The Extradition of John Demjanjuk: War Crimes, Universality Jurisdiction, and the Political Offense Doctrine

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ARTICLES

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OFFENSE DOCTRINE

Rena Hozore Reiss†

TABLE OF CONTENTS

I. INTRODUCTION .............................................. 282
II. THE CASE HISTORY ........................................... 284
    A. The Displaced Persons Act .......................... 284
    B. Demjanjuk's Denaturalization Proceeding ....... 286
III. THE EXTRADITION CASE ................................. 290
    A. Identification ........................................ 292
    B. Subject Matter Jurisdiction ........................ 294


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281
I. INTRODUCTION

On February 27, 1986, John Demjanjuk was flown to Israel to stand trial for allegedly committing crimes against humanity during the Second World War. Demjanjuk is accused of murdering thousands of Jews and others at the Treblinka death camp in Poland. If convicted, Demjanjuk faces a possible death sentence under Israeli law.¹

The Demjanjuk case began in 1977 when the U.S. government initiated denaturalization proceedings against Demjanjuk, based on his alleged illegal procurement of an immigration visa in the early 1950s.² Following its usual practice in the case of alleged war criminals, the government sought to revoke Demjanjuk’s U.S. citizenship and deport him.³ The case changed course in 1983, however, after Israel requested that the United States extradite Demjanjuk to Israel to stand trial for crimes against humanity. The request to extradite Demjanjuk marked the first time that Israel had asked the United States to turn over an alleged Nazi war criminal.⁴

Chief Judge Frank J. Battisti of the Northern District of Ohio certified Demjanjuk’s extradition to Israel in April, 1985. Both the District Court and the Sixth Circuit Court of Appeals denied Demjanjuk’s subsequent petition for a writ of habeas corpus; the Supreme Court then denied Demjanjuk’s petition for certiorari on February 24, 1986.⁵ The Supreme Court’s denial of certiorari removed the final obstacle to Demjanjuk’s extradition.

³. A person whose citizenship is revoked is returned to his country of origin. 1 M. BASSIOUNI, INTERNATIONAL EXTRADITION, UNITED STATES LAW AND PRACTICE § 2 (1983). Demjanjuk, a Ukrainian, would have been deported to the Soviet Union.
Demjanjuk's extradition to Israel has set the stage for what will probably be the last major trial of an alleged Nazi war criminal in the West.\(^6\) The 1961 trial of Adolf Eichmann provides the clearest precedent for the Demjanjuk trial.\(^7\) Demjanjuk revisits not only issues posed during the *Eichmann* trial, but also questions raised by the trial of the major war criminals before the International Military Tribunal at Nuremberg (the "Nuremberg trial"). The difficult issues of extralegal capture that threatened to undermine the *Eichmann* trial, however, do not exist in the *Demjanjuk* case. Thus, Demjanjuk's trial turns on the different, albeit equally difficult issues regarding the legal competence of a state to try a person for crimes committed outside its territory under legislation passed after the crimes were committed.

This Article first examines the question of Israel's jurisdiction over Demjanjuk. The *Demjanjuk* courts dealt with this issue at length, invoking the Nuremberg and *Eichmann* trials as precedent. The courts also relied on an expanded theory of universal jurisdiction, a theory that recently has become widely-accepted.\(^8\)

This Article then considers the applicability of the political offense exception to extradition. Although the *Demjanjuk* courts dealt with it only briefly, this second issue illustrates the conceptual changes in international law that have taken place in the post-war era as courts and commentators have struggled to define and protect legitimate political activity while insuring that those who commit punishable

\(^{6}\) In May 1986, Andrija Artukovic was convicted of killing 700,000 Jews, Serbs, Gypsies, and Croats in World War II concentration camps in Croatia. Artukovic was sentenced to death by firing squad. His sentence was upheld by the Yugoslav Federal Court in September 1986. *N.Y. Times*, Sept. 3, 1986, at A5, col. 1. In April 1987, Karl Linnas was deported to the Soviet Union where he had been tried, convicted, and sentenced to death *in absentia* in 1962 for his role as the supervisor of an Estonian concentration camp during World War II. *N.Y. Times*, Apr. 21, 1987, at A1, col. 1. Linnas, however, died soon after being deported, on July 2, 1987. *N.Y. Times*, July 3, 1987, at A2, col. 1. Feodor Federanko was deported to the Soviet Union in 1984. He was tried and sentenced to death in June 1986 for treason and participation in mass executions during World War II. *N.Y. Times*, June 20, 1986, at A2, col. 5; see also A. Ryan, Jr., *Quiet Neighbors: Prosecuting Nazi War Criminals in America* 142-90 (1984).

\(^{7}\) Adolph Eichmann, as director of the Office for Jewish Affairs and Evacuation Affairs in the Third Reich, was responsible for coordinating the Final Solution, Hitler's plan to exterminate all the European Jews. A group of Israelis kidnapped Eichmann in Argentina in 1960 and brought him to Jerusalem. Eichmann was charged under Israel's Nazis and Nazi Collaborators (Punishment) Law with, *inter alia*, crimes against the Jewish people, crimes against humanity, and war crimes. Nazis and Nazi Collaborators (Punishment) Law 5710, 57 SEFER HAHUKIM 281 (1950) [hereinafter Nazi Statute]; see also Fawcett, *The Eichmann Case*, 1962 BRIT. Y.B. INT'L L. 181, 182. Demjanjuk has been charged with the same offenses. *See infra* text accompanying notes 51-53.

crimes are brought to justice.9

Finally, an underlying question ties the two issues together: even if an expanded notion of universality jurisdiction and a restricted interpretation of the political offense exception in the context of the extradition of an alleged Nazi war criminal are valid, what ramifications do these reformulated doctrines have for less clear cases of universal crimes?

II. THE CASE HISTORY

A. THE DISPLACED PERSONS ACT

The United States admitted John Demjanjuk for lawful permanent residence on February 9, 1952, pursuant to the Displaced Persons Act of 1948 (the “DPA”).10 On November 14, 1958, Demjanjuk became a U.S. citizen by order of the United States District Court in Cleveland, Ohio.11

The Displaced Persons Act, as originally enacted in 1948, provided for the admission of 202,000 “eligible displaced persons” to the United States between June 30, 1948 and July 1, 1950.12 “Eligible displaced persons” referred to those displaced persons so designated by the International Refugee Organization (“IRO”) who had entered the Allied zones of Germany, Austria, or Italy on or after September 1, 1939 and on or before December 22, 1945, and who were there on January 1, 1948. Forty percent of the visas issued under the Displaced Persons Act were reserved for displaced persons “whose place of origin or country of nationality [had] been de facto annexed by a foreign power,” and thirty percent of the visas were allocated to farmers.13

Although seemingly innocuous, these limiting provisions significantly skewed the DPA’s benefits. The Displaced Persons Act was

9. For a comprehensive introduction to the political offense exception, see generally 2 M. BASSIOUNI, supra note 3, § 2-1.
12. The Displaced Persons Act was enacted in order to help relieve the problem of homeless and stateless persons in Europe. Although seven million people were repatriated in the three years following the war, one million “hard-core” displaced persons remained in camps in the occupation zones. Id. at 1378.
criticized as being “viciously discriminatory.” President Truman called for immediate remedial action to change provisions that he believed could have been inserted only “on the abhorrent ground of intolerance.”

Even more disturbing than the criticism that the DPA was unfair, however, was the charge that it enabled Nazi sympathizers and collaborators to resettle in the United States. Critics noted that many of the eligible Balts and Ukrainians were “especially egregious collaborators” who had “guided the SS men, searched the ghettos, beat the people, assembled and drove them to the places of slaughter, [and served as] guards and tormentors within the concentration camps.” Although U.S. officials knew of the presence of collaborators in the displaced persons camps, they did little to eliminate these people through the displaced persons screening process.

In the twenty-five years following the war, the Immigration and Naturalization Service (the “INS”), the agency responsible for enforcing U.S. immigration laws, did not vigorously pursue the alleged war criminals who were “laundered” through the Displaced Persons Act. Instead, the INS quickly plunged into Cold War politics, becoming preoccupied with its efforts to denaturalize and deport alleged Communists. During this time, the INS filed no more than ten cases against suspected Nazi collaborators. The filed cases appear to have been randomly selected and were prosecuted with little zeal or

14. 94 Cong. Rec. H8860 (1948) (statement of Rep. Multer during the debate on H.R. Rep. No. 647, 80th Cong., 2d Sess. (1948), the report accompanying the House bill to amend the Immigration Act, H.R. 3566, 80th Cong., 2d Sess. (1948)). The early cutoff date excluded at least 100,000 Jews who had returned to Poland after the war, only to flee the pogroms that erupted in 1946. L. Dinnerstein, supra note 13, at 166. The preference provisions for farmers and persons from “de facto annexed territories,” interpreted by the State Department to include the Baltic States and other territories under Soviet control, allotted a disproportionate number of visas to Estonians, Latvians, Lithuanians, and Ukrainians.


16. L. Dinnerstein, supra note 13, at 177 (quoting Abraham Duker, who had worked for the Nuremberg Trials Commission). Eastern European collaborators fled to the displaced persons camps in the Allied occupation zones, fearing they would be killed by the Russians as traitors if they stayed in Soviet-occupied territory. Former Congresswoman Elizabeth Holtzman estimates that as many as 10,000 war criminals gained admission to the United States after the war. Holtzman maintains that among them were concentration camp guards, men who served with the police units in Eastern Europe, and mayors of towns who herded Jews into ghettos and confiscated their property. Address by former U.S. Representative Elizabeth Holtzman, Harvard University (Oct. 25, 1985) [hereinafter Holtzman Address].

