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# Demjanjuk v. Petrovsky: An Analysis of Extradition

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## NOTES AND COMMENTS

# *DEMJANJUK v. PETROVSKY*: AN ANALYSIS OF EXTRADITION


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## I. INTRODUCTION

In *Demjanjuk v. Petrovsky*,[1] the United States Court of Appeals for the Sixth Circuit affirmed the district court's denial of a petition for a writ of habeas corpus, thus clearing the way for the State of Israel to

1. 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 106 S.Ct. 1198 (1986). Subsequent to this case, Demjanjuk sought a writ of habeas corpus and a stay of execution of the extradition request. Demjanjuk v. Meese, 784 F.2d 1114 (D.C. Cir. 1986). Demjanjuk contended that the Senate's advice and consent to the ratification of the International Convention on the Prevention and Punishment of the Crime of Genocide modified the extradition treaty and voided the instant court of appeals' decision. *Id.* at 1115. However, because this convention was not yet in effect in the United States and because Demjanjuk was not being extradited for the crime of genocide, the Court of Appeals for the District of Columbia denied the requests. *Id.* Subsequently, the United States extradited Demjanjuk to Israel. Wash. Post, Feb. 17, 1987, at 1, col. 1.

On April 18, 1988, a three judge panel in Israel convicted Demjanjuk of Nazi war crimes. Wall Street Journal, Apr. 19, 1988, at 1, col. 3. He was convicted on four counts: war crimes, crimes against the Jewish people, crimes against humanity, and crimes against persecuted people. *Id.* The court found that there was no doubt that Demjanjuk was "Ivan the Terrible." *Id.* On April 25, 1988, the Israeli court sentenced Demjanjuk to death by hanging. Wall Street Journal, Apr. 26, 1988, at 1, col. 3.

extradite John Demjanjuk.[2] Looking to the treaty of extradition between the State of Israel and the United States[3] for guidance, the court found that the request for extradition met all the requirements.[4]

This note analyzes the *Demjanjuk* decision, specifically examining the issues of extradition discussed by the court, including "double criminality" and "universal jurisdiction." As contrasted to the instant case, this note also discusses the political crime exception to extradition.

## II. FACTS AND PROCEEDINGS BELOW

John Demjanjuk, the petitioner, was a native of the Ukraine, a republic of the Soviet Union.[5] In 1952, under the Displaced Persons Act of 1948, he entered the United States and in 1958, became a naturalized citizen.[6] Since arriving in the United States, he resided in Cleveland, Ohio.[7]

In 1981, based upon evidence that both Demjanjuk's certificate of naturalization and the order admitting him to the United States were illegally procured through willful misrepresentation of material facts,[8] the District Court of Northern Ohio revoked the certificate and vacated the order.[9] The evidence showed that, shortly after the Soviet Union had drafted Demjanjuk, he was captured by the German army.[10] In 1942, after short periods of time in German prisoner of war camps, Demjanjuk became a Schutzstaffel, an SS guard, in Treblinka, Po-

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2. *Demjanjuk*, 776 F.2d 571.

3. Convention on Extradition, December 10, 1962, United States-Israel, 14 U.S.T. 1707, T.I.A.S. No. 5476 [hereinafter Extradition Convention].

4. *Demjanjuk*, 776 F.2d at 571.

5. *Id.* at 575.

6. *Id.*

7. *Id.*

8. 8 U.S.C. § 1451(a) (1982) states:

> It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 1421 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and cancelling of certificate of naturalization shall be effective as of the original date of the order and certificate . . . . *Id.*

9. *Demjanjuk*, 776 F.2d at 575. *See* U.S. v. Demjanjuk, 518 F. Supp. 1362 (N.D. Ohio 1981), *aff'd per curiam*, 680 F.2d 32, *cert. denied*, 459 U.S. 1036 (1982).

