

INTELLECTUAL PROPERTY RIGHTS AND INTERNATIONAL TRADE: AN OVERVIEW OF U.S. CUSTOMS AND BORDER PROTECTION'S ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

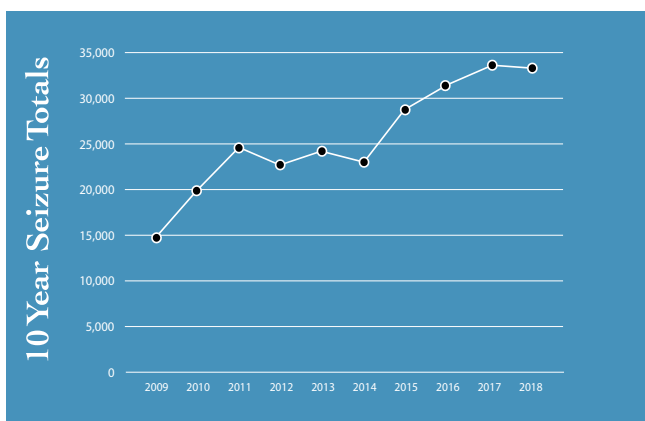
I. INTRODUCTION

On January 24, 2020, The Wall Street Journal reported:¹

The Trump administration is moving to curb the sale of imported counterfeit goods over the internet, warning electronic commerce platforms and warehouse operators of greater scrutiny and penalties if they don't help ferret out fakes.

The Department of Homeland Security is set to release a report Friday outlining its immediate actions and longer-term goals for enlisting e-commerce players to combat counterfeit products that officials say undermine U.S. technology and manufacturing, harm bricks-and-mortar retailers and endanger consumers.

The new initiative, led by U.S. Customs and Border Protection and the White House,² comes the same month as an initial trade agreement with China that requires Beijing to take steps against counterfeiters or risk enforcement actions that could trigger new tariffs.



Source: U.S. Customs and Border Protection, "Intellectual Property Rights: Fiscal Year 2018 Seizure Statistics" (August 2019) https://www.cbp.gov/sites/default/files/assets/documents/2019-Aug/IPR_Annual-Report-FY-2018.pdf



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Intellectual property theft is a widespread commercial concern³ affecting international trade,⁴ national security,⁵ and public safety.⁶ United States (US) Customs and Border Protection (CBP) seizures of imported merchandise⁷ that violate intellectual property rights (IPR) are on the rise.⁸ The incidence of infringing merchandise at US borders has increased from 3,244 seizures in 2000 to 33,810 in 2018, according to the US Department of Homeland Security data.⁹

This article provides an overview of US and international IPR law from the standpoint of IPR owners¹⁰ and importers, describes the measures necessary for registration and enforcement of IP rights at the US border, and outlines common issues that arise in enforcement proceedings involving counterfeit and infringing merchandise. This article also summarizes the issues facing intellectual property owners and importers when allegedly counterfeit and pirated merchandise is seized by the government, either in an administrative proceeding brought by CBP or in a criminal proceeding by the US Justice Department. In short, this article facilitates a general understanding of IPR, how to protect IPR, and how to report and prevent infringement.¹¹

II. IPR ENFORCEMENT AGAINST IMPORTATION OF COUNTERFEIT AND INFRINGING MERCHANDISE

Intellectual property comes in many forms, but those of greatest interest to importers and IP owners seeking to exclude counterfeit and infringing merchandise at the US border are trademarks and trade names, copyrights, and patents. This section covers the enforcement against infringement of such items.

A. Trademarks and Trade Names

CBP recognizes three levels of infringement in its enforcement of trademarks: counterfeit marks, confusingly similar marks, and restricted gray market merchandise, i.e., parallel imports.¹²

1. Counterfeit Marks

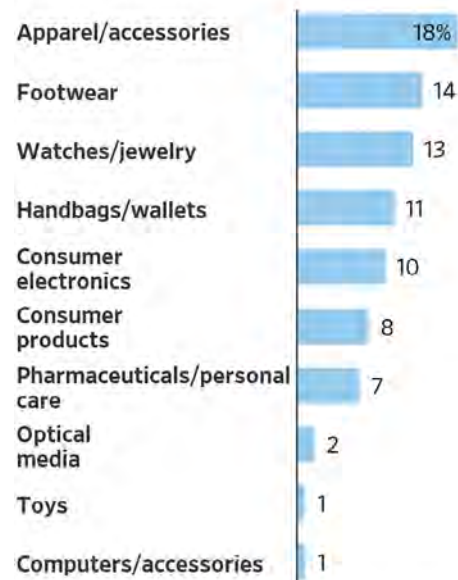
Under section 45 of the Federal Trademark Act of 1946, as amended (the Lanham Act), 15 U.S.C. § 1127, a counterfeit mark is a spurious mark that is identical to, or substantially indistinguishable from, a federally registered trademark. Merchandise imported with counterfeit marks that are registered trademarks and recorded with CBP is subject to seizure followed by the institution of forfeiture proceedings.¹³ The statutory language is mandatory: such merchandise “shall” be seized and, absent the trademark owner’s written consent to import the merchandise, forfeited, for violation of customs laws.¹⁴

After forfeiture, CBP customarily destroys counterfeit merchandise. But if the merchandise is safe, poses no health hazard, and the trademark owner consents, then CBP may “obliterate” the counterfeit mark where feasible and dispose of the seized merchandise by turning over the merchandise to any federal, state, or local government agency, donating the merchandise to a charitable institution, or selling the merchandise at public auction, provided that more than ninety days have passed since the date of forfeiture and no agency or charitable institution needs such merchandise. CBP may impose a civil fine against any person who directs, assists financially or otherwise, or aids and abets the importation of merchandise bearing a counterfeit mark.¹⁵

Merchandise bearing a registered trademark that is not recorded with CBP, by contrast, is subject to seizure “where administratively feasible and appropriate.” That is, CBP is authorized, but not statutorily required, to seize merchandise bearing a mark that is a counterfeit of a federally registered trademark that is not recorded with CBP.¹⁶

Knockoffs Knocked Out

Annual seizures* by category, FY 2018



*As a percentage of total seizures. Fiscal year ends Sept. 30.

Source: U.S. Customs and Border Protection

2. Copying or Simulating Marks

A mark or trade name is one that so resembles a recorded mark or name as to be likely to cause the public to associate the copying or simulating mark or name with the recorded mark or name.¹⁷ Merchandise bearing a copying or simulating mark is subject to detention and seizure.¹⁸ Such merchandise is also denied entry and detained for thirty days from the date when it is presented for examination by CBP, during which time the importer has an opportunity to establish that any of the circumstances described in 19 C.F.R. § 133.22(c) are applicable, e.g., the accused mark is removed or obliterated as a condition to entry, or the recordant gives written consent to the importation.¹⁹ If the importer has not obtained release of the merchandise within the thirty-day detention period, then the merchandise is seized and forfeiture proceedings instituted. Imported merchandise or packaging in which trademark or trade name violations are involved may be seized and forfeited under 19 U.S.C. § 1595a(c)(2)(C) and 19 C.F.R. § 133.22(f). But merchandise bearing a mark that is confusingly similar to a trademark registered with the US Patent and Trademark Office (USPTO), but which is not recorded with CBP, is not subject to detention or seizure.

3. *Restricted Gray Market Articles (“Parallel Imports”)*

Gray market merchandise is merchandise manufactured abroad bearing a genuine trademark or trade name that is identical to, or substantially indistinguishable from, one owned and recorded by an American citizen or US business that is imported into the US without the authorization of the US trademark owner. Gray market merchandise is a genuine product bearing a trademark or trade name that has been applied with the approval of the owner for use in a foreign country. Only trademarks and trade names that are recorded with CBP are entitled to gray market protection.²⁰ Gray market protection takes effect on the date of recordation with CBP, and is limited to instances where the US and foreign trademarks are not owned by the same person, and the US and foreign trademark owners are not a parent or subsidiary, or otherwise subject to common ownership or control. “Common ownership” means individual or aggregate ownership of more than fifty percent of the business entity. “Common control” means effective control in policy and operations.²¹

If a trademark or trade name meets the criteria for gray market protection, then foreign-made products bearing the protected mark or name that are imported into the US will be detained under 19 C.F.R. §§ 133.23 and 133.25, except as provided in 19 C.F.R. § 133.23(b), and are subject to potential seizure and forfeiture under 19 U.S.C. § 1526(b).²²

B. Copyrights

CBP can detain or seize piratical copies of protected copyrighted works. “Piratical copies” are identical or substantially similar copies of a registered copyrighted work that are produced and imported without authorization from the copyright owner.²³ While copyright protection exists the moment a work is fixed in any tangible medium of expression, CBP focuses its enforcement of copyrighted works that have been recorded with the agency. CBP only records claims to copyrights that are registered with the US Copyright Office.²⁴

Copyright law prevents the copying of a copyrighted work in any medium. The determination of copyright piracy is based on whether an average observer would recognize the alleged infringement as a copy of the copyrighted work.²⁵ That requires a plaintiff to prove access to the copyrighted work and a substantial similarity between the works,²⁶ not only as between general ideas, but also as between the expressions of those ideas.²⁷ Access to the copyrighted work may be presumed without direct evidence that the importer had an

opportunity to view the copyrighted work. The substantial similarities between the works may be so striking as to preclude the possibility that they were created independently.²⁸ CBP regulations provide for the possibility of border enforcement action to enforce the Copyright Act of 1976 where the suspect work is clearly or possibly piratical.²⁹

1. *Clearly Piratical*

“Clearly piratical” is defined by CBP as overwhelming and substantial similarity between the copyrighted elements of the protected work and the suspect item so as to clearly indicate that latter is based on the former.³⁰ Imported merchandise constituting “clearly piratical” copies of a federally registered copyright recorded with CBP is subject to seizure and forfeiture under 19 U.S.C. § 1595a(c)(2)(C) for a violation of 17 U.S.C. § 602, as implemented by 19 C.F.R. § 133.42.³¹ If administratively feasible and appropriate, the agency has the discretion to seize piratical merchandise on the grounds that it is clearly piratical, even if the copyright has not been recorded.³²

2. *Possibly Piratical*

“Possibly piratical” is merchandise as to which CBP has “reasonable suspicion” to believe is piratical of copyrighted works recorded with CBP.³³ In such cases, possibly piratical copies “shall” be detained.³⁴ If such merchandise is determined to be piratical, then it may be seized and forfeited under 19 U.S.C. § 1595a(c)(2)(C) for a violation of 17 U.S.C. § 602.³⁵

3. *Digital Millennium Copyright Act*

The Digital Millennium Copyright Act (DMCA)³⁶ prohibits gaining unauthorized access to a copyrighted work by circumventing a technological protection measure put in place by the copyright owner that is designed to control access to the copyrighted work.³⁷ Section 1201(a)(2) of Title 17 prohibits the manufacture or importation of devices, the provision of services, or trafficking in any technology, product, service, device, component, or part thereof, that circumvents technological measures that effectively control access to a work.³⁸ To violate section 1201(a)(2), the suspect technology, service, device, or product must: (1) be primarily designed or produced for the purpose of circumventing such technological measures; (2) have only limited commercially significant purpose or use other than to circumvent such measures; or (3) be marketed by the defendant or another acting in concert with that person’s knowledge for use in circumventing a technological measure.³⁹ Where CBP determines a device violates the DMCA, such device is subject to seizure and forfeiture under 19 U.S.C. § 1595a(c)(2)(C) for a violation of 17 U.S.C. § 1201.⁴⁰

C. Exclusion Orders

Section 337 of the Tariff Act prohibits unfair methods of competition and unfair practices in the importation or sale of merchandise, the effect or tendency of which is to destroy, substantially injure, or prevent the establishment of an efficiently and economically operated US industry, or to restrain or monopolize trade and commerce in the US.⁴¹ Section 337 also prohibits the importation of merchandise that infringes upon a US patent, registered trademark, copyright, or mask work.⁴² Subsequent to an investigation of an alleged violation under section 337, where the US International Trade Commission (ITC) determines that section 337 has been violated, the ITC will issue an order directing the Secretary of the Treasury to exclude the relevant merchandise from entry into the US.⁴³ The ITC may also issue seizure and forfeiture orders against specific importers where, after previously having had merchandise denied entry under an exclusion order and having been notified by CBP that seizure and forfeiture could result from future attempted entries of such merchandise, the importer attempts a subsequent importation of the same or similar merchandise which is the subject of the exclusion order.⁴⁴ Once a seizure and forfeiture notice has been issued, importation of the subject merchandise by the identified importer is subject to forfeiture under 19 U.S.C. § 1337(i), as implemented by 19 C.F.R. § 12.39(c).⁴⁵

1. Patents

Unlike trademarks and copyrights, patents registered with the USPTO may not be recorded with CBP. Thus, CBP's action as to patents is limited to the enforcement of ITC exclusion orders. In that regard, and upon written request from an importer or interested party, CBP may issue rulings under 19 C.F.R. part 177 as to whether prospective importations fall within the scope of an exclusion order issued by the ITC.

2. Design Patents

Design patents, which are frequently encountered at the border in the form of automobile grilles, wheel rims, and other parts in the original equipment manufacturer (OEM) market, are also enforceable by means of a section 337 action. The test for design patent infringement does not require the accused design to reproduce all elements of the patented design,⁴⁶ and a colorable imitation is sufficient to establish the infringement of a design patent.⁴⁷ But proof of infringement requires an assessment of the prior art in addition to evidence, not mere assertions, regarding the extent of consumer awareness associated with a particular design.⁴⁸ Without an examination

of the prior art or a consumer survey to assess the likelihood of consumer deception, it is difficult to estimate the likelihood of success as to a particular claim of design patent infringement.

D. Defenses to Infringement

1. Lever Rule Protection

An exception to the common control provision of the gray market regulations is the Lever Rule. Under the Lever Rule, US trademark owners may submit an application to CBP requesting restrictions on imports of gray market merchandise bearing a genuine trademark that are physically and materially different from the merchandise authorized by the US trademark owner for importation or sale in the US.⁴⁹ The applicant claiming that gray market merchandise possess physical and material differences “must state the basis for such a claim with particularity, and must support such assertions by competent evidence and provide summaries of physical and material differences for publication.”⁵⁰ If CBP grants a trademark owner's application for Lever Rule protection, then the restricted gray market merchandise will be denied entry into the US, detained for a minimum period of thirty days, and potentially subject to seizure and forfeiture proceedings.⁵¹

When applying for Lever Rule protection for specific products, a trademark owner must: (1) state the basis for this claim with particularity; (2) support the claim by competent evidence; and (3) provide CBP with summaries of the alleged physical and material differences that exist between the merchandise authorized for sale in the US and that intended for other markets.⁵² “Physical and material” differences between merchandise authorized for sale in the US and that intended for other markets may include:

- The specific composition of both the authorized and gray market product(s) (including chemical composition);
- Formulation, product construction, structure, or composite product components of both the authorized and gray market product;
- Performance and/or operational characteristics of both the authorized and gray market product;
- Differences resulting from legal or regulatory requirements, certification, etc.; or
- Other distinguishing and explicitly defined factors that would likely result in consumer deception or confusion as proscribed under applicable law.⁵³

2. Personal Use Exemption from Trademark Restrictions

Under 19 U.S.C. § 1526(d), a traveler arriving in the US with merchandise bearing a protected trademark may be granted an exemption to the import restrictions.⁵⁴ Under the personal use exemption, a traveler may import one article of the type bearing a protected trademark.⁵⁵ For example, a person arriving in the US with three watches bearing an unauthorized mark, whether each watch bears the same mark or different marks, is allowed to retain only one watch.⁵⁶ That exemption applies to merchandise bearing a counterfeit or confusingly similar version of a registered and recorded trademark, or an otherwise restricted gray market article.⁵⁷ The exemption is applicable only if the article: (1) accompanies a traveler to the US; (2) is for personal use and not for sale; and (3) the traveler has not been granted an exemption for the same type of article within thirty days preceding his or her arrival.⁵⁸

3. Nominative Fair Use

A claim for trademark infringement requires not only a showing that the alleged violator used the owner's trademark, but that the alleged violator used the trademark to misrepresent the origin and source of the alleged violator's merchandise.⁵⁹ An alleged violator may argue that he or she was making a "nominative fair use" of a trademark, i.e., using it only for the relevant merchandise.⁶⁰

E. Registration and Recordation of Trademarks, Trade Names, and Copyrights

Trademarks and copyrights issued by the USPTO may be recorded with CBP. Trade names may be recorded with CBP without registration. As noted above, patents are not recordable at CBP, but are subject to exclusion orders in section 337 proceedings. CBP actively seeks partnerships with trademark owners and encourages owners to register IPR with CBP.⁶¹ The registration process is electronic. Before filing a registration application, the applicant should have a USPTO Number or a US Copyright Office Registration Number, as well as digital images that identify the IPR to be protected. IPR requires a separate application and nominal fee for each recordation, which applications IPR processes in the order it receives them.⁶²

CBP is less likely to detain or seize a non-recorded mark, even if registered with the USPTO. An electronic application with CBP will begin the administrative recordation process. A separate application is required for each recordation sought.⁶³

III. CBP ENFORCEMENT OF IPR

The Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA) was signed into law on February 24, 2016. It is the first comprehensive CBP legislation since the US Department of Homeland Security was created in 2003 to, among other things, house CBP upon the transfer of the US Customs Service from the US Department of the Treasury to the US Department of Homeland Security. The overall objective of the TFTEA is to ensure a fair and competitive trade environment. CBP has embraced a renewed approach to trade facilitation and enforcement, focusing on IPR and other areas. At the same time, trademark and copyright owners continue to struggle with the importation of counterfeit merchandise and pirated works.

