the way that law is interpreted by its courts does in fact ensure conformity with the treaty obligation assumed by that state.

Prescription by Lapse of Time

The court must dismiss an extradition petition if—due to a lapse of time—the offense is no longer subject to prosecution or the punishment imposed is no longer enforceable either under the law of the requesting state or under the law of Israel.⁸⁸ As to the law of the requesting state, a request for extradition usually includes a statement setting out the law of prescription in that state to indicate that the offense or punishment have not become barred by statute.⁸⁹

As to Israeli law, section 7 of the Criminal Procedure Law of 1965 provides that a person shall not be brought to trial for a felony if ten years have elapsed since the date of the commission of the crime.⁹⁰ Where, however, an investigation has been carried out pursuant to statute or where a complaint has been filed or where court proceedings have begun, then the period of prescription will begin only from the date of such action.⁹¹ The question arises as to whether actions taken in the requesting state can interrupt the prescription period of Israeli law. The courts have never considered the issue. The Criminal Procedure Law does recognize that certain actions showing that the case is being pursued will suffice to break the flow of time for prescription purposes. In an extradition case, these actions will normally have been taken in the country where the crime was committed (in the requesting state). With regard to an extradition request based on that crime, it follows that the Israeli courts should construe such actions as interrupting the prescription period of Israeli law.

The Minister's Discretion

Extradition is a combined judicial and executive process, with the executive function being exercised by the Minister of Justice. The Minister must exercise his powers at two separate stages: at the very beginning of the case and at the very end.

No extradition case can commence unless the Minister of Justice directs that the wanted person be brought before a District Court in order to determine whether he is subject to extradition.⁹² The Minister might refrain from giving such an instruction if, for example, relations between Israel and the requesting state were rapidly deteriorating, if it was clear that the acts complained of in the requesting state did not amount to an extradition offense under Israeli law, or if the requesting state had not furnished evidence that could possibly justify committing the accused person for trial. He could also take into account relevant personal consideration (for example, when the wanted person had been injured in an accident in Israel and was completely crippled).

In *Lipski v. Minister of Justice*,⁹³ the Supreme Court of Israel emphasized

the wide discretion afforded the Minister under section 3 of the Extradition Law. First and foremost, the Minister must satisfy himself, on the strength of the material presented by the foreign state, that the conditions set out in section 2 of the statute are fulfilled: that there exists an extradition treaty between the requesting state and the State of Israel providing for reciprocity in the extradition of offenders and that the person whose extradition is sought has been accused or convicted, in the requesting state, of an offense of a non-political character that is an extradition offense as defined in the schedule to the Extradition Law. Thereafter the Minister may take into account all other relevant considerations for and against commencing extradition proceedings.

The Minister may—but is not obliged to—consider allegations that the requested person could raise before the court hearing the extradition petition. For example, section 10 of the Extradition Law requires the court to dismiss the petition if it finds that there are reasonable grounds for assuming that the accusation or the request for extradition arises from racial or religious discrimination. At the preliminary stage the Minister does not have to consider any such argument raised by the wanted person and may leave the matter to the court. However, the Minister could use the discretion afforded him by section 3 and refuse to order the commencement of extradition proceedings on the same grounds as those set out in section 10.

Following a final determination by the courts that the wanted person is subject to extradition, the matter returns to the executive arm of the government. Under section 18, the Minister of Justice must then decide whether or not to order the extradition. Section 18 states merely that the Minister may order execution of the extradition. His discretion in this matter is nowhere defined.

The Minister of Justice will, of course, be aware that refusal to grant his order may put Israel in breach of her treaty commitments. It would also lead to an undesirable clash with the judicial branch were the Minister to base his decision on a conclusion opposite to that reached by the courts. On the other hand, the Minister is certainly entitled to take into account matters that would not affect a court's decision. For example, the Minister could consider the state of the wanted person's health, the fact that he had made no personal profit from the commission of the offense, or any excessive and unreasonable delay on the part of the requesting state in submitting the request for extradition.⁹⁴

Once the courts have found that a wanted person is subject to extradition, the Minister generally will order implementation of the extradition. In recent years there have been two cases in which the Minister exercised his discretion against execution of the extradition despite the fact that the Supreme Court of Israel had decided that the wanted person could be extradited.⁹⁵

In one case the Minister had to decide whether to order the extradition of an Israeli national. At the date that the matter came before the Minister, Israel's Parliament had already passed on first reading a bill prohibiting the extradition of an Israeli national. Although this bill had not yet passed into law, the Minister found that he could not disregard the clearly expressed wish of the legislature and therefore refrained from ordering the implementation of the extradition.

In the second case, the Minister took into account the wanted person's declining state of health. He noted the comment made by the extradition court that the wanted person had acted out of a misguided sense of loyalty and not in order to achieve any direct, monetary gain. He also considered the fact that the wanted person had not fled to Israel in order to avoid apprehension but had settled here to realize a long standing plan to make his home in this country. Extradition proceedings were commenced against the accused long after his arrival in Israel. Exercising the absolute discretion given to him under section 18 of the Extradition Law, the Minister decided, on essentially humanitarian grounds, not to order extradition.

THE LAW OF RETURN AND THE EXTRADITION OF THE ISRAELI NATIONAL

The Law of Return

To suppress crime, the State of Israel seeks full co-operation with other countries. It has no wish to become a country of refuge for criminals seeking to escape justice. However, the State of Israel exists as a homeland for the Jews of the world, so special care will be taken before a person is uprooted from Israel and handed over to a foreign state. The law of extradition from Israel must therefore be seen against the background of the concept that every Jew has a legal right to settle in this country.

