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Not Guilty – But Not Innocent: An Analysis of the Acquittal of John Demjanjuk and its Impact on the Future of Nazi War Crimes Trials

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INTRODUCTION

On July 29, 1993, the Supreme Court of the State of Israel acquitted John Demjanjuk of charges that he was "Ivan the Terrible," a sadistic Nazi gas chamber operator who assisted in the extermination of thousands of Jews at the Treblinka death camp in Poland during World War II.[1] The acquittal, which overturned the district court's 1988 conviction and death sentence,[2] was based on new evidence which created a "reasonable doubt" that Demjanjuk was "Ivan the Terrible" of Treblinka.[3]

The acquittal of John Demjanjuk comes after a sixteen year legal battle which began in the United States in 1977, when the U.S. government instituted denaturalization proceedings against Demjanjuk for misrepresentations made on his visa application.[4] The United States District Court for the Northern District of Ohio revoked Demjanjuk's certificate of naturalization after finding that he had lied about his wartime activities on his visa application.[5] In November 1983, while a deportation hearing was pending, the Israeli government requested Demjanjuk's extradition.[6] This request marked

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[1] Chris Hedges, *Israel Court Sets Demjanjuk Free, But He Is Now Without a Country*, N.Y. TIMES, July 30, 1993, at A1. Historians estimate that over 800,000 people were murdered at the Treblinka death camp. L. DAWIDOWICZ, THE WAR AGAINST THE JEWS 1933–1945 149 (1975).

[2] THE DEMJANJUK TRIAL (Asher Felix Landau ed. & Hever Translators Pool, trans., Israel Bar Publishing House) (1991).

[3] *The Final Chapter of the Verdict of the High Court of Justice Regarding John Demjanjuk Detailing the Considerations and the Conclusions Which Led to the Judges' Decision* (Israeli Info. Ctr., Jerusalem, Isr.) July 27, 1993, at 20 [hereinafter *Final Chapter*].

[4] United States v. Demjanjuk, 518 F. Supp. 1362, 1363 (N.D. Ohio 1981), *aff'd per curiam*, 680 F.2d 32 (6th Cir.), *cert. denied*, 459 U.S. 1036 (1982); *Israel: Demjanjuk Ruling Caps 16-Year Legal Fight*, REUTERS, Sept. 19, 1993, *available in* LEXIS, Nexis Library, Reuters File [hereinafter *16-Year Fight*].

[5] United States v. Demjanjuk, 518 F. Supp. at 1386.

[6] Rena Hozore Reiss, *The Extradition of John Demjanjuk: War Crimes, Universality Jurisdiction, and the Political Offense Doctrine*, 20 CORNELL INT'L L. J. 281, 289 (1987).

the first time ever that Israel had sought the extradition of a suspected Nazi war criminal from the United States.[7] In 1985, after a year and a half of litigation, the United States District Court for the Northern District of Ohio entered an order certifying to the Secretary of State that Demjanjuk was subject to extradition pursuant to the Extradition Treaty between the United States and Israel.[8] The Sixth Circuit affirmed this order, and on February 28, 1986, Demjanjuk was extradited to Israel to stand trial.[9]

On April 18, 1988, after a fourteen month trial, the District Court of Jerusalem convicted Demjanjuk on charges of being Ivan the Terrible and sentenced him to death by hanging.[10] Demjanjuk appealed the court's decision and its sentence, maintaining, as he had from the start, that he was a victim of mistaken identity.[11] Demjanjuk's appeal to the Israeli Supreme Court began on May 14, 1990, more than two years after the district court's decision.[12] Demjanjuk remained in solitary confinement in a cell near Tel Aviv for five years awaiting a ruling on his appeal.[13]

In 1991, after the collapse of the Soviet Union, Russian leaders released evidence from the Soviet archives which identified another man, Ivan Marchenko, as the gas chamber operator known as Ivan the Terrible.[14] During his appeal, Demjanjuk submitted applications to the Israeli Supreme Court for the admission of this new evidence.[15] The court admitted the evidence and on July 29, 1993, based on the

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[7] Steven Lubet & Jan Stern Reed, *Extradition of Nazis from the United States to Israel: A Survey of Issues in Transnational Criminal Law*, 22 STAN. J. INT'L L. 1, 3 (1986).

[8] *In re* Extradition of Demjanjuk, 612 F. Supp. 544, 571 (N.D. Ohio), *aff'd sub nom.* Demjanjuk v. Petrovsky, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); Lubet & Reed, *supra* note 7, at 3.

[9] *16-Year Fight*, *supra* note 4.

[10] THE DEMJANJUK TRIAL, *supra* note 2, at 385–86; *16-Year Fight*, *supra* note 4.

[11] Clyde Haberman, *Israeli Court Clears Way to Deporting Demjanjuk*, N.Y. TIMES, Aug. 18, 1993, at A3 [hereinafter Haberman, *Court Clears Way*]; Asher Felix Landau, *Free: By Reason of Reasonable Doubt*, JERUSALEM POST, July 30, 1993, *available in* LEXIS, Nexis Library, News File [hereinafter Landau, *Free*].

[12] TOM TEICHOLZ, THE TRIAL OF IVAN THE TERRIBLE 302 (1990).

[13] Howard Goller, *Israel: Demjanjuk Free But Still a Mystery*, REUTERS, Sept. 19, 1993, *available in* LEXIS, Nexis Library, Reuters File.

[14] Ralph Blumenthal, *Nazi Hunters Look Beyond Demjanjuk*, N.Y. TIMES, Aug. 1, 1993, § 4, at 5.

[15] Landau, *Free*, *supra* note 11. The new evidence was allowed in pursuant to § 15 of the Nazis and Nazi Collaborators (Punishment) Law, which states, in relevant part, "the court may 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.*; Law of Aug. 1, 5710–1950 [1950] 4 Laws of the State of Israel No. 64, at 157 [hereinafter Nazi Statute].

reasonable doubt the evidence created, acquitted Demjanjuk of all charges.[16] The court did find, however, that Demjanjuk had served as a Schutzstaffel (S.S.) Wachmann (guardsman) in the Trawniki unit where he aided in the murder of thousands of Jews.[17] The court also found that Demjanjuk had served at the Sobibor death camp in Poland.[18] Despite these findings, the Supreme Court of Israel declined to convict Demjanjuk on the Trawniki and Sobibor crimes or to remit the case to the district court for further inquiry.[19]

Following the Israeli Supreme Court's ruling, a group of Holocaust survivors filed petitions to the court demanding that new criminal proceedings be brought against Demjanjuk based on the Trawniki and Sobibor evidence.[20] The Attorney General of Israel rejected these petitions.[21] The Supreme Court of Israel, sitting as the High Court of Justice, exercised judicial review of the Attorney General's decision and upheld his decision not to bring new charges against Demjanjuk.[22] Following Demjanjuk's acquittal, the United States Court of Appeals for the Sixth Circuit reopened Demjanjuk's extradition case and issued a writ of habeas corpus enabling Demjanjuk to return to the United States.[23] Demjanjuk's re-entry into the United

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[16] *Final Chapter*, *supra* note 3, at 19–20; *16-Year Fight*, *supra* note 4.

[17] *Final Chapter*, *supra* note 3, at 20, 26. In 1941, the German government set up the Trawniki training camp in Poland. THE DEMJANJUK TRIAL, *supra* note 2, at 4. The camp was established to train and instruct Soviet prisoners-of-war taken from the Rovno and Chelm camps in the duties of the S.S. *Id.* Upon completion of their training they were inducted into the German army and took an oath of allegiance to serve with the German S.S. forces as Wachmanns. *Id.*

[18] *Final Chapter*, *supra* note 3, at 20, 34. Sobibor, along with Treblinka and Belzac, constituted the three camps which formed "Action Reinhardt." U.S. v. Demjanjuk, 518 F. Supp. at 1364–65. Action Reinhardt was the code word used by the Nazi regime for its plan to systematically exterminate all Jews from those European countries occupied by German forces. *Id.* at 1364. Three extermination camps, Belzac, Sobibor, and Treblinka, were constructed to implement the mass annihilation conceived by Action Reinhardt. *Id.* at 1364–65. The German S.S. lacked sufficient manpower to carry out all the tasks of Action Reinhardt and, consequently, recruited Russian prisoners-of-war, mainly Ukrainians, to assist in the operation. *Id.* at 1965. Action Reinhardt ended in the late fall of 1943 when prisoners of the Sobibor and Treblinka camps revolted. *Id.* Following the uprisings, the German S.S. dismantled and camouflaged the camps, and exterminated all the remaining Jews. THE DEMJANJUK TRIAL, *supra* note 2, at 5. The S.S. plowed the site of the Treblinka camp and established an agricultural farm on its grounds. *Id.*

[19] *See Final Chapter*, *supra* note 3, at 39–40.

[20] Clyde Haberman, *Israeli Court Rules for Demjanjuk But He Stays in Jail*, N.Y. TIMES, Aug. 19, 1993, at A8 [hereinafter Haberman, *Stays In Jail*].

[21] *Id.*

[22] Asher Felix Landau, *The End of the Demjanjuk Case*, JERUSALEM POST, Aug. 20, 1993, *available in* LEXIS, Nexis Library, News File [hereinafter Landau, *The End*].

[23] *See* Demjanjuk v. Petrovsky, 1993 U.S. App. LEXIS 20596, at *1. (6th Cir. Aug. 3, 1993).

States marked the first time ever that a convicted Nazi war criminal, ejected from the United States, was permitted to return.[24] On November 17, 1993, after finding that the Justice Department's Office of Special Investigations (OSI) had committed prosecutorial misconduct by withholding exculpatory information from Demjanjuk during his extradition hearings, the Sixth Circuit revoked Demjanjuk's extradition order.[25] On October 3, 1994, the United States Supreme Court denied review of the Sixth Circuit's decision.[26] Demjanjuk is now free once again, living in Ohio.

The trial of John Demjanjuk may well mark the last major trial of a suspected Nazi war criminal. It is unlikely that individual nations, already reluctant to expend the time and money needed to bring war criminals to justice, will request the extradition of suspected Nazi perpetrators after the Demjanjuk decision. Unfortunately, this reluctance comes at a time when access to previously sealed information about Nazi war criminals is more abundant than ever.[27] In the end, the lesson of the Demjanjuk case may be that it is extraordinarily difficult to bring to justice the perpetrators of the Holocaust.

Part I of this note briefly looks at the case history, including the denaturalization and extradition proceedings in the United States. Part II of this note examines Israel's basis for jurisdiction under both municipal and international law. Part III focuses on the 1988 trial before the District Court of Jerusalem in which Demjanjuk was found guilty and sentenced to death. Part IV examines Demjanjuk's acquittal by the Israeli Supreme Court and Israel's decision not to retry Demjanjuk for other war crimes. Part V briefly looks at the reopening of Demjanjuk's extradition case in the United States. Finally, Part VI of this note analyzes the Israeli Supreme Court's decision and explores the future of Nazi war crimes trials after the Demjanjuk decision.

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[24] Stephen Labaton, *No Review of Court Ruling That Let Demjanjuk Return*, N.Y. TIMES, Oct. 4, 1994, at A18.

[25] *See* Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993); *see also* Marc J. Hertzberg, *Prosecuting Nazi War Criminals: A Call for the Immediate Prosecution of Living Nazi War Criminals*, 5 MD. J. CONTEMP. LEGAL ISSUES 181, 181 n.2 (1993/1994) (book review).

[26] David Arnold, *Demjanjuk Veteran Sees Strong Case*, BOSTON GLOBE, Sept. 22, 1994, at A1.

[27] Tom Brazaitis, *A Decision, Not An Ending*, THE PLAIN DEALER, Aug. 1, 1993, *available in* LEXIS, Nexis Library, Curnws File. With the collapse of the Soviet Union and the opening of Soviet archives, detailed records of Nazi atrocities are now available to the international community. *Id.*

I. BACKGROUND

John Demjanjuk, a native of the Ukraine, was conscripted into the Soviet Army in 1940, and shortly thereafter was captured by German forces.[28] In 1942, after spending short periods of time in German prisoner-of-war camps, Demjanjuk was recruited by the German S.S.[29] Demjanjuk was then transferred to Trawniki, Poland, where he received an identification card and was trained to fulfill duties in the framework of Operation Reinhardt.[30]

It is alleged that in the fall of 1942, Demjanjuk was sent to work at the Treblinka death camp in Poland, where he operated the gas chambers which killed thousands of Jews.[31] The savage cruelty of this gas chamber operator earned him the nickname "Ivan Grozny" or "Ivan the Terrible."[32] In 1948, after completion of his service in the German army, Demjanjuk applied for immigration to the United States.[33] In his visa applications, Demjanjuk misrepresented his place of residence during the period 1937–1948 and failed to disclose his employment by the German S.S. during the war.[34] In 1952, based on this false information, Demjanjuk was able to enter the United States as a lawful permanent resident pursuant to the Displaced Persons Act (DPA).[35] In 1958, he became a U.S. citizen and changed his first name from Ivan to John.[36] Since his arrival in the United States, he has resided in Cleveland, Ohio.[37]

In 1977, twenty-five years after his admission to the United States, the U.S. government brought charges against Demjanjuk for illegal procurement of his citizenship.[38] Specifically, the government charged

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[28] U.S. v. Demjanjuk, 518 F. Supp. at 1363–64.

