

2-1-1995

Israel v. Ivan (John) Demjanjuk; Wachmann Demjanjuk Allowed to Go Free

Andrew David Wolfberg

Recommended Citation

Andrew David Wolfberg, *Israel v. Ivan (John) Demjanjuk; Wachmann Demjanjuk Allowed to Go Free*, 17 Loy. L.A. Int'l & Comp. L. Rev. 445 (1995).

Available at: <http://digitalcommons.lmu.edu/ilr/vol17/iss2/5>

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles International and Comparative Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

ISRAEL V. IVAN (JOHN) DEMJANJUK; WACHMANN DEMJANJUK
ALLOWED TO GO FREE

I. INTRODUCTION

Criminal justice systems exist to analyze facts, to determine guilt, and to punish the guilty for their wrongdoings. The case of John Demjanjuk frustrates those who believe in upholding criminal justice systems because it appears as if a guilty man may have escaped justice.¹ The trial of John Demjanjuk in Israel represents, quite possibly, the last of the Israeli Nazi War Crimes trials.² Israel accused John Demjanjuk of being "Ivan the Terrible," a Ukrainian who assisted the Nazis in their persecution and murder of European Jewry.³ "Ivan the Terrible" was known as a particularly cruel *Wachmann*, a Nazi death camp guard.⁴

This Note will analyze John Demjanjuk's criminal case in Israel. This Note will argue that the Israeli Supreme Court's decisions not to pursue Demjanjuk as a Nazi who served at multiple Nazi death camps were failures of a criminal justice system.⁵ Section II of this Note discusses the criminal trial of

1. *Demjanjuk v. Israel*, Crim. App. No. 347/88 (Sup. Ct. July 29, 1993) (on file with *Loyola of Los Angeles International and Comparative Law Journal*).

2. EFRAIM ZUROFF, OCCUPATION: NAZI HUNTER, THE CONTINUING SEARCH FOR THE PERPETRATORS OF THE HOLOCAUST 211 (1994). In light of "Demjanjuk's acquittal by the Israeli Supreme Court despite the unequivocal evidence regarding his service at Sobibor death camp . . . [it is] highly unlikely, if not impossible, that Israel will ever again attempt to prosecute a Nazi war criminal." *Id.*

3. *Israel v. Demjanjuk*, Crim. Case (Jerusalem) No. 373/86 (Apr. 18, 1988), *rev'd*, Crim. App. No. 347/88 (Sup. Ct. July 29, 1993), translated in THE DEMJANJUK TRIAL 6 (Asher F. Landau ed. & Hever Translators Pool trans., 1991).

4. "The most feared of the guards . . . was the sadistic Ukrainian Ivan the Terrible, who enjoyed stabbing, punching and mutilating those about to die." Robert Edwin Herzstein, *The 'Arch Henchman'*, N.Y. TIMES, Nov. 25, 1990, § 7, at 6. After observing the brutality committed by Ivan the Terrible, Avraham Goldfarb, a prisoner at the Treblinka camp, said that he "saw clearly how he [Ivan the Terrible] pushed the victims into the gas chambers with iron sticks and a bayonet. Even with his knife he cut the flesh off living people." *Id.* See *infra* notes 10-15 and accompanying text for a discussion of the role of the *Wachmann*.

5. The Israeli Supreme Court had two opportunities to convict John Demjanjuk as a Nazi death camp guard other than Ivan the Terrible. Initially, the Supreme Court refused to convict Demjanjuk as a death camp guard at Sobibor and Trawniki because he had not had a reasonable opportunity to defend himself. *Demjanjuk v. Israel*, Crim. App.

John Demjanjuk and the legitimacy of Israel's prosecution of Nazi war criminals. Section III will focus on the attempts to convict Demjanjuk as a different Nazi death camp guard and the failure of the Israeli criminal justice system to achieve this goal. Finally, this Note will conclude that, irrespective of the Supreme Court's actions, Israel should not have allowed Demjanjuk to leave Israel without punishment.

II. THE TRIAL OF JOHN DEMJANJUK

A. *Nazi Plan to Exterminate World Jewry*

In 1942, the Nazis began "Operation Reinhard" in Poland.⁶ Operation Reinhard was the code used for the Nazi goal to systematically exterminate Jews from all German-occupied countries in Europe.⁷ Operation Reinhard had "one purpose only, namely . . . to make the physical destruction quicker and more efficient . . . by rounding up Jews from their places of residence or places of internment and transporting them to Treblinka, Sobibor, and Lodz, in order to destroy them in the gas chambers."⁸ "The German SS [Shutzstaffeln, however,] lacked sufficient manpower . . . to carry out all the 'tasks' of Action Reinhard."⁹

The Nazis recruited Russian prisoners-of-war ("POWs") to capture and transport Jews from the ghettos in which Nazis had confined them, and to staff concentration camps.¹⁰ Nazis recruited Russian POWs from POW camps in Eastern Poland, including the camps at Rovno and Chelm, and then took them to Trawniki

No. 347/88 at 36.

6. MARTIN GILBERT, *THE HOLOCAUST-A HISTORY OF THE JEWS OF EUROPE DURING THE SECOND WORLD WAR* 364 (1985).

7. *United States v. Demjanjuk*, 518 F. Supp. 1362, 1364 (N.D. Ohio 1981), *aff'd*, *United States v. Demjanjuk*, 680 F.2d 32 (6th Cir. 1982), *cert. denied*, *Demjanjuk v. United States*, 459 U.S. 1036 (1982). Approximately six million Jews were killed by the Nazis. LUCY DAWIDOWICZ, *THE WAR AGAINST THE JEWS 1933-1945*, at xxxv (1986). The Nazis also slaughtered over ten million other non-combatants. GILBERT, *supra* note 6, at 824. The term "non-combatants" includes "as many as a quarter of a million Gypsies, tens of thousands of homosexuals, and tens of thousands of 'mental defectives'." Also murdered, often after the cruelties of tortures, were several million Soviet prisoners-of-war, shot or starved to death long after they had been captured and disarmed." *Id.*

8. *Demjanjuk v. Israel*, Crim. App. No. 347/88 at 22.

9. *United States v. Demjanjuk*, 518 F. Supp. at 1365.

10. *Id.*

for training.¹¹ Nazis classified the Russian POWs trained at Trawniki as *Wachmanner*. *Wachmanner* "took an active part in . . . all the 'dirty' jobs which were required in order to proceed quickly and efficiently with the extermination activity."¹²

Yakob Engelhardt, an ethnic German *Wachmann*, born in Russia, stated:

[N]o one forced the Russian prisoners of war to serve in the said unit but they all volunteered; . . . [and] that also in the Trawniki Camp itself there were mass executions. . . . [T]hat the executions in Trawniki were carried out with the intention of teaching the *Wachmanner* 'to execute and exterminate members of the Jewish race.' According to him, all the *Wachmanner* took part in the extermination.¹³

Dimitri Borodin, another *Wachmann*, said:

In the function of the *Wachmanner* at the Death Camps . . . all of them . . . took part directly in mass extermination of persons who were members of the Jewish race that had been brought to the camp. Their participation in the extermination of the people took the form of taking the people condemned to death out of the trains, making them enter the 'Dressing Room' and the gas chambers, shooting people in the infirmary when they were on guard there. This was how we served; for this reason they kept us there . . . the procedures in the Camp were such that not one of the *Wachmanner* there could have avoided taking part in the extermination of people.¹⁴

Holocaust experts have described the Trawniki guards as indispensable to the operation of Action Reinhard.¹⁵

B. *John Demjanjuk*

John Demjanjuk, born on April 3, 1920, in the village of Dub Macharenzi, Ukraine,¹⁶ "was conscripted into the Russian army in 1940."¹⁷ John Demjanjuk was tried and convicted in the state

11. *Id.* at 1364.

12. *Demjanjuk v. Israel*, Crim. App. No. 347/88 at 25.

13. *Id.* at 28.

14. *Id.*

15. *United States v. Demjanjuk*, 518 F. Supp. 1362, 1365 (N.D. Ohio 1981), *aff'd*, *United States v. Demjanjuk*, 680 F.2d 32 (6th Cir. 1982), *cert. denied*, *Demjanjuk v. United States*, 459 U.S. 1036 (1982).

16. *Id.* at 1363.

17. *Id.* at 1364.

of Israel as Ivan the Terrible of Treblinka.¹⁸ Demjanjuk's trial as Ivan the Terrible was the second Nazi War Crimes trial in Israel.¹⁹ At the first trial in 1961, Israel carried out the death penalty, for the only time in its history, by executing Adolf Eichmann for his crimes against the Jewish people and humanity.²⁰ John Demjanjuk narrowly avoided being the second man to be executed when the Supreme Court, on July 29, 1993, found that reasonable doubt existed as to whether he was Ivan the Terrible.²¹

The Supreme Court overturned Demjanjuk's conviction using what it called "the most lenient application of the law and procedure."²² The Supreme Court had the authority under Israeli law to convict Demjanjuk as a death camp guard other than Ivan the Terrible.²³ The Court decided not to convict Demjanjuk on other charges when it ruled that Demjanjuk had not had a reasonable

18. TOM TEICHOLZ, *THE TRIAL OF IVAN THE TERRIBLE* 296 (1990). The trial court stated that "having weighed and considered the evidence in its entirety, most painstakingly, cautiously, and with the utmost care, we determine unequivocally and without the slightest hesitation or doubt that the accused, Ivan John Demjanjuk, standing trial before us, is Ivan who was called [Ivan the Terrible]." *Id.*

19. Tom Hundley, *Israel Abandons Attempt to Make a Lesson of 'Ivan'*, CHI. TRIB., Sept. 20, 1993, at 1. "In its 45-year history, Israel has tried only one other Nazi war criminal Adolf Eichmann, the bland bureaucrat who admitted he helped organize the extermination of 6 million Jews." *Id.*

20. ARIEL BIN-NUN, *THE LAW OF THE STATE OF ISRAEL* 116 (1990). The state of Israel reserves the punishment of death for certain Nazi crimes and for treason during times of war. *Id.*

21. Asher F. Landau, *The End of the Demjanjuk Case*, JERUSALEM POST, Aug. 20, 1993, available in LEXIS, News Library, JPOST File.