10. *Demjanjuk*, 776 F.2d at 575.

land.[11] On his application for naturalization, Demjanjuk misstated his place of residence from 1937 through 1948, and he failed to admit serving as an SS guard and a soldier in a German military unit.[12]

During his denaturalization proceedings, Demjanjuk acknowledged that he falsified statements concerning his residence, and admitted he had served as a German soldier.[13] Although documentary evidence and eyewitness testimony placed him at Treblinka as an SS guard during its operation as a concentration camp, Demjanjuk steadfastly denied ever serving at Treblinka.[14]

As a result of the court's findings, the United States began deportation proceedings against Demjanjuk.[15] Pursuant to the treaty between the United States and Israel,[16] and in accordance with the federal statute governing American extradition procedures,[17] the State of Israel filed a request with the State Department of the United States seeking the extradition of Demjanjuk.[18] The U. S. Attorney for the Northern District of Ohio filed a complaint on behalf of the State of Israel seeking Demjanjuk's arrest and a hearing for his extradition.[19] In pertinent

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11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* The evidence included eyewitness testimony from five survivors of Treblinka and one guard who served at Treblinka identifying Demjanjuk as a guard known as "Ivan or Iwan Grozny" or "Ivan the Terrible." *Id.*

15. *Id.*

16. *See* Extradition Convention, *supra* note 3.

17. 18 U.S.C. § 3184 (1982) 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 so to do 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 stipulations 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.

18. *Demjanjuk*, 776 F.2d at 575.

19. *Id.*

part, the complaint charged Demjanjuk with the murder of "tens of thousands of Jews and non-Jews" while operating gas chambers at Treblinka.[20] Following the hearing, the district court entered an order certifying to the Secretary of State that Demjanjuk was subject to extradition.[21] As a result of this order, bond previously granted to Demjanjuk was revoked, and pending a warrant of surrender by the Secretary of State, the Attorney General of the United States assumed custody of Demjanjuk.[22] Demjanjuk subsequently petitioned for a writ of habeas corpus,[23] and the district court denied his request.[24] This appeal followed.

## III. THE TREATY AND THE EXTRADITION CHARGE

The extradition sought was pursuant to the treaty signed by the United States and the State of Israel on December 10, 1962, and effective December 5, 1963.[25] In pertinent part, the treaty states:

### 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.

### 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:
>
> 1. Murder.
> 2. Manslaughter.

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20. *Id.* at 578.

21. Extradition of Demjanjuk, 612 F. Supp. 544 (N.D. Ohio), *appeal dismissed*, 762 F.2d 1012 (6th Cir. 1985).

22. *Demjanjuk*, 776 F.2d at 575.

23. The *Demjanjuk* court stated that the only method for review of an order certifying extradition is a collateral petition for a writ of habeas corpus; there is no direct appeal. *Id.* at 576.

24. Demjanjuk v. Petrovsky, 612 F. Supp. 571 (N.D. Ohio), *aff'd.*, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 106 S.Ct. 1198 (1986).

25. *Demjanjuk*, 776 F.2d at 575.

3. Malicious wounding; inflicting grievous bodily harm.

* * *

Article III

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.

The words "territorial jurisdiction" as used in this Article and in Article I of the present Convention mean: territory, including territorial waters, and the airspace thereover belonging to or under the control of one of the Contracting Parties, and vessels and aircraft belong to one of the Contracting Parties or to a citizen or corporation thereof when such vessel is on the high seas or such aircraft is over the high seas.[26]

* * *

The extradition request specifically charged that Demjanjuk " 'murdered tens of thousands of Jews and non-Jews' while operating the gas chambers to exterminate prisoners at Treblinka."[27] The warrant asserted that the acts were committed "with the intention of destroying the Jewish people and to commit crimes against humanity."[28] In Israel, these acts are punishable under a 1950 statute which made certain crimes against the Jewish people, against humanity, and "war crimes committed during the Nazi period" criminal acts.[29] In pertinent part, the statute reads:

"crime against the Jewish people" means any of the following acts, committed with intent to destroy the Jewish people in whole or in part:

1. killing Jews;

2. causing serious bodily or mental harm to Jews;

3. placing Jews in living conditions calculated to bring about their physical destruction;

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26. Extradition Convention, *supra* note 3, arts. I-III.

27. *Demjanjuk*, 776 F.2d at 578. Because of the "principle of specialty," Israel may only prosecute Demjanjuk for offenses for which the United States specifically granted extradition. *Id.* at 583.

28. *Id.* at 578.