Stopping the flow of counterfeit merchandise is a top priority for CBP, pursued by means of seizures at the border, and "pushing the border outward" through audits of infringing importers, risk modeling, and cooperation with the agency's counterparts in foreign countries. Domestically, CBP coordinates enforcement efforts with US government trade policy and law enforcement agencies and works closely with US Immigration and Customs Enforcement (ICE) and the trade community to carry out investigative IPR enforcement actions. CBP partners with IP owners to collaborate on educational programs and individual cases of suspected IPR infringement. CBP also administers an online recordation system, Intellectual Property Rights e-Recordation, which enables IP owners to record their trademarks and copyrights electronically and facilitates seizures by making recordation information readily available to CBP personnel.

CBP has the powers of search, seizure, and arrest, and the legal authority to make determinations regarding infringement of trademarks and copyrights, under the Tariff Act of 1930, the Lanham Act, the Copyright Act of 1976, and the Digital Millennium Copyright Act of 1998. CBP enforces patents under section 337 exclusion orders issued by the ITC.

Under 19 U.S.C. § 1595(a)(c)(2), merchandise "may be seized and forfeited" if certain conditions exist, or certain requirements have not been complied with. The merchandise may be seized and forfeited if:

- Its importation or entry requires a license, permit or other authorization of an agency of the US government and the merchandise is not accompanied by such license, permit, or authorization;

- It is merchandise or packaging involving copyright, trademark, or trade name protection violations (including, but not limited to, violations of sections 1124, 1125, or 1127 of title 15, sections 506 or 509 of title 17, or sections 2318 or 2380 of title 18);
- It is “trade dress merchandise” involved in the violation of a court order citing section 1125 of title 15;
- It is merchandise that is marked intentionally in violation of legal requirements; or
- It is merchandise for which the importer has received written notice that previous importations of identical merchandise from the same supplier were found to have been marked in violation of the law.

five business days from the date on which the merchandise is presented for examination to decide whether to detain the merchandise or to allow its release. If CBP decides to detain a shipment, then CBP must provide the importer with a formal Notice of Detention within five days of the determination to detain the shipment. CBP issues a detention notice to the importer of record.⁶⁴ During the detention phase, the importer can resolve any issues as to admissibility to avoid rejection or seizure.

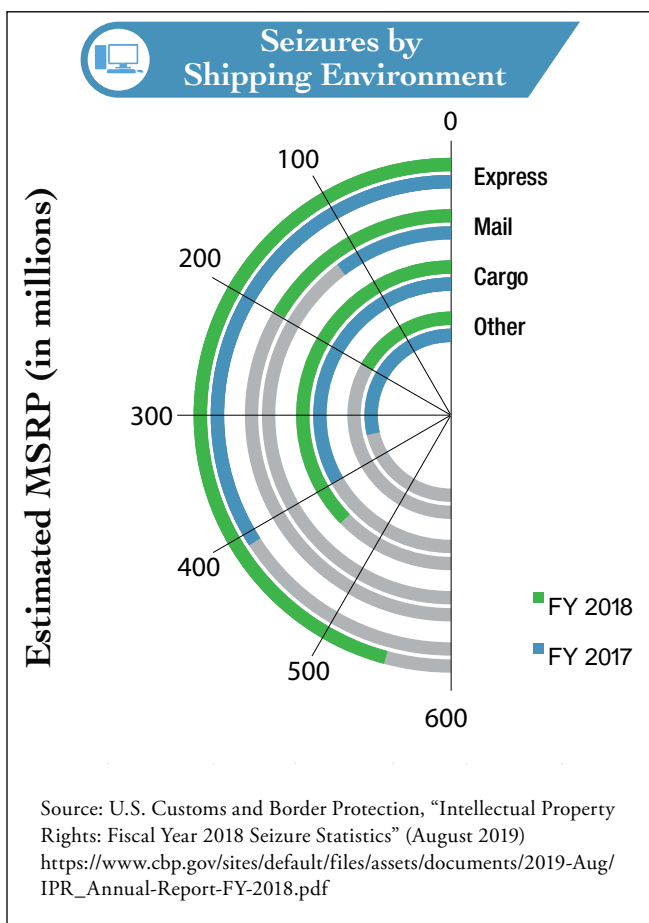
A Notice of Detention must provide the following information:

- That the merchandise has been placed under detention;
- The precise reason for their detention;
- The estimated length of time that it will be detained;
- A description of any inquiries being conducted or tests to be made (legally, test results also must be promptly provided to the importer) regarding the merchandise; and
- Any additional information that may assist in the prompt disposition of the detention.

CBP has thirty days to render a decision regarding the detained shipment unless a longer time has been granted. If no final decision is reached at the end of this thirty-day period, the merchandise is automatically considered excluded for purposes of protest. If the merchandise is seized, the importer will receive a Notice of Seizure and Information to Claimants Form Non-CAFRA or Form CAFRA. It will provide the reasons for the seizure and options available.

In most cases, CBP will seize merchandise when the officer has probable cause to believe that there was a violation of law or regulation. Once the merchandise is seized, the merchandise is turned over to a seized merchandise custodian and a report is prepared and the matter is referred to the appropriate CBP Fines, Penalties, and Forfeitures (FP&F) office. The merchandise is appraised to determine its domestic value. The domestic value is the price at which this merchandise is offered for retail sale. If there is no market for the seized merchandise, the value in the market closest to the place of appraisal is used.

Title 19 provides CBP with the authority to seize and forfeit merchandise imported into the US which bears counterfeit trademarks, marks that are confusingly similar to protected trademarks, and marks that are piratical copies of protected copyrights.⁶⁵ Titles 19 U.S.C. § 1595a(d) and 22 U.S.C. § 401(a) provide CBP with authority to seize and forfeit merchandise



A. CBP’s Detention and Seizure Process

1. Detention

CBP is given broad authority to inspect shipments entering the US. When CBP questions the admissibility of merchandise into the US, CBP has the authority to detain the shipment until satisfactory information is provided to enable release. CBP has

that is exported contrary to law, including through violations involving IPR. Title 19 U.S.C. § 1526(f) also provides CBP with the authority to assess a monetary penalty against parties who direct, assist financially or otherwise, or aid and abet the importation of merchandise bearing counterfeit trademarks which are seized and forfeited under 19 U.S.C. § 1526(e). These authorities, as implemented by part 133 of Title 19, Code of Federal Regulations (19 C.F.R. part 133), apply to importations and exportations, including Transportation and Exportation (T&E) and Importation and Exportation (IE) entries, with limited exceptions.

2. Notice of Seizure and Election of Proceedings

Upon finding a violation, CBP will seize the merchandise and transfer it from the Centralized Examination Station in question to a bonded warehouse. Throughout this process, the importer is charged storage fees, which may need to be paid if CBP agrees to release the merchandise. Seizures are handled by FP&F. An FP&F paralegal reviews the case and issues a seizure notice to the alleged violator. The seizure notice will give information regarding the identity of the merchandise, the location of the seizure, and citations to legal authorities. Generally, the alleged violator is given the option to file a petition with CBP within thirty days of the issuance date on seizure notice; file an offer in compromise; abandon the merchandise; take the matter directly for court action (requiring the violator to fill out the seized asset claim form and post a cost bond equal to 10 percent of the value of the seized merchandise, or \$5,000 USD, whichever is lower); or begin administrative proceedings to forfeit the merchandise.

B. The Post-Seizure Process

1. Penalties, Remission, and Mitigation

In July 2019, CBP revised its guidelines concerning trade, copyright, and patent violations.⁶⁶ CBP may consider aggravating and mitigating factors. While a lack of intent or knowledge as to the counterfeit nature of the importation(s) in question may be considered a mitigating factor in determining the mitigated amount of the fine, it does not shield the involved party from an initial assessment of the fine.

Mitigating factors include:

- lack of knowledge of the counterfeit nature of the trademark;
- prior good record of importation under 19 U.S.C. § 1526;

- inexperience in importing;
- cooperation with CBP officers in ascertaining the facts establishing the violation; and
- inability to pay the fine, demonstrated by documentary evidence, including income tax returns for the prior three years.

Aggravating Factors include:

- more than two prior importations of merchandise seized and forfeited under 19 U.S.C. § 1526(e);
- criminal violation relating to the subject transaction; and
- submission of falsified documentation, i.e., false description, false country of origin, etc., or other deceptive practices in connection with the subject importation.

Although CBP is not required to grant relief in any specific case, CBP may reference its mitigation guidelines when deciding whether to grant relief, and, if CBP deems that relief is appropriate, to determine the mitigation, remission, or cancellation amount. CBP reviews the specific facts and circumstances of each case and may deviate from the guidelines if it determines that such deviation is appropriate.

Under 19 U.S.C. §§ 1618 and 1623, as well as under applicable regulations, CBP officials are entitled to grant relief under such terms and conditions as they deem appropriate, sufficient, reasonable, or just. CBP's Mitigation Guidelines⁶⁷ are as follows:

- Trademark Seizures Under 19 U.S.C. § 1526(e), or 19 U.S.C. § 1595a(d) and 22 U.S.C. § 401+

VIOLATION

- Counterfeit Mark
- Trademark registered on Principal Register of USPTO
 - Trademark recorded with CBP
 - No consent from U.S. trademark owner

- Counterfeit Mark
- Trademark registered on Principal Register of USPTO
 - Trademark recorded with CBP
 - Consent from U.S. trademark owner obtained post-seizure

RECOMMENDED DISPOSITION

No remission of forfeiture

Remission of forfeiture upon payment of ten percent of the dutiable value of the merchandise, payment of all seizure costs and submission of properly executed hold-harmless agreement

- Guidelines for Penalties Levied Pursuant to 19 U.S.C. 1526(f)

<u>VIOLATION</u>	<u>RECOMMENDED DISPOSITION</u>
○ First offense, with mitigating factor(s) and no aggravating factor(s)	10-30 % of the assessed penalty amount
○ First offense with aggravating factor(s)	30-50 % of the assessed penalty amount
○ First offense with evidence of knowledge as to the counterfeit nature of the merchandise, with no aggravating factor(s)	50-80 % of the assessed penalty amount
○ Second offense, with mitigating factor(s) and no aggravating factor(s)	10-30 % of the assessed penalty amount
○ Second offense, with aggravating factor(s), or Third or subsequent offense	50-80 % of the assessed penalty amount
○ Second or subsequent offense, with evidence of knowledge as to the counterfeit nature of the merchandise	No mitigation

- Guidelines for Trademark Seizures Under 19 U.S.C. § 1595a(c)(2)(C) or 19 U.S.C. § 1595a(d) and 22 § U.S.C. 401

<u>VIOLATION</u>	<u>RECOMMENDED DISPOSITION</u>
Counterfeit Mark	No remission of forfeiture
○ Trademark registered on Principal Register of USPTO	
○ Trademark NOT recorded with CBP	
○ No consent from U.S. trademark owner	
Confusingly Similar Mark	Remission of forfeiture upon payment of 25 % of dutiable value, obliteration or removal of the offending mark and export to the country of origin under CBP supervision, payment of all seizure costs (including obliteration/ removal of offending mark) and submission of properly executed hold-harmless agreement
○ Trademark registered on Principal Register of USPTO	
○ Trademark recorded with CBP	
○ No consent from U.S. trademark owner	
Confusingly Similar Mark	Remission of forfeiture upon payment of 10 % of dutiable value, payment of all seizure costs, and submission of properly executed hold-harmless agreement
○ Trademark registered on Principal Register of USPTO	
○ Trademark recorded with CBP	
○ Consent from U.S. trademark owner	

- Guidelines for Trademark Seizures Made Pursuant to 19 U.S.C. 1526(b) (or 19 U.S.C. 1595a(d) and 22 U.S.C. 401)

<u>VIOLATION</u>	<u>RECOMMENDED DISPOSITION</u>
Gray Market	Remission of forfeiture upon payment of 10 % of dutiable value, export to the country of origin under CBP supervision, payment of seizure costs, and submission of properly executed hold-harmless agreement.
○ Trademark registered on Principal Register of USPTO	
○ Trademark recorded with CBP	
○ Trademark has gray market protection	

- Guidelines for Seizures Involving an ITC Exclusion Order Made Pursuant to 19 U.S.C. 1337(i)

<u>VIOLATION</u>	<u>RECOMMENDED DISPOSITION</u>
ITC Exclusion Order	No relief shall be afforded from the seizure of any articles found to be within the scope of an ITC seizure order.
○ The article falls within the scope of ITC exclusion order	
○ Article previously denied entry	
○ Written notice provided that any further attempts would result in seizure and forfeiture	

2. Recovery of Seized Merchandise

If CBP has agreed to release seized merchandise, and depending on the port of entry, there are several steps necessary for the claimant importer to regain custody of the merchandise, including:

- Claimant’s submission a signed, notarized Hold Harmless Agreement and Agreement Not to Contest Decision to CBP, discharging the US from actions, suits, proceedings, debts, dues, contracts, judgments, damages, claims, and/or demands. In consideration of CBP’s agreement not to pursue the matter further, the claimant agrees to waive the right to judicially contest any aspect of the CBP case, including, but not limited to, the remission decision or propriety of the seizure;
- Claimant’s submission a remission or forfeiture fee in an amount determined by CBP;
- Claimant’s filing a duty-paid live entry/entry summary (CBP Form 7501)⁶⁸ (the “Seizure Entry”) and providing the filed 7501 to CBP. For example, the CBP Port of Los Angeles Public Bulletin LA07-014 states that if “FP&F authorizes the release of seized merchandise for entry into the commerce of the U.S., the broker/importer must file a duty-paid live entry/entry summary (CBP

Form 7501) ... Seized merchandise may not be released under an Entry/Immediate Delivery (CBP Form 3461), informal entry or warehouse entry;⁶⁹

- Claimant pays any exam fees and satisfaction of liens filed by the steamship line, terminal, etc. under CBP Form 3485 and providing proof of payment to CBP;⁷⁰
- Claimant's submission of the name and phone number of the person (POC) the storage facility should contact to make arrangements for release, such as a motor carrier;
- FP&F issues disposition order authorizing release and forwards to Seized Property Custodian;⁷¹
- Seized Property Custodian contacts the designated POC. At that time, the claimant will be provided with information about the Seized Property Custodian and the procedures and storage payments needed to gain possession of the merchandise.
- Seized Property Custodian releases the merchandise to claimant's authorized POC.

IV. CASE LAW SURVEY

A. Forfeiture

CBP is required to make the finding that the importer's labels and packages are either identical to or substantially indistinguishable from registered marks before concluding that they are counterfeit and subject to forfeiture. It is arbitrary and capricious for CBP to determine that proposed packages are likely to be confused with registered trademarks without first comparing the proposed packages with the actual packages bearing the registered trademark.⁷² Although 19 U.S.C. § 1526(e) addresses the importation of merchandise bearing counterfeit trademarks and does not expressly address certification marks, courts have nevertheless interpreted the statute to authorize seizure and forfeiture of merchandise bearing counterfeit certification marks.⁷³ A mark on merchandise may be counterfeit, and the merchandise seized, even if the mark owner does not manufacture that type of merchandise at the time of the seizure.^{74,75}

Under the Mitigation Guidelines, CBP can remit a seizure if the importer obtains a post-seizure consent from the IP owner, but such consent is not freely given. IP owners such as UL have strict zero-tolerance policies against granting retroactive consent to use their marks. In a recent case, UL denied an importer's request for a waiver because that "would allow other companies to copy the UL Mark with impunity, safe in

the knowledge that if the merchandise is intercepted at U.S. Customs, that the investment could still be salvaged."⁷⁶

B. Civil Liability

Importers potentially face diverse forms of civil liability. Most dramatically, importers are subject to having their merchandise detained, seized, and forfeited. In addition, importers can be liable in damages to trademark and copyright owners in civil actions brought by such owners not just for willful imports of counterfeit merchandise but also for imports of allegedly counterfeited merchandise to which importers have colorable defenses. Even assuming that trademark infringement is proved, however, the recovery of damages is contingent on a defendant's intent.⁷⁷ That can be an issue in actions against online retailers, as illustrated in *Tiffany (NJ) Inc. v. eBay, Inc.*, 600 F.3d 93 (2d Cir. 2010).

In *Tiffany*, the trademark owner alleged that eBay had contributorily infringed on the Tiffany trademark by allowing third parties to list counterfeit Tiffany merchandise for sale on its website. The court noted the significant efforts made by eBay to prevent sales of counterfeit Tiffany merchandise, pointing out that when "complaints gave eBay reason to know that certain sellers had been selling counterfeits, those sellers' listings were removed and repeat offenders were suspended from the eBay site."⁷⁸ Nevertheless, Tiffany argued that eBay was a contributory infringer because it "continued to supply its services to the sellers of counterfeit Tiffany merchandise while knowing or having reason to know that such sellers were infringing Tiffany's mark."⁷⁹ The court rejected the argument, stating, "For contributory trademark infringement liability to lie, a service provider must have more than a general knowledge or reason to know that its service is being used to sell counterfeit merchandise. Some contemporary knowledge of which particular listings are infringing or will infringe in the future is necessary."⁸⁰

C. Criminal

CBP may seize merchandise that meets the criteria for criminal seizure under 19 U.S.C. § 1595a(c)(2)(C) for violation of the applicable criminal copyright or trademark statute. The determination to initiate criminal prosecution for a violation of an IPR law is made by the US Department of Justice, through the US Attorney for the jurisdiction where the violation occurred.