17. L. Dinnerstein, supra note 13, at 197-98. A 1949 American army intelligence report confirmed that “hundreds, if not thousands, of Nazi collaborators have been and still are residing in displaced person camps.” Id. at 197.

18. A. Ryan, Jr., supra note 6, at 31.
In the 1970s, the INS finally began systematically to investigate the alleged war criminals who had so easily entered the country three decades earlier. According to many, however, the INS efforts were too little and too late. Disgusted by her perception of INS incompetence, however, Congresswoman Elizabeth Holtzman used her power as chairwoman of the House Judiciary Committee's Immigration Subcommittee to force the U.S. Justice Department to assume responsibility for the Nazi cases. On March 28, 1979, the Justice Department formed the Office of Special Investigations ("OSI") within its Criminal Division, to act "unequivocally and vigorously to deny sanctuary in the United States to persons who committed the worst crime in the history of humanity."

B. DEMJANJUK'S DENATURALIZATION PROCEEDING

John Demjanjuk became one of dozens of alleged Nazi war criminals whom the OSI sought to denaturalize and deport. In 1977, twenty-five years after his admission to the United States, the U.S. government brought suit against Demjanjuk, charging him with illegal procurement of his citizenship. Specifically, the government charged that Demjanjuk, a Ukrainian who had fought in the Russian army, served in the German Schutzstaffel (the "SS") at the SS training camp at Trawniki, Poland, and at the Treblinka and Sobibor death

19. Id. at 31-42.
20. It took the efforts of Congresswoman Elizabeth Holtzman and Congressman Joshua Eilberg to initiate action by the White House and the State Department. Holtzman and Eilberg urged the Ford Administration to seek the cooperation of Germany, Israel, and the Soviet Union in the search for suspected Nazi war criminals in the United States, and regularly criticized the State Department for what they considered unjustified delay. By the summer of 1977, the INS had dissolved the special task force it had set up four years earlier and transferred all responsibility for the Nazi cases to a special litigation unit within the Service. That unit, however, proved a disastrous attempt to consolidate INS expertise on the Nazi cases. From 1977 to 1979 the unit did not file a single new case and performed poorly on the cases it attempted to litigate. Id. at 59-60.
21. Id. at 62.
22. Id. at 61 (quoting Congresswoman Holtzman); see also Holtzman Address, supra note 16. The Office of Special Investigations currently operates with an annual budget of approximately $3 million and a staff of 20 lawyers, 10 historians, and numerous investigators. Address given by Allan A. Ryan, Jr., Prof. Philip Heymann's Law Enforcement Seminar, Harvard Law School (Nov. 14, 1985) [hereinafter Ryan Address].
23. The OSI initiates thorough trials attempting to prove that the defendants procured their visas, and hence their citizenship, illegally. At these denaturalization trials, the government seeks to prove the defendants' non-compliance with the immigration laws based on their participation in atrocities and brutal persecutions. Ryan Address, supra note 22. Allan A. Ryan, Jr., former head of OSI, estimates that 75 percent of each trial consists of testimony describing what occurred in the concentration camps or the terrorized villages and towns. Id. Only after such evidence is introduced does the government address the legal questions of eligibility under the immigration laws. Id.
The government also charged that Demjanjuk served in a German military unit toward the end of the war. The government claimed that Demjanjuk’s activities during the war excluded him from the DPA’s definition of an “eligible displaced person.” The government also maintained that Demjanjuk’s visa was invalid because he had willfully misrepresented his war-time activities.

The Demjanjuk case went to trial in February, 1981, presided over by Chief Judge Battisti of the U.S. District Court for the Northern District of Ohio. At trial, the court found that Demjanjuk had been taken prisoner by the Germans in 1942. Following a brief incarceration in German prisoner of war camps, Demjanjuk was transferred to an SS training camp at Trawniki. There, like other Russian prisoners of war, Demjanjuk took an oath of service to the German SS and was recruited to work in Action Reinhard, the SS program to exterminate the Jews of the Nazi-occupied countries. In the fall of 1942, Demjanjuk was sent to work at the extermination camp at Treblinka. Known as “Ivan Grozny” or “Ivan the Terrible,” Demjanjuk operated the camp’s gas chambers and participated in the beating and torturing of the camp inmates.

Demjanjuk concealed this information when he applied to the International Refugee Organization for assistance in 1948, when he applied to the Displaced Persons Commission for consideration to immigrate to the United States, and when he applied for an immigration visa. At those times, he claimed to have been a farmer in Poland until 1943 and then to have worked in Danzig and Munich until the end of the war. At trial, Demjanjuk admitted to making these misrepresentations, claiming he did so in order to avoid repatriation to the Soviet Union.

The district court held that Demjanjuk’s failure to disclose his service at Trawniki and Treblinka constituted a material misrepresentation under sections 2(b) and 10 of the DPA and found the Supreme Court’s decision in Fedorenko v. United States denote of whether Demjanjuk illegally procured his visa and his citizenship.

25. Id.
26. Id.
27. Id.
28. The government had filed suit in the United States District Court for the Southern District of Ohio pursuant to 8 U.S.C. § 1451(a) (1982), which requires that suit be filed in the district in which the defendant resides.
30. Id. at 1379.
31. Id. at 1379-80.
32. 449 U.S. 490 (1981) (Fedorenko was charged with concealing his service as an armed guard at Treblinka).
33. Id. at 1380-81.
In *Fedorenko*, the Supreme Court determined that section 2(b) of the DPA incorporated the definitions of refugees and displaced persons contained in the IRO Constitution’s definition of “eligible displaced persons.”

Annex I of the IRO Constitution specifically excluded from this category any person who assisted “the enemy in persecuting civil populations” or who “voluntarily assisted the enemy forces... in their operations.”

Section 10 of the DPA further provided that any person who made willful misrepresentations for the purpose of gaining admission into the United States as an eligible displaced person would not be admitted.

The Supreme Court interpreted section 10 to apply to willful misrepresentations of material facts and noted that “at the very least, a misrepresentation must be considered material if disclosure of the true facts would have made the applicant ineligible for a visa.”

The Court concluded that if Fedorenko had disclosed his service as an armed guard at Treblinka, he would have been ineligible for a visa under the Displaced Persons Act.

Relying on *Fedorenko*, the district court in *Demjanjuk* found Demjanjuk similarly ineligible for a visa under the DPA. Based on its findings that Demjanjuk had served at Trawniki and Treblinka, the court concluded that Demjanjuk was not an “eligible displaced person” under section 2(b) of the DPA and had, therefore, procured his visa illegally. Consequently, Demjanjuk failed to satisfy a statutory prerequisite of naturalization—lawful admission to the United States. This rendered his citizenship revocable as being illegally procured.

Alternatively, the district court held that Demjanjuk’s certificate of naturalization was cancellable under 8 U.S.C. § 1451(a) because it was procured by “concealment of a material fact or by willful misrepresentation.”

The court referred to the materiality test set forth in *Chaunt v. United States*. In *Chaunt*, the Supreme Court stated that to prove misrepresentation or concealment of a material fact, the government had to show either 1) the suppression of facts which, if
known, would have warranted denial of citizenship, or 2) that the disclosure of suppressed facts might have been useful in an investigation that could have led to the discovery of other facts warranting denial of citizenship.\textsuperscript{42} The Demjanjuk court found that Demjanjuk had denied giving false testimony on his citizenship application for the purpose of obtaining benefits under the immigration and nationality laws.\textsuperscript{43} This denial precluded any inquiry into Demjanjuk's wartime activities. Had those activities been known, Demjanjuk's petition for naturalization would have been denied.\textsuperscript{44}

The district court concluded that the government had satisfied its heavy burden of proof. To meet this burden, the government had to introduce "clear, unequivocal and convincing" evidence, a standard the Supreme Court first enunciated in cases involving denaturalization proceedings brought against alleged Communists, and subsequently affirmed in Fedorenko.\textsuperscript{45} Although this high standard exists to protect defendants about to lose their "precious" right of U.S. citizenship, the district court determined that Demjanjuk's illegally procured certificate of naturalization had to be cancelled.\textsuperscript{46}

Within eighteen months, the Sixth Circuit affirmed the district court's decision denaturalizing Demjanjuk,\textsuperscript{47} and the Supreme Court denied Demjanjuk's petition for certiorari.\textsuperscript{48} Shortly thereafter, the government instituted deportation proceedings based on Demjanjuk's illegal presence in the country.\textsuperscript{49} While the deportation proceeding was before the immigration court, Israel filed an extradition request.\textsuperscript{50}

\textsuperscript{42} Id. at 355.
\textsuperscript{43} Demjanjuk, 518 F. Supp. at 1383.
\textsuperscript{44} Id. The court arguably misapplied the Chaunt test in reaching this alternative holding. The Chaunt test applies only when a court is determining the materiality of misrepresentations and omissions made on a citizenship application, assuming that the applicant has been lawfully admitted to the United States. Given its finding that Demjanjuk's initial entry was unlawful, the Demjanjuk court had no grounds to reach the Chaunt question. See Note, Denaturalization of Nazi War Criminals After Fedorenko, 15 N.Y.U. J. INT'L L. & POL. 169, 178, 191-92 (1982).
\textsuperscript{46} Demjanjuk, 518 F. Supp. at 1386. The Supreme Court has repeatedly characterized the right to acquire U.S. citizenship as "precious." See Fedorenko, 449 U.S. at 505, and cases cited therein.
\textsuperscript{47} United States v. Demjanjuk, 680 F.2d 32 (6th Cir. 1982).
\textsuperscript{48} Demjanjuk v. United States, 459 U.S. 1036 (1982).
\textsuperscript{49} The INS began deportation proceedings against Demjanjuk on December 6, 1982. The Immigration Court ordered Demjanjuk deported to the Soviet Union on May 23, 1984. That decision was subsequently affirmed by the Board of Immigration Appeals, In re Demjanjuk, I. & N. Dec. File A8-237-417 (Cleveland) (B.I.A. February 14, 1985), and by the Sixth Circuit Court of Appeals, United States v. Demjanjuk, 767 F.2d 922 (6th Cir.) (citation limited by Sixth Circuit Rule 24; see LEXIS, Genfed library, Usapp file), cert. denied ___ U.S. ___, 106 S.Ct. 597 (1985).
\textsuperscript{50} In re Extradition of Demjanjuk, 603 F. Supp. 1463 (N.D. Ohio 1984). On October 31, 1983, the Israeli government requested Demjanjuk's extradition pursuant to an Israeli
The request charged Demjanjuk with murder, manslaughter, and malicious wounding under the terms of the United States-Israel Extradition Treaty. Invoking the 1950 Nazis and Nazi Collaborators (Punishment) Law (the "Nazi Statute"), Israel detailed the offenses allegedly committed by Demjanjuk as follows:

The suspect, nicknamed "Ivan the Terrible", was a member of the S.S., and in the years 1942-43 operated the gas chambers to exterminate prisoners at the Treblinka death camp in the Lublin area of Poland, which was occupied 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.