29. *Id.* (citing the Nazis & Nazi Collaborators (Punishment) Law, Law of Aug. 1, 1950, 4 Laws St. Isr. No. 64).

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 to hatred of Jews;

"crime 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;

"war crime" means any of the following acts:

murder, ill-treatment or deportation to forced labour or for any other purpose, of civilian population of or in occupied territory; murder or ill-treatment of prisoners of war or persons on the seas; killing of hostages; plunder of public or private property; wanton destruction of cities, towns, or villages; and devastation not justified by military necessity.[30]

* * *

In the complaint, the charge of murdering Jews was equated to the specific criminal offenses enumerated in the treaty: murder, malicious wounding, and inflicting "grievous bodily harm."[31]

## IV. THE CASE

On an appeal of a petition for a writ of habeas corpus, a court only inquires into three specific areas: (1) whether the magistrate had jurisdiction, (2) whether the offense charged was within the treaty, and (3) whether the evidence was sufficient to warrant a finding of reasonable grounds to believe the accused was guilty.[32] Demjanjuk challenged the district court's decision arguing that the court acted improperly in these three areas.[33]

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30. *Id.* at 578-579 (quoting the Nazis & Nazi Collaborators (Punishment) Law, 4 Laws St. Isr. No. 64).

31. *Id.* at 578.

32. *Id.* at 576 (quoting Fernandez v. Phillips, 268 U.S. 311, 312 (1925)).

33. *Id.* at 576. As an ancillary matter, Demjanjuk contended that because in prior litigation the same district judge determined that Demjanjuk committed the acts which

### A. *Whether the Magistrate Had Jurisdiction*

#### 1. *"Double Criminality" Requirement*

The Restatement of Foreign Relations Law of the United States section 487(c) provides that extradition of an accused offender is not allowed "[i]f the offense with which he is charged or of which he has been convicted is not punishable as a serious crime both in the requesting and in the requested state."[34] The Supreme Court applied this theory of "double criminality" in *Collins v. Loisel*,[35] holding:

> [t]he law does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of the liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions.[36]

Demjanjuk contended that because the crime of "murdering tens of thousands of Jews and non-Jews" was not a specific crime in the United States, the extradition request should fail.[37] The court, however, applying the doctrine set down in *Collins*, disagreed and denied the claim.[38] The court held that the test for "double criminality" only required the same *act*, not the specific crime.[39] Demjanjuk was charged with the act of unlawfully killing one or more persons which is equivalent to an act of murder punishable in both the United States and the State of Israel.[40] The court held that the absence of a specific crime in the United States for the mass murder of Jews was irrelevant.

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required his denaturalization, Demjanjuk argued that the judge was biased against him. *Id.* He based his assertion on 28 U.S.C. § 455(a) (1982) which states, "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." However, the absence of any evidence of actual bias or prejudice from an external source, as required by section 455(b), precluded the court from accepting this argument. *Demjanjuk*, 776 F.2d at 576.

34. RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 487(c) (Tent. Draft No. 5, 1984) [hereinafter RESTATEMENT].

35. 259 U.S. 309 (1922). In *Collins*, the petitioner contended that the crime of cheating, the charge in the requesting state, was dissimilar to the crime of obtaining property under false pretenses, the charge in the requested state. *Id.* at 311.

36. *Id.* at 312.

37. *Demjanjuk*, 776 F.2d at 576.

38. *Id.*

39. *Id.*

40. *Id.* at 580.

It therefore denied Demjanjuk's assertion of a lack of "double criminality."[41]

2. *"Universal Jurisdiction"*

For extradition to be granted, the person sought must have committed crimes "within the jurisdiction of any such foreign government," specifically the requesting country.[42] Demjanjuk contended that because he was neither a citizen nor a resident of the State of Israel, because the alleged crimes took place in Poland, and because the acts charged occurred prior to the establishment of the State of Israel, Israel lacked jurisdictional and extraditional power.[43]

According to the treaty, for offenses committed outside of 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."[44] The *Demjanjuk* court interpreted this language to mean that the parties recognized the right to request extradition for "extra-territorial" crimes, and that the requested party *had* the discretion to deny extradition if its laws did not provide for punishment for the crime charged.[45]

The Israeli statute under which Demjanjuk was charged was designed to punish those involved in carrying out Hitler's "final solution."[46] Thereby, Israel claimed "extra-territorial" jurisdiction over "crimes against the Jewish people," "crimes against humanity," and " 'war crimes' committed during the Nazi years."[47] "Universal jurisdiction" allows "a state to 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,

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41. *Id.*

42. *Id.* (citing 18 U.S.C. § 3184 (1982)). *See also* RESTATEMENT, *supra* note 34, § 486(a).