In a criminal action where a defendant has forfeited assets in the form of a monetary payment as part of a criminal sentence for trademark counterfeiting or copyright piracy, the rightful

owner of such assets may file a petition with the US Department of Justice for Remission of Forfeiture pursuant to the Civil Asset Forfeiture Reform Act of 2000 (CAFRA).⁸¹ Section 6 of CAFRA, entitled “Use of Forfeited Funds to Pay Restitution to Crime Victims,” amended section 981(e)(6) of the US Criminal Code to authorize the remission of funds forfeited by a criminal defendant as restoration to any victim of the offense giving rise to the forfeiture.⁸²

Under 18 U.S.C. § 981(e), the Attorney General has the authority to restore forfeited assets to the victim of an offense that gave rise to the forfeiture, and to “take any other action to protect the rights of innocent persons which is in the interests of justice and which is not inconsistent with the provisions of [the applicable chapter or section].”⁸³ Under 28 C.F.R. § 9.5(a), the trademark or copyright owner in such a case must allege that it has a valid, good faith, and legally cognizable interest in the seized merchandise.⁸⁴ The Justice Department has the discretion to grant a petition for remission of forfeiture under CAFRA if it determines that:

- a pecuniary loss of a specific amount has been directly caused by the criminal offense or related offense that was the underlying basis for the forfeiture, and the loss is supported by documentary evidence including invoices and receipts;
- the pecuniary loss is the direct result of the illegal acts and is not the result of otherwise lawful acts that were committed in the course of the criminal offense;
- the victim did not knowingly contribute to, participate in, benefit from, or act in a willfully blind manner towards the commission of the offense, or related offense, that was the underlying basis for the forfeiture;
- the victim has not in fact been compensated for the wrongful loss of the merchandise by the perpetrator or others; and
- the victim does not have recourse reasonably available to other assets from which to obtain compensation for the wrongful loss of the merchandise.⁸⁵

D. Victim Restitution

In cases involving copyright infringement and intellectual property theft, the intellectual property owner is a “victim” for purposes of the Mandatory Victim Restitution Act of 1996 (MVRA) and may therefore file a victim impact statement. The MVRA makes restitution in the full amount of a victim’s loss mandatory for property offenses in which an identifiable victim suffered a pecuniary loss.⁸⁶

In the case of such theft, the value of victims’ losses is calculated by the volume of counterfeit sales,⁸⁷ based on the entire number of sales established by the evidence, not merely the sale as to which a defendant pleads guilty.⁸⁸ The amount of restitution, which is not the same as forfeiture but is sufficiently analogous for relevant purposes, is determined by calculating only “the actual amount [of infringing merchandise] placed into commerce and sold,” and must be based on net lost profits, not the total sale price.⁸⁹

As in any case involving the calculation of pecuniary loss resulting from criminal conduct, a restitution order or remission of forfeiture in a case of trademark counterfeiting or copyright piracy must be limited to the victim’s actual losses “caused by the specific conduct underlying the offense of conviction.”⁹⁰ But “[w]here a fraudulent scheme is an element of the conviction,” the court may award restitution for actions pursuant to that scheme.⁹¹ Further, a court’s failure to order restitution for others who might have participated in the scheme is of no consequence.⁹²

In order to obtain victim restitution or remission of forfeiture in a trademark counterfeiting or copyright piracy case, the owner must present a forensic accounting of the calculations leading to the damage claim. But in practice, the government will accept reasonable inferences based on the evidence, particularly where claimed royalty is measured in a single digit, on the grounds that the forensic evidence necessary to quantify damages more specifically is exclusively in the possession of the government, which lacks the authority to share such information even in response to a subpoena.⁹³ Regarding the calculation of pecuniary loss in a case involving mandatory restitution, the Fifth Circuit has held, in *United States v. Beydown*, 469 F.3d 102 (5th Cir. 2006), that such restitution must be based on the amount of counterfeit merchandise actually distributed or sold, that the counterfeit merchandise must enter the marketplace to support the calculation, and that the amount must be based on net lost profits, not the total retail price.⁹⁴

To obtain victim restitution or remission of forfeiture, the IPR owner must also show that there is a reasonable relationship between the retail price actually paid by purchasers of the pirated product and the price they would have paid for genuine merchandise.⁹⁵ In quantifying the pecuniary loss to the victim of IPR theft, the Justice Department must ensure that the remission of forfeiture is limited to the actual loss to the victim,⁹⁶ and to prevent a “windfall for crime victims.”⁹⁷ Also recoverable are costs incurred in the rendering of assistance to the government in its investigation and prosecution of the case.⁹⁸

Even if an action is limited to a charge of copyright piracy and does not include a count for trademark infringement, the copyright owner may assert damage incidentally inflicted on its trademark, for example, from the sale of pirated software bearing a counterfeit of the owner's mark. Where a fraudulent scheme is an element of the conviction, a court may award restitution for actions pursuant to that scheme.⁹⁹ Similarly, the remission of forfeiture is available to victims for losses caused by a "related offense."¹⁰⁰ "Related offense" means: "(1) Any predicate offense charged in a Federal Racketeer Influenced and Corrupt Organizations Act (RICO) count for which forfeiture was ordered; or (2) An offense committed as part of the *same scheme or design, or pursuant to the same conspiracy, as was involved in the offense for which forfeiture was ordered.*"¹⁰¹

An award of trademark damages is not certain. At the same time, it is critical to consider claims of trademark damages since statutory damages for trademark counterfeiting are provided for up to \$2 million USD per counterfeited mark under the Anticounterfeiting Consumer Protection Act of 1996.¹⁰²

Finally, the IPR owner, to establish entitlement to victim restitution or grounds for the remission of forfeiture, must show:

- The owner's pecuniary loss is the direct result of the defendant's illegal acts and not the result of otherwise lawful acts that were committed in the course of the criminal offense;
- The owner did not knowingly contribute to, participate in, benefit from, or act in a willfully blind manner towards the commission of the offense, or related offense, that was the underlying basis for the forfeiture;
- The owner has not been compensated for the wrongful loss of the merchandise by the perpetrator or others; and
- The owner has no recourse to other assets from which to obtain compensation for the wrongful loss of the merchandise.

V. MANAGING IPR ISSUES IN INTERNATIONAL TRADE AND AVOIDING SEIZURES

In 1993, Congress enacted Title VI of the North American Free Trade Agreement Implementation Act,¹⁰³ also known as the Customs Modernization or "Mod" Act. An importer's failure to exercise reasonable care can delay the release of merchandise and, in some cases, result in the imposition of penalties, including the forfeiture of counterfeit and pirated merchandise. CBP notes that requirements related to information and

documents apply to electronic records, as well as to hard copy records. Despite the seemingly simple connotation of the term "reasonable care," that explicit responsibility defies easy explanation. In keeping with the Mod Act's theme of informed compliance, CBP has provided the trade community with a list of questions that prompt or suggest a reasonable care program, framework, or methodology that importers may find useful in avoiding compliance problems and meeting reasonable care responsibilities. In the case of IPR, CBP has proposed the following questions:¹⁰⁴

Basic Question: Have you determined or established a reliable procedure to permit you to determine whether your merchandise or its packaging bears or uses any trademarks or copyrighted matter or is patented and, if so, that you have a legal right to import those items into, and/or use those items in, the United States?

- If you are importing merchandise or packaging bearing a trademark registered in the United States, have you checked or established a reliable procedure to ensure that it is genuine and not restricted from importation under the gray-market or parallel import requirements of U.S. law,¹⁰⁵ or that you have permission from the trademark owner to import such merchandise?
- If you are importing merchandise or packaging which consist of, or contain registered copyrighted material, have you checked or established a reliable procedure to ensure that it is authorized and genuine? If you are importing sound recordings of live performances, were the recordings authorized?
- If you are importing merchandise that has been refurbished or remanufactured, do you have documentation detailing the remanufacturing process?
- Have you checked or developed a reliable procedure to see if your merchandise is subject to a U.S. International Trade Commission or court-ordered exclusion order?
- Have you established a reliable procedure to ensure that you maintain and can produce any required entry documentation and supporting information?

Also, importers should review their purchasing agreements and include terms that require foreign vendors to provide copies of licensing agreements, and evidence of the right to use the IPR. Importers should also review the IPR owner's website to determine if the seller is listed. Many IPR owners, such as UL, list their IPR on the Internet and provide search engines to confirm that the foreign vendor is licensed.¹⁰⁶

VI. CONCLUSION

IPR protection is critical to running a successful business. E-commerce and the Internet have revolutionized commerce and importing. The average US company has unparalleled access to international trade, but this access is not without risk. IPR is at the front lines of the US trade war. An IPR owner's ability to enlist CBP and the US government to enforce his or her rights is increasing. Importers risk CBP detention, seizures, and penalties if they do not exercise due diligence, document their right to import merchandise, and follow reasonable care guidelines. Importers are well-advised to implement an IPR trade compliance program with their foreign manufacturers, resellers, and exporters if they want to avoid fees, costs, and significant supply chain disruption. IPR trade compliance programs should be updated regularly and reflect changes in law and the importer's supply chain.

Endnotes

- 1 William Mauldin & Alex Leary, *U.S. Signals Crackdown on Counterfeit Goods Sold Online*, WALL ST. J. (Jan. 24, 2020), <https://www.wsj.com/articles/u-s-signals-crackdown-on-counterfeit-goods-sold-online-11579820400?shareToken=st4a5f30f0891c4d14a022c193e1a67431>.
- 2 ENSURING SAFE & LAWFUL E-COMMERCE FOR US CONSUMERS, BUSINESSES, GOVERNMENT SUPPLY CHAINS, AND INTELLECTUAL PROPERTY RIGHTS (Jan. 31, 2020), <https://www.whitehouse.gov/presidential-actions/ensuring-safe-lawful-e-commerce-us-consumers-businesses-government-supply-chains-intellectual-property-rights/>.
- 3 THE COMMISSION ON THE THEFT OF AMERICAN INTELLECTUAL PROPERTY'S WRITTEN COMMENTS ON BEHALF OF THE COMMISSION ON THE THEFT OF AMERICAN INTELLECTUAL PROPERTY TO THE UNITED STATES TRADE REPRESENTATIVE (May 11, 2018), http://ipcommission.org/report/ustr_written_comments_301_tariffs-may2018.pdf.
- 4 Grant Clark, *What Is Intellectual Property, and Does China Steal It?*, BLOOMBERG (Jan. 21, 2019 2:04am pst), <https://www.bloomberg.com/news/articles/2018-12-05/what-s-intellectual-property-and-does-china-steal-it-quicktake>.
- 5 Riley Walters, *Why China's Intellectual Property Theft Is a Concern for National Security*, HERITAGE FOUND. (April 4, 2019), <https://www.heritage.org/asia/commentary/why-chinas-intellectual-property-theft-concern-national-security>; Press Releases and other news related to FBI intellectual property theft and piracy investigations and initiatives, <https://www.fbi.gov/investigate/white-collar-crime/piracy-ip-theft/intellectual-property-theftpiracy-news>.
- 6 THE U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE) HOMELAND SECURITY INVESTIGATIONS (HSI) LED NATIONAL INTELLECTUAL PROPERTY RIGHTS COORDINATION CENTER (IPR CENTER), <https://www.iprcenter.gov/about>; THE DEPARTMENT OF JUSTICE'S INTELLECTUAL PROPERTY (IP) TASK FORCE, <https://www.justice.gov/iprf/mission-statement>; CBP ENFORCEMENT OF IPR, <https://www.cbp.gov/trade/priority-issues/ipr>.
- 7 For the convenience of the reader and to avoid confusion, this article refers to merchandise, in lieu of goods or property, which may be found in specific legal citations.
- 8 Press Release: IPR Center reports counterfeit seizures rise to \$1.4 billion (Aug 19, 2019), <https://www.ice.gov/news/releases/ipr-center-reports-counterfeit-seizures-rise-14-billion>.
- 9 Mauldin, *supra* note 3.
- 10 For the convenience of the reader and to avoid confusion, this article refers to IPR owners or holders as "owners."
- 11 This article provides information about the law designed to help readers address their own legal needs. But legal information is not the same as legal advice -- the application of law to a specific circumstance. Although we go to great lengths to make sure our information is accurate and useful, we recommend the reader consult a lawyer if the reader wants professional assurance that our information, and the reader's interpretation of it, is appropriate to the reader's particular situation.
- 12 United States Dept. of Homeland Security (DHS), U.S. Customs and Border Protection, *What Every Member of the Trade Community Should Know About: CBP Enforcement of Intellectual Property Rights*, (2012) https://www.cbp.gov/sites/default/files/assets/documents/2017-Feb/enforce_ipr_3_0.pdf (last updated 02/16/2017) (Hereinafter DHS).
- 13 Tariff Act of 1930 § 526(e), 19 U.S.C. § 1526(e); 19 C.F.R. § 133.21.

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- 14 DHS, *supra* note14 at § III.A.1.
- 15 *Id.*
- 16 *Id.* In limited circumstances, CBP may seize such merchandise under 19 U.S.C. § 1595a(c)(2)(C) for a violation of 18 U.S.C. § 2320.
- 17 CBP mitigation guidelines commonly refer to “confusingly similar,” instead of “copying or simulating marks.”
- 18 Lanham Act of 1946§ 42, 15 U.S.C. § 1124; 19 C.F.R. § 133.22.
- 19 19 C.F.R. § 133.22.
- 20 19 U.S.C. § 1526(a); 19 C.F.R. § 133.23.
- 21 DHS, *supra* note14 at § III.A.3.
- 22 *Id.*;19 C.F.R. § 133.23(f).
- 23 *Id.*
- 24 *Id.*
- 25 Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 382 F. Supp. 3d 312, 323 (S.D.N.Y. 2019).
- 26 Funky Films, Inc. v. Time Warner Entm’t Co., 462 F.3d 1072, 1076 (9th Cir. 2006); Three Boys Music Corp. v. Bolton, 212 F.3d 477, 481 (9th Cir. 2000). “By establishing reasonable access and substantial similarity, a copyright plaintiff creates a presumption of copying. The burden shifts to the defendant to rebut that presumption through proof of independent creation.” (*Three Boys*, 212 F.3d at 486.) “Even without proof of access, a plaintiff can still prove copying if he can show that the two works are not only substantially similar, but are so strikingly similar as to preclude the possibility of independent creation.” (*Meta-Film Assocs., Inc. v. MCA, Inc.*, 586 F. Supp. 1346, 1355 (C.D. Cal. 1984) (citing 3 NIMMER ON COPYRIGHT § 13.01[B]; *Ferguson v. Nat’l Broad. Co.*, 584 F.2d 111, 113 (5th Cir. 1978)).) “Thus, whether or not a plaintiff proves access determines the degree of similarity that he must demonstrate between the two works.” (*Id.*)
- 27 *Berkic v. Crichton*, 761 F.2d 1289, 1293–94 (9th Cir. 1985) (rejecting consideration of general ideas as well as scènes-à-faire in determining substantial similarity under the extrinsic test).
- 28 *Three Boys*, 212 F.3d at 484.
- 29 DHS, *supra* note14 at § III.B.
- 30 *Id.* at § III.B.1.
- 31 *Id.*
- 32 19 U.S.C. § 1595a(c)(2)(C) for violation of 17 U.S.C. § 501.
- 33 DHS, *supra* n. 14 at § III.B.2.
- 34 19 C.F.R. § 133.43.
- 35 19 U.S.C. § 1595a(c)(2)(C).
- 36 The Digital Millennium Copyright Act of 1998, Pub. L. No. 105–304, 112 Stat. 2860 (1998).
- 37 *In re Dealer Mgmt. Sys. Antitrust Litig.*, 362 F. Supp. 3d 558, 570 (N.D. Ill. 2019).
- 38 17 U.S.C. § 1201(a)(2).
- 39 *Id.*
- 40 19 U.S.C. § 1595a(c)(2)(C).
- 41 19 U.S.C. § 1337.
- 42 *Id.*
- 43 *Id.*
- 44 DHS, *supra* note14 at § III.C.
- 45 19 U.S.C. § 1337(i).
- 46 *Pac. Coast Marine Windshields Ltd. v. Malibu Boats, LLC*, 739 F.3d 694, 701 (Fed. Cir. 2014). Otherwise “[t]here never could be piracy of a patented design, for human ingenuity has never yet produced a design, in all its details, exactly like another, so like, that an expert could not distinguish them.” (*Id.* (quoting *Gorham Mfg. Co. v. White*, 81 U.S. 511, 527 (1871)); *Braun Inc. v. Dynamics Corp. of America*, 975 F.2d 815, 820 (Fed. Cir. 1992) (“[P]atent infringement can be found for a design that is not identical to the patented design.”)).
- 47 *Lee v. Dayton-Hudson Corp.*, 838 F.2d 1186, 1189 (Fed. Cir. 1988).
- 48 The test for design patent infringement is whether “the accused design could not reasonably be viewed as so similar to the claimed design that a purchaser familiar with the prior art would be deceived by the similarity between the claimed and accused designs,” thereby “‘inducing him to purchase one supposing it to be the other.’” (*Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665, 683 (Fed. Cir. 2008) (quoting *Gorham*, 81 U.S. at 528)).
- 49 19 C.F.R. §§ 133.2(e) (providing trademark owners with the ability to apply for Lever Rule protection), 133.23(a)(3) (describing the merchandise subject to Lever Rule protections).
- 50 19 C.F.R. § 133.2(e).
- 51 19 C.F.R. § 133.23(c)–(f).
- 52 DHS, *supra* note14 at § III.A.4.
- 53 *Id.*
- 54 19 U.S.C. § 1526(d).
- 55 *Id.*
- 56 DHS, *supra* note14 at § III.A.5.
- 57 *Id.*
- 58 19 C.F.R. § 148.55.
- 59 *Jackson v. Odenat*, 9 F. Supp. 3d 342 (S.D.N.Y. 2014) (denying trademark owner’s motion for summary judgment, holding that issue of whether consumers w d source of product by defendant’s use of plaintiff’s trademark was for jury to decide).
- 60 *Id.* The doctrine of nominative fair use originated in the Ninth Circuit. (*See New Kids on the Block v. News Am. Publ’g, Inc.*, 971 F.2d 302, 307–09 (9th Cir. 1992)). A nominative fair use occurs when plaintiff’s mark is used to describe plaintiff’s own product. (*Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1151 (9th Cir. 2002)). In the Ninth Circuit, it provides an alternative way to analyze likelihood of confusion. (*Id.*) The Third Circuit allows it to be used as an affirmative defense. (*Century 21 Real Estate Corp. v. Lendingtree, Inc.*, 425 F.3d 211, 228–31 (3d Cir. 2005)). The Second Circuit has neither adopted nor rejected the doctrine, but has recognized that a “defendant may lawfully use a plaintiff’s trademark where doing so is necessary to describe the plaintiff’s product and does not imply a false affiliation o. (*y (NJ) Inc. v. eBay Inc.*, 600 F.3d 93, 102–03 (2d Cir. 2010)).
- 61 *See* CBP, Help CBP Protect Intellectual Property Rights, <https://www.cbp.gov/trade/priority-issues/ipr/protection> (last accessed 09/09/2019).
- 62 CBP IPR ENFORCEMENT - INTELLECTUAL PROPERTY RIGHTS E-RECORDATION (IPRR) APPLICATION, <https://iprr.cbp.gov/>.
- 63 *Id.*