[29] Demjanjuk v. Petrovsky, 776 F.2d 571, 575 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).

[30] U.S. v. Demjanjuk, 518 F. Supp. at 1365, 1369.

[31] *Id.* at 1369–70.

[32] *Id.* at 1370.

[33] *Id.* at 1379.

[34] Demjanjuk v. Petrovsky, 776 F.2d at 575.

[35] U.S. v. Demjanjuk, 518 F. Supp. at 1363; *see also* Displaced Persons Act of 1948, Pub. L. No. 774, 62 Stat. 1009, 1014 (1948), *as amended by* the Act of 1950, Pub. L. No. 555, 64 Stat. 219, 227 (1950) [hereinafter DPA]. In 1948, Congress passed the DPA, which allowed for the admittance of 202,000 "eligible displaced persons" into the United States between June 30, 1948 and July 1, 1950. *Id.* at § 3. The DPA was enacted to enable European refugees driven from their homeland to emigrate to the United States. U.S. v. Demjanjuk, 518 F. Supp. at 1378.

[36] *Id.* at 1380.

[37] Demjanjuk v. Petrovsky, 776 F.2d at 575.

[38] *See 16-Year Fight, supra* note 4.

that Demjanjuk's wartime activities precluded him from entering the United States as a displaced person under the DPA.[39] The government also claimed that Demjanjuk's visa was invalid because he had willfully misrepresented his service in the German military.[40]

A. *Denaturalization Hearings*

In order to denaturalize an alleged war criminal, the government must prove that the individual in question has obtained entry into the United States illegally or by willfully making a misrepresentation of a material fact.[41] The Supreme Court of the United States has interpreted "material misrepresentations" as facts which, if disclosed at the time of entry, would have made an applicant ineligible for a visa under the DPA.[42] In *Fedorenko v. United States*, the Supreme Court held that the failure to disclose the true facts about service as an armed guard in the German S.S. would have made the petitioner ineligible for a visa under the DPA.[43] As a result, the Court in *Fedorenko* found that petitioner's false statements about his wartime activities were "willful and material misrepresentations" and, therefore, his visa had to be revoked as illegally procured.[44]

On June 23, 1981, the District Court for the Northern District of Ohio found that Demjanjuk had served the German S.S. as a guard at both Trawniki and Treblinka during 1942–1943 and he had willfully misrepresented that service on his visa application.[45] During his denaturalization proceedings, Demjanjuk admitted to falsifying state-

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[39] U.S. v. Demjanjuk, 518 F. Supp. at 1363. In 1950, § 13 of the DPA was amended to state: "No visa shall be issued . . . to any person who advocated or assisted in the persecution of any person because of race, religion, or national origin, or to any person who has voluntarily borne arms against the United States during World War II." DPA, *supra* note 35, § 13.

[40] U.S. v. Demjanjuk, 518 F. Supp. at 1363. Demjanjuk stated on his visa application that from 1936–1943 he worked as a farmer in Sobibor, Poland, and from 1943–1944, at the harbor in Denzig, Germany. *Id.* at 1379. Demjanjuk admitted at the denaturalization proceedings that these statements were false. *Id.*

[41] *Id.* at 1380. Section 1451(a) of the Immigration and Nationality Act requires revocation of United States citizenship that was "illegally procured . . . by concealment of a material fact or by willful misrepresentation." Immigration and Nationality Act, 8 U.S.C.A. § 1451(a) (1982).

[42] Fedorenko v. U.S., 449 U.S. 480, 509 (1981).

[43] *Id.* Fedorenko's failure to reveal his service as an armed guard at Treblinka was found to be material since, under § 2(b) of the DPA, any individual who "assisted the enemy in persecuting civilians" was ineligible for a visa. *Id., citing* DPA, *supra* note 35, § 2b.

[44] *Id.* at 514. Fedorenko was charged with serving as an armed guard at the Treblinka death camp from 1942 to 1943. *Id.* at 494. He obtained entry into the United States under the DPA by falsifying the information on his visa application. Fedorenko v. U.S., 449 U.S. at 496. Fedorenko was naturalized in 1969 at which time he once again failed to disclose his wartime service as a concentration camp guard. *Id.* at 497.

[45] U.S. v. Demjanjuk, 518 F. Supp. at 1381.

ments concerning his residence on his visa application.[46] He also admitted to serving as a German soldier, but denied any association with the S.S. or with the Treblinka death camp.[47]

Demjanjuk's assertions were directly contradicted by documentary evidence which identified him as a member of the S.S., and by eyewitness testimony which placed him at Treblinka during the years in question.[48] The strongest piece of documentary evidence against Demjanjuk was the "Trawniki card," an identification card obtained from the archives of the former Soviet Union, which identified Demjanjuk as a member of the German S.S.[49] The card contained a photograph, allegedly of Demjanjuk, and personal information such as Demjanjuk's name, date of birth, family history, personal characteristics, and army assignments.[50] Despite Demjanjuk's claims that the card was a forgery, the district court held that the card was authentic, the picture was of Demjanjuk, and the card clearly proved Demjanjuk's presence at the S.S. training camp at Trawniki.[51] The government also produced six eyewitnesses from Treblinka, five Jewish prisoners and one German guard, who identified Demjanjuk as the man they knew as Ivan the Terrible, the gas chamber operator at Treblinka.[52] The court found the identifications reliable.[53] Relying on the Supreme Court's opinion in *Fedorenko*, the district court held Demjanjuk's disclosure of his service in the Nazi S.S. would have made him ineligible for a visa, and therefore, his citizenship had to be revoked.[54] Alternatively, the court held Demjanjuk's certificate of

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[46] *Id.* at 1379. The court rejected Demjanjuk's argument that he lied on his visa application because he was afraid of repatriation to the Soviet Union. *Id.* at 1382. A similar defense was used by Fedorenko in his denaturalization proceedings, and also was rejected by the Fifth Circuit. U.S. v. Fedorenko, 597 F.2d at 946, 953, *reh'g denied*, U.S. v. Fedorenko, 601 F.2d 1195 (5th Cir. 1979), *aff'd*, Fedorenko v. U.S., 449 U.S. 480 (1981). The Supreme Court, in the Fedorenko case, although not directly addressing the issue, opined that the fact that Fedorenko gave false statements because he was motivated by fear of repatriation "indicates that he understood that disclosing the truth would have affected his chances of being admitted to the United States and confirms that his misrepresentations were willful." Fedorenko v. U.S., 449 U.S. at 507 n.26.

[47] Demjanjuk v. Petrovsky, 776 F.2d. at 575.

[48] U.S. v. Demjanjuk, 518 F. Supp. at 1365, 1369.

[49] *Id.* at 1365–66. The "Trawniki card" 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 S.S. for the Establishment of S.S. and Police Headquarters in the New Eastern Territory." *Id.* at 1366. The card also states in boldface printing: "HEADQUARTERS LUBLIN, TRAINING CAMP TRAWNIKI, I.D. No. 1393." *Id.*

[50] *Id.* at 1366.

[51] *Id.* at 1368.

[52] U.S. v. Demjanjuk, 518 F. Supp. at 1369–73.

[53] *Id.* at 1375.

[54] *Id.* at 1381–82.

naturalization had to be canceled under 8 U.S.C. § 1451(a) because it was procured by "concealment of a material fact [and] by willful misrepresentation."[55]

Eighteen months later, in 1982, the Sixth Circuit affirmed the district court's decision denaturalizing Demjanjuk.[56] The Supreme Court then denied Demjanjuk's petition for certiorari.[57] Soon after, the government instituted deportation proceedings.[58] While the deportation hearing was pending, the State of Israel filed a request for the extradition of Demjanjuk in accordance with the U.S. statute governing American extradition procedures.[59] This request marked the first time Israel had asked the United States to turn over an alleged Nazi war criminal.[60] Acting on behalf of the State of Israel, the U.S. Attorney General for the Northern District of Ohio filed a complaint in the district court seeking the arrest of Demjanjuk and a hearing on the extradition request.[61]

B. *The Extradition Proceedings*

In order for the United States to extradite an individual to a foreign nation, a valid extradition treaty must exist between the United States and the requesting nation.[62] If a valid treaty exists, the

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[55] *Id.* at 1382–83.

[56] United States v. Demjanjuk, 680 F.2d 32 (6th Cir.), *cert. denied*, Demjanjuk v. U.S., 459 U.S. 1036 (1982).

[57] Demjanjuk v. United States, 459 U.S. 1036 (1982).

[58] Demjanjuk v. Petrovsky, 776 F.2d at 575.

[59] *Id.* at 575, 580, *citing* 18 U.S.C. § 3184 (1982) which states:

> [W]henever there is a treaty or convention for extradition between the United States or any foreign government, any justice or judge of the United States, or any magistrate authorized to do so by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulation of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

[60] Reiss, *supra* note 6, at 281 n.51.

[61] Demjanjuk v. Petrovsky, 776 F.2d at 575.

[62] *See* 18 U.S.C. § 3184 (1982).

extradition court examines several factors to determine whether the individual is extraditable under U.S. law.[63] The extradition court first must determine whether the person before the court is the same individual who is charged in the requesting country.[64] Next, the court must certify that the offenses charged constitute extraditable offenses under the provisions of the applicable treaty.[65] Finally, the extradition court must determine whether there exists probable cause to believe that the accused committed the offenses charged.[66] It is not the function of the extradition court to ascertain the guilt or innocence of the accused.[67] Rather, the ultimate decision of guilt or innocence lies with the judiciary of the requesting nation.[68]

Israel's request for Demjanjuk's extradition was made pursuant to the United States—Israel Extradition Treaty (Extradition Treaty).[69] The validity of the Extradition Treaty was not in dispute, and therefore, the extradition court began by examining the question of identity.[70] The issue of whether Demjanjuk was the person named in Israel's complaint became a contested issue throughout both the extradition and denaturalization proceedings due to Demjanjuk's repeated denials that he was Ivan the Terrible of Treblinka.[71] Despite

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[63] *In re* Extradition of Demjanjuk, 612 F. Supp. at 547.

[64] *Id.*

[65] *Id.*

[66] *Id.* at 563. Once an extradition court finds probable cause, the decision regarding whether to extradite an individual to a foreign nation lies with the Secretary of State. *See* 18 U.S.C. § 3184.

[67] *In re* Extradition of Demjanjuk, 612 F. Supp. at 563.

[68] *Id.*

[69] *Id.* at 546; Convention on Extradition, Dec. 10, 1962, United States—Israel, 14 U.S.T. 1708, T.I.A.S. No. 5476 [hereinafter Extradition Treaty]. The Extradition Treaty states, in pertinent part:

> Article I: Each contracting Party agrees, under the conditions and circumstances established by the present Convention, reciprocally to deliver up persons found in its territory who have been charged with or convicted of any of the offenses mentioned in Article II of the present Convention committed within the territorial jurisdiction of the other, or outside thereof under the conditions specified in Article III of the present Convention.
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> Article II: Persons shall be delivered up according to the provisions of the present Convention for prosecution when they have been charged with, or to undergo sentence when they have been convicted of, any of the following offenses:
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> 1. murder.
> 2. manslaughter.
> 3. malicious wounding; inflicting grievous bodily harm.

Id.

[70] *In re* Extradition of Demjanjuk, 612 F. Supp. at 547.