22. *Demjanjuk v. Israel*, Crim. App. No. 347/88 at 40-41 (Sup. Ct. July 29, 1993). The Israeli Supreme Court stated that evidence obtained from the Soviet Union created a reasonable doubt. *Id.*

If Demjanjuk's supporters are willing to balance his innocence on records from the old Soviet Union, they also should accept Soviet records that place Demjanjuk at Sobibor and the Flossenberg concentration camp, and at the Nazi SS Trawniki training camp in Poland. But most of those supporters pick and choose among what they want to believe in the old Soviet archives.

Carolyn Davis, *Crimes Against Humanity Inexcusable*, CLEV. PLAIN DEALER, Aug. 8, 1993, at 1C.

23. *Demjanjuk v. Israel*, Crim. App. No. 347/88 at 36. Section 216 of the Israeli Criminal Procedure Law [Consolidated Version], 5742-1982, requires two criteria be met before Israel may convict a defendant for a crime different from the original charge. The first requirement is evidentiary, "namely the discovery of facts which indicate another offence from amongst the evidence brought before the Court. The second criterion is procedural, and it deals with the accused having had a reasonable opportunity to defend himself." *Id.*

opportunity to defend himself.²⁴ Although the Attorney General had the authority to charge Demjanjuk with crimes other than the murders committed by Ivan the Terrible,²⁵ he decided to allow Demjanjuk to leave Israel.²⁶

The Supreme Court subsequently denied petitions by Nazi hunters from Israel and other countries to overturn the Attorney General's decision.²⁷ The Supreme Court could have overturned the Attorney General's decision not to retry Demjanjuk if it had determined this decision to be "unreasonable in the extreme."²⁸ Because no such determination was made, Demjanjuk will not be tried as a different death camp guard who participated in the torture and murder of innocent civilians during the Nazi reign of terror.

1. War Crimes Trials

As the end of World War II drew near, the Allied powers began to consider how to punish Nazis for murdering millions of innocent victims.²⁹ "The Allies decided to try and punish those who perpetrated the worst crimes the world has ever seen and in that way establish clear principles of international law that would promote peace and deter war in the future."³⁰ To ensure an educative effect, it was important to conduct well-documented trials.³¹ Executions without trials might unintentionally make

24. *Id.* at 38. The Court stated:

[That it] must exercise extreme caution and that in the event that there is a shadow of a suspicion that the accused has been deprived of his right and possibility of defending himself properly against a new charge has been taken away from him, the Court will not exercise its authority given to it.

Id. at 37.

25. The Israeli Attorney General has exclusive power to bring charges under the Nazis and Nazi Collaborators (Punishment) Law. Nazis and Nazi Collaborators (Punishment) Law, 5710-1950, § 14 [hereinafter Nazi Law].

26. Demjanjuk returned to the United States on September 22, 1993. *Demjanjuk Back in Ohio*, PHOENIX GAZETTE, Oct. 8, 1993, at A7.

27. Landau, *supra* note 21.

28. Irwin Cotler, *Unreasonable in the Extreme*, JERUSALEM POST, Aug. 17, 1993, available in LEXIS, News Library, JPOST File. The Israeli Supreme Court then refused to overturn the Israeli Attorney General's decision not to retry Demjanjuk based on the standard "unreasonable in the extreme." Landau, *supra* note 21.

29. Steven Fogelson, Note, *The Nuremberg Legacy: An Unfulfilled Promise*, 63 S. CAL. L. REV. 833, 836 (1990).

30. *Id.* at 837.

31. *Id.* at 841.

martyrs out of criminals.³² “[A]ll of the Allied parties were sincerely concerned that the trial be seen as legitimate and serve as a precedent for future generations.”³³ Never before had courts held individuals of a warring state criminally liable.³⁴ To ensure fairness, the Allies clearly defined, at the outset, the crimes that the war criminals allegedly committed.

Article 6 of the Nuremberg Charter (“Charter”) defines the relevant charges of war crimes and crimes against humanity as those that violate the laws or customs of war.³⁵ Crimes also include any persecution against political, racial, or religious groups in connection with any crime for which a court had jurisdiction, whether or not the acts were criminal when and where they occurred.³⁶ Article 8 of the Charter states that a court considers the defense of following orders as a mitigating circumstance, not exculpatory evidence.³⁷ Articles 9, 10, and 11 of the Charter authorizes War Crimes Tribunals to declare, after a trial, that a group is a criminal organization.³⁸

2. Israeli Prosecution of Nazi War Criminals

The State of Israel ardently pursues those who harm the Jewish people.³⁹ The prosecutions of Adolf Eichmann and John

32. *Id.* If anyone perceived Israel’s trial against Demjanjuk unfair, then Demjanjuk would appear to be the victim.

33. *Id.* at 850.

34. *Id.* at 842.

35. *Id.* at 847.

36. *Id.*

37. *Id.* at 848.

38. *Id.* This declaration requires any member of such a criminal organization to prove why he should not be found guilty of war crimes based on his membership in that criminal organization. *Id.* The framers of the Nuremberg Charter wanted the individual defendants “to show why they should not be found guilty because of their membership in the group.” *Id.* “To avoid injustice, the prosecution was prepared to allow accused members of a guilty organization to plead ignorance of the criminal aims of the organization as a defense in subsequent trials.” *Id.* at 856.

39. See DAWIDOWICZ, *supra* note 7, at 342-43. Although the Holocaust is not an impending danger, to forget the Holocaust is an invitation to those who wish to finish Hitler’s plan. The trial of Hitler’s Nazis is enacted, in part, to tell the world what happened during the Nazi regime. Simon Wiesenthal,

the legendary pursuer who has helped uncover scores of Nazis argues that criminal justice is not the purpose of *his* quest. “These crimes can’t really be punished anyway,” he says. “I see what I am doing as a warning to the murderers of tomorrow.” A warning to them, he says, “*that they will never rest in peace.*”

Demjanjuk represent Israel's attempts to bring Nazi criminals to justice. Israel passed the Nazis and Nazi Collaborators (Punishment) Law ("Nazi Law") in 1950⁴⁰ in order to define the charges under which it would bring suspected Nazis to trial.

a. *Nazis and Nazi Collaborators (Punishment) Law*

The Nazi Law states that a person is subject to the death penalty if, during the Nazi regime, he committed a crime against the Jewish people, humanity, or other war crimes.⁴¹ Potential prosecutors might seemingly encounter problems because both the Nazi Statute and the Charter of the International Military Tribunal apply retroactively.⁴² Defendants accused of Nazi war crimes may claim that it is unjust to prosecute them for violating a law or laws that did not exist when they committed their atrocities. In addition, even if the law is deemed to be valid, the defendant might also claim he is being unfairly prosecuted for an act of which

Jordan Bonfante, *Where Have All the Nazis Gone?*, TIME, Aug. 9, 1993, at 38 (emphasis added).

40. Nazi Law, *supra* note 25. "The Israeli Supreme Court [in deciding *Eichmann*] considered the Nazi Statute an 'extraordinary measure' designed to cope with an 'extraordinary event.'" Rena Hozore Reiss, *The Extradition of John Demjanjuk: War Crimes, Universality Jurisdiction, and The Political Offense Doctrine*, 20 CORNELL INT'L L.J. 281, 300 (1987).

[War crimes] consist of crimes that Jews have known for centuries and acts that have only recently gained recognition as crimes in international law. In one sense, the Nazi Statute addresses a new crime. In another sense, it merely restates the criminality of an ancient crime and provides a forum for its prosecution.

Id. at 301.

41. Nazi Law, *supra* note 25, § 1. The Nazi Law defines "crimes against humanity" as "murder, extermination, enslavement, starvation or deportation and other inhumane acts committed against any civilian population, and persecution on national, racial, religious or political grounds." *Id.* It similarly designates war crimes as "murder, ill-treatment or deportation to forced labour or for any other purpose, of civilian population of or in occupied territory; murder or ill-treatment of prisoners of war or persons on the seas . . . and devastation not justified by military necessity." *Id.* at 309-10. See also Fogelson, *supra* note 29, at 847 (illustrating the Nuremberg Charter's similar definition of war crimes).

42. George R. Parsons, Jr., Comment, *International Law: Jurisdiction Over Extraterritorial Crime: Universality Principle: War Crimes: Crimes Against Humanity: Piracy: Israel's Nazis and Nazi Collaborators (Punishment) Law*, 46 CORNELL L.Q. 326, 334 (1960-61). "The retroactive effect on Israel's law should not invalidate the statute. Since the Nuremberg judgment has generally been accepted as valid, Israel's law should not be challenged for retroactivity." *Id.* at 334 n.62. For a discussion of the International Military Tribunal, see ROBERT K. WOETZEL, *THE NUREMBERG TRIALS IN INTERNATIONAL LAW* (1962).

he had no notice.⁴³ Also, service in furtherance of the Nazi plan to exterminate the Jews of Europe did not violate the laws of Nazi Germany.⁴⁴ This anomaly posed problems for the Allies of World War II because they had to draft a law in order to prosecute individuals for atrocities committed in furtherance of governmental policy.⁴⁵ One may easily dismiss these arguments because “[a]s the degree of consensus in society condemning a particular act increases, the plausibility of any individual’s claim that he lacked fair notice of the act’s criminality decreases.”⁴⁶ A defendant’s claim that he did not know murder was illegal is not a colorable argument.

Defendants prosecuted under the Nazi Law in Israeli trials may also claim that Israel cannot prosecute them because Israel did not exist at the commission of the alleged war crimes.⁴⁷ The Court rejected this argument, stating:

The underlying assumption is that the crimes are offenses against the law of nations or against humanity and that the prosecuting nation is acting for all nations. This being so, Israel or any other nation, regardless of its status in 1942 or 1943, may undertake to vindicate the interest of all nations by seeking to punish the perpetrators of such crimes.⁴⁸

In order to prosecute Nazi war criminals, Israel first had to establish jurisdiction over the criminal act and actor. The five types of criminal jurisdiction recognized by international law consist of territorial jurisdiction, nationality jurisdiction, protective jurisdiction, passive personality jurisdiction, and universality jurisdiction.⁴⁹ “The universality principle grew out of the notion

43. Eric S. Kobrick, *The Ex Post Facto Prohibition and the Exercise of Universal Jurisdiction Over International Crimes*, 87 COLUM. L. REV. 1515, 1529 (1987).