43. *Demjanjuk*, 776 F.2d at 580.

44. *Id.* (citing Extradition Convention, *supra* note 3, art. III).

45. *Id.* at 581. Demjanjuk contended that the use of the words "need not" prohibited his extradition because "war crimes" and crimes against humanity are not criminal offenses in the United States. *Id.* at 580-581. However, in cases where the requested nation does not provide punishment for the charged offenses, this terminology has been held to grant the judiciary the discretion to determine whether to extradite. *Id.* at 581 (citing In re Assarsson, 687 F.2d 1157 (8th Cir. 1982) and In re Assarsson, 635 F.2d 1237 (7th Cir. 1980), *cert. denied*, 451 U.S. 938 (1981)).

46. *Id.* (citing the Nazis & Nazi Collaborators (Punishment) Law, 4 Laws St. Isr. No. 64).

47. *Id.* at 581.

genocide, war crimes, and perhaps terrorism . . . ."[48] These crimes are universally condemned and any perpetrators are considered to be enemies of all people. Therefore, any nation with custody may punish the perpetrators according to its laws applicable to these offenses.[49] The law of the United States includes international law, and international law recognizes "universal jurisdiction" over certain crimes.[50]

According to section 443 of the Restatement, "a state's courts may exercise jurisdiction to enforce the state's criminal laws which punish universal crimes . . . or other non-territorial offenses within the state's jurisdiction to prescribe."[51] Because the State of Israel sought to enforce its criminal laws for crimes universally recognized and condemned, the court of appeals held that despite the fact that the crimes occurred in Poland, Israel had the right to extradite Demjanjuk.[52] In addition, the court held that because under the universality principle neither the nationality of the accused nor the location of the crime is material, the fact that the State of Israel was not in existence at the time of the alleged crimes did not bar the extradition.[53] The universality principle assumes that the crimes are offenses against the laws of all nations as well as against humanity. Therefore, the State of Israel as the prosecuting nation had the right to seek punishment of the perpetrator of the crime.[54]

### B. *Whether the Offense Charged Was Within the Treaty*

A fundamental requirement for extradition is that the crime charged must be provided for in the treaty between the requesting and the requested nations.[55] Demjanjuk contended that the charge of "murdering tens of thousands of Jews and non-Jews" was not covered under the term of "murder" in the treaty.[56] Based on a logical reading of the treaty and the interpretation given the treaty by the State Depart-

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48. *Id.* at 582 (citing RESTATEMENT, *supra* note 34, § 404).

49. *Id.* at 582. "Universal jurisdiction" had already been asserted regarding "war crimes" with the establishment of the International Military Tribunal. *Id.* This tribunal system consisted of one court in Nuremberg which tried major Nazi officials, and several courts within the four occupational zones of post-war Germany which tried lesser Nazis. *Id.*

50. *Id.*

51. *Id.* (citing RESTATEMENT, *supra* note 34, §443).

52. *Id.* at 582.

53. *Id.* at 582-583.

54. *Id.* at 583.

55. *See* 18 U.S.C. § 3184 (1982); Fernandez v. Phillips, 268 U.S. 311, 312 (1925).

56. *Demjanjuk*, 776 F.2d at 579.

ment,[57] the court had no difficulty holding that "murder" included the mass murder of Jews.[58]

### C. *Whether the Evidence Was Sufficient to Warrant a Finding of Reasonable Grounds to Believe the Accused Guilty*

The evidence presented against Demjanjuk included sworn eyewitness testimony from survivors of Treblinka who had been prisoners between 1942 and 1943.[59] These eyewitnesses identified Demjanjuk as an SS guard who herded prisoners into gas chambers and operated the mechanism which filled the chambers with gas.[60] They also testified to having seen Demjanjuk beat and maim prisoners, at times causing their deaths.[61] In addition, there was corroborating testimony from a former German guard at Treblinka who identified Demjanjuk as "Ivan the Terrible."[62] As required by 18 U.S.C. section 3190,[63] an official of the United States State Department authenticated the evidence.[64] On these bases, the court held that the evidence was admissible in court and sufficient to show probable cause that Demjanjuk committed the acts charged.[65]