- 64 19 C.F.R. § 151.16 (Detention of merchandise).
- 65 Section 1526 of Title 19, United States Code (19 U.S.C. § 1526) and 19 U.S.C. § 1595a(c)(2)(C). CBP administers and enforces exclusion orders issued pursuant to 19 U.S.C. § 1337 by the ITC. Such orders involve a range of unfair trade practices including but not limited to trademarks, copyrights, trade secrets and patents; however, most ITC exclusion orders are patent-based.
- 66 CBP MITIGATION GUIDELINES ICP: TRADEMARK, COPYRIGHT, AND OTHER IPR VIOLATIONS, https://www.cbp.gov/sites/default/files/assets/documents/2017-Nov/Mitigation%20Guidelines_11%20SEIZURES%20AND%20PENALTIES%20-%20Trademark%2C%20Copyright%2C%20and%20Patent.pdf (After May 1, 2019).
- 67 *Id.*
- 68 CBP FORM 750I, https://www.cbp.gov/sites/default/files/assets/documents/2019-Dec/CBP%20Form%20750I_0.pdf.
- 69 CBP PORT OF LOS ANGELES PUBLIC BULLETIN LA07-014, <http://tradeandcargo.com/2020/02/03/los-angeles-public-bulletin-no-la07-014-entries-for-seized-merchandise/>.
- 70 CBP FORM 3485, <https://www.cbp.gov/sites/default/files/assets/documents/2017-May/CBP%20Form%203485.pdf>.
- 71 CBP DISPOSITION ORDER FORM 7605, https://foiarr.cbp.gov/docs/Contracts/2013/5641478_1393/1304241307_PD1244_HSBP1006D01275_Attachments.pdf.
- 72 *See* Ross Cosmetics Distrib. Ctrs., Inc. v. United States, 17 Ct. Int'l Trade 814, 814 (1993) (remanding matter to Customs because the court was unable to review whether Customs decision was based on a consideration of the relevant factors).
- 73 *See* United States v. 10,510 Packaged Comput. Towers, 152 F. Supp. 2d 1189, 1190 (N.D. Cal. 2001) (denying importer's motion for summary judgment because Customs was authorized to forfeit merchandise with counterfeit certification mark).
- 74 *See* United States v. Able Time, Inc., 545 F.3d 824 (9th Cir. 2008)
- 75 United States v. One (1) Lot of Approximately Twenty Thousand (20,000) Pairs of Counterfeit Blue Jeans Bearing the Jordache Trademark, 601 F. Supp. 476, 477 (W.D.N.C. 1985) (granting the United States summary judgment on claim for forfeiture of jeans).
- 76 *See* ICCS USA Corp. v. United States, No. 2019-1561, 2020 U.S. App. LEXIS 7538, at *7-8 (Fed. Cir. Mar. 11, 2020)
- 77 *See* Bentley Motors Ltd. v. McEntegart, 96 F. Supp. 2d 1297 (M.D. Fla. 2013) (denying motion of luxury automobile manufacturer for summary judgment on damage issue in action for trademark and design patent infringement against manufacturers modification of inexpensive vehicles into those resembling the "Bentley" appearance and shape).
- 78 Tiffany (NJ) Inc. v. eBay, Inc., 600 F.3d at 109.
- 79 *Id.* at 106.
- 80 *Id.* at 107.
- 81 Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202 (2000)
- 82 18 U.S.C. § 981(e) & 28 C.F.R. § 9.4. The civil asset forfeiture laws provide law enforcement agencies with the power to seize property and money connected to illegal activity. (*See generally* Moores, *Reforming the Civil Asset Forfeiture Reform Act*, 51 ARIZ. L. REV. 777 (Fall 2009)). In time, however, the system grew exponentially and became a significant source of funding for law enforcement operations, resulting in the loss of property to, "overzealous police forces motivated more by the prospect of forfeiture proceeds than a desire to enforce laws and protect society." (*Id.* at 777.) CAFRA was enacted to "level the playing field between law enforcement and property owners." (*Id.*)
- 83 *See* 21 U.S.C. § 853(i)(1), incorporated by reference at 18 U.S.C. § 982.
- 84 For purposes of remission of forfeiture, the term "victim" means any "person" who has "incurred a pecuniary loss as a direct result of the commission of the offense underlying a forfeiture." (28 C.F.R. § 9.2(v).) A "person" is "an individual, partnership, corporation, joint business enterprise, estate, or other legal entity capable of owning property." (28 C.F.R. § 9.2(m).)
- 85 28 C.F.R. § 9.8(a).
- 86 18 U.S.C. §§ 3663A(c)(1)(A)(ii) & (B). United States v. McKenzie, 550 Fed. App'x. 221, 225 (5th Cir. 2013); United States v. Titus, 547 Fed. App'x. 464, 469 (5th Cir. 2013); United States v. Woodward, 493 Fed. App'x. 483, 484 (5th Cir. 2012); United States v. Warner, 384 Fed.App'x. 416, 417 (5th Cir. 2010); United States v. Arledge, 553 F.3d 881, 899 (5th Cir. 2008); United States v. Harper, No.12-106, 2013 WL 1628353 (E.D. La. April 15, 2013) ("District courts are accorded broad discretion in ordering restitution."); United States v. Aubin, 87 F.3d 141, 150 (5th Cir.1996) (A court "review[s] de novo the district court's method of determining loss, while clear error review applies to the background factual findings that determine whether or not a particular method is appropriate."); United States v. Isiwele, 635 F.3d 196, 202 (5th Cir.2011).
- 87 United States v. Robertson, 493 F.3d 1322, 1332 (11th Cir. 2007); United States v. Chay, 281 F.3d 682 (7th Cir. 2002); United States v. Milstein, 481 F.3d 132, 135-36 (2d Cir. 2007).
- 88 *See* 18 U.S.C. § 3663(a)(3); United States v. Benson, 449 Fed. App'x. 400 (5th Cir. 2011) (recoverable loss not limited to "single count of conviction but could include [the] total offense conduct").
- 89 United States v. Beydoun, 469 F.3d 102, 108 (5th Cir. 2006).
- 90 United States v. Arledge, 553 F.3d 881, 899 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 2028 (2009).
- 91 United States v. Inman, 411 F.3d 591, 595 (5th Cir. 2005).
- 92 *See* United States v. Ingles, 445 F.3d 830, 839 (5th Cir. 2006).
- 93 *See* Campbell v. United States, 365 U.S. 85 (1961)(litigant does not have burden of proof of establishing facts peculiarly within knowledge of adversary); United States v. New York, N.H. & H.R. Co., 355 U.S. 253, 256 (1957) (fairness dictates that litigant does not bear burden of establishing facts primarily within knowledge of opposing party); Shanghai Automation Instrument Co. v. Kuei, 194 F. Supp. 2d 995 (N.D. Cal. 2000) ("[a]lthough the burden of proving each element generally lies with the party asserting the claim, the burden of proving a fact may be shifted to the party who has sole access to evidence which would prove the claim false").
- 94 469 F.3d at 107-08.
- 95 *Cf.* United States v. Hudson, 483 F.3d 707, 710 (10th Cir. 2007) ("As an initial matter, we are very skeptical of the implicit suggestion that [the customer's] agreement to purchase 537 copies of the [counterfeit Microsoft] software for a total price of less than \$86,000 proves that [the customer] would have agreed

- to purchase the same number of copies from Microsoft for more than \$321,000.”).
- 96 *United States v. Chalupnik*, 514 F.3d 748, 754–55 (8th Cir.2008)
- 97 *United States v. Borners*, 553 Fed. App’x. 904 (11th Cir. 2014) (“Restitution [and by implication the remission of forfeiture] is not intended to provide a windfall for crime victims but rather to ensure that victims, to the greatest extent possible, are made whole for their losses”).
- 98 *See United States v. Dwyer*, 275 Fed. App’x. 269, 270 (5th Cir.2008) (affirming award of legal fees incurred in victim’s investigation of employee’s embezzlement, where information gathered was turned over to FBI and U.S. Attorney, thereby “enabling the government to prosecute Dwyer without conducting a significant investigation”); *United States v. Beaird*, 145 Fed. App’x. 853, 855 (5th Cir. 2005) (allowing restitution order for “attorneys’ fees and litigation expenses, associated with assistance to the FBI in the investigation of Beaird’s offense”); *see also United States v. Cuti*, 766 F.3d 199, 208 (2d Cir. 2014) (awarding attorney and investigative fees); *United States v. Wilfong*, 551 F.3d 1182, 1188 (10th Cir. 2008) (awarding loss of employee work hours); *United States v. Amato*, 540 F.3d 153, 159 0160 (2d Cir. 2008) (attorney fees and accounting costs).
- 99 *United States v. Maturin*, 488 F.3d 657, 661 (5th Cir. 2007). “Since the [Mandatory Victim Restitution Act] broadens the definition of the term ‘victim’ for any ‘offense that involves as an element a scheme, conspiracy, or pattern of criminal activity’ to include ‘any person directly harmed by the defendant’s criminal conduct in the course of the scheme, conspiracy, or pattern,’ ... this court has held ‘that where a fraudulent scheme is an element of the conviction, the court may award restitution for actions pursuant to that scheme.’” *Id.* (citation omitted); *see also United States v. Inman*, 411 F.3d 591, 595 (5th Cir. 2005); *United States v. Cothran*, 302 F.3d 279, 289 (5th Cir. 2002).
- 100 28 C.F.R. § 9.8(a)(1).
- 101 28 C.F.R. § 9.2(s) (emphasis added); Losses that are secondary to the principal loss, such as “interest foregone or for collateral expenses incurred to recover lost merchandise or to seek other recompense,” are not eligible for remission. (28 C.F.R. § 9.8(b).) Nor are losses from merchandise damage or physical injuries, or from a tort, *unless the tort is the illegal activity underlying the forfeiture*. (28 C.F.R. § 9.8(c) (emphasis added).)
- 102 Anticounterfeiting Consumer Protection Act of 1996, Pub. L. No. 104-153, § 7, 110 Stat. 1386 (July 2, 1996) (codified at § 35(c) of the Lanham Act, 15 U.S.C. § 1117(c)).
- 103 North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057 (1993).
- 104 *Id.*
- 105 *See* 19 C.F.R. § 133.21.
- 106 MARKS FOR UL’S LISTING SERVICE, <https://marks.ul.com/about/ul-listing-and-classification-marks/appearance-and-significance/marks-for-north-america/>.



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THE IMPACT ON EXPORT-CONTROLLED GOODS AND CUSTOMS MOVEMENTS IN THE EVENT OF A 'NO DEAL BREXIT'

I. INTRODUCTION

This article explores the United Kingdom's decision to leave the European Union and the impact that this will have on the movement of goods. In particular, this article reviews the possible impact of this decision on the trade of export-controlled goods within both the United Kingdom (UK) and European Union (EU).

II. THE FORMATION OF THE EUROPEAN ECONOMIC COMMUNITY

In March, 1957, the Treaty of Rome (Treaty) was signed by France, West Germany, Italy, the Netherlands, Belgium, and Luxembourg, thereby establishing the European Economic Community (EEC) of member states. Still today the Treaty is considered to be the foundation of the current EU.¹

The signing of the Treaty and creation of the EEC enabled, amongst other things, the free movement of goods, services, people, and capital within member states, as well as the abolition of tariffs and customs duties on trade between member states.² The Treaty aimed to develop the economies of its members through uniform trade policies and practices, thereby raising the living and working standards of its population. The Treaty also aimed to create closer ties amongst member states as a way to ensure peace and stability throughout the region.³ The Treaty created an operational framework of four main institutions, namely, the Commission, the Council of Ministers, the Parliamentary Assembly (subsequently to become the European Parliament), and the court of justice.⁴

The UK and Denmark joined the EEC in 1973, with Greece joining in 1981, followed by Spain and Portugal in 1986. Austria, Finland, and Sweden joined in 1995. Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia joined in 2004, followed by Romania and Bulgaria in 2007. In 2013, Croatia joined as the twenty-eighth member.⁵ Further treaties have subsequently been signed, and today the EEC has become the EU. The EU was officially established when the Maastricht Treaty came into force on November 1, 1993. The Maastricht Treaty is of



Andrew Skinner*

particular significance because it not only brought about the formation of a single currency—the Euro—but also created European citizenship, a common EU foreign policy, a common EU security policy, and closer judicial cooperation.

It should be noted that when a country joins the EU it agrees to be bound by multiple EU laws and legal authorities in addition to its domestic laws which are not derived from EU law. EU treaties and regulations are directly applicable to all member states and this is particularly true when it comes to external trade law.

III. THE UK'S DECISION TO LEAVE THE EUROPEAN UNION

In a public vote (referendum) held on June 23, 2016, the UK chose to leave the EU by a margin of 51.9% to 48.1%.⁶ This decision has come to be referred to as “Brexit.” After much political turmoil in the UK in the aftermath of Brexit, the Conservative government of Boris Johnson managed to pass domestic legislation which translated the results of Brexit (i.e., a departure from the EU) into UK law. Specifically, the European Union Withdrawal Agreement Act of 2020 (Withdrawal Agreement) passed both Houses of Parliament—the House of Commons and the House of Lords—and received royal assent on January 23, 2020, thereby becoming UK law.

The Withdrawal Agreement took effect on January 31, 2020, and it repeals the European Communities Act which brought the UK into the EEC in 1973, as well as sets out certain other limited terms relating to the UK's withdrawal from the EU. Under these terms, the UK has now entered into a period of

transition whereby it remains bound by EU law until December 31, 2020, with the exception of those EU treaties, regulations, directives, and acts that were not legally binding on the UK prior to the Withdrawal Agreement coming into force. In particular, the Withdrawal Agreement will keep the UK in the EU Customs Union and the Single Market through December 31, 2020.

The Customs Union considers all member states as one customs territory. The EU imposes a customs tariff on imports from all countries outside the customs territory, and the tariff rate is common across all EU member states. Goods may be customs-cleared in any EU member state upon entry at any EU border, and can then move freely throughout the EU without further customs checks.

The Single Market allows the free movement of goods and services throughout the EU without any internal borders or regulatory barriers. For example, EU countries cannot impose their own national laws which prevent or limit the sale of goods between member states. Also, the free movement of services allows EU workers to move without restriction throughout the EU.

During this transitional phase, the UK and the EU will look to carve out a future relationship which establishes, amongst other things, the basis upon which the UK and the EU will trade once the transition period ends at midnight on December 31, 2020. The ultimate UK negotiating objective is a future free trade deal whereby manufactured and agricultural goods can still move between the UK and the EU without any tariffs, fees, charges, or quantitative restrictions where those goods meet the relevant rules of origin⁷. At the same time, the UK will not want to be bound by existing EU regulations. Other areas for discussion include law enforcement, data sharing and security, aviation standards and safety, product safety, and EU access to UK fishing waters.

In the event that there is no trade deal between the UK and the EU at the end of the transition period (the so-called No Deal Brexit), the UK will no longer have free access to EU markets. The trading relationship between the UK and the EU will then be governed by terms agreed to by both parties under the auspices of the World Trade Organisation. The UK would also lose the access that it had as an EU member to any trade deals that the EU has established with third countries.

Whether or not a trade deal is agreed to between the UK and the EU, both parties will need to redraft and/or implement new laws, and this will only be fully feasible after the end result

of negotiations. Of immediate importance is the fact that the UK will need to implement new export control laws applicable to exports of items capable of both commercial and military applications (referred to as dual-use items).

IV. EXPORT CONTROLS AND BREXIT

The export, transit, and brokering of dual-use items is currently controlled by EU Regulation (EC) No. 428/2009 (Dual-Use Regulation). This regulation contains the EU dual-use control list (Annexes I & IV), as well as end-use controls for non-list-controlled goods, EU export licenses, and documentary requirements relating to the export of dual-use goods, software, and technology.⁸ The UK also has its own national laws relating to, amongst other things, the export of military goods, software, and technology, as well as supplementary end-use controls on non-list-controlled goods, software, and technology.

If there is a No Deal Brexit before midnight on December 31, 2020 (herein Hard Brexit), the export of military goods, technology, and software (military items) will be unaffected from a licensing perspective, as military items are currently controlled by UK national law (e.g., the Export Control Order 2008), and they will still require licensing with the Export Control Joint Unit (ECJU) prior to leaving the UK.⁹ However, all list-controlled dual-use goods, technology, and software will need export authorization when exported from the UK to any EU member state, and similarly from any EU member state to the UK.¹⁰ Of course, the UK and EU could agree on different arrangements prior to a Hard Brexit as part of their broader negotiations.