44. Fogelson, *supra* note 29, at 860. “[C]ommentators argue that the [Nuremberg] Tribunal applied ex post facto law because the actions of the Germans were not crimes at the time they were committed, but were only defined as criminal by the victors after the war had ended.” *Id.* This argument is specious because murder has always been a crime.

45. Operation Reinhard was named after SS General Reinhard Heydrich, who presided over the bureaucratic confirmation of the final solution at the Wannsee Conference, before he was killed by two Czech patriots. GILBERT, *supra* note 6, at 363. For a more detailed discussion of Operation Reinhard see *infra* Section IIA.

46. Kobrick, *supra* note 43, at 1529.

47. The State of Israel was established in 1948, three years after the end of the European theater of World War II.

48. *Demjanjuk v. Petrovsky*, 776 F.2d 571, 583 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).

49. Kobrick, *supra* note 43, at 1519 (footnotes omitted).

that perpetrators of certain acts were *hostis humani generis*, enemies of all mankind.”⁵⁰ The universality principle, also called universal jurisdiction, is premised on the notion “that every state has an interest in bringing to justice the perpetrators of particular crimes of international concern.”⁵¹

Universal jurisdiction can be the basis of jurisdiction if the alleged crime is piracy, slave trading, war crimes or genocide, whether or not there is a controlling international agreement regarding the crime.⁵² “[D]ue to universal condemnation of certain acts, the customary law of nations permits any nation to exercise jurisdiction by enacting statutes proscribing those acts and providing for jurisdiction even if that nation bears no connection to the act or actor.”⁵³ Therefore, Israel may justly claim jurisdiction over accused criminals, including Nazis, if the alleged acts are subject to universal jurisdiction. Based on charges of committing Nazi crimes, Israel applied universal jurisdiction over Eichmann and Demjanjuk and prosecuted them for the international community.

b. *Eichmann Trial*

With the release of John Demjanjuk in 1993, Adolf Eichmann, one of history’s most infamous murderers,⁵⁴ remains the only man that Israel has ever punished for Nazi war crimes.⁵⁵ As supervisor of the “final solution” to the so-called “Jewish Question,” Eichmann was the “chief of the Gestapo’s Jewish Section, . . . [and] had primary responsibility over the persecution, deportation, and extermination of hundreds of thousands of Jews and others in Germany and certain occupied territories.”⁵⁶ While Eichmann

50. *Id.* at 1520 (footnotes omitted). “The eighteenth century doctrine of *hostis humani generis* stood for the proposition that ‘certain acts specified as universally reprehensible would make the perpetrator liable to capture and trial wherever he went.’” *Id.*

51. Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 814 (1988).

52. Kobrick, *supra* note 43, at 1522-23.

53. Jennifer J. Berthiaume, Note, *U.S. v. Juda: Fifth Amendment Due Process and Stateless Vessels on the High Seas*, 73 B.U. L. REV. 477, 481 (1993). In 1950, the State of Israel passed the Nazi Law, which defined Nazi crimes and their respective punishments. For the language of the Nazi Law, see *supra* note 41.

54. Even when defeat of the Nazi regime was imminent, “Eichmann spent most of his energies working for the destruction of every last Jew he could still lay his hands on.” GIDEON HAUSNER, *JUSTICE IN JERUSALEM* 266 (1966).

55. BIN-NUN, *supra* note 20, at 116.

56. Randall, *supra* note 51, at 810.

himself may not have personally killed one person during his lifetime, he played a significant role in the torture and murder of millions.⁵⁷

Eichmann escaped immediate justice at the Nuremberg Trials by hiding in Germany after the war.⁵⁸ He then lived anonymously in Argentina for almost ten years.⁵⁹ Many Holocaust survivors searched for Eichmann,⁶⁰ who eventually was found living in Argentina by Nazi hunters.⁶¹ Some of those searching for Eichmann, referred to as Israeli volunteers, took Eichmann to Israel without authorization from the Argentine government.⁶² The Argentine government responded by bringing a complaint in the United Nations Security Council against Israel for violation of its territorial integrity.⁶³ The Security Council answered Argentina's complaint by requiring "Israel to make 'appropriate reparation.'"⁶⁴ Although Israel had a defendant in custody, Israel still faced a jurisdictional problem.

Israel based its jurisdiction over Eichmann on the international legal principles of passive personality, protective, and

57. Hundley, *supra* note 19, at 1.

58. HAUSNER, *supra* note 54, at 265-70. Eichmann hid under an assumed name in a POW camp in the American Zone of post-war Germany. *Id.* at 269. He became nervous as a result of testimony given at the Nuremberg Trials and decided to leave the POW camp. *Id.* at 270. He then went to the Eastern Zone of Germany, under Russian control, where he worked as a chicken farmer for four years. *Id.* While in Germany, he received assistance from organizations of ex-Nazis, which helped him to flee the country.

[Eichmann escaped to a] monastery in Genoa [that] was the meeting place of many escaped Nazis. There a Franciscan monk provided Eichmann with a refugee passport bearing the name of Ricardo Klamant. On July 14, 1950, he obtained an Argentine visa; a month later he landed in Buenos Aires. . . . After a while he felt that the place was remote enough for his family to join him there.

Id. at 271.

59. Eichmann arrived in Argentina in July 1950 and was captured there in May 1960. *Id.* at 271, 275.

60. *Id.* at 272-76. The famous Nazi hunter Simon Wiesenthal was among those looking for Eichmann. *Id.* at 273.

61. *Id.*

62. *Id.* at 275. Later, Israel admitted that those volunteers who had captured Eichmann were actually Israeli Mossad (Secret Service) agents. Elli Wohlgelemer, *Justice, Not Vengeance*, JERUSALEM POST, Jan. 14, 1994, available in LEXIS, News Library, JPOST File.

63. Kobrick, *supra* note 43, at 1538. For an in-depth discussion of the kidnapping and its impact on international law, see LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 269-78 (1979). "Argentina accepted a public apology and did not insist on Eichmann's return, the usual remedy in such cases." *Id.* at 276 (footnote omitted).

64. *Id.*

universality jurisdiction.⁶⁵ Eichmann decided not to contest Israel's jurisdiction when he consented to be tried in Israel.⁶⁶ Israel's trial of Adolf Eichmann directly involved the two most significant events in the twentieth-century for the Jewish people: the establishment of the state of Israel and the Holocaust.⁶⁷

C. *Israel v. Ivan (John) Demjanjuk*

In 1986, almost thirty years after Israel executed Eichmann, Israel had the opportunity to prosecute an alleged Nazi for crimes he was accused of committing against the Jewish people during World War II. This time, in order to remind the world of what had taken place in Europe during the 1940s, and to achieve justice for those who had died in the ghettos and concentration camps, Israel pursued the monster called Ivan the Terrible. "The trial of Demjanjuk was to be the trial by the generation born since the Holocaust."⁶⁸ The trial would help younger Israelis realize the horrors of the Holocaust.

At the beginning of Demjanjuk's trial, the prosecution claimed that "this may be one of the last [World War II war crime] trials where it is possible to bring to the stand witnesses who can say, 'We were there.'"⁶⁹ Those who prosecute Nazis are confronted with the reality that over fifty years have passed since the perpetration of their crimes. This fact creates many problems for prosecutors, such as the collection of evidence, witness identification and the likelihood that most of the suspects are no longer living.⁷⁰ Despite Israel's commitment to prevent persecutors of Jews to go free, Israel is obliged to grant the accused a fair trial. With these pressures in mind, Israel must also show the world that its judicial system is just and fair.

65. Randall, *supra* note 51, at 814.

66. HAUSNER, *supra* note 54, at 275. Eichmann stated, "I realize that it is futile for me to attempt to go on evading justice. I state that I am prepared to travel to Israel to stand trial in that country before a competent court." *Id.*

67. Pnina Lahav, *The Eichmann Trial, the Jewish Question, and the American Jewish Intelligentsia*, 72 B.U. L. REV. 555, 556 (1992).

68. TEICHOLZ, *supra* note 18, at 4.

69. Herzstein, *supra* note 4, at 6 (alteration in original).

70. Based on the passage of time, any culpable Nazi would be in their late sixties, and likely older.

Israel used conventional means, in contrast with the Eichmann case, to bring Demjanjuk into its jurisdiction.⁷¹ Israel charged Demjanjuk with the commission of war crimes, including the murder of Jews during the Nazi reign of terror.⁷² The extradition treaty between Israel and the United States recognizes the crimes of murder and assisting murder as extraditable.⁷³ Israel, based on its extradition treaty with the United States, formally requested that the United States extradite Demjanjuk to stand trial in Israel as Ivan the Terrible of Treblinka.⁷⁴ Israel, though, had to cite its claim of jurisdiction over the crimes allegedly committed by Demjanjuk in order to make a successful extradition claim. Israel argued that “[e]ither war crimes are crimes against humanity and Israel may prosecute the war criminal on behalf of all nations, or the crimes violate Israel’s municipal law, and are so heinous that international law permits Israel to claim jurisdiction on ‘extraordinary grounds.’”⁷⁵ The U.S. court that extradited Demjanjuk held that Israel’s claim of jurisdiction over Demjanjuk conformed with the international law principle of universal jurisdiction.⁷⁶ United States Secretary of State George Schultz authorized Demjanjuk’s extradition on February 27, 1986, and Demjanjuk arrived in Israel the next day.⁷⁷

1. Prosecutor’s Case

Israeli prosecutors had the task of proving, beyond a reasonable doubt, that John Demjanjuk was Ivan the Terrible of

71. “Israel had applied for Demjanjuk’s extradition from the United States, which upheld its treaty obligations and delivered him to Israeli authorities.” TEICHOLZ, *supra* note 18, at 4.