The idea of the return of the Jews to the land of Israel is a basic tenet of the Jewish faith and a key theme in the ideology of the State.⁹⁶ This concept of a state always open for Jewish immigration found practical legislative expression in the 1950 Law of Return,⁹⁷ which lays down the basic principle that "every Jew has the right to come to this country as an immigrant." Under the statute, an immigrant's visa must be granted to every Jew who has expressed his desire to settle permanently in Israel. Not only does the immigrant under the Law of Return have the legal right to enter and settle in Israel, he also immediately and automatically acquires Israeli nationality. The general principle embodied in the Nationality Law of 1952⁹⁸ is that "every immigrant under the Law of Return shall become an Israeli national."

Israel's short history has given full practical effect to these legal princi-

ples and Israel has become a country of immigration "par excellence." Today, over 40 percent of the Jewish population of the state are immigrants: former foreign nationals or stateless refugees who settled in Israel and acquired Israeli nationality by return.⁹⁹ The Government of Israel cannot restrict the number or human quality of the Jewish immigrants coming to Israel and is bound to accept all those who answer the invitation extended to the Jews of the world by the Law of Return. Occasionally, fugitive offenders are among those taking advantage of this sweeping right of immigration and automatic grant of Israeli nationality. The legislature and courts in Israel have therefore faced the problem of how to preserve the fundamental right of every Jew to immigrate to Israel without permitting this right to be abused by fugitives from justice.

The possibility of refusing entry to the prospective Jewish immigrant is strictly limited. The Law of Return does authorize the Minister of the Interior to refuse an immigrant's visa to a person with a criminal past likely to endanger public welfare,¹⁰⁰ but this power can be used only sparingly. The Minister's power is also limited because it will not solve the problem of the Jew charged with a serious offense in his country of origin who flees to Israel before he can be brought to trial. It is arguably unreasonable to allow the fugitive to exploit the lack of a conviction in order to ensure his acceptance as an immigrant under the Law of Return. Yet, the majority view is that the principle that a man is innocent until proven guilty should also apply to the Minister of the Interior's decision regarding refusal of an immigrant's visa. In the absence of a conviction (or a clear and voluntary admission by the would-be immigrant that he had indeed committed a serious offense in his country of origin), the Minister could not regard him as a person with a criminal past. An unconvicted person cannot therefore be deprived of his fundamental right to settle in Israel.¹⁰¹

Even if the Minister were able to use his power to refuse an immigrant's visa, it would not ensure the wanted person's return to his country of origin. The Minister could only refuse the would-be immigrant the right to settle in Israel. But he would be free to travel to any other country in the world that was prepared to accept him. Moreover, a fugitive offender may come to Israel, acquire the status of an immigrant under the Law of Return and be granted Israeli nationality before anything is known of the fact that he is fleeing from justice. In these cases extradition is the only way in which the fugitive offender can be made to return to his country of origin in order to stand trial.

Extradition of a National

Law Prior to 1978

Prior to 1978, Israeli law did not restrict the extradition of an Israeli national. The Extradition Law did not mention nationality, referring only to the wanted person. Indeed the State of Israel had concluded an extradition treaty with the United States which provided specifically that extradition would not be refused on the ground that the wanted person was a national of the requested state.¹⁰²

In 1977 the question of extraditing an Israeli national was considered by the Supreme Court of Israel in *Pesachovitch v. State of Israel*.¹⁰³ The appellant was an Israeli national, charged in Switzerland with forgery and fraud. Extradition relations between Israel and Switzerland were regulated by the European Convention on Extradition.¹⁰⁴ Article 6(1)(a) of the Convention gives each contracting party "the right to refuse extradition of its nationals," and, under Swiss law, a Swiss national may not be extradited. The appellant argued that since Switzerland would never extradite a Swiss national, it would be a breach of the principle of reciprocity were the court to declare an Israeli national extraditable to Switzerland.

The Court noted that Article 6(2) of the Convention provided that "if the requested Party does not extradite its national, it shall, at the request of the requesting party, submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate." Under Swiss law, a Swiss national could be prosecuted for offenses outside Switzerland. Thus, although there was no formal reciprocity in the extradition relations between Israel and Switzerland, the Supreme Court held that there was substantive reciprocity. Prosecution of a national for offenses committed abroad was a proper alternative to his extradition, since both achieved the aim of bringing the offender to trial. Reciprocity meant two-way traffic but it was not necessary that the traffic in each direction be absolutely identical. Prosecution of a national was equivalent to his extradition, and the Convention was therefore reciprocal. There was, therefore, no legal bar to the appellant's extradition.

The Offenses Committed Abroad

(Amendment of Enactments) Law of 1978

The *Pesachovitch* case attracted much publicity. Legislators proposed various amendments to the existing statute and finally enacted the Offenses Committed Abroad Law of 1978.¹⁰⁵ This statute laid down the general principle that an Israeli national shall not be extradited. Bearing in mind, however, the special nature of the State of Israel as a country for Jewish immigration and the ease by which Israeli nationality by return is acquired, it is still possible to extradite an Israeli national for an offense committed

prior to the acquisition of his nationality.¹⁰⁶ Thus a longtime national who goes abroad, commits an offense there and returns to Israel, cannot be extradited. But the principle of non-extradition does not apply to a Jew from abroad, who commits an offense in his country of residence, flees to Israel, becomes an immigrant under the Law of Return and acquires Israeli nationality by return. Such a new national can still be extradited despite the recent change in the law.