[71] *See id.* at 547; U.S. v. Demjanjuk, 518 F. Supp. at 1376.

these denials, the district court found probable cause to believe Demjanjuk was Ivan the Terrible.[72] The court based its finding on eyewitness affidavits, submitted by the government, which identified photographs of Demjanjuk as Ivan the Terrible.[73] These identifications were held sufficient to identify Demjanjuk as the individual sought by Israel, and, therefore, the court did not rely on the Trawniki card to prove Demjanjuk's identity.[74] This precluded Demjanjuk from challenging the card's authenticity for a second time.[75]

The extradition court then dealt with the question of whether the crimes with which Demjanjuk was charged were extraditable offenses under the Extradition Treaty.[76] Israel's extradition request charged Demjanjuk with murder, manslaughter, and malicious wounding.[77] Israel's arrest warrant set forth the charges attributed to Demjanjuk as follows:

> The suspect, nicknamed "Ivan the Terrible" was a member of the S.S. and in the years 1942–1943 operated the gas chambers to exterminate prisoners at the Treblinka death camp in the Lublin area of Poland, which was operated by the Nazis during the Second World War. The suspect murdered tens of thousands of Jews, as well as non-Jews, killing them, injuring them, causing them serious bodily and mental harm and subjected them to living conditions calculated to bring about their physical destruction. The suspect committed these acts with the intention of destroying the Jewish people and to commit crimes against humanity.[78]

Article II of the Extradition Treaty includes, in its list of extraditable offenses, murder, manslaughter, and malicious wounding.[79] Reasoning that taking part in the murder of thousands of Jews and non-Jews clearly fell within the Extradition Treaty's definition of murder, the court concluded that Demjanjuk was extraditable under the terms of the Treaty.[80]

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[72] *In re* Extradition of Demjanjuk, 612 F. Supp. at 547.

[73] *Id.* at 552.

[74] *Id.* at 553.

[75] *See id.* Demjanjuk had previously challenged the card's authenticity at his denaturalization hearing, where he argued the card was forged by the KGB. U.S. v. Demjanjuk, 518 F. Supp. at 1366.

[76] *In re* Extradition of Demjanjuk, 612 F. Supp. at 554.

[77] *Id.* at 560.

[78] *Id.*

[79] *See* Extradition Treaty, *supra* note 69, art. II, 14 U.S.T. at 1708.

[80] Demjanjuk v. Petrovsky, 776 F.2d at 579. Article II of the Treaty lists murder as an

Following the hearing, the district court entered an order certifying to the Secretary of State that Demjanjuk was subject to extradition pursuant to the Extradition Treaty.[81] As a result of this order, bond, which had previously been granted to Demjanjuk, was revoked, and he was committed to the custody of the U.S. Attorney General pending the issuance of a warrant of surrender by the Secretary of State.[82] Subsequent to this order, Demjanjuk unsuccessfully brought habeas corpus proceedings in the United States District Court.[83] He then appealed to the United States Court of Appeals for the Sixth Circuit, challenging the district court's decision, *inter alia*, on the grounds that Israel lacked jurisdiction to try Demjanjuk.[84]

II. ISRAELI JURISDICTION

To honor an extradition request, the requesting state must have jurisdiction over the offense.[85] The issue of Israel's jurisdiction over Demjanjuk was the most controversial aspect of the case.[86] Demjanjuk relied on two facts to contest Israel's power to exert jurisdiction over him.[87] First, he claimed that he was not a citizen or a resident of the State of Israel, and secondly, that the crimes with which he was charged took place in Poland.[88] The Sixth Circuit rejected both of these claims, stating that under both the terms of the Extradition Treaty and accepted principles of international law, Israel had jurisdiction to try Demjanjuk."[89]

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extraditable offense. *See* Extradition Treaty, *supra* note 69, art. II, 14 U.S.T. at 1708. Demjanjuk alleged that murdering thousands of Jews was not covered by the Treaty's designation of murder. Demjanjuk v. Petrovsky, 776 F.2d at 579.

[81] *In re* Extradition of Demjanjuk, 612 F. Supp. at 571.

[82] *Id.*

[83] Demjanjuk v. Petrovsky, 612 F. Supp. 571, 578 (N.D. Ohio 1985), *aff'd*, Demjanjuk v. Petrovsky, 776 F.2d 571 (6th Cir. Ohio 1985), *cert. denied*, Demjanjuk v. Petrovsky, 475 U.S. 1016. The court rejected Demjanjuk's habeas corpus claims and upheld the order of extradition. *Id.*

[84] Demjanjuk v. Petrovsky, 776 F.2d at 579. Demjanjuk also unsuccessfully challenged the district court's ruling on the grounds that insufficient evidence existed to warrant a finding of probable cause that he was guilty of the crimes charged, and that the district court lacked jurisdiction to consider the request for extradition because the crimes he was charged with were not included within the Treaty. *Id.* at 576–79.

[85] M.C. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 203–04 (1974) [hereinafter BASSIOUNI, EXTRADITION] (international extradition requires a threshold finding that the requesting state has jurisdiction over the offense).

[86] Reiss, *supra* note 6, at 298.

[87] Demjanjuk v. Petrovsky, 776 F.2d at 580.

[88] *Id.*

[89] *Id.* at 582–83; *see also* Francis R. Strauss, Note, Demjanjuk v. Petrovsky: *An Analysis of Extradition*, 12 MD. J. INT'L L. & TRADE 65, 72 (1987).

Article III of the Extradition Treaty provides: "when the offense has been committed outside the territorial jurisdiction of the requesting Party, extradition need not be granted unless the laws of the requested Party provide for the punishment of such an offense committed in similar circumstances."[90] The court recognized in this language an implicit right to request extradition for "extraterritorial" crimes.[91] Furthermore, under principles of international law, the citizenship of the accused is not a controlling factor in extradition, and therefore, the court held that Demjanjuk's lack of Israeli citizenship did not bar Israel from exerting jurisdiction.[92] After examining U.S. extradition laws and international principles, the Sixth Circuit held that jurisdiction over Demjanjuk was proper under both Israeli municipal law and international law.[93]

A. *Jurisdiction Under Municipal Law*

The district court found that Israel had jurisdiction to prosecute Demjanjuk under Israeli law.[94] In 1950, Israel enacted the Nazis and Nazi Collaborators (Punishment) Law (Nazi Statute).[95] Under this law, any person found to have committed crimes against the Jewish people,[96] crimes against humanity,[97] or war crimes,[98] in an enemy

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[90] Extradition Treaty, *supra* note 69, art. III, 14 U.S.T. at 1709.

[91] Demjanjuk v. Petrovsky, 776 F.2d at 581; *see also* Strauss, *supra* note 89, at 72. Demjanjuk argued that the "need not" language of article III prohibited his extradition because there are no provisions for the punishment of war crimes or crimes against humanity under U.S. laws. Demjanjuk v. Petrovsky, 776 F.2d at 580–81. The court rejected this argument and interpreted the language to mean that the requested nation has the discretion to deny extradition if its own laws do not provide for the punishment of the offense. *Id.* at 581.

[92] Demjanjuk v. Petrovsky, 776 F.2d at 582; see discussion *infra* part II.B on universal jurisdiction, an international principle on which this is based.

[93] *In re* Extradition of Demjanjuk, 612 F. Supp. at 554.

[94] *Id.* at 555.

[95] Nazi Statute, *supra* note 15.

[96] The statute defines crimes against the Jewish people as any of the following acts:

(1) killing Jews;
(2) causing serious bodily harm or mental harm to Jews;
(3) placing Jews in living conditions calculated to bring about their physical destruction;
(4) imposing measures intended to prevent births among Jews;
(5) forcibly transferring Jewish children to another national or religious group;
(6) destroying or desecrating Jewish religious or cultural assets or values;
(7) inciting hatred of Jews.

Id. at § 1.

[97] "Crimes against humanity" means any of the following acts: 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.*

[98] "War crimes" means any of the following acts: murder, ill-treatment or deportation to

country[99] during the period of the Nazi regime[100] is subject to the death penalty.[101]

The Nazi Statute's definitions of war crimes and crimes against humanity are consistent with the corresponding definitions contained in the Charter of the International Military Tribunal (IMT) at Nuremberg.[102] Similarly, the statute's definition of crimes against Jewish people is based on the definition of genocide found in the Convention For the Punishment of the Crime of Genocide.[103]

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forced labor 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; killing of hostages; plunder of public or private property; wanton destruction of cities, towns or villages; and devastation not justified by military necessity. *Id.*

[99] "Enemy country" means:

> (a) Germany during the period of the Nazi regime;
> (b) any other Axis state during the period of the war between it [the Axis power] and the Allied powers;
> (c) any country which, during the whole or part of the period of the Nazi regime, was de facto under German rule, for the time during which it was de facto under German rule as aforesaid;
> (d) any territory which was de facto under the rule of any other Axis state during the whole or part of the period of the war between it and the Allied powers, for the time during which that territory was de facto under the rule of that Axis state as aforesaid.

Id. at § 16.

[100] The "period of the Nazi regime" means the period from January 30, 1933 to May 8, 1945. Nazi Statute, *supra* note 15, § 16.

[101] *Id.* at § 1.

[102] The International Military Tribunal Charter, 59 Stat. 1555, 1556 [hereinafter IMT Charter].

> The following acts . . . are crimes within the jurisdiction of the Tribunal for which there shall be individual responsibility:
> (a) crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war of violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
> (b) war crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor 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, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
> (c) crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Id.

[103] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention]. In 1950, Israel enacted the Crime of

Israel first asserted its right to try accused Nazi war criminals under the Nazi Statute in 1961 during the trial of Adolph Eichmann.[104] Eichmann served as chief of the Gestapo's Jewish Section, where his responsibilities included the persecution, deportation, and extermination of hundreds of thousands of Jews and non-Jews in Germany.[105] Eichmann was abducted from Argentina in 1960 and brought to trial in Jerusalem in 1961.[106]

Eichmann was charged with fifteen counts under the Nazi Statute.[107] His offenses fell into four main categories: crimes against the Jewish people, crimes against humanity, war crimes, and membership in hostile organizations.[108] The District Court of Jerusalem convicted Eichmann on all counts and sentenced him to death.[109] On May 31, 1962, after an unsuccessful appeal to the Supreme Court of Israel and denial of his plea for clemency by the President of Israel, Eichmann was hanged.[110]

The District Court of Israel based its jurisdiction to try Eichmann on the Nazi Statute, stating:

> Our jurisdiction to try this case is based on the Nazis and Nazi Collaborators (Punishment) Law, a statutory law the provisions of which are unequivocal. The Court has to give effect to the law of the Knesset,[111] and we cannot entertain the contention that such a law conflicts with the principles of international law.[112]

In affirming the district court's decision, the Supreme Court of Israel noted that the Nazi Statute was an "extraordinary measure" designed to cope with an "extraordinary event:"[113]

Genocide (Prevention and Punishment) Law, to give effect to the Genocide Convention. Law of Mar. 29, 5710–1950, [1950] 4 Laws of the State of Israel No. 31, at 101. Demjanjuk was not tried under this statute because it is not retroactive. *See* George R. Parsons, Jr., Note, *International Law: Jurisdiction Over Extraterritorial Crime: Universality Principle*, 46 CORNELL L. Q. 326, 334 (1960–61).

[104] Attorney General of Israel v. Eichmann, 36 I.L.R. 18, 25 (Isr. Dist. Ct.—Jerusalem 1961), *aff'd*, 36 I.L.R. 277 (Isr. Sup. Ct. 1962). An unofficial translation of the district court opinion prepared by the Israeli government is available at 56 AM. J. INT'L L. 805 (1962); *see* Keith C. Randell, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 810 (1988).

[105] *See* Randell, *supra* note 104, at 810.

[106] J.E.S. Fawcett, *The Eichmann Case*, 38 BRIT. Y.B. INT'L L. 181, 182 (1961).

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.* at 182–83.

[111] The Knesset is the Israeli Parliament. TEICHOLZ, *supra* note 12, at 101.

[112] Attorney General of Israel v. Eichmann, 36 I.L.R. at 25.

[113] Fawcett, *supra* note 106, at 185.

> This law is fundamentally different in its characteristics, in the legal and moral principles underlying it and in its spirit, from all other criminal enactments usually found on the statute books. The Law is retroactive and extraterritorial and its object *inter alia* is to provide a basis for the punishment of crimes which are not comprised within the criminal law of Israel being the special consequence of the Nazi regime and its persecution.[114]

Demjanjuk contested Israel's right to prosecute him under the Nazi Statute, contending that it was an *ex post facto* law, and therefore, impermissible.[115] The United States District Court for the Northern District of Ohio rejected this argument, stating that the Nazi Statute, like the Nuremberg Charter and the Genocide Convention, "did not declare unlawful what had been lawful before, rather it provide[d] a new forum in which to bring to trial persons for conduct previously recognized as criminal."[116] The court cited international agreements, such as the Hague Conventions of 1899 and 1907 which expressly forbade the killing of defenseless persons, as determinative of the illegality of Demjanjuk's conduct at the time committed.[117] The court also noted that by 1942 the operation of gas chambers and the torturing of innocent prisoners were illegal acts under the laws of every civilized nation.[118] The Sixth Circuit affirmed the district court's decision, holding that Israel clearly possessed jurisdiction to try Demjanjuk under the Nazi Statute.[119]

B. *Jurisdiction Under International Law*

The district court also held that Israel had jurisdiction to try Demjanjuk based on the universality principle of international law.[120] The international community recognizes five basic principles of jurisdiction.[121] The "territoriality" principle recognizes the right of a

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[114] *Id.* at 184, *citing* Honigmman v. Attorney General [1952] 12 Pesakin 336, INT'L L. REP., 1951, 543.