At present, less sensitive dual-use goods, technology, and software controlled by Annex I to the Dual-Use Regulation¹¹ can move freely between EU member states subject to Article 22(10), which requires related commercial documents to indicate that such goods are subject to export controls if subsequently exported from the EU. Sales contracts, invoices, dispatch notes, and order confirmations are all considered to be acceptable commercial documents for this purpose.¹²

V. PRECAUTIONS FOR EXPORTS FROM THE UK TO THE EU

The UK has a system of Open General Export Licenses (OGEL) for both military and dual-use items, which UK exporters may use without further authorization, subject to registration with the UK Export Control Joint Unit (ECJU), and full compliance with the specific conditions of the applicable license. Currently, there are around twenty-nine different dual-use OGELs. Users of these licenses are subject to ECJU audits and may

face criminal prosecution for failing to comply with license conditions. These licenses also have reporting obligations.

On February 1, 2019, the ECJU published an Open Export License (export of dual-use items to EU member states)¹³ in anticipation of a Hard Brexit. It is not obligatory to register for this license at present, as the UK may come to a trade deal with the EU prior to a Hard Brexit taking place. However, it has since been possible for exporters to register for this license using the ECJU's online portal called SPIRE.¹⁴

Exporters of dual-use goods should already know whether their tangible items are Annex I dual-use controlled, as they are currently required to comply with Article 22(10) of the EU dual use regulation.¹⁵

Exporters will need to ensure that they have the necessary processes and procedures in place in order to comply with the requirements of new UK OGCL. In particular, they will need to ensure that their items are properly classified and that the accompanying export documents make proper reference to the export license (as detailed in the license).¹⁶ Exporters will also need to ensure that details of each licensed shipment are properly declared through the UK's Customs Handling of Import and Export Freight (CHIEF) system which advises UK Customs of the export declaration.¹⁷ The CHIEF allows exporters (usually via their freight forwarders) to complete a Customs declaration electronically, and it provides exporters with necessary documentary evidence of the export, which the exporter must file for ECJU audit purposes. Exporters must also ensure that they retain certain records relating to each such export for at least three years from the end of the calendar year in which the export takes place.¹⁸

VI. PRECAUTIONS FOR EXPORTS FROM THE EU TO THE UK

Equally, Annex I dual-use controlled goods will become licensable within the EU when exported to the UK as the UK will no longer be a member of the EU. The EU has therefore amended the existing Union General Export Authorisation 001 (UGEA 001) to include the UK as a separate country, although this license shall not come into force until the end of the transition period, and in the event of the UK and EU not agreeing a trade deal on the export of dual-use controlled items.¹⁹

In December 2011, the EU published six UGEAs. UGEA 001 replaced the previous Community General Export Authorization (CGEA), which was the only EU licence to be included in the Dual-Use Regulation of 2009. As UGEA 001

is the most commonly used license in this set of licenses, it will be the only UGEA under consideration for the purpose of this article. Currently, the UGEA 001 permits exports of most Annex I dual-use items to Australia, Canada, Japan, New Zealand, Norway, Switzerland (including Lichtenstein), and the United States (US).

EU exporters must be aware that the UGEA 001 does not permit exports for end-use applications involving weapons of mass destruction or missiles capable of carrying such weapons, or to a customs-free zone or free warehouse located in a destination covered by authorization²⁰

VII. PRECAUTIONS FOR EXPORTS FROM THE UK TO THE US AND OTHER COUNTRIES

The UGEA 001 in its current form will no longer be available to UK exporters of Annex I dual-use controlled items after December 31, 2020. This is because the UGEA 001 is an EU and not a UK license. As such, Annex I dual-use list-controlled items will require an alternative method of licensing when exported to Australia, Canada, Japan, New Zealand, Norway, Switzerland (including Lichtenstein), and the US. The ECJU has indicated that it may simply transfer the UGEA 001 into UK domestic law and make any necessary drafting changes. In this event, this license in its revised UK version will be issued automatically to existing UK holders of the UGEA 001. However, at present, the ECJU has not formally issued a "notice to exporters" advising them of this proposal. In the (albeit unlikely) event that the ECJU does not reissue this license in a revised UK format, the only method of licensing Annex I dual-use list controlled goods following a Hard Brexit will be to request a Standard Individual Export License (SIEL) through the UK government's SPIRE portal.²¹ On average, it takes the ECJU twenty working days to process the application following submission, which requires original hard copy end-use documents.

VIII. CUSTOMS TRADE BETWEEN THE UK AND EU

As described above, there are no customs duties amongst member states of the EU, and this currently includes the UK. This will change at the end of the transition period when all goods will be subject to some form of customs formality. In the event of a Hard Brexit, importers and exporters (traders) of goods within the UK will be required to formally clear goods through customs, and to pay all applicable duty and tax. Similarly, traders in the EU will be required to do the same with UK goods.

Traders in the UK and EU will require an Economic Operator Registration and Identification Number (EORI) if they do not already have one, as this is required when making all customs declarations.²² Traders registered for value added tax (VAT) purposes in the UK are now automatically issued with a UK EORI number by UK authorities (i.e., UK Customs); however, traders who are not VAT registered will need to apply for a GB EORI number if they wish to import EU goods into the UK or export UK goods to the EU. Importers of goods in the EU will also need an EORI number, and UK traders are advised to check their contractual obligations as they may be the importer of record in the EU, as well as an exporter from the UK. UK exporters may therefore require both UK and EU EORI numbers and, if so, they should apply to the EU customs authority in the EU member state into which their goods are first imported. All goods are in free circulation within the EU once all VAT and customs duty has been paid and the goods have formally cleared customs in any EU member state. It should be noted that VAT levels across individual member states vary.

IX. CONCLUSION

Traders should ensure that they are fully prepared for a Hard Brexit. In particular, traders should obtain any necessary EORI number(s) and ensure that systems are in place to conduct all necessary customs activities with the minimum of disruption.

Traders should also confirm that their goods are properly classified for export control reasons. UK exporters of dual-use items should register with SPIRE in order to use the UK's new OGEL (for the export of dual-use items to EU member states) prior to exporting Annex I dual-use controlled goods to any EU member state. Traders must also establish proper processes and procedures in order to fully comply with the conditions of new UK licenses. Similarly, exporters in EU member states will need to make sure that they are registered with the relevant EU authority for use of the UGEA 001 if they wish to export Annex I controlled goods to the UK.

The UK's system of OGELs is tried and trusted, as is the EU's UGEA 001; however, there is no doubt that a new requirement to license Annex I list controlled dual-use goods will put an administrative burden on exporters. This will particularly impact high-volume exporters of such goods. In the event of a Hard Brexit, and in light of the fact that Annex I dual-use controlled goods have moved freely throughout the EU for many years, perhaps going forward both the UK and EU may wish to consider a simplification of the existing export licensing process and introduce a system of license exceptions for UK-EU trade, similar to license exceptions found in US export control laws.

Endnotes

- 1 See Treaty of Rome, March 25, 1957, 298 U.N.T.S. 3, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:xy0023&from=EN>.
- 2 *Id.*
- 3 *Id.*
- 4 *Id.*
- 5 See EUROPEAN UNION COUNTRIES, https://europa.eu/european-union/about-eu/countries_en.
- 6 See THE ELECTORAL COMMISSION, RESULTS AND TURNOUT OF THE EU REFERENDUM, <https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/elections-and-referendums/past-elections-and-referendums/eu-referendum/results-and-turnout-eu-referendum> (Last Updated Sept. 25, 2019).
- 7 See HM Government, The Future Relationship with the EU, The UK's Approach to Negotiations, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/868874/The_Future_Relationship_with_the_EU.pdf
- 8 See Council Regulation 428/2009, of May 5, 2009, Setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, 2009 OJ (L 134) at Annex 1, <https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:32009R0428#d1e32-12-1> [Hereinafter: Council Regulation].
- 9 See Export Control Order 2008, <http://www.legislation.gov.uk/uksi/2008/3231/contents/made>.
- 10 See EXPORTING CONTROLLED GOODS FROM 1 JANUARY 2021, <https://www.gov.uk/guidance/exporting-controlled-goods-after-eu-exit>

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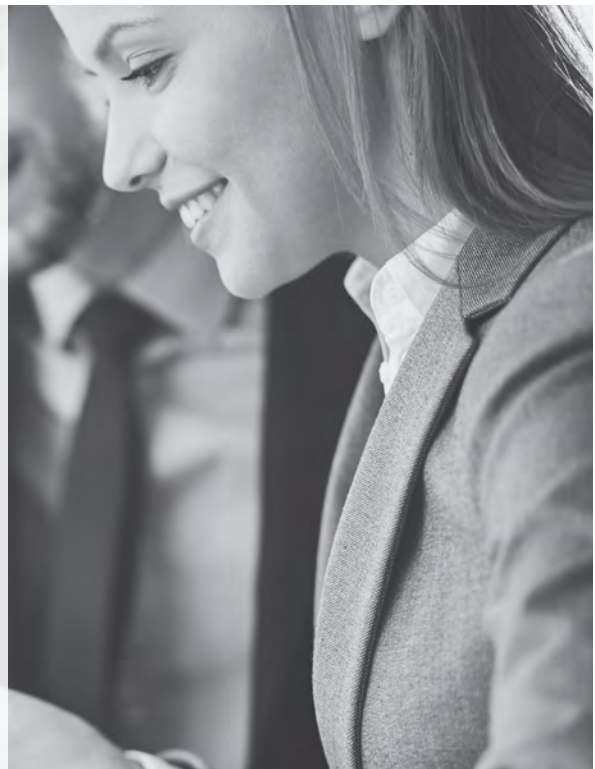
- 11 See Council Regulation, *supra* note 7, at Annex 1, <https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:32009R0428#d1e32-12-1>.
- 12 See Council Regulation, *supra* note 7, at Art. 22, <https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:32009R0428#d1e1057-1-1>.
- 13 See GUIDANCE: OPEN GENERAL EXPORT LICENCE (EXPORT OF DUAL-USE ITEMS TO EU MEMBER STATES) (Feb. 9, 2019), <https://www.gov.uk/government/publications/open-general-export-licence-export-of-dual-use-items-to-eu-member-states>.
- 14 See DEPARTMENT FOR INTERNATIONAL TRADE, *Welcome to SPIRE; The Export Control Organization's online export licensing system*, <https://www.spire.trade.gov.uk/spire/fox/espire/LOGIN/login> (last visited June 8, 2020).
- 15 See Council Regulation, *supra* note 7, at Art. 22, <https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:32009R0428#d1e1057-1-1>.
- 16 See GUIDANCE, *supra* note 12, <https://www.gov.uk/government/publications/open-general-export-licence-export-of-dual-use-items-to-eu-member-states>.
- 17 See IMPORT, EXPORT AND CUSTOMS FOR BUSINESSES, <https://www.gov.uk/guidance/chief-trader-import-and-export-processing-system>.
- 18 See GUIDANCE, *supra* note 12, <https://www.gov.uk/government/publications/open-general-export-licence-export-of-dual-use-items-to-eu-member-states>.
- 19 See REGULATION (EU) 2019/496 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 March 2019 amending Council Regulation (EC) No 428/2009 by granting a Union general export authorisation for the export of certain dual-use items from the Union to the United Kingdom, 2019 O.J. (L. 85) I/20, https://trade.ec.europa.eu/doclib/docs/2019/march/tradoc_157815.pdf.
- 20 See ANNEXES to the Commission Delegated Regulation amending Council Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items (Sept. 12, 2019), <https://ec.europa.eu/transparency/regdoc/rep/3/2016/EN/3-2016-5707-EN-F1-1-ANNEX-12.PDF>.
- 21 See DEPARTMENT FOR INTERNATIONAL TRADE, *supra* note 13, <https://www.spire.trade.gov.uk/spire/fox/espire/LOGIN/login>.
- 22 See GET AN EORI NUMBER, <https://www.gov.uk/eori>.

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JUSTICE FOR THE HOLOCAUST: EICHMANN'S JERUSALEM TRIAL

I. INTRODUCTION

The culmination of international jurisdiction against German war criminals was, paradoxically, not the Nuremberg trials or the subsequent United States (US) trials of 1946-49.¹ Instead, it was Israel's assertion of national and universal jurisdiction over SS leader Adolf Eichmann, kidnapped by Israeli agents from Argentina and forced to stand trial in the newly established Jewish homeland, which gave rise to an expanded view of international authority over genocide. The Israeli courts, asserting jurisdiction over Eichmann for crimes committed in Europe even before the establishment of the State of Israel, enhanced (and, indeed, created) a new form of jurisdiction over perpetrators of crimes against humanity. As the sixtieth anniversary of the *Eichmann* trial approaches, and many countries including the US consider the legality of forced rendition, this article addresses the legal developments that arose out of the Jerusalem trial of Adolf Eichmann.²

For Hannah Arendt, the political scientist and then-correspondent for *The New Yorker*, Eichmann was a clerk in a shop rather than the greatest mass murderer in history. He was, for her, “the *déclassé* son of a solid middle class family” with “the personality of a common mail-man” who was certified by the psychologists who examined him as normal—“more normal,” said one, “than I am after having examined him.”³ Arendt does seem to challenge Eichmann's claim that it was from reading Kant that he had derived his notion of obedience in implementing the final solution at Hitler's order. Critics question, however, Arendt's portrayal of Eichmann as a passive recipient of orders who took no personal initiative to destroy the Jews.

In her book,⁴ Arendt unleashed a firestorm with her characterization of the *Judenräte* (the Jewish councils established by the Nazis to execute German policy and maintain public order in the ghettos) as complicit.⁵ She charged essentially that they were collaborators with the Nazis by supplying Jews for deportation to the camps. Is there some justice in Arendt's assessment of the *Judenräte*? Perhaps they were remiss in not seeking choices to resist the Nazis instead of taking the binary path (either we submit or they take our lives), but Arendt's focus is skewed in making the *Judenräte* responsible for the “Final



Keith D. Nunes*

Solution” rather than focusing more fully on Eichmann's conduct and the consequences of his acts and omissions.⁶

II. LEGALITY OF EICHMANN'S TRIAL IN JERUSALEM: EX POST FACTO JUSTICE?

Eichmann was a major perpetrator of the Holocaust. He was the major organizer for managing and facilitating the mass deportation of Jews to ghettos, killing centers, and slave labor camps in German-occupied Eastern Europe. Eichmann's defense that he had been just a cog in the Nazi state's machinery of mass murder was unsustainable, but his trial in Israel was controversial because of the debate over jurisdictional issues. Eichmann could have been tried by an international tribunal⁷ or by a court in Germany, “the forum *delicti commissi* of many of the crimes attributed to him,”⁸ or in Austria, which was the locus from which he had operated his machinery of transporting human beings in cattle cars for slaughter.

The trial in Jerusalem, by a special panel of three Jewish judges in a Jewish state created just three years after the Holocaust, gave rise to accusations of *ex post facto* justice and extraterritorial jurisdiction. This reproach does not hold water: under international law there is no statute of limitations for crimes against humanity, war crimes, or genocide under the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity,⁹ nor under Article 29 of the Rome Statute of the International Criminal Court.¹⁰ In the Federal Republic of Germany, genocide, crimes against humanity, war crimes, and crimes of aggression have no statute of limitations, and Germany applies international law. Eichmann was indicted on fifteen criminal charges, including crimes against humanity (Counts 5-7, 9-12), war crimes

(Count 8), crimes against the Jewish people (Counts 1-4), and membership in a criminal organization (Counts 13-15).¹¹

Substantively it is true that Eichmann fell under a law both retroactive and extraterritorial in effect. As the District Court of Tel Aviv decided in *Honigmann v. Attorney General*, the Nazis and Nazi Collaborators (Punishment) Law is retroactive and extraterritorial:

[The 1950 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, *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 persecutions.¹²

Israel's law against genocide was based on the 1945 Nuremberg Charter (the London Agreement of 1945)¹³ which attracted the same disapproval. But the question of whether Eichmann could be tried *ex post facto* under law made in 1950 for offenses committed during World War II may be approached by considering what equity requires, namely, that it "looks to the substance rather than the form."¹⁴ True, the form of the Israeli law is a post-war, 1950 statute. But Eichmann was charged with crimes punishable by ordinary criminal law in the countries linked to his offenses; in other words, the Israeli law in substance tracked the existing law of the fora where Eichmann committed his genocide and is retroactive only in form, not substance.

Professor Hans Baade explains:

[I]n those portions that form the *gravamen* of the charges against Eichmann, *the law is retroactive in form, not in substance*. It is true that no Israeli law provided for the punishment of crimes against the Jewish people and crimes against humanity before May 8, 1945. But with some exceptions not material in this connection, *the acts defined as such crimes were punishable* under German law and, where committed outside of Germany, Polish or Soviet law, *at the time of their commission*. *So long as prosecution is limited to acts punishable under German or local law prior to 1945, there is no substantive retroactivity*.¹⁵

Professor Hans Kelsen underscores that Eichmann was subject to the domestic law of the countries where the offenses were committed and the real issue is jurisdiction of the forum, domestic (in Israel) or international:

The atrocities for which persons belonging to the Axis powers, and especially the Germans, shall be prosecuted are almost all ordinary crimes according to the municipal law of the persons to be accused, valid at the moment they were committed. In respect of these crimes *the main problem is not the application of the rule against ex post facto laws but the jurisdiction of the International Tribunal*.¹⁶

What about justice for the accused? Kelsen affirms that the principle against *ex post facto* laws contends with the principle of justice, and the lesser principle must give way to the greater:

Besides, in all cases where the rule against *ex post facto* laws comes into consideration in the prosecution of war criminals, we must bear in mind that this rule is to be respected as a principle of justice and that...this principle is frequently in competition with another principle of justice, so that the one must be restricted by the other. It stands to reason that *the principle which is less important has to give way to the principle which is more important*.¹⁷

Kelsen then looks to enlightened public opinion, the democratic component of law, for support in bringing an offender such as Eichmann to justice, overriding the general rule against *ex post facto* laws:

There can be little doubt that, according to the public opinion of the civilized world, *it is more important to bring the war criminals to justice than to respect*, in their trial, *the rule against ex post facto law*, which has *merely a relative value* and consequently, was never unrestrictedly recognized.¹⁸

Yet, kidnapping a person (Eichmann) from one country (Argentina) to stand trial in a second (Israel) for crimes committed in a third (the various European settings where Jews were murdered) may be more problematic and is addressed under universal jurisdiction in Part VI, *infra*.