In 1978, after the enactment of the new statute, French authorities sought the extradition of a Paris shopkeeper charged with stealing gold and jewels entrusted to him. In the hearing before the Jerusalem District Court, the wanted person's first line of defense was that he had come to Israel as a Jewish immigrant under the Law of Return, that he had automatically acquired Israeli nationality and therefore could not be extradited. The Jerusalem District Court held that even were it to accept the accused's argument that he had become an Israeli national, this would not stop his extradition, since his nationality had been acquired only after the commission of the offense.¹⁰⁷

In *Engel and Friedman v. Minister of the Interior*,¹⁰⁸ the appellants had been declared extraditable to Canada. Before the extradition could be implemented, they petitioned the High Court of Justice for an order requiring the Minister of the Interior to recognize them as Israeli nationals. They further alleged that since they were Israeli nationals and had not yet been convicted they were exempt from extradition. They were aware that the Offenses Committed Abroad Law prohibited extradition of a national "save for an offense committed before he became an Israeli national" but argued that this exception applied only to a person actually convicted of an offense before he acquired Israeli nationality. The Court dismissed their petition on other grounds but commented that the interpretation of the statute proposed by the petitioners seemed devoid of all foundation and contrary to the legislature's intention.¹⁰⁹

Thus the offender who has acquired Israeli nationality after fleeing to this country will not be exempt from extradition. Serious problems arise, however, regarding the fugitive offender who was an Israeli national at the time of the offense and who cannot now be extradited.

Trial of a National in Israel

So that such a person will not escape trial altogether, the 1978 statute extended the jurisdiction of the courts of the State of Israel. The statute authorized them to try a national for a criminal act committed abroad, provided that such act, had it been done in Israel, would have amounted to one of the offenses for which extradition is permitted. The act must also amount to an offense under the law of the place of commission and the

Israeli court must not impose a penalty more severe than that to which the accused would have been subject had he been tried in the state where the offense was committed. The statute requires the written consent of the Attorney General for the filing of an indictment with respect to an offense committed abroad.

This provision amounts to a very considerable departure from the territorial principle of jurisdiction on which Israeli criminal law is largely based. Its full potential has yet to be exploited. It is, however, already apparent that this extended jurisdiction entails serious problems. In Israel the burden is on the prosecution to prove all the elements of the offense with which the accused is charged. It can do this only by bringing all the witnesses to court in order to prove each and every fact set out in the indictment. An accused can be convicted only after all the witnesses have appeared in court, given their evidence, and been cross-examined thereon.

Where the offense has been committed abroad, the witnesses are not likely to be found in Israel. In order to conduct a successful prosecution in Israel, it would therefore be necessary to bring the witnesses to this country—a difficult and expensive task. The court in Israel has no power to subpoena witnesses from abroad in order to compel their attendance. Even if the witnesses agreed to come to Israel, the cost of bringing them to this country and accommodating them here would make the prosecution prohibitively expensive. The duty to ensure the rights of the accused might also require the State of Israel to bring over from the country in which the crime had been committed all those defense witnesses whose evidence the accused wished to adduce.

To solve these problems, the legislature could change the law of evidence so that the testimony taken abroad (in the country where the offense was committed) might be used at the trial in Israel.¹¹⁰ Yet, even if the law of evidence in Israel were changed in this way and the courts empowered to base their decisions on evidence taken abroad, it is hard to imagine a judge in Israel convicting a defendant of a serious crime or sentencing him to a long period of imprisonment without having heard the main prosecution witnesses. The adversary system of trial is a deep-rooted feature of Israel's legal system. Many criminal cases turn on questions of the credibility of the witnesses. Without seeing them in the witness box and observing them as they give their evidence, the judge would not be able to decide between the prosecution's and defense's versions of the facts.

As a result of these difficulties, the unfortunate situation can arise in which an Israeli national, charged with a serious offense abroad, will escape punishment altogether. On the one hand, he cannot be extradited because of the provision of the 1978 law. On the other hand, he will not be prosecuted in Israel because of the practical difficulties involved in bringing all the witnesses to this country. It is perhaps doubly unfortunate

that a principal beneficiary of this state of affairs is likely to be the emigrant from Israel. Such an emigrant may have left this country years ago and made a new home for himself abroad. He will, however, remain an Israeli national. Should such an emigrant return to Israel after committing a crime abroad, he may completely avoid trial and punishment.

Possible Compromise Solution

It is unlikely that the legislature will abandon the principle of nonextradition of Israeli nationals which was introduced only three years ago. One compromise proposal under study suggests that an Israeli national be transferred for trial to the country in which the offense was committed, on condition that immediately after his trial he be returned to Israel. He would serve any sentence of imprisonment imposed upon him abroad in an Israeli jail. Israeli authorities could transfer the wanted person for trial abroad only after an Israeli court had found that he would have been extraditable but for his nationality.¹¹¹

This proposal has a number of advantages. The principle of non-extradition of Israeli nationals would remain. Trial would take place in the most convenient forum, the country in which the offense was committed. The authorities in that country have the greatest interest in pursuing the case and the witnesses and the site of the crime are at hand. The Israeli national would not, however, be abandoned in a foreign jail. He would be able to serve any prison sentence in Israel, where the environment is more familiar to him, where the spoken language is Hebrew and where his family and friends are close to him.