72. *Id.* at 98. Demjanjuk was accused of being Ivan the Terrible of Treblinka. *Id.*

73. Extradition Treaty, Dec. 10, 1962, U.S.-Isr., art. II, 14 U.S.T. 1707 [hereinafter Extradition Treaty].

74. *In re* Extradition of Demjanjuk, 612 F. Supp. 544, 544 (N.D. Ohio 1985).

75. *Dawidowicz*, *supra* note 7, at 304.

76. *In re* Extradition of Demjanjuk, 612 F. Supp. at 555. The court also stated that jurisdiction was proper under Israeli municipal law. *Id.*

77. TEICHOLZ, *supra* note 18, at 77. The United States cannot criminally prosecute Nazi criminals. Jeffrey N. Mausner, *Apprehending and Prosecuting Nazi War Criminals in the United States*, 15 NOVA L. REV. 747, 761 (1991). “Because the Nazi Crimes did not take place in the United States, the United States does not have jurisdiction over the crimes.” *Id.* Nazi criminals in the United States have protection from all legal proceedings except denaturalization, deportation or extradition. *Id.* For an in depth discussion of Demjanjuk’s extradition from the United States, see Cheryl Karz, Comment, *Injustice Revisited: Did Ivan the Terrible Get Away Again?*, 16 LOY. L.A. INT’L & COMP. L.J. 953 (1994).

Treblinka. Demjanjuk claimed that he was a victim of the war. He asserted that as a Soviet soldier he had been captured by the Nazis and imprisoned in numerous POW camps.⁷⁸ The prosecution attempted to prove its case through the use of expert testimony, witness identification and physical evidence.

Demjanjuk asserted that he was a prisoner in the Chelm camp in Poland for a period of eighteen months beginning in May 1942.⁷⁹ The prosecution had to disprove Demjanjuk's contention that he had been a prisoner at Chelm for eighteen months because the Treblinka death camp "operated from July 1942 until August-September of 1943."⁸⁰ If Demjanjuk could prove that he was a POW at Chelm for eighteen months, then it would be impossible for him to have been a guard at Treblinka. Prosecutors contested Demjanjuk's claims that he was at Chelm for such a long period considering the transient nature of the camp.⁸¹

The prosecution produced five witnesses who identified Demjanjuk as Ivan the Terrible.⁸² Witness "testimony came from Treblinka survivors who said they remembered through the years Mr. Demjanjuk zestfully whipping and slashing terrified, naked prisoners as they went to their deaths in the gas chambers."⁸³ The first witness to claim that Demjanjuk was Ivan the Terrible was Eugene Turovsky.⁸⁴ Turovsky died before he could testify in Israel, but the Israeli Supreme Court admitted his statements under Section 15 of the Nazi Law.⁸⁵ Turovsky, while attempting

78. See *infra* notes 98, 100, and 101 and accompanying text for a discussion of Demjanjuk's alibi.

79. *Israel Tries to Discredit an Alibi of Demjanjuk*, N.Y. TIMES, July 30, 1987, at A3. While testifying in the United States, Demjanjuk contended that he had been captured by the Nazis during a major battle at Kerch in the Crimea. *United States v. Demjanjuk*, 518 F. Supp. 1362, 1364 (N.D. Ohio 1981), *aff'd*, *United States v. Demjanjuk*, 680 F.2d 32 (6th Cir. 1982), *cert. denied*, *Demjanjuk v. United States*, 459 U.S. 1036 (1982). The battle took place in May 1942, and an estimated 125,000 Russian soldiers were taken prisoner by the Nazis. *Id.*

80. *United States v. Demjanjuk*, 518 F. Supp. at 1369.

81. See *infra* note 126 for a discussion of the Supreme Court's dismissal of Demjanjuk's claims regarding his extended service at the Chelm camp.

82. Thomas L. Friedman, *Demjanjuk, on the Stand, Denies Guilt*, N.Y. TIMES, July 28, 1987, at A3.

83. John Kifner, *Demjanjuk Given the Death Sentence for Nazi Killings*, N.Y. TIMES, Apr. 25, 1988, at A1.

84. TEICHOLZ, *supra* note 18, at 28-29.

85. *Demjanjuk v. Israel*, Crim. App. No. 347/88 at 8 (Sup. Ct. July 29, 1993).

to identify a different *Wachmann*, viewed a photo spread in the United States and identified Demjanjuk as Ivan the Terrible.⁸⁶

The most significant piece of evidence in the Demjanjuk trial was the Trawniki identification card ("Trawniki ID"). The Trawniki ID "is an identification card clearly stating that 'Iwan Demjanjuk is employed as a guard in the Guard Units (Wachmannschaften) of the Reich Leader of the SS for the Establishment of SS and Police Headquarters in the New Eastern Territory.' . . . 'HEADQUARTERS LUBLIN, TRAINING CAMP TRAWNIKI, I.D. No. 1393.'"⁸⁷ "The reverse side of the Trawniki card . . . contains a photograph, allegedly of the defendant, his name, family history, personal characteristics, . . . army assignments, a checklist of issued equipment, the signature of the issuing officer, Teufel, and the alleged signature of the defendant, indicating receipt of the enumerated equipment."⁸⁸ Alan Ryan, Jr., the former head of the Office of Special Investigations,⁸⁹ called the Trawniki ID "the most analyzed document of the 20th century."⁹⁰ The authenticity of the Trawniki ID was significant in that it possibly placed Demjanjuk not only at Trawniki,⁹¹ a training site for Ukrainian *Wachmann*, but also at Sobibor,⁹² a Nazi death camp in Poland.

The prosecution had to account for inconsistencies and omissions contained on the Trawniki ID. Dr. Wolfgang Scheffler, a German professor and an expert on Operation Reinhard, testified for the prosecution that the identification documents "were filled in by *Volksdeutsche* (ethnic Germans) whose proficiency in spelling and German were [sic] not great. [And that t]he docu-

86. TEICHOLZ, *supra* note 18, at 28-29.

87. *United States v. Demjanjuk*, 518 F. Supp. 1362, 1366 (N.D. Ohio 1987), *aff'd*, *United States v. Demjanjuk*, 680 F.2d 32 (6th Cir. 1982), *cert. denied*, *Demjanjuk v. United States*, 459 U.S. 1036 (1982).

88. *Id.* at 1366-67.

89. The Office of Special Investigations (OSI), formed in 1979 with the sole purpose of locating, investigating and instituting proceedings against Nazi war criminals in the United States falls under the Criminal Division of the United States Justice Department. Mausner, *supra* note 77, at 751 n.23.

90. *Demjanjuk v. Petrovsky*, No. 85-3435, Report of the Special Master at 77 (6th Cir. June 30, 1993) (on file with *Loyola of Los Angeles International and Comparative Law Journal*). The Sixth Circuit Court of Appeals appointed Special Master Thomas A. Wiseman, Jr. to investigate alleged wrongdoing by the OSI in the denaturalization and extradition of John Demjanjuk. *Id.*

91. TEICHOLZ, *supra* note 18, at 167.

92. *Id.* at 168.

ments were all the more subject to errors . . . because they were printed locally (as opposed to Lublin police documents, which were printed in the Reich)."⁹³ Scheffler stated that a person would have to possess supernatural abilities to forge Trawniki documents.⁹⁴ He would have "to create the sort of situation where a variety of aspects must be borne in mind. And he would have to be familiar with each and every one in order to do a good forgery."⁹⁵ Dr. Scheffler concluded that in his twenty to twenty-five years of working with Nazi evidence supplied by eastern-bloc countries, he had not encountered one incident of forgery.⁹⁶

2. Demjanjuk's Defense

Demjanjuk maintained that he did not serve in any death camps.⁹⁷ He asserted that he was a Nazi prisoner and not a Nazi assistant.⁹⁸ Demjanjuk's defense was that he could not have been at Treblinka because he was a prisoner at Chelm and later a soldier in the Vlasov Army, and that the Trawniki I.D. was a Soviet forgery.⁹⁹

Demjanjuk claimed that he remained in Chelm for a period of eighteen months.¹⁰⁰ After spending such time at Chelm, Demjanjuk testified that he was then taken to Graz, Austria in late

93. *Id.* at 167-68.

94. *Id.* at 169-70.

95. *Id.* at 170.

96. *Id.*

97. *Id.* at 212. Demjanjuk continues to deny that he was a Nazi guard of any kind. Mimi Hall, *The Next Struggle for Demjanjuk: Citizenship*, USA TODAY, Nov. 18, 1993, at 3A.

98. *Israel v. Demjanjuk*, Crim. Case (Jerusalem) No. 373/86 (Apr. 18, 1988), *rev'd* Crim App. No. 347/88 (Sup. Ct. July 29, 1993), *translated in* THE DEMJANJUK TRIAL, *supra* note 3, at 332. "The Defendant claims that at the time that 'Ivan the Terrible' committed his horrible crimes in Treblinka, he, the Defendant, was a prisoner-of-war of the Germans in Poland, in the prisoner-of-war camp called Chelm." *Id.*

99. The defense also argued that twenty-nine people who had been at the Treblinka camp had been unable to identify him. Friedman, *supra* note 82, at A3.

100. TEICHOLZ, *supra* note 18, at 227-28. While contesting efforts to strip him of his U.S. citizenship, Demjanjuk testified that he "was in Rovno during 1942-1943 and in Chelm until 1943 or 1944 . . . [this is questionable because] the Germans probably would not have maintained a POW camp at Chelm, Poland, any later than January 1944, since the Russian front was quickly moving westward at this time." *United States v. Demjanjuk*, 518 F. Supp. 1362, 1364 (N.D. Ohio 1981), *aff'd*, *United States v. Demjanjuk*, 680 F.2d 32 (6th Cir. 1982), *cert. denied*, *Demjanjuk v. United States*, 459 U.S. 1036 (1982). Demjanjuk argued that if he were in Chelm for such a long period of time, he could not have been at Treblinka and thus could not be Ivan the Terrible of Treblinka.