III. MALE CAPTUS, BENE DETENTUS: THE "TOUGH LUCK RULE" OF JURISDICTION¹⁹

Was Eichmann's trial in Israel vitiated by his forcible removal from the territory of Argentina, without its consent, by agents of the Government of Israel? The legal maxim *male captus, bene detentus* articulates the principle that a court may exercise jurisdiction over an accused regardless of how that person's rendition to the jurisdiction of the court was secured. In other words, kidnapping Eichmann to stand trial in Israel is not

an offense to jurisdictional principles. *Male captus* situations encompass arrests in which: (1) normal procedures of arrest were not followed; (2) the actual arrest was executed with excessive force although the apprehension procedures were appropriate; or (3) the arrest was followed by a disproportionately long pretrial detention.

In US case law, the Ker-Frisbie doctrine combines two landmark *male captus* cases to provide that for a fair trial, an accused person cannot be tried *in absentia* and must be in court to answer the charges, which supports forcible rendition. The basis of the doctrine is that a defendant must be in court in person to answer the charges; it does not matter how law enforcement got the defendant into court. Because forced rendition actually allows for jurisdiction to be exercised, it is lawful in domestic and international cases, as Justice Black wrote for a unanimous US Supreme Court in *Frisbie*:

[D]ue process of law is satisfied when one present in court is convicted of crime after having been apprised of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will.²⁰

International tribunals proceed on a similar basis: the International Criminal Tribunal for the Former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda, and the International Criminal Court cannot try suspects *in absentia*; the accused must be present in the courtroom in The Hague. For the trial to commence, therefore, the suspect must be arrested and brought to trial.²¹

Some nations, however—such as Germany, provide for trial *in absentia*. “[T]rial in the absence of the accused is permitted where the suspect purposefully places him or herself in a condition precluding fitness to stand trial.”²² After World War II, Martin Bormann was tried in absentia by the International Military Tribunal in Nuremberg. He was charged with three counts: conspiracy to wage a war of aggression (Count 1), war crimes (Count 3), and crimes against humanity (Count 4). On October 1, 1946, the Tribunal acquitted him on Count 1 because he was not present at the main meetings where Hitler laid out his plans of aggression. He was found guilty of war crimes and crimes against humanity on Counts 3 and 4 by the IMT. Consequently, Martin Bormann was sentenced to death *in absentia*. In international jurisprudence, the landmark *male captus* case is *Dragan Nikolić* in the ICTY.²³ Nikolić was the

first person to be indicted by that tribunal, on November 1, 1994. He was indicted on twenty-four counts of crimes against humanity, violations of the laws or customs of war, and grave breaches of the Geneva Conventions. It was asserted that most of these crimes were committed in the detention camp Sušica in eastern Bosnia where Nikolić was allegedly the camp commander. Nikolić was forcibly removed from the Federal Republic of Yugoslavia (FRY) by private individuals and brought to Bosnia and Herzegovina where he was officially arrested by the Stabilization Force in Bosnia and Herzegovina (SFOR) and then brought to The Hague. He claimed that this entailed a breach of both the sovereignty of the FRY and his individual due process guarantees (breaches that occurred prior to his rendition into the custody of SFOR).

The defense further claimed that kidnapping an accused is arbitrary, violates the principle of legality in criminal justice,²⁴ and breaches prescribed legal procedures.²⁵ The defense emphasized that the unlawfulness of the abduction (whether state sponsored or by private individuals) applies not only to the accused, but also causes the jurisdiction itself to be rendered illegal.²⁶ The defense asserted that unlawful rendition of an accused should cause the tribunal to conclude that “international law has to some degree been breached and that the violation of some fundamental principle—whether it be state sovereignty and/or international human rights and/or the rule of law—needs to be protected above all other considerations.”²⁷

In response, the prosecution in *Nikolić* contended, first, that while capture may violate international law, jurisdiction over the accused does not. Second, the prosecution contended that what must be considered are the compelling interests implicated, requiring balancing the integrity of justice against the egregious conduct:

The Prosecution argued that exercising jurisdiction over an Accused is not contrary to international law even if the capture of the Accused was in violation of international law as identified by the Defense. Compelling interests involved are to be balanced so that the decision-maker weighs the minimum conditions for integrity of the conduct of international criminal justice as to egregious conduct attributable to the involved State.²⁸

Although the court in *Nikolić* rejected the defense motion, it appeared to recognize the principle that safeguarding the integrity of the judicial process compels release of the accused when violations of international law are committed by the prosecutor or the violations are so outrageous irrespective of

the prosecution, concluding that “[r]elease of the Accused is compelled in such circumstances to safeguard the integrity of the entire judicial process.”²⁹

There are bad actors in the world, but even thoroughly bad people deserve human rights because they too are human beings. One may recall that an accused’s human rights are preserved under criminal law: *actus reus non facit reum nisi mens sit rea* (the principle that two elements are required for a person to be guilty of a crime for most offenses: the *actus reus* (guilty act) and the *mens rea* (guilty mind)); *nullum crimen sine lege* (conduct does not constitute a crime unless it has previously been prescribed a crime); *poena sine lege* (a person can only be punished for a crime if it is prescribed by law); and *non bis in idem* or double jeopardy (no one shall be tried for a crime who has already been finally convicted or acquitted by a court); along with notice, fair warning of the charge, and opportunity to meet the charge, elements that underlie the principle that “every person is presumed innocent until proven guilty.”

Are these values of fairness, human rights, and judicial integrity in cases of irregular arrests absolute? First, as Professor Jordan Paust says, “although the word ‘arrest’ implies action by State officials, officers, or agents, arbitrary ‘detention’ of individuals in violation of relevant human rights norms could be perpetrated by private actors.”³⁰ Initially, it was concluded that Eichmann was captured by volunteers. Second, context and legal policies determine what is lawful or arbitrary and what is consistent with the principle of justice. In essence, according to Paust, it may not be unjust, unlawful, or arbitrary to abduct or capture an international criminal “in a context when action is reasonably necessary to assure adequate sanctions against egregious international criminal activity.”³¹

Eichmann was a fugitive from justice.³² His “egregious international criminal activity” was condemned publicly by the civilized world.³³ At issue in the *Eichmann* case were considerations of a procedurally fair trial for the accused, justice for the six million Jews who were mass murdered, justice for the survivors of the slave camps and killing centers, and honor for all the victims (the six million plus the six million non-Jews who were liquidated in the concentration, slave, and extermination camps). In the 1930s, both ends of the dictatorial spectrum had mounted show trials: the Soviets and the Nazis mounted lesson-teaching trials with outcomes of sham justice that used naked power to clothe the regimes in unearned legitimacy. The fledgling Israeli Government committed to making Eichmann account for his crimes in a fully fair hearing with paid defense counsel as exemplified in the trials of major war criminals in Nuremberg. The objective was to protect the individual while

acknowledging individual responsibility for crimes against humanity with no refuge under state sovereignty for the worst crimes. Israel’s first Prime Minister, David Ben-Gurion, committed Israel to using trial as an effective weapon to handle mass atrocity and the uniqueness of the Holocaust.³⁴

Eichmann was well treated. He was not brutalized. His treatment was worlds apart from the treatment meted out to the prisoners in the concentration, slave, and death camps of the Nazis and in particular in their special courts for political offenses and the *Volksgericht* (People’s Court) for treason under its president Roland Freisler, with his penchant for violent outbursts and bloodlust in the form of capital punishment. Ben-Gurion was attentive to the function of a court trial to educate the populace, particularly young people both at home and abroad. Israel wanted to create a full narrative of the Holocaust because “[m]any of the country’s more than 200,000 survivors daily relived their nightmares.”³⁵ The Jerusalem trial of Eichmann was a major factor in encouraging Holocaust survivors to speak privately and publicly of their experiences. It opened the doors of academe to Holocaust and genocide studies and the public square to remembrance.

The trial profoundly affected Israelis. The response of the younger generation was unexpected. Telushkin writes that younger Israelis were appalled by the nonresistance:

Many were ashamed to learn that most Jews had not fought back against the Nazis, and unfavorably contrasted their behavior with that of the Israeli army Many such critics forgot . . . that the State of Israel had survived because its army was trained and armed. The Jews rounded up by the Nazis had had no army and almost no armaments. When the Warsaw Ghetto revolt erupted, bunkers jammed with forty Jews often had no more than one rifle per bunker. Jews who wished to escape death by fleeing from concentration camps were often stymied whether that was the morally right course; even if they succeeded, they knew that ten or a hundred other inmates might be tortured to death in retaliation. Furthermore, they could not count on support from local non-Jews living near death camps. Polish peasants who found the fleeing Jews were more likely to alert the Nazis of their escape than to help them.³⁶

IV. THE OBLIGATION TO EXTRADITE OR PROSECUTE

Israel had claim in international law for the rendition of Eichmann by Argentina to Israel based upon the international

criminal law principle of *aut dedere aut judicare*—the obligation to extradite or prosecute.³⁷ The principle was formulated by Grotius:

When appealed to, a State should either punish the guilty person as he deserves, or it should entrust him to the discretion of the party making the appeal.³⁸

The principle is provided for the core crimes of genocide, war crimes, and crimes against humanity in the treaty-based grave breaches of the Geneva Conventions and Additional Protocol I.³⁹ In its Final Report in 2014 on the obligation to extradite or prosecute, the International Law Commission (ILC) stipulated the core international criminal offenses for which impunity is denied:

genocide, war crimes, crimes against humanity and for violations of international humanitarian law and gross violations of human rights law, . . . such violations [must be] properly investigated and appropriately sanctioned, including by bringing the perpetrators of any crimes to justice, through national mechanisms or, where appropriate, regional or international mechanisms, in accordance with international law . . .⁴⁰

The ILC pointed out that the obligation to combat impunity—the freedom from prosecution by flight or grant of refuge in a friendly state—affects a wide range of crimes of serious concern to the international community, and the obligation is incorporated in all sectoral conventions against international terrorism concluded since 1970.⁴¹ The purpose of the contemporary obligation is to provide for “an effective system of criminalization and prosecution of the . . . core crimes.”⁴² The obligation is justified because of (1) the exceptionally grave character of the crimes recognized as such by the international community, and (2) the need to combat impunity for offenders of these crimes of atrocity.⁴³

States in whose territory an offender is found, according to the ILC, have an obligation under the Draft Code of Crimes Against the Peace and Security of [Hum]ankind to extradite or prosecute offenders for the core crimes of genocide, crimes against humanity, war crimes, and crimes against United Nations and associated personnel. Argentina’s alternative to rendition to Israel was to put Eichmann on trial. Argentina—as the state from whose territory Eichmann was forcibly removed by agents of Israel—could also demand under international law that Israel return him to Argentina and his abductors be disciplined.⁴⁴

Israel had a real concern that despite good relations between the government and Jewish Community in Argentina, cooperation would not be forthcoming, and Eichmann as a fugitive from justice would just vanish again. US troops had captured Eichmann after the war, but he managed to escape from his SS officer prison camp in 1946. Under a false identity, he lived in Germany until he made his way across Austria and Italy to Argentina, arriving in 1950 and sending for his family in 1952. The Israeli secret service arrested him at his home twelve miles outside Buenos Aires on May 11, 1960 and smuggled him through airport customs aboard Foreign Minister Abba Eban’s plane to Israel on May 20.

Argentina’s history of denying extradition requests and information about the presence in the country of Nazi war criminals (including the infamous SS *Hauptsturmführer* (captain) and chief physician of Auschwitz, Dr. Josef Mengele) was the kind of proof that deterred Israel from relying on Argentina. Although Argentina had agreed at the end of World War II to render to the Allies for trial Axis and Fascist war criminals who sought asylum there, its penal code precludes retrospective criminal prosecution of genocide, crimes against humanity, and war crimes, meaning that Eichmann could not be tried for his conduct during World War II. In June 1960, Argentina actually declined to surrender such an offender at the request of the German Federal Republic.⁴⁵

It was left to the District Court of Jerusalem, in trying Eichmann, to focus the real issue.⁴⁶ The court drew attention to the social consequences of giving suspected perpetrators of major international crimes a safe harbor:

There is considerable foundation for the view that the grant of asylum by any country to a person accused of a major crime of this type and the prevention of his prosecution constitute an abuse of the sovereignty of that country contrary to its obligation under international law.⁴⁷

In the *Eichmann* case, the Israeli Supreme Court noted that there were no rival jurisdictions with claims of competence to try Eichmann:

We have also taken into consideration the possible desire of other countries to try the appellant in so far as the offenses contained in the indictment were committed in those countries or their injurious effects extended thereto. . . . It is to be observed that we have not heard of a single protest by any of these countries against conducting the trial in Israel, and

it is reasonable to believe that in the face of Israel's exercise of jurisdiction in this matter no other State will demand the right to do so itself.⁴⁸

The supreme court found that the nature of Eichmann's crimes emptied the territorial principle of jurisdiction of content:

What is more, it is precisely the fact that the crimes in question and their effects have extended to numerous countries that drains the territorial principle of all content in the present case and justifies Israel in assuming criminal jurisdiction by virtue of the "universal" principle.⁴⁹

Prime Minister Ben-Gurion insisted that Adolf Eichmann "face trial in Israel, in keeping with the laws governing justice for the Nazis and their helpers."⁵⁰ He insisted that Eichmann be called to the bar of justice as the perpetrator of mass atrocities.

V. SOLUTION TO THE CAPTURE OF EICHMANN

Adolf Eichmann was responsible, together with other Nazi leaders, for the extermination of the six million Jews of Europe in what the Nazis called the Final Solution to the "Jewish Question". He had taken the minutes of the Wannsee Conference in January 1942, agreeing "to purge German living space of Jews by legal means." A list was compiled of population centers equaling eleven million Jews.

Was the kidnapping and removal of Eichmann from Buenos Aires lawful under domestic law and international law? A cardinal principle of international law holds that a state must not perform acts of sovereignty in the territory of a foreign state. It is, therefore, a breach of international law for a state to send its agents into the territory of another state to apprehend persons accused of having committed a crime. A state is responsible for a direct violation of international law by violating another state's territory.

Kidnapping or forced rendition out of the forum of an accused offender by another state is a gross breach of the sovereignty of the state where the person is residing. Full reparation must be made for any injury caused by the illegal act for which the offending state is internationally responsible: reparation consists, first, in restitution of the original situation where possible, i.e., in the instant case hand over the accused to the state in whose territory he or she was apprehended and, second, pay compensation for the offence committed.

Eichmann's forced removal provoked an international incident. Argentina was furious, claiming that Israel violated its sovereignty

when it unlawfully exercised authority on Argentinian territory. Argentina demanded the return of Eichmann "as appropriate reparation," setting a time limit of one week, and called for the punishment of his captors who violated Argentinian sovereignty. The incident caused a rift in the good relations between the President of Argentina and the country's Jewish community. Jews of Argentina had been experiencing a growing sense of personal and community security and well-being, and bilateral relations between Buenos Aires and Jerusalem had grown closer, but this was negatively affected.

When the one-week ultimatum expired, Argentina abandoned its direct negotiations with Israel, and on June 15, 1960 lodged a complaint with the United Nations Security Council to protest Israel's violation of its sovereign rights. It did not specifically characterize Israel's conduct as an international wrong, but this may be inferred from Argentina's request for reparation in the form of Eichmann's return from Israel to Argentina. At the UN, Argentina claimed that Eichmann's unlawful abduction violated its sovereign rights by "the illicit and clandestine transfer of Eichmann from Argentinian territory to the territory of the State of Israel."⁵¹ For the "illegal act committed to the detriment of a fundamental right of the Argentine State," it cited as its grounds in international law that Israel's conduct was "contrary to the rules of international law and the purposes and principles of the Charter of the United Nations."⁵²

Israel claimed, with some internal contradiction, that Eichmann had been captured on Argentinian territory by "volunteer groups" and brought to Israel with his full consent (evidenced by a letter declaring that he was ready to stand trial in Israel⁵³) and "handed over to the security services of the Israel Government."⁵⁴ Israel claimed that both the complaint and the action requested by Argentina fell outside the UN Security Council's competence and the "unilateral allegations of the Argentine Government" were insufficient to invoke Article 34 of the Charter. It claimed that direct negotiations were the appropriate way to settle their disagreement.

Argentina countered that infringement of its sovereignty was a political matter (rather than a legal dispute) governed by Article 36 (3) of the Charter and that this deliberate violation of state sovereignty conflicted with the Charter. (The Security Council's competence is engaged under Article 33 et seq. where a dispute leads to "a situation likely to endanger international peace and security."⁵⁵) More importantly, Argentina claimed that protection of its sovereign rights involved the protection of all members of the international community by the principle of "the unqualified respect which States owe to each other and

which precludes the exercise of jurisdictional acts in the territory of other States.”⁵⁶

Argentina submitted a draft resolution to the Security Council on June 22, 1960 which recognized the violation of Argentina’s sovereignty and in which Israel was requested to make appropriate reparation. The resolution, which opened a way for reconciliation between Argentina and Israel, significantly did not reiterate the call for the return of Eichmann as Argentina set out in its initial complaint to the Security Council. Ultimately, Argentina did not request the return of Eichmann in the context of the proceedings before the Security Council.