Sentence in Israel

The legislature has already accepted the principle of enforcing a foreign penal judgment in the Offenses Committed Abroad Law. The law presently deals with the case of the Israeli national sentenced to prison abroad who finds his way to Israel before completing his term of sentence—usually by escaping from a foreign jail. In such a case, the Minister of Justice may order, at the request of the state in which the sentence was imposed, that the fugitive be required to serve the remainder of his sentence in Israel, as though a final judgment of an Israeli court had imposed the sentence. Such an order can be given only after a court in Israel has found that the fugitive would be extraditable but for his Israeli nationality.

In *Nurieli v. Minister of Justice*,¹¹² an Israeli national, sentenced in the United States for drug offenses, escaped from the American penitentiary and managed to reach Israel. He could not be extradited because of his Israeli nationality. The High Court of Justice upheld an order of the Minister of Justice, compelling the fugitive to complete—in an Israeli jail—the

unfinished portion of the five-year prison sentence imposed upon him in the United States. The court also held that the provisions of the Israeli Penal Law regarding release on parole (which in some respects are stricter than their American counterparts) would apply in place of those of the United States Code.¹¹³

Orenstein v. State of Israel,¹¹⁴ involved a similar factual setting. An Israeli national had been convicted in Toronto of importing drugs into Canada and sentenced there to a long prison term. Pending his appeal, he was released on bail, but then fled to Israel. The government could not extradite him because of his Israeli nationality. The Ministry of Justice therefore initiated proceedings to have the fugitive declared subject to extradition but for his nationality, so that he could then be compelled to serve the Canadian prison sentence in Israel. The Supreme Court ordered him held in custody for the duration of these proceedings. When the fugitive offender saw that he had not escaped justice by fleeing to Israel and was likely to serve a long prison sentence in any event he elected to return to Canada and try his luck in the appeal pending before the Canadian court. As a result, a difficult question remains unanswered: could a foreign prison sentence that was not yet final but still subject to an appeal be enforced in Israel?

Conclusion

The above survey shows how the legislature and the courts in Israel are wrestling with a number of conflicting principles. On the one hand, there is the basic right of every Jew to settle in Israel. Allied to this right is a sense of responsibility for all Israeli nationals and a feeling that Israeli authorities should deal with nationals and not simply hand them over to the law enforcement authorities of a foreign state.

On the other hand, the government recognizes that it should not allow a fugitive offender to abuse these rights and feelings so as to escape from justice. To this end, extradition is still possible for the person who acquired his Israeli nationality only after committing a crime abroad. Additionally, the Israeli courts now have jurisdiction to prosecute a national for offenses committed abroad. The courts may enforce a foreign penal sentence in Israel if extradition of the convicted fugitive is not possible because of his Israeli nationality.

These powers are relatively new and the government has not yet fully explored their potential. There is room for an improvement of the legislative and judicial mechanisms. The overall aim is, however, clear. Israel shall seek to cooperate with other states so that the fugitive offender may eventually be brought to justice.

NOTES

¹ No overall survey of the topic has as yet appeared in the English language. For treatment in English of specific problems in Israel's extradition law, see Feller, *Some New Emphases in Extradition Case Law*, 16 ISRAEL L. REV. 215 (1978); Feller, *The Scope of Reciprocity in Extradition*, 10 ISRAEL L. REV. 427 (1975); Feller, *The Significance of the Requirement of Double Criminality in the Law of Extradition*, 10 ISRAEL L. REV. 51 (1975); Meron, *Non-Extradition of Israeli Nationals and Extraterritorial Jurisdiction: Reflections on Bill No. 1306*, 13 ISRAEL L. REV. 215 (1978); Meron, *Israel and the European Extradition System*, 5 ISRAEL L. REV. 75 (1970); Shachor-Landau, *Extraterritorial Penal Jurisdiction and Extradition*, [1980] INT'L & COMP. L.Q. 274.

² Extradition Law 1954, §§ 6-7, 8 Laws of the State of Israel [L.S.I.] 144, 145. Laws of the State of Israel are authorized English translations of Israeli statutes, which are enacted in Hebrew. The Ministry of Justice prepares the translations.

³ In Israel the District Court is the middle level court in a three-tier structure and serves as the court of first instance for the trial of serious offenses.

⁴ Extradition Law, 1954, § 3, 8 L.S.I. 144, 144.

⁵ *Id.*, § 4, 8 L.S.I. 144, 145.

⁶ *Id.*, § 5, 8 L.S.I. 144, 145.

⁷ Extradition [Procedure and Rules of Evidence on Petitions] Regulations, 1970 (published in Hebrew only) prescribe the procedure in extradition cases.

⁸ Extradition Law, 1954, § 9, 8 L.S.I. 144, 145.

⁹ *Id.*, § 13, 8 L.S.I. 144, 146.

¹⁰ *Id.*, § 14, 8 L.S.I. 144, 146.

¹¹ *Id.*, § 18, 8 L.S.I. 144, 146.

¹² The wanted person must be removed from Israel within sixty days from the day on which the court's declaration becomes final. The court may, however, extend this period on the ground that there are special circumstances delaying the carrying out of the extradition. *Id.*, §§ 19(a), 20, 8 L.S.I. 144, 146-47.

¹³ The statute was amended and updated by the addition of improved technical provisions in 1956, 1965 and 1975. See Extradition (Amendment) Law, 1956, 10 L.S.I. 27; Extradition (Amendment) Law, 1964, 19 L.S.I. 186 (amending § 22); Extradition (Amendment No. 3) Law, 1975, 29 L.S.I. 305 (amending § 7). A major change in approach and policy occurred in 1978 with the enactment of the Offenses Committed Abroad (Amendment of Enactments) Law, 1978, which laid down the new principle that an Israeli national was not to be extradited save for an offense committed before he became a national.