## V. THE POLITICAL CRIME EXCEPTION

The allowance of extradition in the instant case is in sharp con-

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57. There is considerable weight given to interpretations of treaties as rendered by the political department of a government. *See Demjanjuk*, 776 F.2d at 579 (quoting Argento v. Horn, 241 F.2d 258, 263 (6th Cir. 1957) and Charlton v. Kelly, 229 U.S. 447 (1913)).

58. *Id.* at 579.

59. *Id.* at 576.

60. *Id.*

61. *Id.*

62. *Id.*

63. 18 U.S.C. § 3190 (1982) states:

> Depositions, warrants, or other papers or copies thereof offered in evidence upon the hearing of any extradition case shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required. *Id.*

64. *Demjanjuk*, 776 F.2d at 576.

65. *Id.* In addition, Demjanjuk challenged the documentary evidence contending it was forged. *Id.* The court dismissed this charge and noted that, even in the absence of the documentary evidence, there was sufficient grounds to find probable cause. *Id.*

trast to the traditional disallowance of extradition for perpetrators of political crimes. All extradition treaties include an exception precluding extradition for political crimes perpetrated against the requesting nation.[66] For example, the treaty between the United States and the United Kingdom specifies that "[e]xtradition shall not be granted if . . . the offense for which extradition is requested is regarded by the requesting party as one of a political character . . . ."[67] This exclusion allows perpetrators of heinous crimes to escape prosecution by seeking asylum in a foreign country which will use the political crime exception to deny an extradition request.[68] Because of this exclusion, "crimes may have been committed of the most atrocious and inhuman character and still the perpetrators of such crimes escape punishment as fugitives beyond the reach of extradition."[69]

The origin of the political crime exception was based on the beliefs that: (1) individuals have "a right to resort to political activism to foster political change,"[70] (2) "individuals should not be returned to their countries where they may be subjected to unfair trials and punishments because of their political opinions," and (3) "governments should not intervene in the international political struggles of other nations."[71]

Extradition is generally not allowed for "pure political crimes" such as treason, sedition, and espionage.[72] Litigation contesting extradition for political crimes usually involves "relative political crimes." These are otherwise common crimes committed either in connection with a political act, for political motives, or within a political context.[73] Courts have held that to be exempt from extradition, the charged offense must be "incidental to," "in the course of," or "in the furtherance of" a political uprising or disturbance.[74] In analyzing the facts of a case, a court must determine whether "it is clear that the man was acting as one of a number of persons engaged in acts of violence of a

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66. Note, *Eliminating the Political Offense Exception for Violent Crimes: The Proposed United States-United Kingdom Supplementary Extradition Treaty*, 26 VA. J. INT'L L. 755, 759 (1986).

67. Quinn v. Robinson, 783 F.2d 776, 783 (9th Cir.), *cert. denied*, 107 S.Ct. 271 (1986) (citing the Extradition Treaty, June 8, 1972, United States-United Kingdom, 28 U.S.T. 227, T.I.A.S. No. 8468, art. V(1)(c)(i)).

68. *See generally Quinn*, 783 F.2d at 796-803.

69. In re Ezeta, 62 F. 972, 997 (N.D. Cal. 1894).

70. *Quinn*, 783 F.2d at 793 (quoting Note, *American Courts and Modern Terrorism: The Politics of Extradition*, 13 N.Y.U.J. INT'L L. & POL. 617, 622 (1981)).

71. *Id.* at 793.

72. *Id.* at 793-794.