[115] *In re* Extradition of Demjanjuk, 612 F. Supp. at 567. The Nazi Statute, which was passed in 1950, declared acts occurring between 1933 and 1945 illegal. *See* Nazi Statute, *supra* note 15, § 16.

[116] *In re* Extradition of Demjanjuk, 612 F. Supp. at 567.

[117] *Id.*

[118] *Id.*

[119] Demjanjuk v. Petrovsky, 776 F.2d at 581–82.

[120] *In re* Extradition of Demjanjuk, 612 F. Supp. at 555.

[121] *See* Randell, *supra* note 104, at 787–88; M. C. BASSIOUNI, INTERNATIONAL CRIMINAL LAW (1986) 4–5 [hereinafter BASSIOUNI, CRIMINAL LAW].

state to punish crimes committed within its territory.[122] The "nationality" principle grants jurisdiction when the offender is a national of the prosecuting state.[123] The "passive personality" principle confers jurisdiction when the victim is a national of the prosecuting state.[124] The "protective principle" recognizes jurisdiction where an extraterritorial act threatens the security or a vital interest of the prosecuting state.[125] Finally, the "universality" principle allows a state to exercise jurisdiction to define and punish certain offenses recognized by the international community to be of international concern.[126]

1. The Universality Principle

The universality principle of international jurisdiction is premised on the notion that certain crimes are so universally condemned that their perpetrators are enemies of all people.[127] Thus, when universal jurisdiction is the basis under which a State is proceeding, neither the nationality of the accused or the victims, nor the location of the crime is relevant.[128] Universal jurisdiction gives a State the authority to act individually and prosecute a criminal under its own law, rather than under the law of the nation where the act was committed.[129] Under the universality principle, a State may enact municipal laws which declare illegal crimes against all humanity and empower the State's national courts to hear such cases.[130] Thus, under international law, the Nazi Statute is a proper method to punish crimes universally recognized and condemned by the community of nations.

The idea that perpetrators of crimes against humanity and of war crimes could be subject to universal jurisdiction found acceptance in the aftermath of World War II.[131] Wartime allies[132] created the IMT

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[122] BASSIOUNI, CRIMINAL LAW, *supra* note 121, at 5; Randell, *supra* note 104, at 788.

[123] BASSIOUNI, CRIMINAL LAW, *supra* note 121, at 5; Randell, *supra* note 104, at 788.

[124] BASSIOUNI, CRIMINAL LAW, *supra* note 121, at 5; Randell, *supra* note 104, at 788.

[125] BASSIOUNI, CRIMINAL LAW, *supra* note 121, at 5 ;Randell, *supra* note 104, at 788.

[126] *See* BASSIOUNI, CRIMINAL LAW, *supra* note 121, at 5; Randell, *supra* note 104, at 788; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS § 404 (1986) ("A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircrafts, genocide, war crimes and perhaps terrorism . . .").

[127] Demjanjuk v. Petrovsky, 776 F.2d at 582–83.

[128] *Id.*

[129] Reiss, *supra* note 6, at 302.

[130] *Id.*

[131] *In re:* Extradition of Demjanjuk, 612 F. Supp. at 556. Various tribunals were set up after World War II to prosecute Nazi war criminals. *See id.* Most notably, the IMT was set up at Nuremberg to try "major" German war criminals. *Id.*

[132] The IMT was created and administered jointly by the United States, Great Britain,

to try Nazi officials accused of war crimes, crimes against humanity, and crimes against peace, most of which were committed outside the territory of the four Allies.[133] The IMT's jurisdiction was not limited to the sovereign territories, or even the occupied zones; rather, it was empowered by its charter to exercise jurisdiction over even those offenses that had no "particular geographic location."[134] The international community affirmed and endorsed the principles of law invoked by the tribunals.[135]

2. The Application of the Universality Principle to the Eichmann Trial

By 1961, it was clear that war crimes and crimes against humanity were accepted as crimes of universal jurisdiction.[136] In the trial of Adolph Eichmann, the Israeli Supreme Court specifically recognized its right to try Nazi war criminals under principles of universal jurisdiction.[137] The District Court of Jerusalem stated a dual foundation in international law for trying Eichmann: "the universal character of the crimes in question and their specific character as intended to exterminate the Jewish people."[138]

The Supreme Court of Israel further stated:

> . . . there is full justification for applying here the principle of universal jurisdiction since the international character of the 'crimes against humanity' dealt with in this instant

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France, and the Soviet Union, collectively known as the "Allies." Randell, *supra* note 104, at 801. The Allies established the IMT through the London Agreement which was assented to by nineteen other states. *Id., citing* The London Agreement, Aug. 8, 1945, 59 Stat. 1544.

[133] IMT Charter, *supra* note 102; *In re* Extradition of Demjanjuk, 612 F. Supp. at 556–57. For a list of the offenses over which the IMT had jurisdiction, see IMT Charter, *supra* note 102.

[134] Reiss, *supra* note 6, at 303.

[135] *In re* Extradition of Demjanjuk, 612 F. Supp. at 557.

[136] Reiss, *supra* note 6, at 304.

[137] Attorney General of Israel v. Eichmann, 36 I.L.R. 277, 304 (Isr. Sup. Ct. 1962). The Eichmann Court further stated:

> The abhorrent crimes defined in this law are crimes not under Israeli law alone [sic]. These crimes which affected the whole of mankind and shocked the conscience of nations are grave offences against the law of nations itself. Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, in the absence of an International Court the international law is in need of the judicial and legislative authorities of every country, to give effect to its penal injunctions and to bring criminals to trial. The authority and jurisdiction to try crimes under international law are universal.

Attorney General of Israel v. Eichmann, 36 I.L.R. at 26 (Isr. Dist. Ct.-Jerusalem 1961).

[138] *Id.*

> case is no longer in doubt . . . . Not only do the crimes attributed to appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant.[139]

Thus, after the Eichmann decision, it was clear that Israel would assert its right to try Nazi war criminals under the universality principle of international law.

3. Application of the Universality Principle in the Demjanjuk Case

The extradition court in the Demjanjuk case held that Israel's assertion of jurisdiction was proper under the universality principle of international law.[140] The district court cited the IMT at Nuremberg and several other international agreements as examples of the international community's acceptance of universal jurisdiction over war crimes and crimes against humanity.[141] In affirming the lower court's decision, the Sixth Circuit cited section 404 of the Restatement of Foreign Relations Law of the United States, which specifically recognizes the universality principle as a proper means to obtain jurisdiction over an individual.[142]

Thus, because the international community recognizes the universality principle as a proper basis for exercising jurisdiction over perpetrators of war crimes, and because the law of the United States includes international law, the extraterritorial nature of Demjanjuk's crimes did not bar extradition.[143] Based on these principles, the Sixth Circuit rejected Demjanjuk's jurisdictional challenges to the

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[139] Attorney General of Israel v. Eichmann, 36 I.L.R. at 299.

[140] *In re:* Extradition of Demjanjuk, 612 F. Supp. at 555.

[141] *Id.* at 557. The court cited the Genocide Convention and the United Nations' "Nuremberg principles" as examples of post-World War II acceptance of the universality principle. *Id.* at 557–58. The Nuremberg Principles were formulated by the International Law Commission of the United Nations at the request of the United Nations General Assembly. *Id.* at 557. The report describes crimes against peace, war crimes, and crimes against humanity as "international crimes." *Id., citing Report of the International Law Commission*, 5 U.N. GAOR, 2nd Sess., Supp. No. 12, 111 U.N. Doc. A/1316 (1950).

[142] Demjanjuk v. Petrovsky, 776 F.2d at 582; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS, § 404 (1986).

[143] Demjanjuk v. Petrovsky, 776 F.2d at 582.

district court's extradition order and held that the State of Israel, as the prosecuting nation, had the right to seek the punishment of Demjanjuk under principles of international law.[144] On February 28, 1986, Demjanjuk was extradited to Israel to stand trial for his role in Operation Reinhardt.[145]

III. THE 1988 TRIAL

Criminal Case 373/86, The State of Israel v. Ivan (John) Demjanjuk, began on February 16, 1987 before a three judge panel of the Jerusalem District Court.[146] In the indictment submitted to the district court, the State of Israel charged Demjanjuk with the following offenses under the Nazi Statute:[147]

1) crimes against the Jewish people;[148]
2) crimes against humanity;[149]
3) war crimes;[150]
4) crimes against persecuted people.[151]

Specifically, the Israeli Government accused Demjanjuk of serving as an S.S. Wachmann, of perpetrating unspeakable acts of cruelty by pushing his victims towards and into the gas chambers at Treblinka,

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[144] *Id.* at 583. The court also noted that Israel may have been able to assert jurisdiction over Demjanjuk pursuant to the Nazi Statute based on the protective principle, which recognizes jurisdiction where an extraterritorial act threatens the security or a vital interest of the prosecuting state. *In re:* Extradition of Demjanjuk, 612 F. Supp. at 558–59 n.13. The extradition court noted that it was argued that important state interests of Israel were affected by the acts alleged. *Id.* It was also noted that Israel may have been able to assert jurisdiction over Demjanjuk based on the passive personality principle, which confers jurisdiction when the victim is a national of the prosecuting state. *Id.* Although the victims of Ivan the Terrible's acts were not Israeli citizens, Israel claimed jurisdiction under this theory based on its close nexus with the victims. *Id.*

[145] *16-Year Fight, supra* note 4.

[146] *See* THE DEMJANJUK TRIAL, *supra* note 2, at xii; *16-Year Fight, supra* note 4.

[147] THE DEMJANJUK TRIAL, *supra* note 2, at 7.

[148] For a definition of "crimes against Jewish people," see *supra* note 96.

[149] For a definition of "crimes against humanity" under the Nazi Statute, see *supra* note 97.

[150] For a definition of "war crimes" under the Nazi Statute, see *supra* note 98.

[151] *See* Nazi Statute, *supra* note 15, § 2, which states:

> [I]f a person, during the period of the Nazi regime, committed in an enemy country an act by which, had he committed it in Israel territory, he would have become guilty of an offence under one of the following sections of the Criminal Code, and he committed the act against a persecuted person as a persecuted person he shall be guilty of an offence under this Law and be liable to the same punishment to which he would have been liable had he committed the act in Israel territory: . . . (e) section 212 (manslaughter); (f) section 214 (murder); (g) section 222 (attempt to murder). . . .

and of beating their naked bodies and cutting pieces from their living flesh.[152] Israel also accused Demjanjuk of operating, with his own hands, the gas chambers at the Treblinka death camp, thereby causing the death of hundreds of thousands of people.[153] The prosecution further alleged that Demjanjuk, because of his cruelty, earned the nickname "Ivan Grozny" or "Ivan the Terrible."[154] In his response to the indictment, Demjanjuk repeated the assertions that he had made in his denaturalization and extradition hearings in the United States.[155] Namely, he contended that he was never a member of the auxiliary forces that served the German authorities and he never received training in the Trawniki camp, and thus, that the Trawniki card was a forgery.[156] Demjanjuk also asserted that he was never a part of Operation Reinhardt, that he was never at either the Treblinka death camp or the Sobibor extermination camp, and that he was not Ivan the Terrible.[157]

In his defense, Demjanjuk contended not only that the prosecution witnesses were mistaken in their identification, but also that at the time that Ivan the Terrible was committing his horrible crimes in Treblinka, he, Demjanjuk, was a German prisoner-of-war in Poland.[158] According to Demjanjuk, in 1942, during his service in the Soviet Army, he was captured by the Germans at the "Battle of Kerch."[159] After being held for several weeks at temporary camps in the Crimean peninsula and Rovno, Demjanjuk claims he was transferred to the Chelm prisoner-of-war camp in Eastern Poland.[160] According to Demjanjuk, he remained at Chelm for about eighteen months, where he worked building residential quarters, unloading coal, and cutting peat.[161] In 1944, after approximately eighteen months, Demjanjuk claims he was taken with other prisoners to a place used by the National Liberation Army in Austria and later to a camp near the Swiss border.[162] He further contended that he was attached to these forces until the end of the Second World War, after which time

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[152] THE DEMJANJUK TRIAL, *supra* note 2, at 6.

[153] *Id.*

[154] *Id.*

[155] *Id.*; U.S. v. Demjanjuk, 518 F. Supp. at 1376–77 (denaturalization hearing); *In re:* Extradition of Demjanjuk, 612 F. Supp. at 553 (extradition case).