¹⁴ Only one section of the Extradition Law covers a person extradited to Israel. Section 24 provides that a person extradited to Israel by a foreign state shall not be detained or tried for another offense, or extradited to another state for any offense committed before his extradition unless that foreign state consents in writing to such an act or he has not left Israel within sixty days after being given the opportunity to do so. Extradition Law, 1954, § 24, 8 L.S.I. 144, 147.

¹⁵ Israel may of course remove people from its borders and territory through procedures other than extradition. First, when a person reaches Israel but has no right to enter, he may be refused admission and removed from the borders of the state. Entry into Israel Law, 1952, § 10(a), 6 L.S.I. 159, 160. This may lead to his removal to the country in which he boarded the carrier which brought him to Israel. Second, if a person has succeeded in entering Israel but has no right to remain in the country (because he lacks a valid permit), the Minister of the Interior may issue an order for his deportation. *Id.*, § 13(a) 6 L.S.I. 161. Deportation of a person may lead, in the absence of any other nation willing to accept him, to his forced return to the country of nationality. Either of these two forms of removal could result in a kind of de facto extradition if the person concerned were wanted for trial in the country to

which he was removed. *Compare* R. v. Brixton Prison (Governor), *ex parte* Soblen, [1962] 3 All E.R. 641. This must not, however, be the aim of nonadmittance or deportation. In the absence of extradition proceedings against him, an unwelcome arrival in Israel should be allowed to leave for whichever country he chooses provided that country is prepared to accept him.

16 The countries are Belgium, Luxembourg, France, South Africa, the United Kingdom, the United States of America, Canada, Swaziland and Australia.

17 The countries covered by the European Convention on Extradition are Austria, Italy, Ireland, Denmark, the Netherlands, Turkey, Greece, Lichtenstein, Norway, Sweden, Finland, Cyprus, Switzerland and West Germany.

18 *E.g.*, Switzerland, the Netherlands.

19 European Convention on Extradition, Dec. 13, 1957, art. 28, 359 U.N.T.S. 273.

20 *E.g.*, West Germany, Cyprus.

21 European Convention on Extradition, *supra* note 19, art. 1.

22 *See* Custodian of Absentee Property v. Samara, 10(3) Piske, Din [P.D.] 1825, 1829 (1956); Israel Maccabi Ass'n v. State of Israel, 31(1) P.D. 770, 777 (1977).

23 *See, e.g.*, Extradition Law, 1954, §§ 12, 21, 8 L.S.I. 144, 146, 147, which gave effect to evidentiary and other provisions of agreements concerning extradition law.

24 Extradition Law, 1954, § 3, 8 L.S.I. 144, 144.

25 In Hebrew "ne'esham." The word might also be translated as "accused."

26 In Hebrew "Hashood."

27 30(2) P.D. 701 (1976).

28 19 L.S.I. 158.

29 33(3) P.D. 113 (1979).

30 *See* Agreement for the Reciprocal Extradition of Criminals, April 4, 1960, United Kingdom-Israel, 11 Israel Treaties 65, 377 U.N.T.S. 331.

31 Under the Criminal Procedure Law, a suspect has been charged only after an information containing the specified facts has been filed against him. *See* Criminal Procedure Law, 1965, § 75, 19 L.S.I. 158, 167.

32 Support for this view is to be found in a Supreme Court decision of 1952, in which section 133(a) of the Criminal Code Ordinance was interpreted. That section prescribed a special penalty for a person who escaped from lawful custody "if he is charged with, or has been convicted of, a felony." In *Kapon v. Attorney General*, the appellant was convicted of this offense even though at the time of his escape from custody, no indictment had been filed against him. In dismissing his appeal the Supreme Court refused to accept his argument that a person could not be convicted of an offense under section 133(a) unless it was proved that he had escaped after an indictment for felony had been filed against him. In the Court's view, the word charged also extended to the case of a person who had been accused of a felony at the police station.

33 Extradition Law, 1954, § 9, 8 L.S.I. 144, 145.

34 Criminal Procedure Law, 1965, § 116, 19 L.S.I. 173.

35 *See*, 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW, 1117 (1963), for examples of the ways other jurisdictions have decided this issue.

36 Ch. 56, 1 Laws of Palestine [L.P.] 677.

37 "[A] person may be extradited if . . . (2) he is charged or has been convicted in the requesting state of an offense of a non-political character which, had it been committed in Israel, would be one of the offenses set out in the Schedule of this Law." Extradition Law, 1954, § 2, 8 L.S.I. 144, 144.

38 34(3) P.D. 98 (1980).

39 27(2) P.D. 365 (1973).

40 This is an offense under Penal Law, 1977, § 375, L.S.I. (Special Volume) 1, 97.

41 This is an offense under Penal Law, 1977, § 367, L.S.I. (Special Volume) 1, 96.

42 259 U.S. 309 (1922).

43 *Id.* at 312. For the purpose of the double criminality rule, the different names given by the legal systems of the two states to the acts complained of or the different ways in which the two systems classify the offense are of no significance. In *Ross*, 27(2) P.D. 365, it was held that “. . . full identity or complete overlapping of the offenses under the laws of the two countries is not required.” In *Attorney General v. Dov Cohen*, Misc. App. 869/76 (unpublished), a former assistant city engineer of an American town was charged in the United States with extorting money from contractors who performed road works for the city. It was doubtful whether the acts attributed to the respondent could amount to extortion under Israel law. The Tel Aviv District Court held that it was sufficient if the acts amounted, under Israel law, to the offense of bribery. In fact, the court found that the evidence was not sufficient to make out a *prima facie* case for either of the offenses.