73. *Id.*

74. *Id.* at 797.

political character with a political object, and as part of the political movement and uprising in which he was taking part."[75] For example, in *In re Ezeta*,[76] San Salvador sought extradition of Antonio Ezeta, its former President, and four of his military officers accused of crimes which occurred during the revolutionary take-over of the country.[77] Because of the political crime exception, the District Court of Northern California denied the extradition for crimes which occurred during a conflict between military forces.[78] However, because one of the crimes occurred four months prior to the hostilities, the court held that the political crime exception was not operative. Therefore, the court allowed the extradition of the accused perpetrator.[79]

Allowance of the political crime exception can create conflicts between the requested and requesting countries. By refusing extradition requests, the requested country indicates doubt about the requesting country's good faith and the integrity of its legal system, and the act can be interpreted as an endorsement of the accused's actions.[80] In 1978, President Mobutu of Zaire characterized Belgium's denial of the extradition of a political adversary as "effective support to those willing to overthrow him." In Mobutu's eyes, Belgium's action was the equivalent of a hostile act directed against his government.[81] Because of differing judicial interpretations of the political offense clause, there may also be an imbalance in the number of extraditions allowed from each country.[82]

The standard for determining whether a crime meets the political crime exception has been held to be both underinclusive and overbroad.[83] The narrowness of the standard was evident in *Escobedo v. United States*,[84] where the court held that because the crime did not occur during a political uprising, the political crime exception was not

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75. In re Ezeta, 62 F. at 999 (quoting In re Castioni, 1 Q.B. 149 (1891)).

76. *Ezeta*, 62 F. at 972.

77. *Id.* at 978.

78. *Id.* at 1002-1003.

79. *Id.* at 986.

80. Comment, *International Law - Political Offense Exception to Extradition: A 19th Century British Standard in 20th Century American Courts*, 59 NOTRE DAME L. REV. 1005, 1007 (1984).

81. Gilbert, *Terrorism & the Political Offense Exemption Reappraised*, 34 INT'L & COMP. L.Q. 695 (1985).

82. Comment, *supra* note 80, at 1007.

83. *See Quinn*, 783 F.2d at 798; Eain v. Wilkes, 641 F.2d 504, 519 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981).

84. 623 F.2d 1098 (5th Cir.), *cert. denied*, 449 U.S. 1036 (1980) and 450 U.S. 922 (1981).

operative.[85] The alleged crime was the kidnapping of a Cuban consul, reportedly for the purpose of ransoming the consul for political prisoners being held in Cuba.[86] Technically, this crime did not fall within the requirements for the political exception. It is clear, however, that this was a political act and extradition should not have been allowed.[87] In the alternative, due to the overbroad nature of the exception, essentially any crime occurring during a political uprising and in the furtherance of a rebellion can theoretically qualify as a political crime.[88]

However, the political crime exception cannot be used as protection against crimes which violate international law, such as crimes against humanity.[89] Because these crimes could not have been perpetrated without the toleration of the authority of a state, these crimes, including "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population . . . or persecution on political, racial, or religious grounds,"[90] constitute an abuse of sovereignty.[91] The political offense exception can never protect those carrying out a governmental policy calling for acts of destruction whose nature and scope exceed human imagination.[92] Because these crimes are unparalleled in history, they are excluded from protection under normally applicable laws.[93]

In recent years, the political crime exception has been used extensively to prevent the extradition of members of the Provisional Irish Republican Army ("PIRA"). For example, in *In re McMullen*,[94] the District Court of Northern California held that, even though the committed offense was deplorable, the crime met the requisites for exemption as a political crime. Therefore, the court denied the extradition request.[95] Furthermore, the Court of Appeals for the Second Circuit, in

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85. *Escobedo*, 623 F.2d at 1104.

86. *Id.*

87. *See Quinn*, 783 F.2d at 798.

88. Note, *supra* note 66, at 766-767.

89. *Quinn*, 783 F.2d at 799-801.

90. Garcia-Mora, *Crimes Against Humanity and the Principle of Nonextradition of Political Offenders*, 62 MICH. L. REV. 927, 928 (1964) (quoting Charter of the International Military Tribunal at Nuremberg, art. 6, para. (c)).

91. *Quinn*, 783 F.2d at 799-800.

92. *Id.* at 801.