Pursuant to its obligations under the United States-Israel Extradition Treaty, the United States filed a complaint in federal district court seeking Demjanjuk's extradition to Israel.

III. THE EXTRADITION CASE

The right of any foreign country to request the return of a fugitive from the United States, and the obligation of the United States to surrender the fugitive, depend on the existence of an extradition treaty between the United States and the requesting nation. Pursuant to 18 U.S.C. §§ 3183 and 3184, the United States may surrender an accused person to a requesting state only if a valid extradition treaty exists with the requesting state. The language of sections 3183 and 3184 does not indicate whether satisfaction of the statutory requirements imposes an obligation on the United States to extradite; however, U.S. jurisprudence reflects the view that extradition is always subject to executive discretion.


51. Convention on Extradition, Dec. 10, 1962, United States-Israel, 14 U.S.T. 1717, T.I.A.S. No. 5476 [hereinafter Extradition Treaty]. The request was the first ever filed by Israel to extradite a Nazi war criminal from the United States.

52. See supra note 7.

53. In re Extradition of Demjanjuk, 603 F. Supp. at 1467.

54. In re Extradition of Demjanjuk, 584 F. Supp. 1321, 1323 (N.D. Ohio 1984). The district court later ruled that the extradition and deportation proceedings were independent and could proceed simultaneously. Furthermore, the government was not obligated to elect either deportation or extradition as the sole means of proceeding against Demjanjuk. In re Extradition of Demjanjuk, 612 F. Supp. at 547.


56. 1 M. BASSIOUNI, supra note 3, at ch. 2, § 5-1.

57. Id. Professor Bassiouni adds that this view may not be in accord with international law. Id.
The purpose of an extradition hearing is to determine whether sufficient evidence exists to sustain the charge against the accused under the provisions of the applicable treaty. To find "sufficient evidence," a judge must determine that "there is 'probable cause' or 'reasonable grounds' to believe the individual is guilty of the crime charged." If a judge finds sufficient evidence to sustain the charges under the applicable treaty, the judge certifies the same to the Secretary of State, who can then issue a warrant of surrender to the "proper authorities" of the requesting state.

No direct appeal may be taken from the issuance of an extradition certificate. The accused may petition for a writ of habeas corpus, but review on habeas is limited. For an extradition determination to survive collateral review under habeas corpus, the following conditions must be met:

1. The judge must be authorized to conduct extradition proceedings.
2. The judge must have jurisdiction of the subject matter and of the accused.
3. The applicable treaties must be in full force and effect.
4. The crimes for which extradition is requested must be offenses "within the treaty".
5. The judge must determine that the party brought before it is the one named in the complaint . . . .
6. There must be "competent and adequate evidence" for the decision.

The district court had no difficulty resolving the first condition. As a federal judge, Battisti was empowered to conduct the extradition proceedings pursuant to the explicit terms of 18 U.S.C. § 3184. As to the third condition, a valid extradition treaty is in force between the United States and Israel. The court, however, had more difficulty resolving the sixth condition, the existence of "competent and adequate" evidence. Under the applicable statutes and case law, the requesting state may either present witnesses or rely on properly authenticated depositions, warrants, and other documents for its proof. The respondent may present witnesses, but not documents on
his behalf. The court interpreted the "competent and adequate" standard to mean that the respondent could not present evidence contradicting the requesting state's proof; rather, the respondent could only present "explanatory" evidence. Thus, while Demjanjuk could present evidence rebutting probable cause, he could not present evidence in defense, such as alibi. The court reserved discretion to decide what constituted permissible "explanatory" evidence.

The district court could not so easily dispose of the three remaining conditions. The ultimate resolution of these issues formed the core of the district court's extradition decision. This Article, therefore, now considers the issues of identification (condition five), subject matter jurisdiction (condition two), and then focuses on two facets of the treaty interpretation question (condition four), Israel's jurisdiction to try Demjanjuk and the applicability of the political offense exception.

A. IDENTIFICATION

The identification of Demjanjuk as the person named in the complaint became a contested issue due to Demjanjuk's repeated denials that he was "Ivan the Terrible" of Treblinka. Despite Demjanjuk's insistence that he was not the man Israel sought, the district court found probable cause to believe Demjanjuk was "Ivan the Terrible."

Identification had been a key issue in Demjanjuk's denaturalization case, as it is in virtually all cases brought against alleged war criminals. In the denaturalization case, the government introduced what became known as the "Trawniki card," a picture identification card which stated: "Iwan Demjanjuk is employed as a guard in the Guard Units (Wachmannschaften) of the Reich Leader of the SS for the Establishment of SS and Police Headquarters in the New Eastern Territory." Concluding that the card was authentic despite Demjanjuk's insistence to the contrary, the court found the Trawniki card clearly established Demjanjuk's presence at the SS training

68. In re Extradition of Demjanjuk, 603 F. Supp. at 1464.
69. Id. This evidence would obviously be admissible at any subsequent full-scale trial. See id. at 1465.
70. Id. at 1465.
73. Demjanjuk, 518 F. Supp. at 1366.
camp.\textsuperscript{74} Furthermore, the court determined that Demjanjuk had been at Treblinka based on photographic identifications made by six camp survivors.\textsuperscript{75}

The extradition court noted that the government had only to make out a prima facie case to establish identification.\textsuperscript{76} While the government did not have to prove that the person demanded was the person before the court, it did have to show probable cause to believe the two were the same.\textsuperscript{77} Moreover, the court held that it could rely solely on affidavits to identify the individual sought for extradition.\textsuperscript{78} Although Demjanjuk’s identity had been established in the denaturalization proceeding and the denaturalization findings had been incorporated into Israel’s extradition request, the government stated that independent eyewitness identifications could sufficiently identify Demjanjuk as the individual sought by Israel.\textsuperscript{79} Because the court held affidavit identification to be sufficient, the government did not have to rely on the Trawniki card, thereby precluding Demjanjuk from challenging the card’s authenticity a second time.\textsuperscript{80}

Having set this rather low threshold standard for identification, the court easily found that the government had met its burden of showing probable cause. In particular, the court relied on photographs and eyewitness affidavits given by six Treblinka survivors.\textsuperscript{81} The court found that positive identification was established irrespective of the Trawniki card.\textsuperscript{82} The court concluded its discussion of the identification issue by noting the “obvious and striking resemblance” between the man in the photographs and Demjanjuk.\textsuperscript{83}

\textsuperscript{74} Id. at 1368. Although Demjanjuk maintained that the card was forged by the Soviet authorities, the district court rejected Demjanjuk’s contentions that the Soviets had improperly tampered with documents and witnesses. United States v. Demjanjuk, 103 F.R.D. 1, 5 (N.D. Ohio 1983). The court compared Demjanjuk’s case with the case of United States v. Kungys, 571 F. Supp. 1104 (D.N.J. 1983), where the court had found such improper behavior and held much of the government’s evidence inadmissible. As a result, the court in Kungys found that the government had not sustained its heavy burden of proof. The Third Circuit, however, reversed the lower court’s decision in Kungys, finding sufficient evidence in the record to resolve the denaturalization issue even excluding Soviet depositions which the government had tried to introduce. United States v. Kungys, 793 F.2d 516, 520 (3rd Cir.), cert. granted, --- U.S. ---, 107 S.Ct. 431 (1986).

\textsuperscript{75} Demjanjuk, 518 F. Supp. at 1376.

\textsuperscript{76} In re Extradition of Demjanjuk, 612 F. Supp. at 548, 552.

\textsuperscript{77} Id.

\textsuperscript{78} Id. at 550.

\textsuperscript{79} Id.

\textsuperscript{80} In re Extradition of Demjanjuk, 603 F. Supp. 1468, 1471-72 (N.D. Ohio 1985).

\textsuperscript{81} In re Extradition of Demjanjuk, 612 F. Supp. at 550-52. It is estimated that only 20 survivors of the Treblinka camp are still alive. Boston Globe, Mar. 3, 1986, at 3, col. 1.

\textsuperscript{82} See supra notes 78-80 and accompanying text; see also Demjanjuk v. Petrovsky, 776 F.2d 571, 577 (6th Cir. 1985) cert. denied, --- U.S. ---, 106 S.Ct. 1198 (1986).