44 This is the exceptional case in which the treaty provision takes precedence over the Extradition Law, but it does so only because the statute itself so provides. Extradition Law, 1954, § 21, 8 L.S.I. 144, 147.

45 Misc. App. 369/80 (unpublished).

46 The court did find the accused extraditable on another charge of intercourse with a minor.

47 “The offenses listed in a treaty are not in general expressed in exact and specific language but rather in a comprehensive and generic sense. They should not be interpreted subject to the fine or nice distinctions of the law of either country. This is in accord with the principle that treaties should receive a fair and liberal meaning, and that in extradition matters the ordinary technical rules of criminal law should only apply to a limited extent.” G. LAFOREST, *EXTRADITION TO AND FROM CANADA* 57 (1977).

48 Penal Law, 1977, § 345, L.S.I. (Special Volume) 1, 91.

49 Penal Law, 1977, § 346, L.S.I. (Special Volume) 1, 91.

50 Extradition Agreement, March 10, 1967, Canada-Israel, schedule, art. I. 21 Israel Treaties [I.T.] 367, 722 U.N.T.S. 284.

51 Penal Law, 1977, 32 L.S.I. Under the Nazis and Nazi Collaborators (Punishment) Law, 1950, 4 L.S.I. 154, a person who, during the Nazi regime in Europe committed crimes against the Jewish people, crimes against humanity or war crimes is subject in Israel to the death penalty. Were such a person to be found in Israel he could be prosecuted here since under the above law the courts in Israel have jurisdiction to try such offenses wherever and whenever committed. Thus the question of the extradition of a person liable under Israel law to this death penalty is not likely to arise.

52 Sometimes the extradition treaty will refer to the place in which the offense was committed. *See, e.g.*, Convention on Extradition, Dec. 10, 1962, United States-Israel, 14 U.S.T. 1707, T.I.A.S. No. 5476, 13 I.T. 795, which lays down in article 1 the general principle that extradition be granted in respect of offenses committed within the territorial jurisdiction of the requesting state. This general rule is subject to paragraph 1 of Article 3, which provides that 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.

53 The State of Israel has on several occasions asked for the extradition of offenders who committed crimes against Israeli nationals or Jewish persons outside the territory of Israel. Thus, in 1977, Israel asked for the preliminary arrest pending extradition of Abu Daoud, the PLO terrorist who allegedly masterminded the murder of the Israel athletes at the Munich Olympic games. Israel's request was rejected by France on the ground that at the date of the commission of the offense, France had no such extra-territorial jurisdiction and that the necessary condition of reciprocity was not therefore fulfilled.

In 1978, the State of Israel asked Holland for the extradition of Nazi war criminal Peter

Menten, who was accused of participating in the mass murder of the Jewish inhabitants of two villages in Poland during the Second World War. The request was refused on the ground of Menten's Dutch nationality. Menten was, however, subsequently convicted on one of the charges by the courts of Holland and sentenced to a long prison term.

⁵⁴ See, e.g., *In re Abu Eain*, No. 7917 175 (slip opinion)(1979), *aff'd sub nom. Eain v. Wilkes*, 641 F.2d 504 (7th Cir. 1981). This case involved a request by Israel for the extradition of a PLO terrorist charged with placing a bomb in a trash bin in the crowded market area of the town of Tiberias, Israel. In the resulting explosion, two youths were killed and thirty-six passersby were seriously injured. Extradition was requested in order that the wanted offender be tried for murder, attempted murder and causing bodily harm in aggravating circumstances.

The fugitive argued, *inter alia*, that there existed a state of military and political conflict between the Government of Israel and what he termed the people of Palestine and that the bombing was a political act aimed at weakening the Government of Israel.

In rejecting the political defense argument, the United States courts found that the bombing was an act of terrorism pure and simple. It involved indiscriminate violence not directed against any arm of government but against innocent civilians. Whatever the perpetrator's motive, the act complained of was a common crime for which extradition would be granted. There was probable cause for believing that the wanted offender had committed a random bombing intended to result in the cold blooded murder of civilians. In these circumstances, he could not be considered as charged with a political offense and could not benefit from the political offense exemption from extradition.

⁵⁵ The kind of question that could arise at this stage would be whether the facts set out in the telegraphic request amount on their fact to an extraditable offense under Israel law, whether the offense is sufficiently serious to justify detaining the suspect in custody or whether he should be released on bail.

⁵⁶ Extradition Law, 1954, § 6, 8 L.S.I. 144, 145.

⁵⁷ Extradition (Amendment No. 3) Law, 1975, § 1, 29 L.S.I. 305 (amending Extradition Law, 1954, § 7(a), 8 L.S.I. 144, 145).

⁵⁸ *Id.* (amending Extradition Law § 7(b)).

⁵⁹ Criminal Procedure (Amendment) Law, 1969, § 1, 23 L.S.I. 210 (adding § 49A to Criminal Procedure Law, 1965, 19 L.S.I. 158).

⁶⁰ Extradition (Amendment No. 3) Law, 1975, § 1, 29 L.S.I. 305 (amending Extradition Law § 7(b)(proviso)).

⁶¹ *Id.* (amending Extradition Law § 7(c)).

⁶² *Id.* (amending Extradition Law § 7(d)).

⁶³ Criminal Procedure Law, 1965, § 34, 19 L.S.I. 158, 163.