[156] THE DEMJANJUK TRIAL, *supra* note 2, at 7–8.

[157] *Id.* at 8.

[158] *Id.* at 332.

[159] *Id.*

[160] *Id.* at 333.

[161] THE DEMJANJUK TRIAL, *supra* note 2, at 333.

[162] *Id.* at 8.

he relocated to a Displaced Persons camp, where he remained until he emigrated to the United States.[163]

The prosecution relied on two main pieces of evidence to prove its case. The first piece consisted of the testimony of five Treblinka survivors and one German guard who positively identified Demjanjuk as Ivan the Terrible of Treblinka.[164] Four other Treblinka survivors also identified Demjanjuk's photo to investigators, but they died before the trial commenced.[165] Further support arose from the identification of Demjanjuk's photo by a farmer named Dudoc, who operated a tavern near the Treblinka death camp.[166] Dudoc identified Demjanjuk's photo as someone known to him as Ivan the Terrible, operator of the gas chambers at Treblinka.[167]

The District Court of Jerusalem dealt at length with the question of whether or not it is possible to remember and accurately describe the details of events that took place over forty-five years ago.[168] After hearing the testimony of the survivors, the court concluded that it was *impossible to forget* the realities of Treblinka, and that anyone who underwent the shock of the Treblinka extermination camp could not forget what their eyes had seen.[169] The court held that the identifications by the survivors were both reliable and accurate.[170]

The second piece of evidence relied on by the prosecution was the "Trawniki document," an S.S. identification card which placed Demjanjuk as a member of the Trawniki unit of the German S.S., a

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[163] *Id.* at 8–9.

[164] *Id.* at 118. Demjanjuk was positively identified by Otto Horn, a guard who served at the Treblinka extermination camp during the years that Ivan the Terrible operated the gas chambers. *Id.* at 162. Horn testified that he was well acquainted with Ivan and saw him frequently performing his various duties. *Id.* at 164. Prior to his testimony, Horn, in succession, picked out both Demjanjuk's 1951 visa picture and the Trawniki photograph and identified him as the Ivan he knew from Treblinka. *Id.* at 167.

[165] *See Final Chapter*, *supra* note 3, at 8.

[166] *Id.* at 9.

[167] *Id.*

[168] THE DEMJANJUK TRIAL, *supra* note 2, at 10. The district court also, and perhaps more importantly, posed the question in the alternative, i.e., is it at all possible to forget? *Id.* The court asked itself:

> Can people who were in the vale of slaughter and experienced its horrors . . . people who saw, day after day, the killing, the humiliation, the brutality, the abuse by the German oppressors . . . forget all this? . . . . Is it possible that someone who has experienced the terrible reality described in the indictment would remember so well the details of the actions while forgetting their perpetrators?

Id.

[169] *Id.* at 198.

[170] *Id.* at 263.

unit which worked at the Treblinka death camp.[171] The card bears Demjanjuk's name and several identifying features, such as his father's name, his date of birth, his place of birth, and a photograph in S.S. uniform which appeared to be of Demjanjuk.[172] The card does not mention Demjanjuk's service at Treblinka, but instead lists his presence at Sobibor, another Nazi death camp where approximately 250,000 Jews were put to death.[173] The district court rejected Demjanjuk's claim that the card was a forgery by the secret services of the former Soviet Union, the KGB. The court held that the Trawniki certificate was authentic and proved Demjanjuk's service at the Trawniki camp.[174] Demjanjuk's alibi was also disproved by expert testimony which established that Chelm was only a transit camp in which prisoners remained for no longer than several weeks.[175]

On April 18, 1988, after a fourteen month trial, the Israeli District Court found that Demjanjuk was Ivan the Terrible and convicted him on all four counts of the indictment.[176] The court based its verdict principally on the testimony of the five Treblinka survivors and the statements of those survivors who had identified Demjanjuk to Israeli police, but had died before the trial began.[177] Although the court held that the identifications, in and of themselves, were sufficient proof of Demjanjuk's guilt, the court also cited the Trawniki document, and Demjanjuk's faulty alibi as reinforcing its holding.[178] One week later, the court sentenced Demjanjuk to death by hanging.[179] Demjanjuk remained in solitary confinement in a cell near Tel Aviv for five years awaiting a ruling on his appeal.[180]

IV. THE 1993 APPEAL AND THE ACQUITTAL

Demjanjuk's appeal to the Israeli Supreme Court began on May 14, 1990, more than two years after the district court's decision.[181]

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[171] THE DEMJANJUK TRIAL, *supra* note 2, at 265.

[172] *Id.*

[173] *Id.* at 325; DAWIDOWICZ, *supra* note 1, at 149.

[174] THE DEMJANJUK TRIAL, *supra* note 2, at 265, 328.

[175] *Id.* at 384.

[176] *16-Year Fight, supra* note 4; THE DEMJANJUK TRIAL, *supra* note 2, at 385.

[177] THE DEMJANJUK TRIAL, *supra* note 2, at 384.

[178] *Id.* at 384.

[179] *16-Year Fight, supra* note 4.

[180] Goller, *supra* note 13.

[181] TEICHOLZ, *supra* note 12, at 302. The appeal was originally scheduled for December 1988. *Id.* One week before the appeal was to begin, a member of Demjanjuk's defense team, former Israeli District Court Judge Dov Eitan, committed suicide by jumping from the fifteenth floor

In his petition, Demjanjuk appealed both the district court's conviction and its sentence.[182] Demjanjuk continued to assert that he was not Ivan the Terrible of Treblinka.[183]

The prosecution's evidence regarding identification in the Demjanjuk case consisted of two distinct sets of evidence.[184] The first set related to Demjanjuk's service as a Wachmann of the S.S. in the Trawniki unit.[185] The second set dealt with his service within that unit as an operator of the gas chambers at Treblinka.[186] On appeal, the Supreme Court of Israel allowed Demjanjuk to introduce new evidence which called into question his service at Treblinka.[187]

A. *The Treblinka Evidence*

The district court based its ruling, which found Demjanjuk guilty of being Ivan the Terrible, principally on the testimony and depositions of the Treblinka survivors.[188] The Israeli Supreme Court carefully examined the identification procedures and testimony of these witnesses to assess their reliability.[189] The court found that the procedures used by Israeli investigators complied with Israeli rules of evidence, and the identifications themselves were completely reliable.[190] The court also dismissed the defense counsel's allegations of

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of a building in Jerusalem. *Id.* At Eitan's funeral on December 1, 1988, Yisrael Yehezekeli, a Holocaust survivor, threw a solution of hydrochloric acid at Yoram Sheftel, Demjanjuk's attorney. *Id.* at 303. Demjanjuk's appeal was delayed a year to allow Sheftel to recover. *Id.*

[182] Landau, *Free*, *supra* note 11. The appeal filed by Demjanjuk's counsel also contained allegations about "the general functioning of the honourable Court of the first instance, throughout the trial of the appellant, including its attitude to the parties before it, especially everything related to applying different criteria in the extreme towards the prosecution on the one hand and the defence on the other." *Final Chapter*, *supra* note 3, at 38. The Israeli Supreme Court dismissed these allegations as having no substance. *See id.*

[183] *Final Chapter*, *supra* note 3, at 21.

[184] *Id.* at 1.

[185] *Id.*

[186] *Id.*

[187] *Id.* at 10.

[188] THE DEMJANJUK TRIAL, *supra* note 2, at xxv.

[189] *Final Chapter*, *supra* note 3, at 2–10. In determining the reliability of the identification procedures, the court applied the totality of the circumstances test as set forth in Neil v. Biggers, 409 U.S. 111, 199–200 (1972). *Final Chapter*, *supra* note 3, at 6. This test requires that a court weigh the corrupting influence of any suggestiveness against the ultimate reliability of the identification. *Biggers*, 409 U.S. at 189. The court should consider the following factors: the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. *Id.*

[190] *Final Chapter*, *supra* note 3, at 3.

senility, deception, and negligible identification capacity against the witnesses.[191] Thus, the court found no grounds for interfering with the district court's findings based on the survivors' testimony.[192]

The identification testimony, however, was not the only piece of evidence submitted regarding the identity of Ivan the Terrible.[193] In 1991, following the collapse of the Soviet Union, new evidence was released from Soviet archives which identified another man, Ivan Marchenko, as the gas chamber operator known as Ivan the Terrible.[194] The new evidence consisted of "protocols"[195] of thirty-seven former Treblinka guards and forced laborers, who had been interrogated about their crimes in the former Soviet Union following World War II.[196] Many of the depositions stated that the name of the gas chamber operator known as Ivan the Terrible was Ivan Marchenko.[197] Some of these former guards identified Marchenko in photographs that bore little resemblance to Demjanjuk.[198]

During the appeal, Demjanjuk submitted applications for the admission of this new evidence.[199] Under Israeli law, the Supreme Court has a wide degree of discretion regarding what evidence it can review on appeal.[200] For example, section 15 of the Nazi Statute 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."[201] On August 14, 1991, pursuant to this section, the Israeli Supreme Court accepted the new evidence.[202]

To prove its case, the prosecution did not need to prove guilt with absolute certainty.[203] Rather, it was only necessary to prove guilt beyond a reasonable doubt.[204] In determining whether the new evidence created a reasonable doubt, the court first measured the

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[191] *Id.* at 10.

[192] *Id.*

[193] *Id.*

[194] *Id.* at 10–11; Hedges, *supra* note 1, at A8.

[195] Protocols are written summaries, taken by a clerk, stating what a prisoner said under interrogation. Interview with Allan A. Ryan, former director of the United States Justice Department, Office of Special Investigations, in Boston, Massachusetts (Jan. 28, 1993).

[196] *Final Chapter, supra* note 3, at 14; Goller, *supra* note 13.

[197] *Final Chapter, supra* note 3, at 11. Marchenko was last seen in Yugoslavia in 1944. Hedges, *supra* note 1, at A8.

[198] *Final Chapter, supra* note 3, at 11.

[199] Landau, *Free, supra* note 11.

[200] TEICHOLZ, *supra* note 12, at 303.

[201] Nazi Statute, *supra* note 15, § 15(a); Landau, *Free, supra* note 11.

[202] *16-Year Fight, supra* note 4.

[203] *Final Chapter, supra* note 3, at 16.

[204] *Id.*

evidentiary weight of the protocols.[205] The court recognized the inherent difficulty in determining the reliability of the protocols given the fact that no evidence regarding the statements, outside of the written documents themselves, was submitted to the court.[206] The court noted, for example, that neither party had submitted any evidence regarding the protocols' chain of possession from the time they came into existence until the present.[207] As a result, it was impossible for the court to clarify anything beyond that which was written in the statements.[208]

In order to uphold the district court's conviction, the prosecution needed to convince the Israeli Supreme Court that the collection of facts put before it was not consistent with any rational conclusion other than the one that Demjanjuk, and no other person, was Ivan the Terrible of Treblinka.[209] The prosecution, however, failed to advance any arguments that could reconcile the new evidence with the statements of the survivors.[210] Despite the many questions and problems surrounding the Russian protocols, without a reasonable basis for rejecting the evidence as untrustworthy, the court refused to rule out their significance.[211]

As the court stated:

> In the circumstances before us the statements submitted at the appeal stage prevent [us from] reaching a rational conclusion, which is close to certain, about the soundness of the appellant's conviction as Ivan the Terrible, operator of the gas chambers. In the absence of a rational conclusion . . . with regard to the statements there remains a deadlock, i.e., a reasonable doubt, and if there is a reasonable doubt, the appellant is entitled to benefit from it.[212]

On July 29, 1993, as a result of this reasonable doubt, the Supreme Court of Israel acquitted Demjanjuk on charges of being Ivan the Terrible of Treblinka.[213]

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[205] *Id.* at 12.
[206] *Id.*
[207] *Id.*
[208] *Final Chapter*, *supra* note 3, at 12.
[209] *Id.* at 16.
[210] *Id.* at 18.
[211] *Id.*
[212] *Id.* at 19–20.
[213] *Final Chapter*, *supra* note 3, at 20.