At the Security Council, Israel on June 22, 1960: (1) recognized that Argentina’s law had been broken by Eichmann’s apprehenders who took him to Israel; (2) apologized to Argentina; (3) held this isolated violation of Argentinian law was subject to the context of the “exceptional and unique character of the crimes attributed to Eichmann” and the motives of his abductors; (4) argued, somewhat implausibly, that the unusual manner of bringing Eichmann to justice was by Israeli citizens operating on their own initiative, not by Israeli agents (Israel accepted it may have infringed Argentinian law, but its unlawful conduct “should not be confused, as a basic legal proposition, with the non-existing intentional violation of the sovereignty on one Member State by another”⁵⁷); and (5) denied emphatically that it violated Argentinian sovereignty. Israel held that its expressions of regret constituted adequate reparation.

The UN Security Council, in its Resolution No. 138 of June 23, 1960, called on Israel to make appropriate reparations, and, while noting that a repetition of this situation could lead to a breach of the peace, pointed out that the resolution did not condone Eichmann’s “odious crimes” and affirmed “universal condemnation of the persecution of the Jews under the Nazis” along with concern across countries for justice for the crimes of which Eichmann was accused. In a joint communiqué issued on August 3, 1960, the two governments stated that they “resolve[d] to regard as closed the incident which arose out of the action taken by citizens of Israel, which infringed the fundamental rights of the State of Argentina.”⁵⁸ The controversy was settled. Thus, Eichmann was tried in Jerusalem.

The *Eichmann* trial, held before a special tribunal of the Jerusalem District Court, began on April 11, 1961. International interest was intense. As one of the first trials televised with live coverage, the trial vividly brought home the viciousness of the Nazis. The events, and “the Holocaust” as a phrase, seem decisively rooted in the public consciousness from this time forward. The big difference between the Nuremberg trials

and the Jerusalem trial of Eichmann was that Jerusalem made “testimonies” of Holocaust survivors the focus of attention. Whereas Nuremberg relied on documentary proof against indicted individuals and organizations, the Israeli prosecutor chose, instead, to rely upon witnesses who were actual victims. One significant advance was the birth of Holocaust studies as an academic discipline and of annual Holocaust remembrance as an obligation in the Jewish world and beyond, including in California and elsewhere in the US.

The *Eichmann* case is a significant landmark in the development of human rights enforcement and the determination to make perpetrators accountable in behalf of the victims of genocide and crimes against humanity. The case revitalized the international community’s interest in tackling the crimes of the Nazi regime and its European partners. Interest had waned precipitously because of the Cold War in the comparatively few years since the conclusion of the Nuremberg trials. The case revived prosecutorial interest in Germany and the US. Regrettably, few prosecuting agencies pursued any measure of justice for the victims of the Nazi crimes after the 1950s.

VI. THE ISRAEL COURTS’ VIEW OF UNIVERSAL JURISDICTION IN *EICHMANN*

In the *Eichmann* case, the Jerusalem District Court in considering *male captus* concluded unanimously that there was jurisdiction and “*the manner in which he was brought within the jurisdiction of this Court has no relevance according to law, neither has the fact whether he was apprehended abroad by emissaries of the governing authorities of the State of Israel or not.*”⁵⁹ The Court underscored that in comparative law the circumstances of *male captus* are not germane. “The courts in England, the United States and Israel have constantly held that *the circumstances of the arrest and the mode of bringing of the accused into the territory of the State have no relevance to his trial*, and they have consistently refused in all instances to enter upon an examination of these circumstances.”⁶⁰

Israel was the *forum conveniens*. Eichmann was most suitably tried in Jerusalem for the interests of all the parties and the ends of justice. Eichmann’s criminal conduct invaded the interests of the community of states as a whole in terms of the gravity of the crimes he was charged with, and the importance of the human/social interests that the international community seeks to protect. Moreover, the majority of the surviving witnesses were resident in Israel, which meant there was no more convenient alternative forum elsewhere in which to charge Eichmann. As the translator of Eichmann’s notes remarked, “An unexpectedly large number of survivors of the camps who had personal

confrontations with Eichmann testified.”⁶¹ Their testimony as survivors of the Holocaust was crucial for the charge, and they would have been inconvenienced by having to testify in a court outside Israel. Documentary evidence was also mainly located in Israel. The bulk of the original perpetrator documents was in archival holdings collected and conserved by Yad Vashem (the World Holocaust Remembrance Center) in Jerusalem, adding to the weight of Jerusalem as *forum conveniens*.⁶²

The relevant evidence and records were enhanced by the Nazi penchant to record everything they did to their victims. Eichmann did not suffer overwhelming hardship by having to mount his defense outside Germany in the forum.⁶³ His material costs were borne by Israel. Thus, Israel was by all accounts fit and proper logistically and administratively and ably equipped to conduct the prosecution of Eichmann.

As to the basis of jurisdiction, the decision of the Israeli Supreme Court is strikingly modern in its approach. First, it speaks as a national court acting as an agent of the international community to implement international, not national, law for crimes that are so atrocious that they affect the entire international community:

Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant. That being the case, no importance attaches to the fact that the State of Israel did not exist when the offences were committed.⁶⁴

This seems to be an application of the concept of *dédoulement fonctionnel* (role splitting) of Professor Georges Scelle.⁶⁵ National or domestic decision-makers act as state representatives when they operate within the domestic legal system, and they act *qua* international agents when they operate within the international legal system. Whenever a judicial or other decision-maker is seized of a case that escapes national boundaries, they act *qua* international agents. This flows from the decentralized nature of the international legal order which is without legislative, executive, or judicial organs acting on behalf of the whole community—complicated by the rapidly globalizing and diffuse international society of the present day.

Second, the court refused to give fidelity to formal law without paying attention to the broader consequences. Thus, the

supreme court held that “Act of State” was no defense to charges of crimes under international law in a foreign forum:

[T]here is no basis for the doctrine when the matter pertains to acts prohibited by the law of nations, especially when they are international crimes of the class of “crimes against humanity” (in the wider sense). Of such odious acts it must be said that in point of international law they are completely outside the “sovereign” jurisdiction of the State that ordered or ratified their commission, and therefore those who participated in such acts must personally account for them and cannot shelter behind the official character of their task or mission, or behind the “Laws” of the State by virtue of which they purported to act.⁶⁶

This refusal to give judicial avoidance to moral problems is a healthy antidote to giving effect to odious acts done abroad under the act of state doctrine. Although the acts may be repellent to US law and morality, as per the Second Circuit in *Bernstein v. Van Heyghen Freres S.A.*,⁶⁷ where a Jewish plaintiff sued in an American court to recover confiscated property after World War II, the court still refused to accept jurisdiction due to sovereign immunity. This is even though it found that the confiscation of the property of a Jewish person by Nazi Germany “was utterly odious” and “abhorrent to . . . moral notions” and that, if the confiscator were a private person, the confiscation could be acted upon by an American court.

Third, as to superior orders the Israeli court emphasized “that full criminal intent be attributed to [Eichmann] even had he not admitted this fact in his evidence [i.e., “to have had knowledge of the unlawful character of the order he carried out”]. The court declared that its “main purpose [was] to make it clear that in the past no principle recognizing such defense became crystallized in international law.”⁶⁸ Superior orders would go to the sentencing stage of the criminal process to be considered in mitigation of punishment.

As to the test for the reality of a superior order, the supreme court quoted the Nuremberg judgment:

[T]he true test was not whether a superior order existed, but “whether moral choice was in fact possible.” In other words, the mere defence of obeying a superior order—as distinct from the defence that he could not avoid committing the crime because he had no “moral choice” to pursue another course—will not avail the accused.⁶⁹

As for the meaning of “moral choice,” the court observed that the Nuremberg Tribunal “had in mind the consideration of circumstances which placed the accused under the threat of having to pay with his life in the event of his failure to obey the criminal order.” This led the court to conclude:

If this interpretation be correct—and we express no opinion on this point—then it must be understood that the Tribunal recognized that a defence of “constraint” or “necessity” might be advanced.⁷⁰

The court noted that the defenses of constraint or necessity were rejected by the Israeli Nazi and Nazi Collaborators (Punishment) Law, 1950. Moreover, if the circumstances of such a defense were permitted, the accused would have to prove:

(1) that the danger to his life was imminent; [and] (2) that he carried out the criminal assignment out of a desire to save his own life and because he found no other possibility of doing so.⁷¹

Fourth, perhaps the most striking modern contribution of the Israeli Supreme Court was its rejection of the traditional view of law as a world of rules and the utility of positivism. It declared that:

[T]he rules of the Law of Nations are not derived solely from international treaties and from crystallized international usage.⁷²

The supreme court cited a range of scholars—including Hersch Lauterpacht, Hans Kelsen, Julius Stone, Egon Schwelb, C.K. Allen, L.C. Green, MacGibbon, W.B. Cowles, W.W. Cook, Helen Silving, Herbert W. Briggs, George A. Finch, Doman, F.B. Schick, Quincy Wright, Wolfgang Freidmann, Morris Greenspan, Robert K. Woetzel, Blaine Sloan, Henry Wheaton, Richard Baxter, Sheldon Glueck, and Oliver Wendell Holmes—to signal the standpoint that:

During the early stage (or a particularly disturbed stage) of any system of law—and international law is still in a relatively undeveloped state—the courts must rely a great deal upon non-legislative law, and thereby run the risk of an accusation that they are indulging in legislation under the guise of decision, and are doing so *ex post facto*. Whenever an English common-law court for the first time held that some act not previously declared by Parliament to be a crime was a punishable offence for which the doer of that act was now prosecuted and held liable . . . the court in one sense ‘made law.’ Yet, fundamentally, it thereby

did no violence to the technique of law enforcement or the requirements of man-made justice, unless it acted most unreasonably and arbitrarily.⁷³

In creating such positive law, courts must be careful to pay close attention to the ends of law and social consequences: a consideration of the larger needs of the community.⁷⁴

Finally, it is these considerations of the common interests of humankind that led the Israeli Supreme Court to derive universal jurisdiction from the long-standing concept of universal jurisdiction over piracy in international law. Namely, fundamental state interests require that perpetrators who reject state authority, who routinely act outside state boundaries, and who have no connection to a state, be apprehended on the high seas to stand trial in the courts of the apprehending state. The supreme court likened these concepts to that of the war criminal, such as Eichmann, who has also removed himself from the constraints of the international community:

[T]he substantive basis underlying the exercise of universal jurisdiction in respect of the crime of piracy also justifies its exercise in regard to the crimes with which we are dealing in this case.⁷⁵

The Princeton Principles on Universal Jurisdiction, a restatement of universal jurisdiction,⁷⁶ affirm that piracy is “crucial to the origins of universal jurisdiction.”⁷⁷ It is true that piracy “in its jurisdictional aspects is *sui generis*.”⁷⁸ Universal jurisdiction over piracy committed on the high seas is conferred as a matter of necessity to protect international trade.

By analogy,⁷⁹ universal jurisdiction is extended over genocide, war crimes, and crimes against humanity as a matter of similar necessity because of the heinousness of the conduct and need to protect fundamental human interests. These international crimes are committed within state borders and may be committed by public officials in the exercise of state policy. Universal jurisdiction, according to the Princeton Principles, “is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.”⁸⁰

Universal jurisdiction does not rely upon contacts, whether links of nationality or territoriality.⁸¹ Its jurisdictional basis is the atrociousness of the crime. Universal jurisdiction sustains the effective implementation of international humanitarian law. Mandatory universal jurisdiction is established over violations defined as grave breaches in the Geneva Conventions of 1949 and Additional Protocol I of 1977. Other international agreements

recognize that states are obliged to exercise universal jurisdiction to prosecute serious violations of the treaties, including in an armed conflict.⁸²

As to Eichmann, the Israeli Supreme Court stated that:

[T]he principle of universality ... is, in essence, ... power ... vested in every state regardless of the fact that the offense was committed outside his territory by a person who did not belong to it, provided he [or she] is in its custody at the time he [or she] is brought to trial.⁸³

This universal state power was not based on “the recognition of the universal jurisdiction to try and punish the person who committed piracy.” Rather, the justification for characterizing the crime as “an international crime *sui generis*” is “the agreed vital interest of the international community” which justifies exercising universal jurisdiction over the offense. The supreme court said that in this capacity, the prosecuting state operates as “the organ and agent of the international community” and sanctions the offender under international law.⁸⁴

The *Eichmann* court took note of the advance of universal jurisdiction “for quite some time” in going further than just the international crime of piracy. It cited application of universal jurisdiction in the field of conventional war crimes regardless of where they were perpetrated. It looked at cases which occurred both prior to and subsequent to World War II. In other words, the source of universal jurisdiction ultimately derives from the underlying nature of the crime and a profound awareness that certain crimes are of such all-encompassing interest that third states, as in the instant case Israel, are justified in prosecuting them.⁸⁵ Israel was thus claiming the authority of universal jurisdiction in the *Eichmann* case to achieve justice for heinous crimes.

The issue of universal jurisdiction in international law and domestic law was extensively considered by the World Court in a separate opinion by Judges Higgins, Kooijmans, and Buergenthal.⁸⁶ In their view, offenses falling under the competence of universal jurisdiction have no territorial or nationality linkage for either perpetrator or victim. The offenses are of exceptional gravity. Beyond the classic offenses (piracy and slave trading), war crimes, hijacking, hostage taking, torture, crimes against humanity, and genocide have developed as grounds for universal jurisdiction.

They noted that insistence on territorial contacts for jurisdiction (e.g., in the form of landing a plane) or presence (e.g., in the case of aircraft hijacking or hostage taking) should be

outweighed by alarm for the exceptional gravity of the offence. This perspective has led countries to modify their perceptions and policy positions. International indignation at the heinous nature of the crimes is aimed at creating jurisdiction over crimes against humanity; there is now an international consensus to punish perpetrators.⁸⁷ International indignation is also targeted at ending impunity for the perpetrators of atrocities and gross human rights violations, whether in war or peacetime.⁸⁸ Universal jurisdiction allows national courts to act as “agents for the international community.”⁸⁹

VII. THE PROTECTIVE PRINCIPLE OF JURISDICTION

The protective principle is the second jurisdictional principle directly on point in the *Eichmann* case. On the basis of this principle, states may exercise extraterritorial jurisdiction over aliens to guard against serious threats to their national interests.

The argument that the protective principle could not be applicable because Israel did not exist as a state at the time of Eichmann’s alleged offenses is weak. At issue was whether Israel had emergent and developed interests that were seriously threatened by the Holocaust. “The real difficulty related to whether Israel, after attaining independence, could claim that her fundamental interests as existing at that time had been so threatened by the prior Nazi holocaust as to justify the application of the protective principle.”⁹⁰

The Israeli court went about establishing these threatened fundamental interests by looking at the effective contacts rather than just the identity that existed between the Jewish people and the State of Israel. For the district court, the protective principle lay in “[t]he State of Israel’s ‘right to punish’ the Accused [which] derives ... from ... a specific or national source which gives the victim nation the right to try any who assault its existence.”⁹¹

The district court asked:

What is the special connection between the State of Israel and the offences attributed to the Accused, and [is] this connection . . . sufficiently close to form a foundation for Israel’s right of punishment against the Accused[?] This is no merely technical question but a wide and universal one; for the principles of international law are wide and universal principles and not articles in an express code.⁹²

The court related elements of the crime and criminal sanction: the *actus reus* and causation—the causal connection between

the crime, the victim and the offender.⁹³ The jurisdictional nexus is furthered by “linking points” with the forum:

The “linking point” between Israel and the Accused (and for that matter between Israel and any person accused of a crime against the Jewish People under this law) is striking in the “crime against the Jewish People”, a crime that postulates *an intention to exterminate the Jewish People in whole or in part*.⁹⁴

The court concluded that:

If there is *an effective link* (and *not necessarily identity*) between the State of Israel and the Jewish People, then a crime intended to exterminate the Jewish People has an obvious connection with the State of Israel.⁹⁵

The Jewish population now residing in the State of Israel, or the Jewish ‘Yishuv’ which lived in Palestine before the establishment of the State, too, is part of the Jewish people whom the accused sought . . . to exterminate.⁹⁶

With universal jurisdiction and the principle of protective jurisdiction there is a limit which must not be overstepped. Exorbitant extraterritorial jurisdiction over crimes of aliens committed abroad is unlawful. What is exorbitant depends on context and policy. Territorial communities have an expectation, as Lauterpacht observes, that “a state is entitled to expect that the exclusiveness of other states’ jurisdiction over their own territory will not result, even indirectly, in a serious menace to its existence and safety.” This “attitude of self-restraint” gives way to intervention if vital state interests are not respected.⁹⁷ The exercise of extraterritorial jurisdiction over foreigners must be reasonable and necessary. By this measure, the Jerusalem court did not overstep its jurisdictional competences under international law.

VIII. EICHMANN AND CALIFORNIA

A curious Eichmann connection with California was his adjutant Otto von Bolschwing,⁹⁸ a double agent and Cold War spy for the US, who wrote memos and reports with the objective of frightening Jews into leaving Germany by heightening their sense of personal insecurity. He devised threats to them with bureaucratic methods, such as increased taxes or denial of a passport unless they emigrated from Germany—a first phase of the war against the Jews.⁹⁹ As he himself stated in 1937: “The Jews in the entire world represent a nation which is not bound by a country or by a people but by money . . . [We sought to] purge Germany of the Jews . . . take away the sense of security from the Jews. Even though this is an illegal method, it has had

a long-lasting effect. . . . [T]he Jew has learned a lot through the pogroms of the past centuries and fears nothing as much as a hostile atmosphere which can go spontaneously against him at any time.”¹⁰⁰

Bolschwing lived in California. Naturalized in 1959, he was Vice-President of the Trans-International Computer Investment Corporation of Sacramento which went into administration in 1971. Eichmann’s capture in Argentina in 1960 alarmed Bolschwing. He sought the help of the CIA, worried he might be pursued as a collaborator and fellow conspirator. He was assured that his ties to Eichmann would not be disclosed.¹⁰¹

Bolschwing agreed to give up his citizenship in 1981, and a US Department of Justice proceeding to deport him for concealing his Nazi past ended when he died in March 1982 in a Carmichael, CA, nursing home.