⁶⁴ Extradition Law, 1954, § 5, 8 L.S.I. 144, 145. Appeals against the decision of the District Court with regard to the detention or release of the wanted person are heard by one judge of the Supreme Court.

⁶⁵ 24(2) P.D. 17 (1970).

⁶⁶ The President of Israel's Supreme Court noted with approval the following statement made sixty years ago by Chief Justice Hewart of England: "That does . . . not mean that in no case under the Extradition Acts is the question of bail to be considered. What it does mean is that where a case is under the Extradition Acts, there is, in addition to the normal considerations which apply to a question of bail, an added ingredient due to the fact that a treaty has been made with a foreign country." *R. v. Phillips*, 27 Cox 332, 335 (1922).

⁶⁷ 34(3) P.D. 500 (1980).

⁶⁸ See Criminal Procedure (Trial upon Information) Ordinance, ch. 36, 1 Laws of Palestine [L.P.] 475.

⁶⁹ See Criminal Procedure Amendment (Investigation of Felonies and Cause of Death) Law, 1958, 12 L.S.I. 66, 66; Criminal Procedure Law, 1965, 19 L.S.I. 158.

70 Criminal Procedure Law, 1965, § 56, 19 L.S.I. 158, 165.

71 22(2) P.D. 85 (1968).

72 *See also* Pessachovitch v. State of Israel, 31(2) P.D. 449 (1977), in which the Court noted that a detailed examination of the charges against the wanted person was not one of the purposes of an extradition hearing. The only question to be determined was whether there was evidence to serve as a first basis for the charge. In Hanauer v. State of Israel, 33(3) P.D. 173 (1979), the Court found it unnecessary to conduct a detailed analysis of the evidence. To do so would be to misconceive the purpose of extradition proceedings. For a person to be subject to extradition, it was sufficient to point to a foothold for the charges in the evidence supplied by the requesting state. In Engel and Friedman v. State of Israel, 34(3) P.D. 98 (1980), the Supreme Court again analyzed the requirements of section 9 of the Extradition Law. The Court explained that it must always bear in mind that consideration of a request for extradition was not consideration of the criminal case itself. It should not, therefore, convert an extradition hearing into a trial at which the innocence or guilt of the accused would be decided. The one and only object of the extradition hearing was to find out whether the evidence against the accused justified his trial before a properly authorized court. Inconsistencies in the evidence need not be resolved at this stage and although mere suspicion was not enough, it was not necessary that there be evidence which, if proved reliable, would be sufficient to convict the accused.

73 Evidence Ordinance, §§ 3-5, ch. 54, 2 L.S.I. (New Version) 198.

74 *See, e.g.*, Hackshtatter v. State of Israel, 26(1) P.D. 241, 249 (1972).

75 34(3) P.D. 98.

76 In contrast to American law, the "accused's refraining from testifying may serve to add weight to the evidence of the prosecution as well as to corroborate such evidence where it requires corroboration. . . ." Criminal Procedure (Amendment No. 8) Law, 1976, § 145A, 30 L.S.I. 236, 240.

77 This restriction will not apply where the wanted person left the requesting state after his extradition or if he has not left the requesting state within sixty days after being given an opportunity to do so or if the State of Israel has consented in writing to other proceedings being taken against him. Extradition Law, 1954, § 17(a), 8 L.S.I. 144, 146.

78 29(1) P.D. 589 (1975).

79 Extradition Treaty, Sept. 18, 1959, Israel-South Africa, 10 I.T. 649, 373 U.N.T.S. 47.

80 2 Statutes of the Republic of South Africa 1962 1185, 1197.

81 Extradition Ordinance, ch. 56, 1 L.P. 677.

82 The defect in the treaty was remedied by an exchange of notes between the Governments of Israel and South Africa in May 1976, whereby the appropriate undertaking to act in accordance with the specialty rule was added to the treaty. *See* Exchange of Notes Amending the Extradition Treaty of 18 September, 1959, May 2, 1976, Israel-South Africa, 25 I.T. 175.

83 Extradition Treaty, Nov. 12, 1958, Israel-France, art. 17, 10 I.T. 379, 219 U.N.T.S. 215.

84 33(2) P.D. 169 (1979).

85 33(3) P.D. 113 (1979).

86 "Where, in pursuance of any arrangement with a foreign state, any person accused or convicted of any crime which, if committed in England, would be one of the crimes described in the first schedule to this Act is surrendered by that foreign state, such person shall not, until he has been restored or had an opportunity of returning to such foreign state, be triable or tried for any offense committed prior to the surrender in any part of Her Majesty's dominions other than such of the said crimes as may be proved by the facts on which the surrender is grounded." Extradition Act, 1870, 33 & 34 Vict., c.52, § 19.

87 The appellant relied in particular on *The King v. Corrigan*, 1 K.B. 527 (1931) and *R. v. Aubrey-Fletcher, ex parte Ross-Munro*, 1 Q.B. 620 (1968).

⁸⁸ Extradition Law, 1954, § 8(2), 8 L.S.I. 144, 145.

⁸⁹ *See, e.g.*, Convention on Extradition, United States-Israel, *supra* note 52, art. 10 which provides that the request for extradition "shall be accompanied by . . . the text of the applicable laws of the requesting Party including . . . the law relating to the limitation of the legal proceedings or the enforcement of the penalty for the offense."

⁹⁰ Criminal Procedure Law, 1965, § 7(a)(2), 19 L.S.I. 158, 158-59.

⁹¹ *Id.* at § 7(b).

⁹² Extradition Law, 1954, § 3, 8 L.S.I. 144, 144.