93. *Id.*

94. No. 3-78-1099 MG (N.D. Cal. 1979).

95. *Quinn*, 783 F.2d at 801 (citing In re McMullen, No. 3-78-1099 MG). The court held that because the acts occurred during a state of political uprising in the United Kingdom and were "incidental to" a political disturbance, McMullen, a PIRA member charged with murder in connection with the bombing of military barracks in England, was held exempt from extradition. *Id.*

*In re Macklin*,[96] denied the extradition request for a PIRA member charged with wounding a British soldier during a gun battle.[97] The court, applying the political crime exception test, held that the crime was "incidental to" the PIRA's political uprising.[98] Also, in *In re Doherty*,[99] the District Court of Southern New York denied the extradition request for Doherty, a PIRA member charged with the murder of a British officer during an attempted ambush of a convoy of British soldiers.[100] The court applied the political crime exception because it viewed the acts as traditional military hostilities.[101] Finally, in *Quinn v. Robinson*, the only case in which a PIRA member was extradited, Quinn failed to meet the qualifications for the exception solely because the charged crimes did not occur in the same location as the rebellion.[102] Had the charged crimes occurred in Northern Ireland, rather than in England, it is probable that Quinn would have been protected from extradition.[103]

It seems contrary to public policy and the need for international stability to protect these suspected perpetrators from facing trial for crimes charged against them. The sheer horror of the acts perpetrated, as well as the availability of alternative peaceful means of protest, precludes justification for such protection.[104] In *Eain v. Wilkes*,[105] the Court of Appeals for the Seventh Circuit took the first judicial step towards a stricter standard for the exception.[106] The court held that a Palestine Liberation Organization member was subject to extradition to the State of Israel for planting a bomb in Tiberias, Israel which exploded and killed two boys and injured thirty people.[107] The court reasoned that the political crime exception required direct political effect from the act.[108] In addition, the court held that because the act could

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96. 668 F.2d 122 (2d Cir. 1981).

97. *Id.* at 125.

98. *Id.*

99. 599 F. Supp. 270 (S.D.N.Y. 1984). This decision provoked anger in the United Kingdom and was characterized as "outrageous" in the United States. Recent Development, *Extradition: Limitation of the Political Offense Exception*, 27 HARV. INT'L L.J. 266, 270-271 (1986).

100. Recent Development, *supra* note 99, at 272.

101. *Id.* at 276-277.

102. *Quinn*, 783 F.2d at 814.

103. Note, *supra* note 66, at 768.

104. *See generally* Gilbert, *supra* note 81, at 705.

105. 641 F.2d 504 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981).

106. *Id.* at 520.

107. *Id.* at 518.

108. *Id.* at 520-521.

be classified as an individual act of violence rather than part of an ongoing battle between contending armies and because the act was perpetrated in order to bring about the ultimate expulsion of the entire Israeli population, the attack should be considered as perpetrated against a social structure rather than a political structure.[109] Therefore, the accused was not protected by the political crime exception.[110] Although the court in *In re Doherty*[111] held the political crime exception was operative, it indicated an inclination towards a more severe standard.[112] Noting that prior lenient decisions would be inconsistent with the reality of the modern world, the court stated that the political crime exception should not be used to protect "every act committed for a political purpose or during a political disturbance."[113] The court enumerated acts which fall outside of the political crime exception, including acts "inconsistent with international standards of civilized conduct," such as bombings in public places, acts which "transcend the limits of international law," harm to hostages, violations of the Geneva convention, or acts of "amorphous" or "fanatic" groups without structure, organization, or clearly defined political objectives.[114]

According to the Reagan Administration, the slow progress towards a tougher standard invites perpetration of heinous crimes against civilians and poses a threat to the stability of both the requesting and the requested countries.[115] Therefore, the Administration is taking action.[116] On June 25, 1985, the United States and the United Kingdom signed a new extradition treaty[117] sharply limiting the judiciary's ability to prevent the extradition of PIRA members.[118] This Supplemen-

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109. *Id.* at 519-520.

110. *Id.*

111. 599 F. Supp. 270 (S.D.N.Y. 1984).

112. *Id.* at 274.

113. *Id.*

114. *Quinn*, 783 F.2d at 803 (citing *Doherty*, 599 F. Supp. at 274-276).

115. *See* Note, *supra* note 66, at 755.