1943.¹⁰¹ While in Graz, he was recruited into the Vlasov army.¹⁰² Demjanjuk also explained that while he was a member of the Vlasov army, the Germans tested his blood and tattooed his blood type under his arm.¹⁰³ Demjanjuk also contended that Ivan the Terrible was actually killed in an inmates' uprising in 1943.¹⁰⁴

Demjanjuk's defense went to great lengths to prove that the Trawniki ID was a forgery.¹⁰⁵ Demjanjuk argued that Soviet Intelligence "had fabricated the identity card in order to incriminate a Ukrainian expatriate."¹⁰⁶ A defense documents expert testified that Demjanjuk's signature on the Trawniki ID was "unlikely to be authentic."¹⁰⁷ Rudolf Reiss, an SS payroll officer at Trawniki from December 1941 to August 1943, testified that he had never seen a document such as the one that the prosecution claimed was Demjanjuk's Trawniki ID.¹⁰⁸

Demjanjuk argued that the Trawniki ID contained no reference to Demjanjuk's alleged posting at Treblinka.¹⁰⁹ Also, Demjanjuk's height is listed as being 175cm (5'8¼"), whereas Demjanjuk estimated his height in 1941 to be 185cm (6'1"), and that it was currently 180cm (5'10¼").¹¹⁰ These inconsistencies

101. Thomas L. Friedman, *Demjanjuk, on the Stand, Denies Guilt*, N.Y. TIMES, July 28, 1987, at A3.

102. *Israeli Challenges Demjanjuk on Dates and Places*, N.Y. TIMES, Jul. 29, 1987, at A10. "The unit referred to was commanded by Andrei A. Vlasov, a lieutenant general in the Soviet Army taken prisoner in 1942. He was anti-Stalin and agreed to fight against Bolshevism." *Id.*

103. *Id.*

104. Francis X. Clines, *Judge Bars Tactic in War Crime Case*, N.Y. TIMES, Feb. 20, 1987, at A12.

105. *In War-Crimes Trial, Horror and Humdrum*, N.Y. TIMES, Dec. 13, 1987, § 1, at 8 [hereinafter *Horror and Humdrum*]. The trial went from a discussion of Nazi war crimes into "a detailed study of signatures, ink, paper and even paper clips." *Id.*

106. *Id.*

107. *Id.*

108. *Israel v. Demjanjuk*, Crim. Case (Jerusalem) No. 373/86 (Apr. 18, 1988), *rev'd*, Crim. App. No. 347/88 (Sup. Ct. July 29, 1993), *translated in* THE DEMJANJUK TRIAL, *supra* note 3, at 268.

109. TEICHOLZ, *supra* note 18, at 168. Nazi documents expert, Dr. Wolfgang Scheffler, testified that "[t]he postings were not always faithfully entered." *Id.* at 169. "The prosecution produced other Trawniki personnel cards and paybooks of persons who were known to have been at Treblinka and other camps, but whose Treblinka posting was not listed." *Id.*

110. *Id.* at 169. The prosecution "introduced two documents belonging to defense witness Rudolf Reiss, one of which listed his [Reiss'] height at 1m 70cm (5'6 1/3"), the other as 1m 90cm (6'2")—a greater discrepancy even than that on the Trawniki card." *Id.*

hurt prosecutors' efforts to prove the authenticity of the Trawniki ID in light of "the German reputation for meticulous record keeping."¹¹¹

"The only Israeli witness to appear on Mr. Demjanjuk's behalf was Avraham Shifrin, a self-declared expert on the K.G.B. who said most documents coming from the Soviet Union were forged."¹¹² Demjanjuk argued that "the document itself is a Soviet forgery and part of a KGB security police plot to frame him and embarrass the Ukrainian exile community in the United States."¹¹³ Demjanjuk claimed that he was a victim of mistaken identity and Soviet attempts to frame him.¹¹⁴

3. District Court Convicts Demjanjuk as Ivan the Terrible

Demjanjuk's trial "lasted 15 months, filled 10,000 pages of court documents and captured the attention of the Israeli public."¹¹⁵ Judge Zvi Tal sentenced Demjanjuk to "hang for torturing and killing thousands of Jews at the Treblinka death camp in Poland."¹¹⁶ The judge noted that "[t]he crimes he [Demjanjuk] committed cannot be forgiven either in the letter of the law or in the hearts of men."¹¹⁷

The district court concluded that the Nazi army captured Demjanjuk and placed him in prisoner-of-war camps and then transferred him to Trawniki.¹¹⁸ Trawniki is known infamously as the site where Nazis trained Russian POWs to assist in the implementation of Operation Reinhard.¹¹⁹ After training at

111. *Id.* at 168. See *supra* text accompanying note 93 for a possible explanation of the inconsistencies contained on the Trawniki ID.

112. *Horror and Humdrum*, *supra* note 105.

113. Galina Vromen, *Israel has Soviet Evidence Against Accused Nazi*, REUTERS, Mar. 5, 1987, available in LEXIS, News Library, ARCNEWS File.

114. *Nazi Trial Adjourns for Day*, UPI, Mar. 30, 1987, available in LEXIS, News Library, ARCNEWS File.

115. Roni C. Rabin, *Israeli Court Convicts Demjanjuk of Atrocities at Treblinka Camp*, N.Y. TIMES, Apr. 19, 1988, at A1.

116. Kifner, *supra* note 83. It is significant to note, in order to rebut potential double jeopardy claims that Demjanjuk was convicted for the killing of Jews in the Treblinka camp, not for the murder of the Jews at any other camps. *Id.* For a discussion of double jeopardy, see *infra* notes 185-91 and accompanying text.

117. Kifner, *supra* note 83.

118. *Israel v. Demjanjuk*, Crim. Case (Jerusalem) No. 373/86 (Apr. 18, 1988), *rev'd*, Crim. App. No. 347/88 (Sup. Ct. July 29, 1993), translated in THE DEMJANJUK TRIAL, *supra* note 3, at 384.

119. *United States v. Demjanjuk*, 518 F. Supp. at 1364.

Trawniki, "guards were transferred to the concentration camps of Belzec, Sobibor, and Treblinka where they performed most of the duties that were necessary in the extermination camps, including guarding the camp and supervising the Jewish victims as they were being herded to the gas chambers."¹²⁰ Trawniki was "the mother unit of the auxiliary forces and amongst these the Ukrainian units of guards which served at the Extermination Camps at Belsec, Sobibor and Treblinka. One hundred and twenty of the Trawniki conscripts were sent to each Extermination Camp for permanent service in various positions."¹²¹

The district court in Israel stated that there could not be a presumption of forgery based upon an assumption that the Soviet K.G.B., the holder of the card for many years, engaged in forgery.¹²² The court further stated that "no evidence of forgery whatsoever has been produced."¹²³ In order to rebut Demjanjuk's claim that Ivan the Terrible had been killed in a prisoner uprising, prosecutors called Dr. Yitzhak Arad.¹²⁴ The court seemingly accepted the testimony of Dr. Arad, "a historian and director of the Yad Vashem Memorial in Israel, who said his research showed this to be 'wishful thinking' by survivors."¹²⁵

When Demjanjuk was first deposed in the United States concerning his whereabouts during World War II, he recalled that he had been at two POW camps, Rovno and another camp, the name of which he could not remember.¹²⁶ While testifying in Israel, Demjanjuk claimed that his experiences in Chelm "were atrocities that I want to forget, but one can't forget them."¹²⁷ It is curious that Demjanjuk "recalled the place where he had been

120. *Id.* at 1365.

121. Demjanjuk v. Israel, Crim. App. No. 347/88 at 24. Note the difference in spelling (Belzec/Belsec), which is a result of different translations of German to English. Differences can also be seen in the English translations of proper names and places, see, e.g., Operation Reinhard and Action Reinhard.

122. Israel v. Demjanjuk, Crim. Case (Jerusalem) No. 373/86, *translated in* THE DEMJANJUK TRIAL, *supra* note 3, at 281.

123. *Id.*

124. Clines, *supra* note 104.

125. *Id.*

126. TEICHOLZ, *supra* note 18, at 227. Demjanjuk claimed that he was a prisoner in the Chelm Camp for a period of eighteen months. *Id.* at 288. The Israeli Trial Court found this claim to be "totally unacceptable and implausible, in view of the transient nature of the camp." *Id.* Further, Demjanjuk asserted that he was in Rovno for only two or three weeks. *Id.* at 224.

127. *Id.* at 227.

for a number of weeks, but not the one where he had suffered for a year-and-a-half under conditions that were, by his own account, impossible to forget."¹²⁸

In response to Rudolf Reiss' testimony, the court stated "that it was not the truth that was before his eyes, but [rather] his desire to assist the Defendant."¹²⁹ Demjanjuk's expert witness, who testified regarding the possible forgery of the Trawniki ID, was pronounced judicially insignificant.¹³⁰ "The theoretical possibility that the forger is so talented that the experts will not be able to discover the forgery, is the type of argument which cannot create reasonable doubt, unless there exists external evidence . . . which indicates forgery."¹³¹ The Israeli witness, Avraham Shifrin, who had testified that most Soviet supplied documents were forgeries, was wholly discredited during cross-examination. Under cross-examination, prosecutors elicited testimony that Shifrin had previously stated that "the K.G.B. had used witchcraft to kill an American legislator and to turn Richard M. Nixon into a Communist sympathizer."¹³²

In response to Demjanjuk's alibi that he was in Chelm for eighteen months, the district court said that except "for the Defendant's own testimony, the Defense brought no evidence whatsoever for this claim."¹³³ "The entire alibi," the Court concluded, "rest[ed] on the credibility of the Defendant, and on whether he succeeded in creating reasonable doubt as to his being, indeed, at Chelm throughout the relevant period."¹³⁴ The district court held that Demjanjuk's claim that he was at Chelm for such a long period was "a lie" and that "[t]he Chelm version is simply unacceptable to us and is not credible. It is very poor. It is not

128. *Id.* Demjanjuk also has an inconsistent memory regarding his activities while in the Chelm camp. *Id.* at 224. While in the United States, Demjanjuk remembered that he had built barracks for the Chelm camp. *Id.* at 225. In Israel, Demjanjuk recalled that he had dug peat for a period of nine to ten months, sometimes walking two-and-one-half kilometers to do so. *Id.*

129. *Id.*

130. *Israel v. Demjanjuk*, Crim. Case (Jerusalem) No. 373/86 (Apr. 18, 1988), *rev'd*, Crim. App. No. 347/88 (Sup. Ct. July 29, 1993), *translated in* THE DEMJANJUK TRIAL, *supra* note 3, at 283.