\textsuperscript{83} The court seemed so certain that Demjanjuk was "Ivan the Terrible" that the eyewitness identifications seem merely to confirm its own identification. In re Extradition of Demjanjuk, 612 F. Supp. at 554. The court’s certainty is hardly surprising given its earlier
The Sixth Circuit Court of Appeals affirmed the district court’s findings on the identification issue. Reiterating the limited nature of an extradition proceeding, the court noted that it was irrelevant that Demjanjuk had “had no opportunity to cross-examine the affiants.” The court emphasized that an extradition court’s sole evidentiary function “is to determine whether there is sufficient evidence to justify holding a person for trial in another place.”

The court rejected a third challenge by Demjanjuk as to the Trawniki card’s authenticity. First, the court found, based on the district court’s conclusions, that no support existed for Demjanjuk’s claim that the card was forged and that the government had perpetrated a fraud on the court by introducing it into evidence. Second, the court held that because the district court had not relied on the card to identify Demjanjuk, the issue of the card’s validity was not properly before the court on appeal.

The Sixth Circuit acknowledged the lenient standard for evaluating identification evidence in an extradition proceeding, and found that the government had met its burden of producing “any evidence warranting the finding that there was reasonable ground to believe [Demjanjuk] guilty of the crimes charged.” Thus, the Sixth Circuit seemed to agree with the district court’s conclusion that the trial in Israel represented the appropriate forum for Demjanjuk to introduce exculpatory evidence.

B. SUBJECT MATTER JURISDICTION

Notwithstanding the statutory grant of jurisdiction to federal courts to preside over extradition proceedings, Demjanjuk argued that the district court lacked jurisdiction over the subject matter of the extradition. That is, Demjanjuk contended that the district court could not conduct the extradition proceeding without specific authorization to hear war crimes cases. Demjanjuk claimed that because he had been a soldier and a prisoner of war, and because the crimes alleged occurred during wartime, only a military tribunal could try

findings on identification in the denaturalization case. See United States v. Demjanjuk, 518 F. Supp. 1362 (N.D. Ohio 1981); see also supra notes 73-81 and accompanying text.
84. Demjanjuk v. Petrovsky, 776 F. 2d at 576.
85. Id.
86. Id.
87. Id. at 577.
88. Id.
89. Id. at 576 (quoting Justice Holmes in Fernandez v. Phillips, 268 U.S. 311, 312 (1925)).
him. Accordingly, Demjanjuk contended that only a military tribunal would have jurisdiction to extradite him.

The district court rejected Demjanjuk's argument on two levels. First, the court reviewed the case law and found no case in which a federal (civilian) court determined that it lacked jurisdiction over an extradition proceeding because the subject matter involved war crimes. The court further determined that neither the Constitution nor the statutes give military tribunals exclusive jurisdiction over war crimes. The court found "no reason why jurisdiction to try John Demjanjuk should be vested exclusively in an American military tribunal." Noting that no U.S. military tribunal currently exists to try alleged war criminals, the court decided that "Congress certainly did not intend for persons physically present in the United States who are accused of 'war crimes' to be able to avoid trial and punishment because no American court had jurisdiction to hear an extradition request." The court noted that its refusal to shield Demjanjuk from prosecution was consistent with the U.S. policy of trying and punishing war criminals, as reflected by "this nation's participation in the Nuremberg trials."

Despite the lack of clear Congressional intent, the district court probably reached the correct result regarding its jurisdiction to conduct the extradition proceeding. The plain language of the statutory authorization for the proceeding does not restrict the categories of charges that a federal (civilian) court may consider. Furthermore, consistent with the court's finding that an extradition proceeding is akin to a preliminary hearing and not to a full-fledged trial, Demjanjuk's contention that servicemen have never been tried by civilian courts in the United States was irrelevant.

The district court also discussed the issue of subject matter jurisdiction in terms of Demjanjuk's being charged with "war crimes." The court had previously noted that it did "not today find [that] the
alleged conduct respondent is accused of constitutes war crimes or genocide . . . [but rather that] the United States government on behalf of the State of Israel has formally charged respondent with murder, manslaughter, and malicious wounding."101 Presumably, Demjanjuk could not object to the court's subject matter jurisdiction if those were indeed the charges.

The court's ultimate conclusion that the charges against Demjanjuk fell within the extradition treaty between the United States and Israel depended on the characterization of his alleged crimes as murder.102 Because Article II of the treaty recognizes murder as an extraditable crime, the murder charges against Demjanjuk clearly fell within the terms of the treaty.103

Two of Demjanjuk's other defenses to extradition also failed based on the characterization of his alleged crimes as murder. The court rejected Demjanjuk's time bar defense, because neither the United States nor the State of Ohio imposes a statute of limitation on murder charges.104 Demjanjuk also claimed that the possibility of his receiving the death penalty if convicted under the Nazi Statute should bar his extradition.105 In rejecting this claim, the court noted that both the United States and Ohio impose the death penalty "for murder of the type and magnitude alleged."106

IV. TREATY INTERPRETATION: ISRAELI JURISDICTION TO TRY DEMJANJUK

The most complex issues of the case concerned treaty interpretation. After laying out the relevant questions in a preliminary order, Chief Judge Battisti discussed them at length in his extradition opinion.107

101. Id. at 1474 n.2. Article II of the U.S.-Israel Extradition Treaty specifically provides for extradition in cases where the accused is charged with those crimes. Extradition Treaty, supra note 51, art. II.

102. The court refused to extradite Demjanjuk on the charges of manslaughter and malicious wounding because the statutes of limitation on those charges had expired. In re Extradition of Demjanjuk, 612 F. Supp. 544, 561 (N.D. Ohio 1985).

103. Id. The court held that it was immaterial that Demjanjuk would not be prosecuted for murder in the United States as long as the crime charged fell within the treaty. Id. at 569.

104. Id. at 560.

105. Id. at 566 n.19. Article VII of the U.S.-Israel Extradition Treaty provides that extradition may be refused if the offense is punishable by death under the laws of the requesting state, but not under the laws of the requested state. Demjanjuk claimed the offense charged (war crimes) was punishable by death in Israel, but not in the United States. Extradition Treaty, supra note 51, art. VII.


107. The Chief Judge's characterization of the relevant issues in determining whether the crimes alleged fell within the treaty was as follows:
The court concluded that it had the authority to extradite Demjanjuk under the treaty even though Israel was charging him with extraterritorial crimes. Since the crimes were extraterritorial in nature, the court's authority to extradite was discretionary. None of the exceptions to extradition set forth in the treaty applied in this case: Demjanjuk's alleged crimes were not political offenses; there was no statute of limitations problem; the double jeopardy provision of the treaty was inapplicable; and the Israeli death penalty provisions did not bar extradition. Furthermore, Israel's lack of statehood at the time of Demjanjuk's alleged crimes was immaterial.

1. Does this Court have the authority, under the Extradition Treaty to extradite respondent to Israel where the Israeli government has charged him with crimes committed outside the territory of the State of Israel (i.e., the "extraterritoriality" of the Extradition Treaty)?
   a. Is the judicial determination of whether respondent is extraditable for the offenses charged discretionary under Article III of the Treaty because the Israeli statute under which respondent is charged asserts jurisdiction over acts which occurred outside the territory of Israel?
   b. Do the laws of the United States, the requested party, provide for the punishment of similar offenses, within the meaning of Article III of the Treaty?
2. Does the extradition request fall into one of the exceptions to extradition set forth in the Treaty?
   a. Is the Article VI § 1 "double jeopardy" provision applicable to the instant case?
   b. Is the extradition request time-barred under Article VI § 3?
   c. Is extradition prohibited by Article VI § 4 because respondent is charged with crimes allegedly of a "political character"?
   d. Do the death penalty provisions of the Nazi and Nazi Collaborators Law 5710-1950 bar extradition?
3. What effect, if any, does Israel's lack of statehood during the time the alleged crimes occurred have on whether the respondent is extraditable under the Treaty?
4. Is the Nazi and Nazi Collaborators Law an ex post facto law? If so, of what import is such a determination in these extradition proceedings?


109. Id. at 561. Article III of the Treaty provides: "When the offense has been committed outside the territorial jurisdiction of the requesting Party, extradition need not be granted unless the laws of the requested Party provide for the punishment of such an offense committed in similar circumstances." Extradition Treaty, supra note 51, art. III. The Seventh Circuit Court of Appeals interpreted substantially similar language in the United States-Sweden Extradition Treaty to mean that extradition is discretionary if the offense is prosecutable under the laws of only one of the countries but mandatory if prosecutable under the laws of both countries. In re Assarsson, 635 F.2d 1237, 1244-45 (7th Cir. 1980), cert. denied, 451 U.S. 938 (1981). The Eighth Circuit accepted the Seventh Circuit's interpretation of the treaty language in a related case involving a different party. In re Extradition of Assarsson, 687 F.2d 1157, 1163 (8th Cir. 1982). Chief Judge Battisti cited the Assarsson cases as authority, noting that the United States Senate gave its advice and consent to the United States-Sweden Treaty on the same day it considered the United States-Israel Treaty. In re Extradition of Demjanjuk, 612 F. Supp. at 561.

111. Id. at 568. See supra note 105 and accompanying text.
112. Id. at 569.
113. Id. at 566 n.19. See supra note 106 and accompanying text.
114. Id. at 568.
Finally, the court held that the Nazi Statute was not an ex post facto law.115

The extradition court and the court of appeals on habeas review made several other findings in discussing the issue of Israel’s jurisdiction to try Demjanjuk.116 Both courts found the universality principle117 to be an accepted means of obtaining jurisdiction in international law, and that the United States specifically incorporated the principle into section 404 of the Restatement of the Foreign Relations Law of the United States.118 In addition, the district court found that the political offense exception applied only to political activities undertaken against established governments or occupying forces, not to criminal activities intended to solidify the power of an established government or occupying force.119 Demjanjuk, therefore, could not invoke the political offense exception based on his alleged activities in support of the Nazi occupying forces in Poland.120 The dismissal of the political offense exception by the district court as inapplicable to Demjanjuk’s case confirmed the exclusion of crimes against humanity from the category of protected offenses.