⁹³ High Court of Justice 59/72 (unpublished opinion).

⁹⁴ In reference to a similar discretion afforded to the English Home Secretary, it was said that "the Secretary of State can decide not to grant the request for extradition if in the exercise of his discretion he thinks that it is proper to take that course." *Schtraks v. Government of Israel*, [1964] A.C. 556, 559. *See also* *Atkinson v. United States Government*, [1971] A.C. 197, 232, where it was said that ". . . Parliament must have intended the Secretary of State to use that power whenever in his view it would be wrong, unjust or oppressive to surrender the man."

⁹⁵ Since the exercise of the Minister of Justice's discretion is an administrative and not a judicial matter, there are no published reports of the way in which he uses his power in this matter.

⁹⁶ The Preamble to the Declaration of the Establishment of the State refers to the need to solve the problem of Jewish homelessness by establishing a State "which would open the gates of the homeland wide to every Jew." Declaration of the Establishment of the State of Israel, preamble, 1 L.S.T. 3, 3-4. The Declaration goes on to set out certain basic principles by which the new State of Israel is to be governed. The first of these principles is that the State shall be open for Jewish immigration. *Id.* at 4.

⁹⁷ Law of Return, 1950, 1 L.S.I. 114, 114.

⁹⁸ Nationality Law, 1952, § 2(a), 6 L.S.I. 50, 50. *See* M. D. GOULDMAN, ISRAEL NATIONALITY LAW (1970), for a survey of the subject of Israeli nationality.

⁹⁹ Table 22B, STATISTICAL ABSTRACTS OF ISRAEL (1981).

¹⁰⁰ Law of Return, 1950, 1 L.S.I. 114.

¹⁰¹ A recent decision of the Supreme Court has perhaps eased the Minister's problem in this regard. Two would-be immigrants from Canada were wanted for rape and other sexual offenses. They had fled to Israel prior to their trial in Canada but proceedings for their extradition were nearing completion. The Court held that the Minister was entitled, in these circumstances, to withhold the grant of an immigrant's visa until the extradition proceedings and the subsequent trial in Canada had been completed. Only then would the Minister have to take his decision as to whether the exception to the Law of Return was to be applied. *See Engel and Friedman v. Minister of Justice*, 34(4) P.D. 329 (1980).

¹⁰² Convention on Extradition, United States-Israel, art. 4, *supra* note 52.

¹⁰³ 31(2) P.D. 449 (1977).

¹⁰⁴ European Convention on Extradition, Dec. 13, 1957-Nov. 29, 1965, 17 I.T. 87, 359 U.N.T.S. 273.

¹⁰⁵ 32 L.S.I. 63.

¹⁰⁶ *Id.* The law added section 1A to the Extradition Law, 8 L.S.I. 144, which provided that "an Israel national shall not be extradited save for an offense committed before he became an Israel national."

¹⁰⁷ *See* *Attorney General v. Azen*, Misc. App. 137/78 (unpublished).

¹⁰⁸ 34(4) P.D. 329 (1980).

¹⁰⁹ *See* *Attorney General v. Glickman*, Misc. App. 1384/78 (unpublished). An Australian lawyer, charged in Melbourne with theft and embezzlement, sought to delay the opening of his extradition trial in Israel until the hearing of a petition he had filed with the High Court

of Justice for an order requiring the Minister of the Interior to recognize him as a new immigrant under the Law of Return. The Tel Aviv District Court rejected the application for deferment of the extradition trial, since even if the High Court of Justice petition were to succeed, the lawyer's newly acquired nationality by return would not affect his liability to extradition.

110 Section 14 of the Evidence Ordinance provides that "notwithstanding anything in the Criminal Procedure Law, 1965, where evidence has been taken outside the jurisdiction of the Courts of Israel in virtue of any treaty, agreement or law, for the purpose of any criminal proceeding in Israel, the court may permit the record of any evidence so taken to be submitted as evidence in a trial, provided that the Court is satisfied that there is sufficient reason for the absence of the witness who gave the evidence in the record and that the accused or his attorney were afforded the opportunity of cross-examining the witness at the time the evidence was taken."

To date it has proved most difficult to make use of this section. First, its use depends on the existence of a treaty or agreement with the state where the evidence is to be taken. Second, difficulty arises with regard to the requirement ensuring the accused's right of cross-examination. Is it sufficient merely to notify the accused of the date and place at which evidence will be taken abroad so that he can appoint an attorney to attend and cross-examine the witness? Is the State of Israel obliged to pay for defense counsel? If not, will not an accused lacking in means be deprived of the fundamental right to cross-examine prosecution witnesses? Unless the accused himself is present at the cross-examination in order to react to whatever is said by the prosecution witness and give the necessary instructions to his counsel, how can the cross-examination be effective? Third, it is difficult to know whether the judge would regard the mere expense of bringing a critical witness to Israel as "good reason for the absence of the witness."

111 *Accord*, I. A. SHEARER, EXTRADITION IN INTERNATIONAL LAW (1971)(the proposal is similar to that proposed by Shearer as a solution to the problem of the extradition of a national); see also *Draft Convention on Expatriation of Accused Persons for Trial and Sentence and Repatriation for Enforcement of Sentence*, INTERNATIONAL LAW ASSOCIATION, REPORT OF THE FIFTY-EIGHTH CONFERENCE HELD AT MANILA 477 (1980).

112 33(1) P.D. 752 (1979).

113 See generally 18 U.S.C. § 4202-4209.

114 34(3) P.D. 500 (1980).