131. *Id.*

132. *Horror and Humdrum*, *supra* note 105, § 1, at 8.

133. *Israel v. Demjanjuk*, Crim. Case (Jerusalem) No. 373/86, *translated in* THE DEMJANJUK TRIAL, *supra* note 3, at 333.

134. *Id.* at 333-34.

substantiated by anything, and a few details that he brought forth in order to bring it to life have been proved false."¹³⁵ The district court held that evidence tending to exculpate Demjanjuk was unreliable.¹³⁶ The district court employed powerful language in dismissing the Chelm claim that comprised much of Demjanjuk's alibi.¹³⁷ "The Defendant's lies and incriminating behavior strengthen and reinforce the Prosecution's evidence, according to which the Defendant was in Trawniki, Treblinka and Sobibor."¹³⁸ In light of Demjanjuk's admission that he had a blood group tattoo¹³⁹ and the gaps in his alibi covering the period of World War II, Demjanjuk's claims that he was only a Nazi prisoner should not be believed.¹⁴⁰

135. TEICHOLZ, *supra* note 18, at 288.

136. *Id.* at 244-45. Defense expert Edna Robertson testified at the trial that the Trawniki ID, the most significant piece of evidence presented at trial, was not authentic. *Id.* at 240. The prosecution conducted a particularly harsh cross-examination, completely discrediting Robertson. *Id.* at 244. The night of the cross-examination, Mrs. Robertson was found in her hotel room passed out after she had "swallowed more than fifty pills, mostly painkillers and tranquilizers, and had slit her wrists." *Id.* at 245. Her doctors reported that she told them that, "[s]he didn't want to live." *Id.* She later stated that testifying at the Demjanjuk trial had been a nightmare. *Id.*

137. Israel v. Demjanjuk, Crim. Case (Jerusalem) No. 373/86, *translated in* THE DEMJANJUK TRIAL *supra* note 3, at 378. "The Defendant's lies and incriminating behavior strengthen and reinforce the Prosecution's evidence, according to which the Defendant was in Trawniki, Treblinka and Sobibor." *Id.*

138. *Id.*

139. *Id.* at 372. "There is no dispute that the Defendant's blood type was tattooed on the inside of his arm. The Defendant himself tells about it." *Id.* The United States district court that denaturalized Demjanjuk noted that the "defendant's admission that he had a blood group tattoo on the inside of his left arm raises serious questions. Only persons affiliated with the German SS were given such tattoos and it is unlikely that ordinary Russian POWs would be so marked." United States v. Demjanjuk, 518 F. Supp. 1362, 1377 (N.D. Ohio 1981), *aff'd*, United States v. Demjanjuk, 680 F.2d 32 (6th Cir. 1982), *cert. denied*, Demjanjuk v. United States, 459 U.S. 1036 (1982). Further, "evidence of the blood group tattoo raises a final, serious doubt about the defendant's testimony concerning his whereabouts during the war." *Id.* at 1378. The Israeli district court called the removal of the tattoo "a lengthy and painful process [that] has no reasonable explanation other than disguising the clear evidence connecting the Defendant with the S.S. [Shutzstaffeln] forces." Israel v. Demjanjuk, Crim. Case (Jerusalem) No. 373/86, *translated in* THE DEMJANJUK TRIAL, *supra* note 3, at 373.

140. Statements made by Ignat Tarantevich Danylchenko, a convicted *Wachmann*, place Demjanjuk at Sobibor, Pilau and Flossenburg, not at Treblinka. TEICHOLZ, *supra* note 18, at 280. The prosecution claimed that *Wachmann* were shuttled between the different camps depending upon need; and since Demjanjuk was a skilled driver, he was needed at Treblinka while Danylchenko was not. *Id.* Irrespective of whether or not Demjanjuk served at Treblinka, Danylchenko stated that he "remembered him [Demjanjuk] as an excellent *Wachmann*."

4. Automatic Appeal to the Israeli Supreme Court

a. Review of District Court Evidence

Appeal to the Supreme Court in capital cases is automatic in Israel.¹⁴¹ The Supreme Court reviewed the most significant evidence that the district court had heard as well as new evidence proffered by both sides.¹⁴² The Court cited Eugene Turovsky's witness identification of Demjanjuk as "significant" and gave it "considerable weight" based on the fact that "he was the first person who, of his own initiative, mentioned that the appellant was Ivan the Terrible."¹⁴³ The Court acknowledged that a considerable amount of time had passed since the witness had seen the person whom they identified as Ivan the Terrible, but that the cumulative weight of all identifications, when added to all the pieces of evidence, was legally and practically significant.¹⁴⁴

b. New Evidence Considered by the Supreme Court

Demjanjuk submitted statements to the Israeli Supreme Court made by various *Wachmanner*, which asserted that someone else was Ivan the Terrible of Treblinka.¹⁴⁵ Demjanjuk claimed that the real "Ivan the Terrible" was a man named Ivan Marchenko.¹⁴⁶ Demjanjuk relied, in part, on evidence that the

It is reasonable to question Demjanjuk's claim regarding his whereabouts during World War II because of the inconsistencies in his statements, the blood group tattoo, its removal, and the Trawniki ID. For a discussion of the Trawniki ID, see *supra* notes 87-96 and accompanying text.

141. *Demjanjuk Sentenced to Hang as Israelis Applaud and Weep*, L.A. TIMES, Apr. 25, 1988, at 2.

142. *Demjanjuk v. Israel*, Crim. App. No. 347/88 at 40 (Sup. Ct. July 29, 1993).

143. *Id.* at 8. Turovsky died before he could testify in Israel. His testimony was accepted, although he could not be cross-examined, under § 15 of the Nazi Law, which allows the Court to "deviate from the rules of evidence if it is satisfied that this will promote the ascertainment of the truth and the just handling of the case." *Id.*

144. *Id.* at 10.

145. *Id.* at 10-11. The testimony of the former guards is referred to collectively as the Fedorenko Protocols. See *infra* note 152 for a discussion of the Fedorenko Protocols.

146. Anton La Guardia, *Demjanjuk on Appeal Delay Hunger Strike*, THE DAILY TELEGRAPH (London), Mar. 1, 1993, at 11. When Demjanjuk filed for his visa to come to the United States, he stated that his mother's maiden name was Olga Martschenko. TEICHOLZ, *supra* note 18, at 46. Demjanjuk submitted evidence as to his mother's true maiden name, but the Supreme Court noted that "the question is not what was her true name but why did the appellant record that her name was Marchenko." *Demjanjuk v. Israel*, Crim. App. No. 347/88 at 11 (Sup. Ct. July 29, 1993) (emphasis added). In addition,

television show *60 Minutes* had uncovered.¹⁴⁷ *60 Minutes* found a woman, Maria Dudek, who claimed that she knew "Ivan the Terrible" well, and that his name was Ivan Marchenko.¹⁴⁸ Maria Dudek "refused to come to Israel or give a signed statement."¹⁴⁹ Prosecutors did not object to the Court's consideration of Mrs. Dudek's statements regarding Marchenko so long as the Court looked at a sworn statement given to Polish authorities by Kazimierz Dudek, Maria's husband.¹⁵⁰ In his statement, Mr. Dudek "positively identified" Demjanjuk's picture in a photo line-up and stated that the man in the picture was "Ivan the Terrible," Ivan Marchenko, as he knew him.¹⁵¹

The Supreme Court looked at statements referred to as the Fedorenko Protocols.¹⁵² The Fedorenko Protocols consisted of statements made by *Wachmanner*, who were questioned after World War II by Soviet authorities concerning their involvement in the persecution of civilians.¹⁵³ The Court did not have the

on that same visa application, Demjanjuk claimed he was a farmer in Sobibor during part of the Nazi regime. *United States v. Demjanjuk*, 518 F. Supp. 1362, 1376 n. 31 (N.D. Ohio 1981), *aff'd*, *United States v. Demjanjuk*, 680 F.2d 32 (6th Cir. 1982), *cert. denied*, *Demjanjuk v. United States*, 459 U.S. 1036 (1982). This claim is false and, in light of allegations that Demjanjuk served in the Sobibor concentration camp, raises more suspicions regarding Demjanjuk's previous use of the Marchenko name. Therefore, Demjanjuk's claims that the true Ivan is someone named Ivan Marchenko may be more inculpatory than exculpatory.

147. TEICHOLZ, *supra* note 18, at 305.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 306.

152. The Fedorenko Protocols contain

statements received from the former Soviet Union including the statements of two former Treblinka guards, Malagon and Leleko, who discussed the presence of a gas chamber motorist named Marchenko. Both the Leleko and Malagon statements are by Treblinka guards who demonstrate great familiarity with the operations and the operators of the gas chambers of Treblinka. They both name a man other than the accused as the notoriously cruel "Ivan the Terrible" who ran the motors of the gas chambers.

Demjanjuk v. Petrovsky, 10 F.3d 338, 342 (6th Cir. 1993) *reh'g denied*, 1994 U.S. App. LEXIS 3678 (6th Cir. 1994), *cert. denied*, 1994 U.S. LEXIS 6950.

In fact, neither of the two Treblinka guards questioned during the case of Fedor Fedorenko, another Nazi guard, names anyone other than Demjanjuk as being Ivan the Terrible; they don't mention the name Ivan the Terrible at all. One of the two, Nikolay Malagon, reported that a guard named Ivan Demyanyuk or Demedyuk became a gas chamber operator, which the [U.S.] Justice Department calls a 'highly inculpatory fact' to which the court made no reference.