The issue of Israel’s jurisdiction over Demjanjuk represented the most controversial aspect of the case. If Israel lacked jurisdiction, the United States could not extradite.121 In concluding that Israel held jurisdiction, the court advanced two propositions: first, that Israeli courts have jurisdiction to try alleged war criminals for extraterritorial crimes pursuant to Israel’s Nazi Statute, as interpreted and affirmed by the Eichmann courts;122 and second, that international law generally does not prohibit the application of a state’s laws or the jurisdiction of its courts over non-citizens for acts committed outside of its territory.123 Israel, therefore, was not prohibited from asserting jurisdiction under international law, and was affirmatively empowered to do so according to the universality principle of jurisdiction.124

115. Id. at 567; see infra notes 128-32 and accompanying text.
117. See supra note 8.
118. Demjanjuk, 776 F.2d at 582-85; In re Extradition of Demjanjuk, 612 F. Supp. at 555-58; see infra notes 146-75 and accompanying text.
120. Id.
121. Id. at 554.
122. Id. at 554-55.
123. Id. at 555.
124. See infra notes 146-75 and accompanying text.
A. ISRAELI JURISDICTION UNDER MUNICIPAL LAW

The district court first proposed that Israel’s Nazi Statute enables Israel to assert jurisdiction over Demjanjuk. The Nazi Statute lists the following as capital offenses: an act constituting a war crime, a crime against humanity, or a “crime against the Jewish people” committed in an “enemy country” during the “period of the Nazi regime.” The Statute then defines “war crimes” and “crimes against humanity” in a manner consistent with the corresponding definitions contained in the Charter of the International Military Tribunal (the “Nuremberg Charter”). The definition of “crimes against the Jewish people” is based on the Genocide Convention’s definition of genocide.

Demjanjuk attacked the validity of the Nazi Statute, contending that it was an impermissible ex post facto law. Although the Statute was passed in 1950, it declared acts committed between 1933 and 1945 as criminal. In dismissing this argument, the extradition court determined that the Nazi Statute, like the Nuremberg Charter and the Genocide Convention, did not “declare unlawful what had been lawful before.” The court held that Demjanjuk’s alleged offenses were criminal when committed, citing international agreements dating from 1899 defining the laws of war and forbidding the killing of defenseless persons. The court noted that by 1942, the operation of gas chambers and the torture of unarmed prisoners were illegal under the “laws and standards of every civilized nation.” The Nazi Statute, like the Nuremberg Charter and the Genocide Convention, did no more than restate existing law and provide an additional forum to prosecute offenders. Thus, because the Nazi Statute was not necessary to establish the criminality of Demjanjuk’s alleged acts, it was not an

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125. Nazi Statute, supra note 7, art. 1(a).
128. In re Extradition of Demjanjuk, 612 F. Supp. 544, 567 (N.D. Ohio 1985). The judgment of the International Military Tribunal specifically stated that the Nuremberg Charter was “the expression of international law existing at the time of its creation.” The Nurnberg Trial, 6 F.R.D. 69, 107 (1946). This claim was made to counter the criticism that the jurisdiction conferred by the Charter was nothing more than an “arbitrary exercise of power on the part of the victorious nations.” Id. In fact, critics of the Nuremberg trial decry it as the traditional vengeance of the victors dressed in black robes. See, e.g., Schwarzenberger, The Judgment of Nuremberg, 21 Tul. L. Rev. 329, 338 (1947); Taylor, Large Questions in the Eichmann Case, N.Y. Times, Jan. 22, 1961, § 6 (Magazine), at 22.
130. Id.
131. Id.
impermissible ex post facto law.\textsuperscript{132}

It is not clear, however, that the crimes of which Demjanjuk stands accused were considered illegal in 1942. One commentator maintains that the crimes enumerated in the Nuremberg Charter were not criminal during World War II because at that time the offenders could not have been punished for their acts.\textsuperscript{133} It is widely acknowledged that even if the acts characterized as "crimes against peace" and "war crimes" were criminal during the Nazi regime, acts constituting "crimes against humanity" represented an unprecedented addition to the list of punishable offenses.\textsuperscript{134} Moreover, the Nuremberg Charter restricted the International Military Tribunal's (the "IMT") jurisdiction over "crimes against humanity" to offenses "committed in execution of or in connection with any crime within the jurisdiction of the Tribunal."\textsuperscript{135} The IMT interpreted this to mean that its jurisdiction was limited to acts committed after the outbreak of war in 1939.\textsuperscript{136} The Nazi Statute, however, defined "crimes against humanity" to include acts committed not only during the War, but throughout the Third Reich.\textsuperscript{137}

The Israeli Supreme Court considered the Nazi Statute an "extraordinary measure" designed to cope with an "extraordinary event":

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 extra-territorial and its object \textit{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.\textsuperscript{138}

Even so, it is not clear that the Knesset, which enacted the Nazi Statute, necessarily viewed the Holocaust as an unprecedented event. One commentator has suggested that the legal rationalizations in the \textit{Eichmann} trial illustrate "how little Israel was prepared to recognize that the crime Eichmann was accused of was an unprecedented crime. In

\begin{itemize}
  \item \textsuperscript{133} April, \textit{An Inquiry into the Juridical Basis for the Nuremberg War Crimes Trial}, 30 MINN. L. REV. 313, 320-24 (1946). The "crimes" listed in the Nuremberg Charter were "crimes against peace" (waging a war of aggression), "war crimes," and "crimes against humanity." Nuremberg Charter, supra note 126, art. 6.
  \item \textsuperscript{134} See, e.g., H. ARENDT, \textit{EICHMANN IN JERUSALEM} 255 (rev. ed. 1964); April, supra note 133, at 324.
  \item \textsuperscript{135} Nuremberg Charter, supra note 126, art. 6(c).
  \item \textsuperscript{136} The Nurnberg Trial, 6 F.R.D. 69, 131 (1946); Baxter, \textit{Jurisdiction Over War Crimes and Crimes Against Humanity: Individual and State Accountability}, in \textit{A TREATISE ON INTERNATIONAL CRIMINAL LAW} 65, 83 (1973).
  \item \textsuperscript{137} Baxter, supra note 136, at 84.
  \item \textsuperscript{138} Fawcett, supra note 7, at 184-85 (quoting Honigman v. Attorney General, [1952] 12 Pesakim 336).
\end{itemize}
the eyes of the Jews, the catastrophe that had befallen them under Hitler appeared not as the most recent of crimes, the unprecedented crime of genocide, but, on the contrary, as the oldest crime they knew and remembered."  

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

Indisputably, Israel validly asserted jurisdiction over Demjanjuk under the Nazi Statute. A more difficult question is the validity of Israel's jurisdiction under international law. In other words, can the United States justify the extradition of Demjanjuk under international law?

B. ISRAELI JURISDICTION UNDER INTERNATIONAL LAW

Five theories of jurisdiction exist in international law. "Territoriality", the primary theory, permits a state to assert jurisdiction over an offense committed within its territory. The "nationality" principle confers jurisdiction over an offender who is a national of the state seeking jurisdiction. The "protective" principle grants jurisdiction over offenders who commit acts prejudicial to the vital interests of the state claiming jurisdiction. Closely related is the theory of "passive personality" which confers jurisdiction on the ground that the victim of the offense is a national of the state exercising jurisdiction. Finally, the "universality" principle permits a state to exercise jurisdiction regardless of the place of the offense and the nationality of either the offender or the victim. This theory of extraordinary jurisdiction is premised on the notion that certain offenses constitute crimes against all humanity. Therefore, any state that captures the

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139. H. ARENDT, supra note 134, at 245.
142. Id.
143. Id.
144. Id.
145. Id.
offender may prosecute him on behalf of the world community.\footnote{151}

Each state must act individually to assert jurisdiction under the universality theory. A state may enact municipal laws which criminalize offenses against all humanity and empower its courts to hear such cases. The Israeli Nazi Statute\footnote{148} represents an example of this method. Alternatively, states may define their rights and duties by treaties which allow universal jurisdiction. Examples of this method include the Geneva Convention of the High Seas\footnote{149} and the 1949 Geneva Conventions for the Protection of War Victims.\footnote{150}

Under the High Seas Convention, any state may seize and try offenders.\footnote{151} Under the 1949 Geneva Conventions, any contracting party is obligated to try before its own courts any person who has committed a grave breach of the Conventions' provisions, regardless of the person's nationality.\footnote{152} Finally, states may set up international tribunals to try individuals who commit offenses against humanity. The IMT is a result of this method of asserting jurisdiction under the universality principle.\footnote{153}

The Demjanjuk extradition court held that Israel's assertion of jurisdiction based on the Nazi Statute conforms to the universality principle of jurisdiction in international law.\footnote{154} The court determined that the findings of the Nuremberg trial and the post-war trials of minor war criminals in the occupied zones supported the applicability of the universality theory.\footnote{155}

The court cited United States v. Wal-

\footnotesize{\begin{itemize}
\item \footnote{147} 1 M. BassiouNi, supra note 3, at ch. 6, § 6-1.
\item \footnote{148} See supra note 7.
\item \footnote{151} Geneva Convention of the High Seas, supra note 149, art. 19.
\item \footnote{152} Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, \textit{supra} note 150, art. 49; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, \textit{supra} note 150, art. 50; Geneva Convention Relative to the Treatment of Prisoners of War, \textit{supra} note 150, art. 129; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, \textit{supra} note 150, art. 146.
\item \footnote{153} 1 M. BassiouNi, \textit{supra} note 3, at ch. 6, § 6-8.
\item \footnote{154} \textit{In re} Extradition of Demjanjuk, 612 F. Supp. 544, 555 (N.D. Ohio 1985).
\item \footnote{155} \textit{Id.} at 557.
\end{itemize}}
a case involving physicians, guards, and officials from the Buchenwald concentration camp. The court quoted that case as follows:

Any violation of the law of nations encroaches upon and injures the interests of all sovereign states. Whether the power to punish for such crimes will be exercised in a particular case is a matter resting within the discretion of a state. However, it is axiomatic that a state, adhering to the law of war which forms a part of the law of nations, is interested in the preservation and the enforcement thereof. This is true, irrespective of when or where the crime was committed, the belligerency status of the punishing power, or the nationality of the victims.157

The Waldeck formulation of universality jurisdiction exemplified that of the war crime trials. The district court discussed the trial of the major war criminals at Nuremberg, noting that the Nuremberg Court had tried defendants "whose offenses [had] no particular geographical location."158 Citing the Genocide Convention and the United Nations "Nuremberg Principles," the court concluded universal jurisdiction over war crimes and crimes against humanity had become well-accepted after the war; thus, extraterritoriality was no bar to Israel's assertion of jurisdiction over Demjanjuk.159

The extradition court claimed that "universal condemnation of the acts involved and general interest in cooperating to suppress them" establishes the universality principle.160 In its classic statement, however, the universality theory encompasses acts committed beyond any country's territorial jurisdiction, the paradigm offense being piracy on the high seas.161 War crimes and crimes against humanity, which occur within the territorial jurisdiction of a specific country are, therefore, prosecutable in and by such country and are arguably beyond the reach of the universality theory. The district court, however, citing the Nuremberg and Eichmann trials, simply stated that the universality principle applies to war crimes and crimes against humanity. This view is probably correct, but warrants a more thorough examination.

An expanded theory of universal jurisdiction can be reconciled with its original formulation by examining the basis of the piracy paradigm. Piracy occurs only where there is a "lack of governmental control" in the pirate's area of operation.162 This fact, not the physical

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156. No. 000-50-9 (DJAWC Nov. 15, 1947).
158. Id. at 556 (quoting The Nurnberg Trial, 6 F.R.D. 69, 76 (1946)).
159. Id. at 557-58.
160. Id. at 556.
161. 1 M. BASSOUNI, supra note 3, at ch. 6, § 6. The justification for the universality principle lies in the fact that without such jurisdiction, no country could prosecute the offender.
location of the pirate on the high seas, provides the justification for
jurisdiction under the universality principle. Similarly, war crimes
occur where there is no "adequate judicial system operating," either
because of chaotic wartime conditions or irresponsible leadership.
Like piracy, war crimes are carried on beyond the boundaries of legal
control, and subject the offender to the jurisdiction of any state that is
able to seize him and bring him to justice. Under this analysis, the
universality principle applies to war crimes by analogy to piracy.

Two formulations of the justification for jurisdiction over high
seas pirates exist under the universality principle. First, piracy is a
violation of the law of nations; therefore, any nation may punish the
pirate on behalf of all sovereign states. The law of nations permits, as
an extraordinary ground of jurisdiction, any state to seize and prose-
cute the pirate regardless of location of the offense. Second, piracy
may not violate the law of nations, but rather violates municipal law.
Municipal law defines the parameters of the crime; then, by interna-
tional agreement, any state may seize the offender and subject him to
its municipal law.

If war crimes are analogous to piracy, either formulation of the
universality principle supports Israel's jurisdiction over Demjanjuk.
Either war crimes are crimes against humanity and Israel may prose-
cute the war criminal on behalf of all nations, or the crimes violate
Israel's municipal law, and are so heinous that international law per-
mits Israel to claim jurisdiction on "extraordinary grounds."

Based at least partially on the analogy between war crimes and
piracy, the universality principle has expanded during the past four
decades to encompass war crimes and crimes against humanity. By
the time of the Eichmann trial in 1961, war crimes and crimes against
humanity were commonly accepted as crimes of universal jurisdic-
tion. Universal jurisdiction, however, fails to include every "univer-

163. Id.
164. Id. at 194; see also E. Janeczek, Nuremberg Judgment in the Light of
International Law 60 (1949).
165. Sponsler, The Universality Principle of Jurisdiction and the Threatened Trials of
166. Id. at 45-46.
167. Id.
168. See Note, International Law: Jurisdiction Over Extraterritorial Crime: Universality
169. Baxter, supra note 136, at 83; Carnegie, supra note 141, at 422. For a partial list of
conventions allowing universal jurisdiction, see supra notes 149, 150. Additionally, universal jurisdiction was mandated by the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, opened for signature May 14, 1954, art. 28, 249 U.N.T.S. 240.
The Sixth Circuit relied on section 404 of the Restatement of Foreign Relations Law to uphold Israel’s jurisdiction over Demjanjuk. Section 404 provides:

A state may exercise jurisdiction to define and punish certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps terrorism, even where none of the bases of jurisdiction indicated in § 402 is present.

Comment “a” to Section 404 states that the listed offenses are subject to universal jurisdiction “as a matter of customary law,” even for states “not party to any international agreement on the subject.”

Similarly, the Sixth Circuit relied on the Restatement and the universality theory to explain why Israel had jurisdiction over Demjanjuk notwithstanding its lack of statehood at the time of his alleged crimes. Because the universality principle provides that crimes against humanity may be punished by one country on behalf of all, “Israel or any other nation, regardless of its status in 1942 or 1943, may undertake to vindicate the interest of all nations by seeking to punish the perpetrators of such crimes.” The district court, on the other hand, resorted to a complicated discussion of the successor state theory.

The district court briefly discussed two other jurisdictional theories. First, the court suggested that Israel could assert jurisdiction based on the protective principle, which permits a country to assert jurisdiction over extraterritorial conduct by non-nationals, when the conduct is directed against the state’s security or vital interests. The court, however, failed to explain how the theory might apply to Israel’s attempt to try Demjanjuk. Second, the court noted that although Demjanjuk’s alleged victims were not Israeli nationals, their

170. See, e.g., Genocide Convention, supra note 127, which makes no provision for universal jurisdiction. But see RESTATEMENT OF FOREIGN RELATIONS LAW § 404 reporter’s note 1 (Tent. Draft No. 2, 1981) (stating that an “international crime is presumably subject to universal jurisdiction.”).


172. RESTATEMENT OF FOREIGN RELATIONS LAW § 404 (Tent. Draft No. 6, 1984). The jurisdictional bases in § 402 are the territoriality, nationality, and protective principles. Id. at § 402.

173. Id. at § 404 comment a. The reporter’s notes acknowledge that war crimes and genocide are subject to universal jurisdiction and will probably be joined by other offenses as customary law continues to evolve.

174. Demjanjuk, 776 F.2d at 582-83.

175. Id. at 583 (emphasis added). This mirrors the post-war U.S. position regarding the jurisdiction of U.S. military courts to try war criminals who committed offenses prior to the United States’ entry into the war. REPORT OF THE DEPUTY JUDGE ADVOCATE FOR WAR CRIMES EUROPEAN COMMAND, JUNE 1944-JULY 1948, at 58.

176. See infra note 184.

“close nexus” with Israel might enable Israel to assert jurisdiction based on the passive personality theory.\textsuperscript{178}

For more than two decades, these two theories had justified Israel’s jurisdiction over Adolph Eichmann. The \textit{Eichmann} court formulated the protective principle as the right of the “victim nation . . . to try any who assault [its] existence.”\textsuperscript{179} Quoting numerous legal authorities, the court found that the protective principle, and, by extension, the passive personality principle, applied when there is a “linking point” between the punisher and the accused, and where the acts of the accused concern the punishing state more so than other states.\textsuperscript{180} Noting the character of the crimes charged and the unique character of the State of Israel as a country established as a haven for survivors of the Holocaust, the \textit{Eichmann} court found a very “special tragic link.”\textsuperscript{181}

Some writers criticized the \textit{Eichmann} court’s formulation of the protective and passive personality theories on the grounds that Israel was not a sovereign state during the Nazi regime and Eichmann’s victims, therefore, were not Israeli nationals.\textsuperscript{182} The \textit{Eichmann} district court, aware of his problem, presented a very formalistic argument about the rights of a successor state.\textsuperscript{183} The \textit{Demjanjuk} court advanced a similar argument.\textsuperscript{184} The \textit{Eichmann} court did address the underlying justification for the applicability of the protective and passive personality theories:

\begin{quote}
The right of the “hurt” group to punish offenders derives directly . . . from the crime committed against them by the offender, and it was only want of sovereignty that denied them the power to try and punish the offender. If the hurt group or people thereafter reaches political sovereignty in any territory, it may make use of such sovereignty for the enforcement of its natural right to punish the offender who hurt them . . . .
\end{quote}

\begin{quotation}
\textsuperscript{178} \textit{Id.}\n\end{quotation}

\begin{quotation}
\textsuperscript{179} Israel v. Eichmann, 36 I.L.R. 5 (D.C. Jerusalem 1961), \textit{reprinted in} 56 \textit{AM. J. INT’L L.} 805, 828 (1962).\n\end{quotation}

\begin{quotation}
\textsuperscript{180} \textit{Id.} at 829, 832.\n\end{quotation}

\begin{quotation}
\textsuperscript{181} \textit{Id.} at 830-32.\n\end{quotation}

\begin{quotation}
\textsuperscript{182} \textit{See, e.g.,} Fawcett, \textit{supra} note 7, at 190-192.\n\end{quotation}

\begin{quotation}
\textsuperscript{183} Israel v. Eichmann, 36 I.L.R. 5 (D.C. Jerusalem 1961), \textit{reprinted in} 56 \textit{AM. J. INT’L L.} at 832-34.\n\end{quotation}

\begin{quotation}
\textsuperscript{184} According to the successor state theory, municipal laws remain in effect after a change in government until the new government acts to amend or repeal them. The Israeli criminal law prohibiting murder incorporates the Criminal Code in effect in Palestine during the period of the British Mandate. Israel, as the successor state to Palestine, can try persons for murders committed during the Mandate. Had the British Mandatory Power enacted a law providing for the prosecution of extraterritorial war crimes (including murder), Israel, as successor state, would be competent to try persons violating that law. The rights of the successor state include the ability to amend or supplement retroactively the preceding legislation, and to provide for the prosecution of crimes for which legislation could have provided. \textit{In re} Extradition of Demjanjuk, 612 F. Supp. 544, 567-68 (N.D. Ohio 1985).\n\end{quotation}
The State of Israel, the sovereign State of the Jewish people, performs through its legislation the task of carrying into effect the right of the Jewish people to punish the criminals who killed their sons with intent to put an end to the survival of this people.185