B. *Service at the Trawniki Unit and at Sobibor*

Although the new evidence created a reasonable doubt as to whether Demjanjuk was Ivan the Terrible, it in no way refuted the evidence of Demjanjuk's service as a Wachmann of the S.S. in the Trawniki unit.[214] To the contrary, the protocols from Russia included a deposition of an S.S. Wachmann named Danilchenko who testified that he had served together with Demjanjuk as part of the Trawniki unit at the extermination camp at Sobibor.[215] Danilchenko identified Demjanjuk to the Soviet authorities in three photographic lineups containing three different pictures of Demjanjuk.[216] The new evidence introduced on appeal also added a detailed description of a Wachmann's duties in the Trawniki unit.[217] These duties included: guarding those condemned to extermination on their way to death camps, dealing with their disembarkment from the trains, preparing for their extermination, and forcing Jewish prisoners, by threats, violence, and murder, to collect the other prisoners' clothes, gather up their valuables, and take corpses to burial.[218] Thus, it was clear from the factual information presented to the Israeli Supreme Court that Demjanjuk was part of the Trawniki unit, a unit whose primary purpose was to aid the Nazi administration in the destruction of the Jewish people.[219]

The court then considered whether it had the authority to convict Demjanjuk for crimes committed during his service in the Trawniki unit—crimes with which he had not formally been charged.[220] The court examined this question under both international laws of extradition and Israeli criminal procedure.[221] Both the extradition request and the indictment sheet submitted to the United States by

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[214] *Id.* at 19–20.

[215] *Id.* Sobibor was an extermination camp located in the northeastern part of the Lublin district of Poland, one hundred miles south of Treblinka. THE DEMJANJUK TRIAL, *supra* note 2, at 28–29. The U.S. Immigration and Naturalization Services and the Israeli authorities originally believed that Demjanjuk had served at Sobibor. *See* THE DEMJANJUK TRIAL, *supra* note 2, at 129; ALLAN A. RYAN, QUIET NEIGHBORS 104 (1984). It was not until several survivors identified Demjanjuk's photo as "Ivan the Terrible" of Treblinka that the Treblinka charges were investigated. RYAN, *supra*, at 107.

[216] *See* Landau, *Free*, *supra* note 11; *Final Chapter*, *supra* note 3, at 20. New evidence was also presented on appeal that showed Demjanjuk served with the S.S. in the Flossenbeurg and Regensbuerg concentration camps. Landau, *Free*, *supra* note 11; *Final Chapter*, *supra* note 3, at 20.

[217] *Final Chapter*, *supra* note 3, at 20.

[218] *Id.* at 20–29.

[219] *Id.* at 25, 32.

[220] *Id.* at 33.

[221] *Id.* at 33.

Israel discussed Demjanjuk's service in the Trawniki unit.[222] Although aiding in murder is an extraditable offense under the Extradition Treaty,[223] the extradition decision by the U.S. District Court addressed only the charge of murder as part of Demjanjuk's service at Treblinka; it did not separately examine the charge of aiding in murder as part of his service in the Trawniki unit.[224] Under the "principle of specialty," which is encompassed in the Extradition Treaty,[225] a country requesting the extradition of a person cannot prosecute that person for another offense listed in the Treaty, but for which extradition was not granted.[226] Section 24 of the Extradition Law of the State of Israel, 5714–1954, encompasses this principle, providing:

> [W]here a person has been extradited to Israel by a foreign state, he shall not be detained or tried for another offence, or extradited to another state for any offence, 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 an opportunity—subsequent to his extradition—so to do or he left Israel after his extradition and has voluntarily returned to it.[227]

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[222] *Final Chapter*, *supra* note 3, at 32. The indictment described the overall objectives of the Trawniki unit and Demjanjuk's membership in this unit. *Id.*

[223] Extradition Treaty, *supra* note 69, art. II, 14 U.S.T. at 1708, 1709.

[224] *In re:* Extradition of Demjanjuk, 612 F. Supp. at 560. Demjanjuk was extradited for the charge of murder pursuant to article II of the Treaty. *Id.*; Extradition Treaty, *supra* note 69, art. II, 14 U.S.T. at 1708.

[225] *See* Extradition Treaty, *supra* note 69, art. III, 14 U.S.T. at 1712, which states:

> [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 nor be extradited by that Party to a third State unless:
> 1. He has left the territory of the requesting Party after his extradition and has voluntarily returned to it;
> 2. He has not left the territory of the requesting Party within 60 days after being free to do so; or
> 3. The requested Party has consented to his detention, trial, punishment or extradition to a third State for an offense other than that for which extradition was granted.

[226] BASSIOUNI, EXTRADITION, *supra* note 85, at 352–53; RESTATEMENT (THIRD) OF FOREIGN RELATIONS, § 477 (1986) regarding the doctrine of specialty, which states, in relevant part: "Under most international agreements . . . (1) A person who has been extradited to another state will not, unless the requested state consents, (a) be tried by the requesting state for an offense other than one for which he was extradited . . . ." *Id.*

[227] *Final Chapter*, *supra* note 3, at 33–34, *quoting* § 24 of the Extradition Law of the State of Israel.

The Israeli Supreme Court interpreted the principle of specialty as mandating two requirements in order to convict Demjanjuk of aiding in murder as a member of the Trawniki unit.[228] The first condition, which is implied from the laws of extradition, requires that the new charge—aiding in murder—be an extraditable offense under the Extradition Treaty.[229] The last paragraph of section II of the U.S.—Israel Extradition Treaty, in which the list of extraditable offenses appears, states that extradition shall also be granted for participation in any of the offenses mentioned in the article.[230] Because murder is an extraditable offense under the Extradition Treaty, the court concluded that aiding in murder is an extraditable offense as well.[231]

The second condition of the principle of specialty relates to the issue of what constitutes another offense under section 24 of Israeli law; that is, "whether and when can the alternative offence be considered an offence of which the accused was indicted *ab initio* since it was included within the indictment or was an element thereof."[232] Although the prosecution made no attempt to obtain from the United States an alternative indictment relating to the Trawniki charges, this fact did not prevent the Israeli court from convicting Demjanjuk on these charges.[233] The key inquiry was whether the Trawniki charges constituted the same or another offense under the indictment.[234] That is, if the facts supporting the original request for Demjanjuk's extradition also supported the Trawniki charges, the Israeli Supreme Court properly could retain jurisdiction over Demjanjuk without violating the principle of specialty.[235] If, however, the Trawniki charges were found to constitute another offense, the court would not have jurisdiction to convict Demjanjuk.[236] The Supreme Court of Israel never addressed the question of whether the principle of specialty would be violated by convicting Demjanjuk on the Trawniki or Sobibor charges.[237] Instead, the court based its decision

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[228] *Id.* at 34.

[229] *Id.* at 35.

[230] *See* Extradition Treaty, *supra* note 69, art .II, 14 U.S.T. at 1709.

[231] *See id.*; *see also Final Chapter*, *supra* note 3, at 35.

[232] *Final Chapter*, *supra* note 3, at 35.

[233] *Id.*

[234] *See id.*

[235] *See* BASSIOUNI, EXTRADITION, *supra* note 85, at 357–58.

[236] *Final Chapter*, *supra* note 3, at 35.

[237] *Id.* at 38.

not to convict Demjanjuk of the Trawniki charges on principles of Israeli law.[238]

Under section 216 of the Israeli Criminal Procedure Law (Consolidated Version) of 1982, an Israeli court may convict the accused when the facts prove that he is guilty of an offense, even though those facts are not alleged in the indictment, provided that the defendant has been given a "reasonable opportunity to defend himself."[239] A reasonable opportunity to defend oneself includes both a technical-procedural element and a fundamental-substantive element.[240]

The procedural element dictates that the "defendant ha[s] the opportunity to cross-examine witnesses, to bring evidence of his own and to manage the defense as he desires."[241] The substantive element relates to the objective ability of the defendant to prepare against an indictment that has language different from the one originally filed, and to organize the pleading and the defense strategy completely, without being subject to any surprises.[242] In the case before the district court, the prosecution presented evidence of Demjanjuk's service in the Trawniki unit as part of the factual information surrounding Demjanjuk's training in the S.S.[243] His service in the Trawniki unit also was alleged in the extradition application.[244] In addition, the prosecution relied on the Trawniki card to prove Demjanjuk's service in the S.S.[245] Throughout all levels of his legal battle, Demjanjuk not only tried to prove that he was not Ivan the Terrible, but also persistently refuted any connection between himself and the German S.S.[246] For example, Demjanjuk repeatedly

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[238] *Id.* at 38–9.

[239] *Id.* at 36, *citing* Criminal Procedure Law [Consolidated Version], 5742–1982. The law also states that the court may not impose a heavier penalty than could have been imposed if the facts alleged in the indictment had been proven. *Id.*

[240] *Id., citing* Criminal Appeal 63, 76/79 Ozer v. State of Israel, Supreme Court Judgments, 33 (3) 606, 615.

[241] *Id.*

[242] *Final Chapter, supra* note 3, at 36, *citing* Criminal Appeal 242/63, Kariti v. Attorney General, Supreme Court Judgments 18 (3) 477 (Isr.); Criminal Appeal 428/74, Dadash v Municipality of Jerusalem, Supreme Court Judgments 29 (2) 23 (Isr.).

[243] *Id.* at 32.

[244] *Id.*

[245] *See id.* at 1.

[246] *Id.* at 21, 39. Demjanjuk brought in expert witnesses who attempted to prove that the Trawniki card was forged by the KGB. THE DEMJANJUK TRIAL, *supra* note 2, at 275. Demjanjuk's alibi defense attempted to refute allegations of both his training at Trawniki and his service at Treblinka. *Id.* at 334.

denied that he was ever at the Trawniki training camp.[247] To prove this, he maintained that the Trawniki card was forged by the KGB.[248] As part of his defense, expert witnesses were retained to testify that the Trawniki card was not authentic.[249] Demjanjuk also tried to convince the court that the statements of Danilchenko, an S.S. guard who claimed he served with Demjanjuk at Sobibor, were forged.[250]

The focus of the government's case in both the United States and in Israel, however, had been Demjanjuk's service at the Treblinka death camp in Poland.[251] The identifications central to the Israeli District Court's decision related to a Wachmann known as Ivan the Terrible at the Treblinka camp.[252] At the trial before the district court, the prosecution never advanced the charge of aiding in murder as a result of Demjanjuk's service in the Trawniki unit.[253] Instead, the charge arose at trial before the Supreme Court of Israel, during the examination of the new evidence.[254] Similarly, the charges relating to Demjanjuk's service at Sobibor were not central to the lower court's proceedings.[255] For these reasons, the court held that Demjanjuk did not have a reasonable opportunity to defend himself against the Trawniki charges.[256] The court stated:

> [H]aving a reasonable opportunity to defend would mean today, *de facto*, starting the proceedings again, i.e. further continuation of the proceedings beyond the proper measure. Such a change in the line of attack in everything relating to the substance of the indictment seven years and more after the proceedings began does not seem to us reasonable, considering the severe nature of the first indictment which served as the basis for the extradition, and that is so even if we take into account the severe substance, nature and circumstances of an alternative indictment . . . .[257]

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[247] *Id.*
[248] *Final Chapter*, *supra* note 3, at 21; THE DEMJANJUK TRIAL, *supra* note 2, at 265.
[249] THE DEMJANJUK TRIAL, *supra* note 2, at 268.
[250] *Final Chapter*, *supra* note 3, at 39.
[251] *Id.*
[252] *Id.*
[253] *Id.*
[254] *Id.*
[255] *Final Chapter*, *supra* note 3, at 39.
[256] *Id.*
[257] *Id.*

Thus, the court declined to use its authority under section 216 to convict Demjanjuk.[258]

An the underlying assumptions in Israeli criminal law is that a court must operate within strict constraints to assure absolute reliability in the determination of guilt, and that the accused should be given every opportunity to exonerate himself.[259] As the Supreme Court of Israel stated in the Demjanjuk case, "where there is a shadow of suspicion that the accused has been deprived of his right and his possibility of defending himself properly against a new indictment, or where this has been diminished to an unreasonable degree, the Court shall not exercise its authority under . . . section 216."[260]

Jewish law embodies the view that the proper function of the court is not to determine the absolute truth, but to lift the cloud of guilt from the accused.[261] This philosophy is revealed in the final sentences of the Israeli Supreme Court's ruling:

> The main issue of the indictment sheet filed against the appellant was his identification as Ivan the Terrible, an operator of the gas chambers in the extermination camp in Treblinka. A substantial number of survivors of the Treblinka inferno identified the appellant as Ivan the Terrible of Treblinka, one of the chief murderers and tormentors of the Jews who were brought to Treblinka on their way to suffocation in the gas chambers. He was therefore convicted in the district court. Before us, after the hearing of the appeal ended, there were submitted statements of various Wachmanner, which spoke of someone else as Ivan the Terrible of Treblinka. We do not know how these statements came into the world or who gave birth to them; but we admitted them by the most lenient application of the law and procedure. And when they came before us doubt began to gnaw away at our judicial conscience; perhaps the appellant was not Ivan the Terrible of Treblinka. By virtue of this knawing—whose nature we knew, but not the mean-

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[258] *Id.* at 40.