Seth Lipsky, *Briefs Highlight Errors By Judges in 'Ivan' Case*, FORWARD, Jan. 21, 1994.

153. *Id.*

benefit of knowing who had possession of the statements before they were turned over to the Court. Although the Fedorenko Protocols raised many questions, the Court could neither question nor hear cross-examination from those who made the statements.¹⁵⁴ The Court was also unable to question the methods used to obtain the statements or question those who took the statements concerning the declarants' condition.¹⁵⁵ The Court observed that "the assessment of the authenticity and reliability of these written statements is, therefore, difficult."¹⁵⁶ The Supreme Court concluded that "[w]e do not know how these statements came into the world and who gave birth to them; but we admitted them by the most lenient application of the law and procedure."¹⁵⁷ The Supreme Court found that reasonable doubt existed regarding whether this Nazi death camp guard, Demjanjuk, was the Nazi death camp guard known as Ivan the Terrible.¹⁵⁸ The Supreme Court concluded its *acquittal* decision of Demjanjuk by stating that "[t]he matter is closed—but not complete. The complete truth is not the prerogative of the human judge."¹⁵⁹

5. The Israeli Attorney General Decides Not to Retry Demjanjuk for Other Crimes

The Attorney General decided not to retry Demjanjuk for the following reasons: (1) Demjanjuk's trial had already lasted too long, (2) there was a problem with Demjanjuk's extradition, (3) there was insufficient evidence to convict Demjanjuk on other charges and (4) Demjanjuk could make a successful double jeopardy claim.¹⁶⁰ The Attorney General is the only official with the discretion to bring charges under the Nazi Law,¹⁶¹ however,

154. Demjanjuk v. Israel, Crim. App. No. 347/88 at 12 (Sup. Ct. July 29, 1993).

155. *Id.*

156. *Id.*

157. *Id.* at 41.

158. Irwin Cotler, president of InterAmicus, a Canadian human rights group, stresses that if the Demjanjuk verdict was "actually read, [people would see] that Demjanjuk had been released due to procedural problems unique to this case" and not for any lack of guilt. Evelyn Gordon, *Petitions to Retry Demjanjuk Rejected*, Jerusalem Post, Aug. 19, 1993, available in LEXIS, News Library, JPOST File.

159. Demjanjuk v. Israel, Crim. App. No. 347/88 at 41 (Sup. Ct. July 24, 1993).

160. Gordon, *supra* note 158.

161. See *supra* note 25 regarding the Attorney General's authority to bring charges under the Nazi Law.

private citizens can contest this discretionary decision.¹⁶² A successful claimant must argue that the discretionary decision was "unreasonable in the extreme."¹⁶³

III. FAILURE OF THE ISRAELI CRIMINAL JUSTICE SYSTEM

A. Supreme Court's Decision Not to Convict

The Supreme Court should have convicted Demjanjuk as a guard at Sobibor. The Supreme Court had substantial evidence to convict Demjanjuk for the crime of being a *Wachmann* at Trawniki, Sobibor, or elsewhere,¹⁶⁴ and it had the authority, under section 216 of Criminal Procedure Law 5742-1982, to do so.¹⁶⁵ The Court refused to exercise its authority to convict Demjanjuk on the charge that he was a death camp guard in the Trawniki unit because Demjanjuk had not been given the opportunity to defend himself directly on those charges.¹⁶⁶ The Court noted that it "must exercise extreme caution and that in the event that there is a shadow of a suspicion that the accused has been deprived of . . . [the] possibility of defending himself properly against a new charge . . . [then] the Court will refuse to exercise its

162. See generally Evelyn Gordon, *Shamgar Delays Demjanjuk's Release Again Gives Petitioners 15 Days to Request Second Hearing*, JERUSALEM POST, Aug. 22, 1993, available in LEXIS, NEWS Library, JPOST File.

163. *Id.*

164. *Demjanjuk v. Israel*, Crim. App. No. 347/88 at 20 (Sup. Ct. July 29, 1993). The Supreme Court held that the evidence regarding Demjanjuk's service

as a *Wachmann* of the S.S. in the Trawniki unit was not refuted by the statements of the *Wachmann* which were brought from Russia; quite the contrary, the statements of Danilchenko dated 1949 supported these pieces of evidence even more, since he mentions his service together with the appellant as a member of the Trawniki unit.

Id.

165. *Id.* at 36. Upon first glance, it may appear absurd that people attempted to try Demjanjuk as a different Nazi death camp guard after the Supreme Court found that reasonable doubt existed as to Demjanjuk's identification as Ivan the Terrible of Treblinka. It appears to be too convenient and coincidental for the Israelis to assert that Demjanjuk might be another death camp guard. One may be more willing to accept that Demjanjuk, at the very least, was a former death camp guard, if it was understood that before any suspicion existed that Demjanjuk was Ivan the Terrible, that the United States Immigration and Naturalization Service "received [in 1975] a list of possible Ukrainian Nazi collaborators at large in the U.S. [sic] [and] Demjanjuk's name was among them." TEICHOLZ, *supra* note 18, at 26. Israel only pursued Demjanjuk as Ivan the Terrible after someone identified his picture that had been placed in a photo lineup intended to identify Fedor Fedorenko, a suspected Nazi living in the United States. *Id.* at 28-29.

166. *Id.* at 37.

authority.”¹⁶⁷ In overturning the conviction of John Demjanjuk as Ivan the Terrible, “the Supreme Court did not convict him for Sobibor because he had not had a proper chance to defend himself [on those charges].”¹⁶⁸

B. Attorney General’s Decision Not to Retry

Yosef Harish, the Israeli Attorney General, based his decision not to charge Demjanjuk as a death-camp guard other than Ivan the Terrible on four factors. The Attorney General believed that a new trial would carry high emotional and financial costs and would not necessarily result in a conviction.¹⁶⁹ Harish considered that seven years had passed since the beginning of the Israeli portion of Demjanjuk’s trial; that Demjanjuk might claim that another trial would violate the terms of his extradition from the United States; that the evidence might be insufficient to convict him; and that Demjanjuk might make a “double jeopardy [claim], since the Supreme Court had considered convicting him for offenses committed at Sobibor and Trawniki during his successful appeal.”¹⁷⁰ The Attorney General used his discretion when he decided not to try Demjanjuk on charges of being a Nazi death camp guard other than Ivan the Terrible.¹⁷¹ The decision not to retry Demjanjuk, and the basis for that decision, was significant because the Supreme Court would not grant petitions to retry Demjanjuk unless it found the Attorney General’s decision to be “unreasonable in the extreme.”¹⁷²

C. Supreme Court’s Decision Not to Overturn the Attorney General

1. Demjanjuk Caused Most of the Trial Delays

Attorney General Harish argued that it was unreasonable to continue to prosecute Demjanjuk for crimes committed at camps

167. *Id.*

168. Evelyn Gordon, *Wiesenthal Center Seeks Another Hearing on Demjanjuk Petition*, JERUSALEM POST, Sept. 2, 1993, available in LEXIS, News Library, JPOST File.

169. Gordon, *supra* note 158.

170. *Id.*

171. “The prosecution for an offense under this Law may only be instituted by the Attorney-General or his representative.” Nazi Law, *supra* note 25, § 14.

172. Cotler, *supra* note 28. The standard of “unreasonable in the extreme” is a very high standard.

other than Treblinka after seven years of legal proceedings on the Ivan the Terrible charges.¹⁷³ The Supreme Court stated that it made no "difference that the trial was drawn out almost entirely because of numerous applications for postponement by the defense counsel We have, therefore, decided not to continue with proceedings regarding the alternative indictments."¹⁷⁴ The Court, therefore, did not consider convicting Demjanjuk on other charges and, thus, did not consider the doctrine of specialty.

2. Doctrine of Specialty

The Attorney General cited the doctrine of specialty as part of the reason why he would not charge Demjanjuk for other wartime atrocities. Although the Supreme Court did not address the doctrine, it must be considered to determine if Israel could have possibly retried Demjanjuk. The extradition treaty between the United States and Israel contains a fairly common provision with applicable exceptions, which denies the country receiving the extradited person the right to try him on any charges other than those for which he was extradited.¹⁷⁵ The problem raised by Demjanjuk's extradition order is the doctrine of specialty.

The Extradition Treaty seems to prevent the Israeli judicial system from trying John Demjanjuk for crimes other than those for which he was extradited.¹⁷⁶ "The doctrine of specialty is based upon the principle that 'the State to which a person has been extradited may not, *without the consent of the requisite State*, try a person extradited save for the offense for which he was extradited."¹⁷⁷ Demjanjuk was extradited as Ivan the Terrible

173. Gordon, *supra* note 158.

174. Demjanjuk v. Israel, Crim. App. No. 347/88 at 39-40 (Sup. Ct. July 29, 1993).

175. Extradition Treaty, *supra* note 73, art. XIII. Article XIII of the Extradition Treaty between Israel and the United States reads, in part:

A person extradited under the present Convention shall not be detained, tried or punished in the territory of the requesting Party for any offense other than that for which extradition has been granted . . . unless: (3) *The requested Party has consented to his detention, trial, [or] punishment . . . for an offense other than that for which extradition has been granted.*

Id. (emphasis added).

176. Demjanjuk was extradited to Israel to stand trial as Ivan the Terrible of Treblinka. TEICHOLZ, *supra* note 18, at 78. The extraditing country, the United States, could have contested any further prosecution of Demjanjuk, had Israel attempted to try Demjanjuk on charges that did not appear on the extradition order.

177. Michael Bernard Bernacchi, Comment, *Standing for the Doctrine of Specialty in Extradition Treaties: A More Liberal Exposition of Private Rights*, 25 LOY. L.A. L. REV.

of Treblinka, not as Ivan of Trawniki and Sobibor. Thus, assuming the Attorney General wanted to retry Demjanjuk or the Supreme Court found the Attorney General's decision to be unreasonable in the extreme, Demjanjuk could only be retried on other charges if the United States, the extraditing country, consented to the retrial.