The court’s interpretation of these two theories clearly illustrated their applicability to Eichmann. Although objections to these jurisdictional theories may have been technically correct, they tended to “obscure the decisive fact that Jews were regarded as a nation by the Nazis,”186 and that the Jews had been killed as Jews.187 Not only did Israel, as the territorial state of the Jews, have a greater interest in Nazi atrocities than did any of the other eighteen states that had jurisdiction under the territoriality principle, but the citizens of Israel had perhaps as much right to punish crimes committed against their people as states which punish crimes committed within their territory.

The Demjanjuk court unfortunately failed to consider fully the protective and passive personality theories. Both theories complement the universality argument. Whereas the universality theory grants jurisdiction to any country, including Israel, to try alleged war criminals, the protective and passive personality theories give Israel alone jurisdiction to try Nazi war criminals. Moreover, the protective and passive personality theories illuminate the measure of revenge and self-assertion that underlies Israel’s insistence on trying individuals like Eichmann and Demjanjuk. As the Israeli Supreme Court stated:

The punishments meted out in the law [the Nazi Statute] were not intended principally to reform the criminal or to deter potential criminals, but rather—as the title of the law itself indicates—“to take revenge” on the enemies of Israel and the destroyers of Israel.188

Notwithstanding Israel’s ultimate motives, it is difficult to argue that Israel lacks jurisdiction over Demjanjuk under accepted principles of international law. In the past four decades, war crimes and crimes against humanity have been widely recognized as international offenses subject to universal jurisdiction.189 In addition, given the unique nature of the crimes charged and the close nexus between the accused, the victims, and Israel, the protective and passive personality theories of jurisdiction govern the Demjanjuk case.190

186. Note, supra note 132, at 130.
187. Id.
189. See supra notes 154-76 and accompanying text.
190. See supra notes 177-81 and accompanying text.
V. THE POLITICAL OFFENSE EXCEPTION

A. THE DEMJANJUK CASE: WAR CRIMES AND CRIMES AGAINST HUMANITY

Although the district court considered it only briefly and the Sixth Circuit did not address it at all, the applicability of the political offense exception is an interesting and potentially significant aspect of the Demjanjuk case. Demjanjuk raised the exception as a defense, claiming that the alleged acts, if committed, had been incidental to the ongoing Nazi war effort. The court rejected Demjanjuk’s claim, stating that “[t]he murdering of numerous civilians while a guard in a Nazi concentration camp, as part of a larger ‘Final Solution’ to exterminate religious or ethnic groups, is not a crime of a ‘political character’ and thus is not covered by the political offense exception to extradition.”

The political offense exception evolved as extradition shifted from a mechanism used against political dissenters to a device used against perpetrators of common crimes. The exception has three justifications: 1) that political dissent and activism should exist in democratic societies; 2) that humanitarian considerations militate against extraditing unsuccessful dissenters if the requesting state is likely to subject them to unfair trials and punishment; and 3) that no government should facilitate the punishment of political acts committed against another state, if such acts do not harm its own internal political order.

In the absence of any treaty-based definition of the term “political offense,” courts have devised various tests to determine whether a particular act falls within the exception. Two categories of political offenses have emerged: “pure” political offenses and “relative” political offenses. Pure political offenses are “acts directed against the state that contain none of the elements of an ordinary crime.” Examples are treason, espionage, and sedition. A relative political offense is an offense in which “a common crime is so connected with a

192. Id. at 571.
193. Quinn v. Robinson, 783 F.2d 776, 792-93 (9th Cir. 1986), cert. denied, ___ U.S. ___, 107 S. Ct. 271 (1987). This shift occurred in the aftermath of the American and French Revolutions as the concept of justified political resistance gained legitimacy. Id.
194. Id. at 793; see also Deere, Political Offenses in the Law and Practice of Extradition, 27 AM. J. INT’L L. 247, 249 (1933); Note, State Department Determinations of Political Offenses: Death Knell for the Political Offense Exception in Extradition Law, 15 CASE W. RES. J. INT’L L. 137, 138-39 (1983).
political act that the entire offense is regarded as political.”

United States courts apply an incidence test to determine whether “the nexus between the crime and the political act is sufficiently close” for the crime to be deemed a relative political offense. The test focuses on whether a “violent political disturbance” existed at the time of the alleged acts and whether the acts charged were “recognizably incidental to the disturbance.” Generally, U.S. courts have read the incidence test loosely, including even murder and robbery within its scope so long as the accused demonstrates some link with a political uprising.

The incidence test has produced some anomalous results, most notably in the first Artukovic extradition case. In that case, Yugoslavia sought the extradition of Andrija Artukovic, former Minister of the Interior of the Independent State of Croatia, the puppet state formed by the Nazis after their 1941 invasion of Yugoslavia. Yugoslavia charged Artukovic with complicity in the murders of over 700,000 civilians from 1941 through 1943. Before an extradition hearing was held, the Ninth Circuit affirmed the issuance of a writ of habeas corpus on the ground that the alleged offenses were of a “political character,” and reflected a “marked degree of connection between the alleged murders and a political element.” The court rejected the argument that the common crime element of “war crimes” negated any political character of Artukovic’s alleged crimes. The court also rejected the government’s claim that the United States was obligated to extradite Artukovic pursuant to various

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199. Quinn, 783 F.2d at 794.
201. See, e.g., In re Mackin, No. 80 Cr. Misc. 1 (S.D.N.Y. Aug. 13, 1981), appeal dismissed, 668 F.2d 122, 130-37 (2d Cir. 1981) (murder of British soldier in Northern Ireland deemed a political offense); In re McMullen, No. 3-78-1099 MG (N.D. Cal. May 11, 1979) (murder resulting from bombing of military barracks in England took place during state of uprising in the United Kingdom); In re Ezeta, 62 F. 972, 976 (N.D. Cal. 1894) (murder and robbery closely identified with an uprising as part of an unsuccessful effort to suppress it).
A requesting government is not barred from reinstating extradition proceedings if its original request is denied. Collins v. Loisel, 262 U.S. 426 (1923); Hooker v. Klein, 573 F.2d 1360 (9th Cir. 1978).
203. Artukovic, 140 F. Supp. at 246-47.
204. Id. at 247.
205. Karadzole, 247 F.2d at 204.
206. Id.
207. Id. at 204-05.
United Nations resolutions.208

The United States Supreme Court vacated the Ninth Circuit's decision and remanded the case to the district court for a full-scale extradition hearing under 18 U.S.C. § 3184.209 In the subsequent decision, the extradition magistrate found no probable cause that Artukovic was guilty of murder and participation in murder.210 The magistrate discussed the political offense exception in dicta, noting that it would have barred Artukovic's extradition even if the requisite probable cause had been present.211

Artukovic is "one of the most roundly criticized cases in the history of American extradition jurisprudence."212 The Ninth Circuit recently acknowledged its erroneous application of the incidence test in that case, stating that crimes against humanity are beyond the ambit of the political offense exception.213

The overwhelming majority of post-war literature asserts that crimes against humanity (and in many cases, war crimes) are excluded from the category of protected political offenses because their "barbarity [is] out of proportion to the political end in view."214 Such crimes violate international law and, even if committed during a time of war or violent political uprising, have "no connection with furthering the legitimate policy of the State."215 The taking of human life in "gas chambers, before firing squads, or in laboratories dedicated to vicious
medical experiments, is murder."\textsuperscript{216} Such common crimes are unprotected by the political offense exception.

The Demjanjuk court adopted this position regarding the political offense exception, although it never expressly adopted a \textit{per se} exclusion for crimes against humanity.\textsuperscript{217} Rather, the court found that the mass murder of civilians at Treblinka could not be characterized as part of a political disturbance or struggle for power within the Third Reich.\textsuperscript{218} Although the court never explicitly applied the incidence test, the alleged offenses would nevertheless have failed to qualify as protected political acts.\textsuperscript{219} The court found the requisite nexus between the alleged offenses and the Nazi war effort lacking, irrespective of whether a "violent political disturbance" existed in Eastern Europe in 1942-43.\textsuperscript{220}

\textbf{B. \textit{AFTER DEMJANJUK: IMPLICATIONS FOR THE FUTURE}}

\textit{Demjanjuk} raises considerable uncertainty as to whether other crimes will be excluded completely from the protection of the political offense exception. While perhaps laudable, the wholesale exclusion of crimes against humanity threatens the continued viability of the political offense exception. This is particularly important given the increasingly difficult distinction between legitimate political activity and terrorism. Terrorism, like crimes against humanity, elicits reactions of outrage and horror. Moreover, terrorism continues to gain recognition as an international crime. Because of these similarities, it is useful to consider how legal developments regarding crimes against humanity may portend developments in terrorism cases.