[259] *See* Irene Merker Rosenberg & Yale L. Rosenberg, *Guilt: Henry Friendly Meets the MaHaRaL of Prague*, 90 MICH. L. REV. 604, 614, 617 (1991).

[260] *Final Chapter*, *supra* note 3, at 37–38.

[261] *See* Rosenberg & Rosenberg, *supra* note 259, at 620; *see also* Alex Kozinski, *Sanhedrin II: The Case of Ivan Demjanjuk*, THE NEW REPUBLIC, Sept. 13, 1993, *available in* LEXIS, Nexis Library, Newrep File.

> ing—we restrained ourselves from convicting the appellant of the horrors of Treblinka.
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> Wachmann Ivan Demjanjuk has been acquitted by us, because of doubt, of the terrible charges attributed to Ivan the Terrible of Treblinka. This was the proper course for judges who cannot examine the heart and the mind, but have only what their eyes see and read. The matter is closed—but not complete. The complete truth is not the prerogative of the human judge.[262]

C. *Israel's Decision Not to Retry Demjanjuk*

Following the Supreme Court's July 29th ruling, a group of Holocaust survivors and others filed petitions to the Supreme Court of Israel demanding new criminal proceedings against Demjanjuk based on the Trawniki and Sobibor evidence.[263] The Attorney General of Israel rejected these petitions, choosing not to pursue new war crimes charges against Demjanjuk.[264] In an opinion submitted on August 11, 1993, the Attorney General offered four reasons for this decision: (1) trying Demjanjuk on these charges could constitute a case of double jeopardy. Demjanjuk's service at both Trawniki and Sobibor had been featured in the evidence, and the prosecution had even requested his conviction on these charges; (2) trying Demjanjuk on these new charges might violate the specialty clause in the U.S.—Israel Extradition Treaty, because Demjanjuk was extradited to Israel pursuant to charges of being Ivan the Terrible, and, therefore, the Attorney General stated that trying him on new charges might violate principles of international law;[265] (3) the Supreme Court's judgment itself characterized any further proceedings against Demjanjuk as unreasonable, and the Attorney General emphasized his obligation to pay proper regard to the comments of the Supreme Court; and (4) trying Demjanjuk on new charges was not in the public interest as it may well result in another acquittal after a protracted, complex proceeding. In the opinion of the Attorney General, the chances of securing a conviction in a new trial were

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[262] *Final Chapter*, *supra* note 3, at 40–41.

[263] Haberman, *Stays in Jail*, *supra* note 20.

[264] *Id.*

[265] See discussion *supra* part IV.B, regarding the Israeli Supreme Court's analysis of the specialty clause and its application to the Demjanjuk case. The Attorney General stated that the doctrine of specialty was not a "main" consideration in his decision not to prosecute Demjanjuk. Landau, *The End*, *supra* note 22.

slim, and a second acquittal may have a negative effect on bringing other Nazi criminals to justice.[266]

The Supreme Court of Israel, sitting as the High Court of Justice, exercised judicial review of the Attorney General's decision.[267] The court stated that it would intervene only if it found that the Attorney General's grounds for not pursuing the charges were plainly wrong.[268] In the court's opinion, the decision not to try Demjanjuk on the new charges clearly fell within the bounds of the Attorney General's legitimate discretion, and the petitioners had advanced no adequate grounds for the court to intervene.[269] Therefore, the petitions were dismissed and Demjanjuk was released.[270]

V. SUBSEQUENT PROCEEDINGS IN THE UNITED STATES

Following Demjanjuk's acquittal by the Israeli Supreme Court, the United States District Court for the Sixth Circuit reopened Demjanjuk's extradition case.[271] The issue before the court was whether the integrity of the judicial process had been violated in the earlier proceedings and if so, whether Demjanjuk's extradition order should be set aside.[272] Specifically, the question before the court was whether the attorneys in the Justice Department's Office of Special Investigations (OSI) had engaged in prosecutorial misconduct by failing to disclose, to the court and to Demjanjuk, exculpatory information in their possession.[273]

While this matter was pending, the Sixth Circuit issued a writ of habeas corpus ordering the U.S. government to allow Demjanjuk to return to the United States.[274] This marked the first time ever that a convicted Nazi war criminal ejected from the United States was permitted to return.[275] The court's decision to issue a writ of habeas corpus was based on four factors: (1) Demjanjuk's physical presence in the United States was needed to help prepare his case; (2)

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[266] Landau, *The End*, *supra* note 22.

[267] *Id.*

[268] *Id.*

[269] *Id.*

[270] *Id.*

[271] Demjanjuk v. Petrovsky, 1993 U.S. App. LEXIS 20596, at *1.

[272] *Id.* Under Rule 60(b) of the Federal Rules of Civil Procedure, an extradition order should be set aside if it was procured by a fraud practiced on the court or if it would be otherwise inequitable or unjust to leave the order in effect. *See* FED. R. CIV. P. 60(b).

[273] Demjanjuk v. Petrovsky, 10 F.3d at 339.

[274] Demjanjuk v. Petrovsky, 1993 U.S. App. LEXIS 20596, at *1.

[275] Labaton, *supra* note 24, at A18.

Demjanjuk's life might be in jeopardy by remaining in Israel; (3) Demjanjuk's presence might be required for direct testimony in review of his extradition order; and (4) basic humanitarian concerns required that Demjanjuk be allowed back into the United States.[276]

The principal basis for Demjanjuk's claim of prosecutorial misconduct related to undisclosed documents which OSI attorneys had received from the former Soviet Union and from Poland.[277] These documents related to the identity of Ivan the Terrible of Treblinka.[278] The Israeli Supreme Court's decision to acquit Demjanjuk was based primarily on statements which became available in 1991, after the break-up of the Soviet Union.[279] Thus, although it was not contended that the OSI possessed these documents during its investigation, Demjanjuk maintained that prior to the denaturalization trial the OSI had obtained material that should have raised doubts about Demjanjuk's identity as Ivan the Terrible.[280]

On November 17, 1993, the Sixth Circuit released its opinion, holding that the OSI had committed prosecutorial misconduct by withholding exculpatory information that Demjanjuk might have used to contest his extradition order.[281] As a result of this finding, the court revoked the extradition order which had sent Demjanjuk to Israel in 1986.[282] On October 3, 1994, the Supreme Court of the United States denied review of the Sixth Circuit's decision.[283]

V. WHERE DO WE GO FROM HERE: AN ANALYSIS OF THE SUPREME COURT'S DECISION & ITS IMPACT ON THE FUTURE OF NAZI WAR CRIMES TRIALS

The Israeli Supreme Court's decision in the Demjanjuk case rests on two key rulings. The first concerns the sufficiency of the evidence that Demjanjuk was Ivan the Terrible, the operator of the gas chambers at the Treblinka death camp in Poland.[284] According to the court, this charge was not proven beyond a reasonable doubt.[285] The second deals with the lesser charges of aiding in murder as part of

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[276] Demjanjuk v. Petrovsky, 1993 U.S. App. LEXIS 20596 at *1–2; *see also* Hertzberg, *supra* note 25, at 181.

[277] Demjanjuk v. Petrovsky, 10 F.3d at 342.

[278] *Id.*

[279] *Final Chapter*, *supra* note 3, at 10–11.

[280] Demjanjuk v. Petrovsky, 10 F.3d at 342.

[281] *Id.* at 356; *see also* Hertzberg, *supra* note 25, at 181 n.2.

[282] Demjanjuk v. Petrovsky, 10 F.3d at 356.

[283] Arnold, *supra* note 26, at A14.

[284] *See Final Chapter*, *supra* note 3, at 1; Kozinski, *supra* note 261.

[285] *Final Chapter*, *supra* note 3, at 19–20.

the Trawniki unit, and service at the extermination camp at Sobibor and the concentration camps at Flossenbuerg and Regensbuerg.[286] These charges were proven to be factually certain.[287]

A. *The Treblinka Charges*

The Supreme Court of Israel found that a reasonable doubt existed as to Demjanjuk's identity as Ivan the Terrible.[288] The court reached this decision despite the testimony of five Treblinka survivors and an S.S. guard who positively identified Demjanjuk as the man they knew as Ivan the Terrible.[289] In the proceedings before the Jerusalem District Court, each of these witnesses identified Demjanjuk with absolute certainty as the gas chamber operator at the Treblinka death camp.[290] Statements of three other survivors, who identified Demjanjuk to Israeli investigators but did not appear in court, supported these in-court identifications.[291]

During the out-of-court identification procedures, each witness was shown photographic displays of suspected Nazi war criminals from which they picked out Demjanjuk's 1951 visa photo.[292] These witnesses had lived and worked near Ivan the Terrible for an extended period of time.[293] Many of them suffered directly from his abuse.[294] The five Treblinka survivors who testified in court insisted that the photograph of Demjanjuk was that of Ivan the Terrible of Treblinka.[295] These witnesses provided the core of the testimony relating to the Treblinka charges.[296] The Supreme Court of Israel carefully analyzed these identifications and found no grounds to question their reliability.[297]

The court found the reliability of the new evidence, on the other hand, to be extremely suspect.[298] The evidence consisted largely of

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[286] *Id.* at 20; *see also* Kozinski, *supra* note 261.

[287] *See Final Chapter*, *supra* note 3, at 21.

[288] *Id.*

[289] *Id.* at 19–20.

[290] *Id.* at 6.

[291] *Id.* at 8. These statements were admitted under § 15 of the Nazi Statute. *See* Landau, *Free*, *supra* note 11.

[292] WILLEM ALBERT WAGANEER, IDENTIFYING IVAN 95 (1988). Each witness was shown a photo display containing at least eight pictures. *See* THE DEMJANJUK TRIAL, *supra* note 2, at 206.

[293] *See Final Chapter*, *supra* note 3, at 6.

[294] *See* THE DEMJANJUK TRIAL, *supra* note 2, at 80–88.

[295] *See Final Chapter*, *supra* note 3, at 6.

[296] *Id.*

[297] *Id.* at 10.

[298] *See id.* at 12.

the hearsay statements of dead Nazi collaborators.[299] These collaborators, at the time, were being questioned about their own wartime activities.[300] Most of the Nazi guards interrogated tried to de-emphasize their personal role in the acts of extermination and many, initially, denied their very service in the Trawniki unit.[301] Moreover, the new evidence did not consist of direct statements by the guards, but rather were summaries, written by a Soviet clerk, of what the prisoners said while being interrogated.[302] Adding to the unreliability of the statements was the complete absence of any evidence regarding the persons who took the statements, the circumstances under which they were taken, or the methods by which they were obtained.[303] In addition, the statements in question were taken by the KGB, an organization which is not known for adhering to western notions of procedural regularity.[304] In sum, nothing was presented to the court which could clarify the reliability and authenticity of the documents.

Although the Israeli Supreme Court recognized the many problems surrounding the Russian evidence, it admitted the protocols, and acquitted Demjanjuk based on the reasonable doubt created by them.[305] The court's willingness to admit these statements, despite their inherent unreliability, highlights the basic principles of Israeli law, which places the rights of the accused above all else.[306] What the Israeli Court demanded—and could not find—was "an additional layer of evidence"; something which would reconcile the statements from the KGB files with the statements of the Treblinka survivors.[307] The court insisted that the prosecution produce a concrete, rational explanation to dissipate the doubt created by the new evidence.[308] The prosecution had no way of refuting these statements because it had not had the opportunity to cross examine the declarants. In addition, the prosecution could not attack the reliability of the

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[299] *Id.* at 10–11.

[300] *See Final Chapter, supra* note 3, at 14.

[301] *Id.* at 15.

[302] Interview with Allan A. Ryan, former Director of the United States Justice Department, Office of Special Investigations, in Boston, Massachusetts (Jan. 28, 1993).

[303] *Final Chapter, supra* note 3, at 12.

[304] Kozinski, *supra* note 261; *see generally Borys Y. Dackiw, Note, Denaturalization of Suspected Nazi War Criminals: The Problem of Soviet-Source Evidence,* 24 COLUM. J. TRANSNAT'L L. 365 (1986).

[305] *Final Chapter, supra* note 3, at 40–41.

[306] *See* Rosenberg & Rosenberg, *supra* note 259, at 615–17.

[307] *Final Chapter, supra* note 3, at 19.