116. *Id.*

117. Supplementary Treaty, June 25, 1986, United States-United Kingdom, *reprinted in* 24 I.L.M. 1105 (1985) [hereinafter Supplementary Treaty]. The new treaty supplements the 1972 treaty between the United States and the United Kingdom. Recent Development, *supra* note 99, at 266. The Supplementary Treaty was ratified by the United Kingdom Order in Council on December 15, 1986, and entered into force on December 23, 1986.

118. Note, *supra* note 66, at 755.

The Reagan Administration is currently negotiating to similarly supplement its extradition treaties with other nations. *Id.* at 756-757 (citing Statement of A. Sofaer before the Senate Foreign Relations Committee, Aug. 1, 1985, at 21). Further recognition of the problem of extraditing these alleged "political" criminals is evidenced by a

tary Treaty exempts from the political crime exception crimes which are generally associated with terrorist activities.[119] In pertinent part, the treaty states:

> Article 1
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> For the purposes of the Extradition Treaty, none of the following offenses shall be regarded as an offense of a political character:
>
> * * *
>
> (b) murder, voluntary manslaughter, and assault causing grievous bodily harm;
>
> (c) kidnapping, abduction, or serious unlawful detention, including taking a hostage;
>
> (d) an offense involving the use of a bomb, grenade, rocket, firearm, letter or parcel bomb, or any incendiary device if this use endangers any person; and
>
> (e) an attempt to commit any of the foregoing offenses or participation as an accomplice of a person who commits or attempts to commit such an offense.
>
> * * *
>
> Article 5
>
> This Supplementary Treaty shall apply to any offense committed before or after this Supplementary Treaty enters into force, provided that this Supplementary Treaty shall not apply to an offense committed before this Supplementary Treaty enters into force which was not an offense under the laws of both Contracting Parties at the time of its commission.[120] In depoliticizing these crimes,

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resolution adopted by the General Assembly of the United Nations. The resolution, outlining measures to prevent international terrorism, *inter alia*,

> urges all States to co-operate with one another more closely, especially through the exchange of relevant information concerning the prevention and combating of terrorism, the apprehension and prosecution or extradition of the perpetrators of such acts, the conclusion of special treaties and/or the incorporation into appropriate bilateral treaties of special clauses, in particular regarding the extradition or prosecution of terrorists . . . .

United Nations General Assembly, Resolution on Measures to Prevent International Terrorism, Res. 40/61 para. 8 (1985), *reprinted in* 25 I.L.M. 239, 241 (1986).

119. Recent Development, *supra* note 99, at 266. The Supplementary Treaty allows for application to acts committed prior to its existence, and permits retroactive application to extraditions previously refused. *Id.* at 267-268.

120. Supplementary Treaty, *supra* note 117, arts. 1, 4.

tension created by the denial of extradition for alleged criminals will be diminished.[121] Perpetrators of heinous crimes will no longer be able to rely on the political crime exception to escape extradition for their criminal acts.

## VI. CONCLUSION

*Demjanjuk* and the Supplementary Treaty indicate that attitudes toward extradition are changing. Some crimes that now demand extradition were barred from extradition because they fell within the political crime exception. Thus, the current stricter standard allows extradition in more situations than ever before.

John Demjanjuk was neither a citizen of Israel nor had his alleged crimes occurred there. Nevertheless, he was extadited by the United States to Israel. Power to demand extradition was founded on the "universal jurisdiction" principle. This principle applies to crimes which are so heinous that they are universally condemned by society as a whole. Considered as "crimes against humanity," the crimes which meet the requirements of the "universal jurisdiction" principle include war crimes, such as those allegedly committed by Demjanjuk, as well as genocide, piracy, and slave trade. Because these crimes are universally condemned, the prosecuting nation serves as a representative of society. The "universal jurisdiction" principle creates the necessary means for ensuring prosecution of those charged with crimes when usual jurisdiction requirements are insufficient.

Alternatively, with the political crime exception, the law has been used to limit the means for prosecution of those charged with certain crimes. However, as these crimes move from the political arena to more closely resemble irrational acts of terrorism, society has chosen to act to prevent protection of those charged with these crimes. As extradition treaties are being modified to exclude such acts as murder and kidnapping from the protection of the political crime exception, international law is once again being used to ensure that justice prevails and prosecution can proceed.

*Francine R. Strauss*

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121. *Id.*