Several recent extradition cases suggest parallels between crimes against humanity and acts of terrorism. Courts examining acts of terrorism tend to invoke the imagery of ruthless attacks against innocent civilians and to allude to the dangers of a broad definition of the political offense exception. In \textit{Eain v. Wilkes},\textsuperscript{221} the Seventh Circuit refused to grant a writ of habeas corpus to a member of the Palestine Liberation Organization ("PLO"). Israel charged the PLO member with planting a bomb in a market in Tiberias that killed two boys and wounded thirty other people. In refusing to apply the political offense exception, the court rejected the argument that a "random bombing intended to result in the cold-blooded murder of civilians [was] inci-

\begin{itemize}
  \item \textsuperscript{216} \textit{Id.} at 950.
  \item \textsuperscript{217} \textit{In re Extradition of Demjanjuk}, 612 F. Supp. 544, 570-71 (N.D. Ohio 1985).
  \item \textsuperscript{218} \textit{Id.}
  \item \textsuperscript{219} \textit{See id.} at 570.
  \item \textsuperscript{220} \textit{Id.}
  \item \textsuperscript{221} 641 F.2d 504 (7th Cir.), \textit{cert. denied}, 454 U.S. 894 (1981).
\end{itemize}
dental to the purpose of toppling a government."\textsuperscript{222} The court adopted a \textit{per se} test: violent attacks against defenseless civilians are not protected by the exception regardless of their underlying political objective.\textsuperscript{223}

The District Court for the Southern District of New York accepted this new articulation of the incidence test in the case of \textit{In re Doherty}.\textsuperscript{224} The court stated that "not every act committed for a political purpose or during a political disturbance may or should properly be regarded as a political offense."\textsuperscript{225} Like the \textit{Eain} court, the \textit{Doherty} court signalled its willingness to judge the legitimacy of political struggles in determining the applicability of the political offense exception. In addition, the \textit{Doherty} court construed the political offense exception to exclude acts whose nature "is such as to be violative of international law and inconsistent with international standards of civilized conduct,"\textsuperscript{226} noting that any other construction of the political offense exception would sweep in the "atrocities at Dachau, Auschwitz and other death camps."\textsuperscript{227}

The recent Ninth Circuit decision in \textit{Quinn v. Robinson}\textsuperscript{228} rejected the \textit{Eain-Doherty} reformulation of the incidence test.\textsuperscript{229} Stating that the application of the incidence test should be "ideologically neutral," the \textit{Quinn} court objected to an extradition court's inquiry into the legitimacy of an actor's motives and to a determination of political legitimacy based on the actor's tactics.\textsuperscript{230} The court

\begin{itemize}
    \item \textsuperscript{222} \textit{Id.} at 521.
    \item \textsuperscript{223} \textit{Id.} Aside from the blanket characterization of a violent attack on civilians as a \textit{per se} unprotected act, the \textit{Eain} court imposed two other limitations on the incidence test: first, that a "political uprising" is restricted to a struggle between "organized, nondispersed military forces," thus excluding the PLO from the definition; and second, that certain acts lack "political legitimacy" and therefore fall outside the scope of the exception. \textit{Id.} at 519-20. The District Court for the Southern District of New York rejected the first of these limitations but accepted the second in \textit{In re Doherty}, 599 F. Supp. 270, 276 (S.D.N.Y. 1984). The Ninth Circuit rejected both limitations in \textit{Quinn v. Robinson}, 783 F.2d 776, 807-09 (9th Cir. 1986), \textit{cert. denied}, \textit{U.S.}, 107 S. Ct. 271 (1987); see infra notes 228-35 and accompanying text.
    \item \textsuperscript{224} 599 F. Supp. 270 (S.D.N.Y. 1984).
    \item \textsuperscript{225} \textit{Id.} at 274. The court ultimately found that Doherty could not be extradited because he had committed a protected political offense. \textit{Id.} Doherty subsequently designated the Republic of Ireland as his country of deportation under 8 U.S.C. \S 1253(a) (1982) and demanded immediate deportation. Doherty's demand was a consequence of the Supplementary Extradition Treaty between the United States and the United Kingdom, which retroactively eliminates the political offense exception. \textit{See} Doherty v. Meese, 808 F.2d 938 (2d Cir. 1986) (affirming denial of habeas corpus).
    \item \textsuperscript{226} \textit{Id.}
    \item \textsuperscript{227} \textit{Id.}
    \item \textsuperscript{228} 783 F.2d 776 (9th Cir. 1986), \textit{cert. denied}, \textit{U.S.}, 107 S.Ct. 271 (1987).
    \item \textsuperscript{229} \textit{Id.} at 808.
    \item \textsuperscript{230} \textit{Id.} at 804. In fact, ideological neutrality may not be required. Recent commentary suggests that a standard of political justifiability based on democratic ideals must be read into the "superficially neutral language" of the political offense exception, as the exception was designed specifically to recognize the "citizen's right to revolt against tyrannical gov-
expressed confidence that the traditional incidence test, if correctly applied, would exclude both crimes against humanity and terrorist acts from the political offense doctrine. Regarding the former, the court simply stated that crimes against humanity are "treated differently and are generally excluded from the protection of many normally applicable rules, [and are] certainly . . . to be excluded from coverage under the political offense exception."\textsuperscript{231} Regarding terrorism, the court's lengthy analysis hinged on its interpretation of the "uprising" component of the incidence test. According to the court, the political offense exception properly protects

\begin{quote}
[those engaged in internal or domestic struggles over the form or composition of their own government, including, of course, struggles to displace an occupying power. It was not designed to protect international political coercion or blackmail, or the exportation of violence and strife to other locations—even to the homeland of an oppressor nation.]\textsuperscript{232}
\end{quote}

Thus, the exception only applies to a revolt by an indigenous population against its own government or an occupying power, when those engaged in violence seek to accomplish a fundamental political objective.

Although the Quinn court's formulation of the political offense doctrine as it applies to terrorism is bound to be controversial, it confirms the Demjanjuk position regarding crimes against humanity. Moreover, Quinn avoided a critical failing of Eain and Doherty, namely, the blurring of the line between crimes against humanity and acts of political expression that have a reasonable claim to legitimacy notwithstanding the courts' disagreement with the means employed and the sentiments expressed. Under any test, crimes against humanity must by their nature be excluded from the political offense exception. The Quinn court urged other courts evaluating terrorist acts to avoid making political judgments that affect the political offense analysis.\textsuperscript{233} Thus, courts should not limit the political offense exception to acts that are "blows struck in the cause of freedom against a regressive totalitarian regime" in the tradition of the American and French revolutions.\textsuperscript{234} Furthermore, however repulsive, modern revolutionary tactics, including random acts of violence against civilians, should not

\footnotesize{\textsuperscript{\textcopyright 1987}}
be presumed politically illegitimate.\footnote{235} Under the Quinn analysis, Demjanjuk’s crimes are not protected political offenses because the political offense exception excludes crimes against humanity. Even without this straightforward exclusion, however, Demjanjuk’s alleged crimes do not meet the incidence test. The Treblinka murders were not committed in the course of a revolt by an indigenous population against a government or an occupying power. No “uprising” existed as defined in Quinn;\footnote{236} therefore, it is irrelevant that the Treblinka crimes were committed during World War II.

Despite the clear inapplicability of the political offense exception to Demjanjuk, both the decision of the extradition court and Quinn suggest that the blanket exclusion of crimes against humanity may be somewhat troublesome. Both courts premised the exclusion of crimes against humanity on a characterization of those crimes as violative of international law and international standards of civilized conduct.\footnote{237} Yet crimes against humanity have only recently been recognized as international offenses; indeed, one commentator noted that the drafters of the Nuremberg Charter developed the concept of crimes against humanity primarily because no other legal way existed to punish the Nazis for offenses committed against other Germans and stateless persons living in Nazi-occupied territory.\footnote{238} Thus, certain offenses may be deemed international crimes when the world community becomes sufficiently outraged to make a concerted effort to punish them. The designation of certain crimes as international presumes that nations should and will intervene in the affairs of other sovereign states when such crimes occur. Yet, one of the major justifications for the political offense exception is to ensure that sovereign states do not interfere with each others’ internal affairs. The recent effort to expand the category of international crimes to include aircraft hijacking, narcotics trafficking, and possibly terrorism,\footnote{239} necessarily implies a corresponding narrowing of the political offense exception. It remains to be seen whether the continuing expansion of international criminal law will intrude unacceptably on the traditional right of political actors to seek asylum free from the threat of extradition.

\footnote{235} Id. at 804-05. 
\footnote{236} See id. at 811-14. 
\footnote{237} Id. at 799; In re Extradition of Demjanjuk, 612 F. Supp. 544, 571 (N.D. Ohio 1985). 
\footnote{238} E. Janeczek, supra note 164, at 97. 
VI. CONCLUSION

Demjanjuk confirms the character of crimes against humanity and war crimes as offenses subject to universal jurisdiction. The case also confirms the exclusion of these crimes from the coverage of the political offense exception. Demjanjuk, however, raises serious questions regarding the scope of both the universality principle of jurisdiction and the political offense exception. The steady expansion of the category of international crimes subject to universal jurisdiction and the concurrent position of at least one court that such crimes are per se excluded from the political offense exception means that an increasing number of relative political offenses will be subject to the extraordinary reach of universal jurisdiction. Moreover, they may also lose the protection afforded by the political offense exception. Given that there appears to be no discernible limit to the acts that may fall into this category, it is possible that acts considered critical to the survival of political dissent may some day not only be prosecutable by any state, but wholly unprotected by the political offense exception. At such time the freedom to engage in anything but orthodox political protest will effectively vanish.