Justice Bach, of the Israeli Supreme Court, ruled that if "the extradition did not cover the proposed new charges, the US [sic] could be requested to amend the grounds accordingly. If such a request were [sic] refused, he could [then] be deported."¹⁷⁸ In hearing appeals to the Attorney General's decision not to retry Demjanjuk, the Supreme Court did not consider the doctrine of specialty issue. The Court reasoned that

[a]ffording the appellant "a reasonable opportunity" to defend himself now meant an additional extension of the hearings beyond an acceptable limit. Even taking into account the nature and extreme gravity of any charge or charges which could now be preferred against the appellant, a change in the basis of the extradition, more than seven years after the proceedings against the appellant were opened, would be unreasonable. The right of defense in a criminal trial was of the greatest importance, and was not to be sacrificed whatever were the reasons for the delays in the proceedings against the appellant.¹⁷⁹

Application of the doctrine of specialty would have prevented a new trial on allegations that arose in the appeal process, absent a waiver by the United States. Soon after the Supreme Court overturned Demjanjuk's conviction on charges of being Ivan the Terrible, an anonymous member of the Clinton Administration stated that "[t]he United States would probably not object if Israel brought new charges against John Demjanjuk."¹⁸⁰ Because the Attorney General decided not to retry Demjanjuk, and the Supreme Court decided that his reasoning was not *unreasonable in the extreme*, it will never be known whether the United States would have waived its rights under the doctrine of specialty.

1377, 1377 (1992) (emphasis added).

178. Landau, *supra* note 21.

179. *Id.*

180. *Demjanjuk Trial Might Be OK With U.S.*, L.A. TIMES, Aug. 17, 1993, at A6.

3. Evidentiary Problems

A new trial also posed some evidentiary problems for the prosecution.¹⁸¹ Those who wanted to overturn the Attorney General's decision not to retry Demjanjuk argued that "exceptions to the rules of evidence, in the Nazi and Nazi Collaborators Punishment Law, would facilitate procuring sufficient evidence to secure Demjanjuk's conviction."¹⁸² The Supreme Court determined that "[t]he appellant was . . . a member of a group of 'S.S. Wachmaner' [sic] whose purpose was murder and whose objective was genocide, and whose like is unknown in the history of humanity."¹⁸³ If the Supreme Court was able to make this conclusion based upon the facts that it heard, it seems to be "unreasonable in the extreme" that there would be factual problems in securing Demjanjuk's conviction on charges of being a different death camp guard.

4. Double Jeopardy

The basis of the Supreme Court's decision not to convict Demjanjuk as a guard at another camp seems to rebut any charge of double jeopardy. Although the Israeli Supreme Court was authorized to convict Demjanjuk on charges of being Ivan of Sobibor, the Court declined to do so, citing that Demjanjuk had not been given a reasonable opportunity to defend himself on those charges.¹⁸⁴ Therefore, jeopardy on the Sobibor charges never attached because Demjanjuk was never found guilty of the charges.

181. See generally Landau, *supra* note 21.

182. Landau, *supra* note 21. See *supra* note 143 for a discussion of Section 15(a) of the Nazis and Nazi Collaborators (Punishment) Law, 5710-1950, which allows for a deviation from the rules of evidence in an action under the Nazi Law. The Supreme Court stated that the district court had already deviated from the formal rules of evidence that resulted favorably for Demjanjuk when it "admitted the statements of a number of SS Wachmannen in which some person other than the appellant was referred to as Ivan the Terrible of Treblinka. The court did not know the origin or authorship of these statements, but admitted them as evidence without formal proof of their authenticity." Asher Landau, *Free: by Reason of Reasonable Doubt*, JERUSALEM POST, July 30, 1993, available in LEXIS, News Library, JPOST File. The petitioners also argued "that the State of Israel was obliged to try Nazi criminals irrespective of the prospects of a conviction." Landau, *supra* note 21.

183. Landau, *supra* note 182.

184. Demjanjuk v. Israel, Crim. App. No. 347/88 at 39 (Sup. Ct. July 29, 1993).

A double jeopardy claim is based on the belief that it is unfair to try a person twice for the same criminal act.¹⁸⁵ The purpose of double jeopardy is to protect a person from being prosecuted on charges for which they were previously found not guilty.¹⁸⁶ Israel already tried Demjanjuk on charges of being Ivan the Terrible.¹⁸⁷ On appeal, "the prosecution had asked the Court to convict Demjanjuk in respect to his crimes at Trawniki and Sobibor."¹⁸⁸ Supreme Court Justice Gavriel Bach, ruling on the issue of double jeopardy when hearing petitions to retry Demjanjuk, stated that "it was not necessary that the defendant should already have been convicted or acquitted; it was sufficient if there were a risk of such result."¹⁸⁹

New charges against Demjanjuk could have included atrocities committed against Jewish people in concentration camps where Ivan the Terrible is not known to have served.¹⁹⁰ This charge would satisfy the double jeopardy requirement that a person not be tried for the same crime more than once. Double jeopardy should not protect the guilty when, upon a further investigation, additional facts surface that raise allegations of other criminal acts. The Supreme Court that acquitted Demjanjuk of being Ivan the Terrible raised deep suspicion that he may have been Ivan of Trawniki and Sobibor. The crimes that he is suspected of committing at Trawniki and Sobibor and the crimes for which he was extradited are the same and are included in the Extradition Treaty between the United States and Israel.¹⁹¹

IV. CONCLUSION

Demjanjuk's return to the United States is a failure of the Israeli criminal justice system to achieve justice. A closer investigation of the legal grounds cited by the Attorney General

185. See generally MICHAEL FRIEDLAND, *DOUBLE JEOPARDY* (1969).

186. *Green v. United States*, 355 U.S. 184, 187 (1957). Lack of double jeopardy protection for a defendant "compel[s] him to live in a continuing state of anxiety and insecurity." *Id.*

187. TEICHOLZ, *supra* note 18, at 98.

188. Landau, *supra* note 21.

189. *Id.*

190. "[N]ew evidence admitted in the appeal included that of one Danilchenko who had testified in the Soviet Union that he had served together with Demjanjuk at the extermination camp in Sobibor." *Id.*

191. Article II of the Treaty allows for the extradition of persons charged with murder. Extradition Treaty, *supra* note 73, art. II.

in deciding not to retry Demjanjuk reveals that they were legally flawed and that the decision not to retry can be characterized as unreasonable in the extreme.¹⁹² The Supreme Court's decision not to convict Demjanjuk of being a death camp guard other than Ivan the Terrible is an extreme example of an apparently, by the court's own judgment, guilty man going free in order to prove that justice really exists. In light of the serious allegations, it would have been better to reach a final conclusion, based on all existing evidence, concerning Demjanjuk's Nazi involvement. The Supreme Court chose to follow the principle that "is fundamental to Western jurisprudence: it is better to let a thousand guilty people go free than wrongly punish one innocent person."¹⁹³ If, as the Supreme Court said, Demjanjuk did not have a reasonable opportunity to defend himself, though, then why not give him that opportunity?

The Attorney General's decision not to retry, while not deemed to be *unreasonable in the extreme*, was not well grounded in law or fact. It was based on the opinion that the Demjanjuk case was a failure and that any further trial would present a no-win situation. Another Demjanjuk acquittal would further bolster the claims of Holocaust deniers, while a conviction would be tainted by the belief that the Israeli justice system acted unfairly in securing a conviction. Thus, the Attorney General's decision not to retry Demjanjuk cannot be justified based on legal reasoning alone. The Supreme Court's judgment regarding the Attorney General's discretionary decision was wrong because the legal arguments cited in the decision not to retry Demjanjuk are unconvincing.

Demjanjuk's departure from Israel without having been punished is but the latest tragedy of the Holocaust. "That Demjanjuk is now a free man is nothing less than devastating to those who believe no Nazi war criminal should be allowed to get away with genocidal crimes. But it is for the sake of democratic justice, not revenge, that the war against such criminals has been waged."¹⁹⁴ Although the Supreme Court labeled Demjanjuk as

192. The Israeli Supreme Court stated that "[t]he decision taken fell within the bounds of the Attorney-General's legitimate discretion, and the petitioners had advanced no adequate grounds for the court to interfere." Landau, *supra* note 21.

193. *The Demjanjuk Verdict*, JERUSALEM POST, July, 30, 1993, available in LEXIS, News Library, JPOST File.

194. *Id.*

“*Wachmann* Demjanjuk” in concluding that it could not convict him as a different guard,¹⁹⁵ many will conclude that Demjanjuk was not a Nazi war criminal. The truth, though, rests in the very decisions that allowed Demjanjuk to leave Israel. The Court unambiguously held that Demjanjuk was “among the thousands who volunteered to serve in the S.S. within the framework of the *Wachmann* unit that served the Germans in” Operation Reinhard,¹⁹⁶ which was “set up in order to aid the objective of murder, and nothing else.”¹⁹⁷

Andrew David Wolfberg*

195. The Supreme Court referred to Demjanjuk “as a *Wachmann*, a ‘graduate’ of Trawniki, which was a school for murderers, a place where [they] were taught how to systematically murder Jews in the extermination camps.” Netty C. Gross, *In the Tradition of Justice*, JERUSALEM POST, Jan. 21, 1994, available in LEXIS, News Library, JPOST File (alteration in original). The Supreme Court of Israel overturned John Demjanjuk’s conviction as “Ivan the Terrible,” it referred to him as a “*Wachmann*,” a Guardsman of the German *Shutzstaffeln* (“SS”), who volunteered to participate in the mass murder of the European Jews during the Holocaust. *Id.* at 1-2. To paraphrase the holding of the Supreme Court: because there is reasonable doubt, *Id.* at 16-17, that this Nazi death camp guard, Demjanjuk, was the Nazi death camp guard that the State believed him to be, Demjanjuk is not guilty. *Id.* at 41.

196. *Id.* at 1.

197. *Id.* at 31-32.

* J.D. Candidate, Loyola Law School, 1995; B.A. University of California, Santa Cruz, 1992. This Comment is dedicated to my family, which has given me so much love and support.