[308] *Id.*

statements because the circumstances surrounding the existence of the documents were unknown.[309] Thus, the very factors which made the statements inherently unreliable also made them immune to attack.[310]

The Israeli Supreme Court's insistence that the prosecution produce with "an additional layer of evidence" to refute the Soviet statements is a much more rigorous standard than that required by American law. Where there is newly discovered evidence, an American court places the burden on the defendant to prove that the new evidence *probably would have resulted in acquittal* at trial.[311] In determining whether the defense has met its burden, the court evaluates the new evidence in light of the entire record made at trial.[312] The strength of the evidence presented at trial is an important consideration in the court's evaluation.[313] If the court thinks that there is a reasonable probability of acquittal a new trial will be ordered.[314]

The Israeli Supreme Court should have done what appellate courts in the United States do when faced with new evidence—remand the case back to the trial court for further proceedings. The district court had heard all of the testimony in the 1988 trial; it had witnessed the testimony of the survivors and observed the cross examinations.[315] Thus, the district court was in a better position to examine the new evidence and make findings of fact.

The Supreme Court of Israel, however, chose to make its own findings of fact based on the new evidence and the record, and to acquit Demjanjuk. This decision may have been based on the tradition of Israeli law, which views the function of a court as removing the cloud of guilt from the accused, not determining the absolute truth.[316] This tradition is revealed most clearly in the last line of the Israeli Supreme Court's opinion: "The matter is closed—but not complete. The complete truth is not the prerogative of the human judge."[317]

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[309] *Id.* at 12.

[310] *See* Kozinski, *supra* note 261.

[311] U.S. v. Agurs, 427 U.S. 97, 111 (1976); *see* WRIGHT, FEDERAL PRACTICE & PROCEDURE: CRIMINAL 2d § 557.

[312] WRIGHT, *supra* note 311, § 557.

[313] *Id.*

[314] *Id.*

[315] *See generally* THE DEMJANJUK TRIAL, *supra* note 2.

[316] *See* Rosenberg & Rosenberg, *supra* note 259, at 620.

[317] *Final Chapter*, *supra* note 3, at 41.

B. *The Trawniki and Sobibor Charges*

While the new evidence created a doubt that Demjanjuk was Ivan the Terrible, it left no doubt of Demjanjuk's service as a Nazi Wachmann in the Trawniki unit.[318] The "Trawniki card," the statements of Danilchenko, and various other documents submitted on appeal proved these charges with absolute certainty.[319] The Israeli Supreme Court declined, however, to convict Demjanjuk on this charge.[320] The court reasoned that, because the trial before the lower court had dealt primarily with the Ivan the Terrible charge, and the Trawniki evidence was only part of background information, Demjanjuk did not have a reasonable opportunity to defend himself against the Trawniki charges.[321] Giving Demjanjuk that opportunity, reasoned the court, would mean instituting new proceedings.[322] The court advised that "such a change in the line of the attack in everything relating to the substance of the indictment seven years and more after the proceedings began does not seem to us reasonable."[323] Finding this unreasonable, the court declined to use its authority under section 216 of the Criminal Procedure Laws of Israel to convict Demjanjuk of the Trawniki charge.[324]

The court's decision to free Demjanjuk, a man who was shown to be an accessory to the mass extermination of millions of Jews, is perplexing. While this decision would have been understandable if the court had ruled that Demjanjuk should not be tried because human memory cannot be trusted to go back that far, the court clearly considered the testimony of the eyewitnesses reliable.[325] Although the court cited the unreasonableness of new proceedings as the basis for its holding, it is doubtful that this factor was controlling in the judges' ultimate decision. Demjanjuk's trial in Israel had already lasted for seven years, and it is unlikely that a few years beyond that would have made any significant difference. Moreover, one of the reasons that the trial had been prolonged was the nu-

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[318] *See id.* at 21.

[319] *Id.* at 20.

[320] *Id.* at 40–41.

[321] *Id.* at 39.

[322] *Final Chapter*, *supra* note 3, at 39.

[323] *Id.*

[324] *Id.* at 36. Under § 216, an Israeli court may convict the defendant of a crime of which he is shown to be guilty, even if the charge was not alleged in the complaint. *Id.*

[325] *Id.* at 10.

merous postponements requested by the defense.[326] It is hard to believe that a few years beyond the many that had already passed could be characterized as so unreasonable as to prevent prosecuting a known Nazi collaborator.

It is also unlikely that the decision not to convict Demjanjuk on the Trawniki charges was based on a possible violation of the specialty principle of international law.[327] The Israeli Supreme Court discussed this principle in its decision, but never ruled on it, basing its decision, instead, on the unreasonableness of new proceedings.[328] The Attorney General of Israel, however, cited the specialty principle in his decision not to bring new charges against Demjanjuk.[329] The rule of specialty states that a requesting nation only can prosecute an extradited defendant for the crime for which that person was certified for in the extradition order.[330] For example, because the United States only certified Demjanjuk's extradition on the Ivan the Terrible charges, Israel did not have jurisdiction to try Demjanjuk on the Trawniki charges. If Israel seriously had wanted to pursue the Trawniki charges, however, it is unlikely that the principle of specialty would have stood in its way. The United States could have granted a "waiver" of the rule of specialty based on a formal request from Israel.[331] These waivers are routinely granted when the original record contains probable cause evidence supporting the additional charge.[332] Evidence of Demjanjuk's service at Trawniki was submitted to the United States extradition court and, thus, the probable cause requirement clearly was met.

The court's decision not to convict Demjanjuk on the Trawniki charges may have been based on its feeling that the eyes of the world were on it and on Israel.[333] As a member of the Trawniki unit, Demjanjuk was just one of the many thousands who served as concentration camp guards during the Holocaust.[334] The court may have felt that singling Demjanjuk out, after he had been exonerated of the higher charges, would appear petty or vindictive.

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[326] *Final Chapter*, *supra* note 3, at 39–40. The court stated that the reason for the delay was not relevant, it only mattered that there had been such a long delay. *Id.* at 40.

[327] *Id.* at 34–35.

[328] *Id.* at 38–39.

[329] Landau, *The End*, *supra* note 22.

[330] BASSIOUNI, CRIMINAL LAW, *supra* note 121, at 423.

[331] *Id.*

[332] *Id.*

[333] *See* Kozinski, *supra* note 261.

[334] *Id.*

The court's decision not to convict Demjanjuk, and the subsequent decision by the Israeli government not to bring new charges against him, may also have reflected the opinion of many Israelis that, whatever the truth about Demjanjuk's guilt or innocence, they wished to finally rid themselves of this difficult case. In 1987, when the Demjanjuk trial began, lawyers and scholars believed that the trial would teach a new generation of Israelis about the horrors of the Holocaust.[335] The trial was broadcast daily on the radio, and students and soldiers were taken on field trips to watch the trial.[336] After more than seven years, however, the Demjanjuk trial had produced a mixture of pain, embarrassment, and perplexity among the Israeli people.[337] In the end, the court's decision to free Demjanjuk may have rested on the view articulated by the Attorney General—that a new trial was unwarranted in the public interest.[338]

C. *Fewer War Crimes Trials as a Result of the Demjanjuk Decision*

The trial of John Demjanjuk may well mark the last major trial of a suspected Nazi war criminal. The decision is likely to increase the reluctance of nations to seek the extradition of suspected war criminals. The United States Justice Department's Office of Special Investigations currently has twenty lawsuits pending against war criminals living in the United States and between four hundred and five hundred more under investigation.[339] Under current U.S. law, Nazi war criminals present in the United States cannot be criminally prosecuted.[340] The United States can only strip Nazi war criminals of their U.S. citizenship and deport them, if a country is willing to accept them, or extradite them to another country to stand trial.[341] In order for the U.S. to extradite a suspected war criminal, however, another nation must be willing to prosecute the criminal.[342] Very few

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[335] Carol Rosenberg, *Demjanjuk Ruling Worries Nazi Hunters: Other Suspects May Avoid Trial*, THE DALLAS MORNING NEWS, July 30, 1993, *available in* LEXIS, Nexis Library, News File.

[336] *Id.*

[337] Haberman, *Stays in Jail*, *supra* note 20.

[338] Irwin Cotler, *Unreasonable in the Extreme*, JERUSALEM POST, Aug. 17, 1993, *available in* LEXIS, Nexis Library, News File.

[339] *See* Brazaitis, *supra* note 27.

[340] *See* Debbie Morowitz, Note, *Prosecuting Nazi War Criminals in the United States: The Time In Which To Punish Them Is Running Out*, 15 SYRACUSE J. INT'L L. & COM. 257, 258 (1989).

[341] *Id.* at 274–75.

[342] J. Martin Wagner, Note, *U.S. Prosecution of Past and Future War Criminals and Criminals Against Humanity: Proposals for Reform Based on the Canadian and Australian Experience*, 29 VA. J. INT'L L. 887, 893 (1989).

nations are willing to seek the extradition of alleged Nazi war criminals.[343] For example [formerly West] Germany, the State that has the clearest jurisdiction to try Nazi criminals,[344] has been reluctant to do so.[345] Forty-eight cases of suspected Nazi criminals were pending in Germany in the mid-seventies.[346] It was reported that these cases were no longer being actively pursued by German prosecutors because the German government felt that the Nazi crimes committed during World War II were a "thing of the past."[347] Germany is also reluctant to seek the extradition of Nazi war criminals because many of the alleged criminals, like Demjanjuk, were not German citizens at the time they committed the atrocities.[348] Therefore, many Germans feel it is not their obligation to try these criminals.[349]

After Demjanjuk's acquittal, it is unlikely that members of the international community will be willing to expend the time and money it takes to put a war criminal on trial.[350] Unfortunately, this reluctance comes at a time when access to previously sealed information about Nazi war criminals is more abundant than ever.[351] With the collapse of the Soviet Union and the opening of Soviet archives, detailed records of Nazi atrocities are now available.[352]

Reluctance to pursue Nazi criminals also may be felt by survivors who will be unwilling to expose themselves in the future by recounting the horrors of their past.[353] As survivor Josef Czarny said just moments after the Demjanjuk verdict came down: "[H]ad I known

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[343] *Id.*

[344] Germany has territorial and national jurisdiction over Nazi war criminals. Morowitz, *supra* note 340, at 336.

[345] *See id.* at n.79. Only one individual has ever been extradited from the United States to Germany. *Id.* Moreover, Germany is unwilling to prosecute war criminals who are not German citizens and whose crimes were committed beyond the territorial borders of Germany, even though they acted under the direction of the Nazi government. *Id.*

[346] *See* RYAN, *supra* note 215, at 332.

[347] *Id.*

[348] Morowitz, *supra* note 340, at 266.

[349] *Id.*

[350] *See, e.g.,* Brazaitis, *supra* note 27 (discussing Rabbi Hier, the founder of the Simon Weisenthal Center's belief that the Demjanjuk trial will result in fewer war crimes trials); Arthur Brice, *The Demjanjuk Case: Free, But Not to Go Home: Reaction Clock Running Out on Nazi Prosecutions?*, THE ATLANTA CONST., JULY 30, 1993, *available in* LEXIS, Nexis Library, News File (reporting an Emory professor's opinion that the Demjanjuk decision will make people "gun-shy" about going after Nazi criminals); Rosenberg, *supra* note 335 (reporting experts' belief that Demjanjuk decision will discourage governments from prosecuting Nazi war criminals).

[351] *See* Brazaitis, *supra* note 27.

[352] *Id.*

[353] *See* Rosenberg, *supra* note 335.

that such a thing would happen, I would not [have] taken [it] upon myself to stand up that day in court and relive Treblinka."[354] Unfortunately, in the aftermath of the Demjanjuk verdict, this sentiment may be echoed by many survivors.

CONCLUSION

The acquittal of John Demjanjuk by the Israeli Supreme Court will no doubt have a tremendous impact on the future of Nazi war crimes trials. The acquittal of Demjanjuk on the charge of being Ivan the Terrible calls into doubt the reliability of Holocaust survivors' testimony and supports those who believe the time has come to stop the search for Nazi war criminals. Israel's decision not to prosecute Demjanjuk on the Trawniki charges raises questions about the international community's duty to prosecute perpetrators of war crimes. In the end, the lesson of the Demjanjuk case may be that it is extraordinarily difficult to bring to justice the perpetrators of the Holocaust. The international community's responsibility to try Nazi war criminals is as great as it ever was. The passage of fifty years is not long enough to justify abandoning the pursuit of Nazi war criminals, as the passage of time is irrelevant to determining one's criminal or moral responsibility. As long as the perpetrators are still alive, the international community's responsibility to try them for their crimes remains. This duty exists not only to punish the criminals for the atrocities they committed but also to send a message that the international community will not tolerate these types of crimes in the future. As Justice Robert Jackson said in his opening statement at the Nuremberg Trials in Germany: "[T]he wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated."[355]

As for Demjanjuk, as of this writing he is reunited with his family and living in Ohio. The Justice Department is continuing its fight to have Demjanjuk deported based on the Trawniki charges.

Lisa J. Del Pizzo

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[354] *Id.*

[355] TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 167 (1992).