IX. IMPACT ON THE UNITED STATES¹⁰²

The *Eichmann* trial afforded “a transformative moment in the life of the Jews of America.”¹⁰³ In fact, the trial facilitated integration of the Holocaust for both non-Jews and Jews. To counter Christian complicity in the Holocaust and the impression that both the Catholic and Protestant church leaders had not strongly condemned Nazi racism or propaganda, the Protestant World Council of Churches in December 1961 censured antisemitism and stated that the existing Jewish people were not responsible for Jesus’ death. Sister Rose Thering’s dissertation to the St. Louis University in 1961 on the negative portrayal of Jews and Judaism widespread in Catholic teaching materials was the basis for the American Jewish Committee’s request to the Second Vatican Council to issue an authoritative denial of the religious roots of anti-Semitism. On November 20, 1964, Vatican II condemned “hatred and persecutions of Jews, whether they arose in former or in our own days,” and in its landmark 1965 document *Nostra Aetate: Declaration on the Relation of the Church to Non-Christian Religions*, the Catholic Church condemned antisemitism and restated its teaching that Jews are not to blame for the death of Jesus.

American media made two contributions to perceptions of the *Eichmann* trial. American television applied the word “Holocaust” to Attorney-General Gideon Hauser’s use of the Hebrew word *Shoah* to encapsulate “the capital transgressions of the Law of Nations” of the Nazis.¹⁰⁴ American television also brought out a dimension not at issue in the Nuremberg trials: the persecution and the extermination of the Jews of Europe. Americans were able to perceive how unconcerned, antagonistic, and inhumane the world was to the plight of innocent defenseless individuals and their families.

X. CONCLUSION

Was justice done in Jerusalem? The Nuremberg trials dealt with the major Nazi leadership. Many principal Nazis escaped punishment either by suicide (Hitler, Goebbels, Himmler, Göring prior to execution, Ley while awaiting trial) or fleeing (Eichmann, Mengele, Rauff, Stangl, Schwammberger, Priebke, Bohne).¹⁰⁵ Eight million members of the Nazi party could not be tried. The Nuremberg trials were to have continued, but by the late 1940s relations between the Allies soured, although certain national trials were held. Since a war with the Soviets seemed a distinct possibility, resources were not allocated by either ally to tracking down surviving Nazi war criminals. This responsibility was left to the West German Government and Austria.

Israel took jurisdiction over the SS leader Adolf Eichmann. Eichmann who, subsequent to the city's vicious Jew-baiting campaign, had been involved in anti-Jewish terror after the *Anschluss* in Vienna from the Palais Albert Rothschild, devised an initial bureaucratic apparatus to force Jewish emigration from their home states of Austria and Germany. Subsequently, Eichmann affirmed in Wannsee the final phase of the decision-making process to implement the decision of the *Endlösung*, the so-called "Final Solution"—the decision to pursue genocide in the death camps.

The *Eichmann* court was conscientious in analyzing its competence to carry out jurisdiction over Eichmann as a foreigner. Properly, Israel based its jurisdiction on two primary foundations, jurisdiction based not on the place of the crime or the nationality of the criminal but upon the universality of jurisdiction for "crimes of unsurpassed gravity" and upon the threatened serious interests of Israel and its most important resource, its people.

Universal jurisdiction must be both reasonable and necessary for the court's assertion of its competence over Eichmann. The Jerusalem court's exercise of extraterritorial jurisdiction over Eichmann was not too wide in scope and its decision thus lawful under international law as a viable enhancement of the concept

of universal jurisdiction for crimes against humanity and grave breaches of human rights.

Endnotes

- 1 United States military courts conducted numerous trials and issued jurisdictional rulings involving crimes committed against non-nationals of Allied countries. *See, e.g., supra* note 3.
- 2 *People of Israel v. Eichmann*, Supreme Court of Israel, 36 I.L.R. 306 (CrimC. Judgment of May 29, 1962) [hereinafter *Eichmann Case*]; *see also* Michael A. Musmanno, *The Objections in Limine to the Eichmann Trial*, 35 TEMP. L.Q. 1, 20 (1961) ("It would be emphasizing the obvious to say that the Eichmann trial is one of the most momentous trials of history; one which will never be forgotten. . . . [It] was imperatively necessary. Its omission would have been a gaping chasm in the geography of the human spirit."). Three noteworthy landmark decisions on the Holocaust are the *Nuremberg* trials (the major war criminals' trial 1945-46, the main trial, and the subsequent (US) trials 1946-49, *inter alia* the judges' trial and the *Einsatzgruppen* trial); and the two trials which dealt specifically with the Holocaust, namely, the Jerusalem trial of Adolf Eichmann and the London civil trial of the Holocaust denier, David Irving; *Irving v. Penguin Books Limited*, Deborah E. Lipstadt, [2000] EWHC 115 (QB) (April 11, 2000), *appeal denied* [2001] EWCA Civ. 1197; (From England and Wales Court of Appeal (Civil Division) Decisions); 104 (KB) (July 20, 2001), <https://www.bailii.org>.
- 3 HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF Evil* 25, 145 (1963).
- 4 *Id.*
- 5 These councils were established by decree on September 21, 1939 (three weeks after the invasion of Poland) by the Nazis in German-occupied Poland and eastern Europe. They followed different models of governing: the council in Warsaw (the largest ghetto) applied laissez-faire capitalism, while the council in Łódź centralized its rule and controlled commerce and municipal services, including distribution of food and allocation of housing.
- 6 *See* JACOB ROBINSON, *AND THE CROOKED SHALL BE MADE STRAIGHT: THE EICHMANN TRIAL, JEWISH CATASTROPHE, AND HANNAH ARENDT'S NARRATIVE* (1965).
- 7 *See* Telford Taylor, *Large Questions in the Eichmann Case*, N.Y. TIMES, Jan. 22, 1961, at SM11; *see also* ARENDT, *supra* note 4, at 269 (citing a radio interview with Swiss philosopher Karl Jaspers, which was later published in *Der Monat*: "the verdict can be handed down only by a court of justice representing all mankind.").
- 8 *Eichmann Case*, *supra* note 3, at ¶12(d).

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- 9 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Adopted and opened for signature, ratification, and accession by General Assembly Resolution 2391 (XXIII) of 26 November 1968, in force as of November 11, 1970, https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.27_convention%20statutory%20limitations%20warcrimes.pdf.
- 10 Rome Statute of the International Criminal Court (ICC), July 17, 1998, 2187 U.N.T.S. 90, <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf> (entered into force July 1, 2002).
- 11 *Nazi and Nazi Collaborators (Punishment) Law of August 1, 1950, 5710-950*, ISRAEL, GOV'T Y.B. 5712 (1951/51), 89 (reprinted in Y.B. ON H.R. at 163 (1950)). Adolf Eichmann - TRIAL Internationaltrialinternational.org › latest-post › adolf-eichmann
- 12 *Honigmann v. Attorney General*, [1951] I.L.R. 542, 543 (CrimC T.A. 1953) (Majority decision).
- 13 The Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis, https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.2_Charter%20of%20IMT%201945.pdf.
- 14 *Equitable Maxims: An Overview*, THE BLACK LETTER (Mar. 2017), <https://theblackletter.co.uk/tag/equity-looks-to-the-substance-rather-than-the-form/>.
- 15 Hans W. Baade, *The Eichmann Trial: Some Legal Aspects*, 10 DUKE L.J. 400, 412-13 (1961) (emphasis added).
- 16 Hans Kelsen, *The Rule against Ex Post Facto Laws and the Prosecution of the Axis War Criminals*, 2 JUDGE ADVOC. J.10 (1945) (emphasis added).
- 17 *Id.* at 11 (emphasis added).
- 18 *Id.* (emphasis added).
- 19 See C.Y.M. Paulussen, *Male Captus Bene Detentus? Surrendering suspects to the International Criminal Court* (2010) (unpublished dissertation, Tilburg University) (on file with author).
- 20 *Frisbie v. Collins*, 342 U.S. 519, 522 (1952) (citing *Ker v. Illinois*, 119 U.S. 436 (1886)).
- 21 Two other ways to get a suspect before the ICC are for the suspect to be summoned to come to The Hague, avoiding the necessity of an arrest, and a suspect may appear voluntarily before the judges.
- 22 For Germany's limited trial in absentia, see STRAFPROZESSORDNUNG [StPO], [German Code of Criminal Procedure], April 7, 1987, , , at §§ 230 & 231a, http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html (official English translation).
- 23 *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-PT, Decision on Defense Motion Challenging the Exercise of Jurisdiction by the Tribunal, (Int'l Crim. Trib. for the Former Yugoslavia, October, 9 2002) [hereinafter *Nikolić*].
- 24 See Peter Westen, *Two Rules of Legality in Criminal Law*, 26 L. & PHIL. 229-305 (2007).
- 25 *Nikolić*, *supra* note 24 ¶ 107, <https://www.icty.org/x/cases/dragannikolic/tdec/en/10131553.htm>.
- 26 *Id.* at ¶ 108.
- 27 *Id.* at ¶ 70.
- 28 *Id.* at ¶ 72.
- 29 *Id.* at ¶¶ 72, 114.
- 30 Jordan J. Paust, *After Alvarez-Machain: Abduction, Standing, Denials of Justice, and Unaddressed Human Rights Claims*, 67 ST. JOHN'S L. REV. 551, 562 n.48 (1993).
- 31 *Id.* at 563-64 (emphasis added).
- 32 *Eichmann Case*, *supra* note 3, at ¶ 13 (8)(a).
- 33 *Id.*
- 34 “[T]he uniqueness of the process of extermination derived from the uniqueness of the German attitude both to the Jews and to the way in which they would get rid of them. The Germans were unique enough because, more radically than anyone else in the last several millennia, they denied the idea of a common humanity both theoretically and practically. They embodied this denial of humanity in the way in which they fused humiliation and extermination in their ridding the world of the Jews.” Avishai Margalit & Gabriel Motzkin, *The Uniqueness of the Holocaust*, 25 PHIL & PUB. AFF. 65, 83 (1996).
- 35 JOSEPH TELUSHKIN, JEWISH LITERACY, 406 (1991, 2001).
- 36 *Id.*
- 37 See CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* (1995); CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* (2002); CHERIF BASSIOUNI, *INTERNATIONAL CRIMINAL LAW CONVENTIONS AND THEIR PENAL PROVISIONS* (1997).
- 38 HUGO GROTIUS, *DE JURE BELLI AC PACIS*, bk II, ch. XXI, § IV, 527 (Francis W. Kelsey, trans. 1925).
- 39 Geneva Convention Relative to the Treatment of Prisoners of War, art. 49 (1st Geneva Convention), art. 50 (2d Geneva Convention), art. 129 (3d Geneva Convention) & art. 146 (4th Geneva Convention).
- 40 “Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, the Heads of State and Government and Heads of Delegation Attending the Meeting on 24 September 2012” G.A. Res. 67/1 (Sept. 24, 2012).
- 41 *Final Report of the International Law Commission*, [2014] 2 Y.B. Int'l L. Comm'n, ch. 6 at 91-105.
- 42 *Report of the International Law Commission*, 66th Sess. U.N. GAOR, 69th Sess., Supp. No. 10, U.N. Doc. A/69/10, at 142.
- 43 Draft Code of Crimes Against the Peace and Security of Mankind, art. 8, ¶¶ (3), (4) & (8) and art. 9, ¶ (2), *Report of the International Law Commission*, 48th Sess., U.N. GAOR, 51st Sess., Supp. No. 10, U.N. Doc. A/51/10.
- 44 HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 309-12, 329 (2d ed. 1942).
- 45 L.C. Green, *The Eichmann Case*, 23 MOD. L.R. 507, 510 n. 16 (1960).
- 46 Att'y Gen. Israel v. Eichmann , 36 I.L.R. [1968] (CrimC (J) 1961) (Israel), https://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Israel/Eichmann_Judgement_11-12-1961.pdf (Judges Moshe Landau (presiding), Benjamin Halevi, and Yitzchak Raveh) [hereinafter *Eichmann Case Dist. Ct.*].
- 47 *Id.* The United Nations War Crimes Commission observed: “The captor belligerent is not required to surrender the alleged war criminal when such surrender is equivalent to a passport to freedom. The only adequate remedy is the concurrent jurisdictional principle to which we have heretofore adverted. The

- captor belligerent may therefore surrender the alleged criminal to the state where the offence was committed, or, on the other hand, it may retain the alleged criminal for trial under its own legal processes.” LAW REPORTS OF TRIAL OF WAR CRIMINALS, 27 (Vol. VII, 1949), www.loc.gov/tr/frd/military_law/pdf/law-reports_vol-8.pdf.
- 48 *Eichmann Case*, *supra* note 3, at ¶ 12 (d).
- 49 *Id.*
- 50 Matti Friedman, *Ben-Gurion’s bombshell: ‘We’ve caught Eichmann’*, TIMES OF ISRAEL (April 8, 2013), <https://www.timesofisrael.com/ben-gurions-bombshell-weve-caught-eichmann/> (Transcript of the May 23, 1960 Meeting of the Israeli Cabinet, twelve days after the capture of Eichmann) [hereinafter *Transcript*].
- 51 Complaint by Argentina (*Eichmann Case*) Initial Proceedings, REPERTOIRE PRACTICE SC SUPP 1959-1963 Part II at 159, https://www.un.org/en/sc/repertoire/59-63/Chapter%208/59-63_08-7-Complaint%20by%20Argentina.pdf (hereinafter *Argentina Complaint*).
- 52 *Id.*
- 53 A letter to this effect is mentioned by Ben-Gurion to the Israeli Cabinet meeting of May 23, 1960, *see Transcript, supra* note 51; Eichmann’s letter reads:
- I, the undersigned, Adolf Eichmann, declare of my own free will that, since my identity has been discovered, I realize that it is futile for me to attempt to go on evading justice. I state that I am prepared to travel to Israel to stand trial in that country before a competent court. I understand that I shall receive legal aid, and I shall endeavour to give a straightforward account of the facts of my last years of service in Germany so that a true picture of the facts may be passed on to future generations. I make this declaration of my own free will. I have been promised nothing, nor have any threats been made against me. I wish at last to achieve inner peace. As I am unable to remember all the details and am confused about certain facts, I ask to be granted assistance in my endeavours to establish the truth by being given access to documents and evidence.
- See* N. Verbale, letter dated June 3, 1960 from the Embassy of Israel in Buenos Aires to the Ministry for Foreign Affairs and Religion of the Argentine Republic in U.N. Docs. S/4342; Letter dated June 21, 1960 from the Representative of Israel to the President of the U.N. Security Council, ¶ 6.
- 54 *Argentina Complaint, supra* note 52, at 160.
- 55 *Id.*
- 56 *Id.*
- 57 *Id.* at 161.
- 58 *Eichmann Case Dist. Ct., supra* note 47, at ¶ 40.
- 59 *Id.* at ¶ 41 (emphasis added).
- 60 *Id.* (emphasis added).
- 61 *Id.*
- 62 *Eichmann Case, supra* note 3 at ¶ 12.
- 63 *Id.*
- 64 *Id.* at ¶ 12 (f); *Attorney-General of the Government of Israel v. Eichmann*, 36 I.L.R. 277, 304 (Israel Sup. Ct. 1962) (English translation).
- 65 GEORGES SCELLE, *Précis de droit des gens*, in PRINCIPES ET SYSTEMATIQUE at 43, 54-56, 217 (Vol. I, 1932); *id.* at 10, 319, 450 (Vol. II, 1934).
- 66 *Eichmann Case, supra* note 3, at ¶ 14 (b). The supreme court defined crimes against humanity in the wider sense as including genocide and war crimes.
- 67 *Bernstein v. Van Heyghen Freres S.A.*, 163 F.2d 246 (2d Cir. 1947).
- 68 *Eichmann Case, supra* note 3, at ¶ 15 (b); *contra* Rome Statute of the I.C.C. art. 33 allows the defense of superior orders for war crimes bar genocide or crimes against humanity, in trials at the I.C.C.. It is, however, narrowly circumscribed, with application only to trials in that court. It is contrary to all other international instruments as regards international crimes.
- 69 *Eichmann Case, supra* note 3, at ¶ 15 (d).
- 70 *Id.*
- 71 *Id.*
- 72 *Id.* at ¶ 11 (a).
- 73 *Id.* (quoting Sheldon Glueck, *The Nuremberg Trial and Aggressive War*, 59 HARV. L.R. 396, 414 (1946)).
- 74 *Id.* (quoting HERSCH LAUTERPACHT, FUNCTIONS OF LAW IN THE INTERNATIONAL COMMUNITY (1933)).
- 75 *Eichmann Case, supra* note 3, at ¶ 12.
- 76 Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation*, 45 HARV. INT’L L.J. at 185 (2004).
- 77 S. MACEDO, *Commentary to the Princeton Principles on Universal Jurisdiction*, in UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 30 (2004).
- 78 *The Case of S.S. Lotus (France v. Turkey)*, 1927 P.C.I.J. (ser. A) No. 10, at 70, ¶ 249.
- 79 *Eichmann Case, supra* note 3, at ¶ 11 (“When international tribunals are confronted with a ‘novel case,’... [t]hey may proceed either by analogy with specific rules of international law, or by recourse to general principles of international law . . . (or) by shaping a legal rule through the process of judicial reconciliation of conflicting legal claims entitled to protection by law . . . (or) by a consideration of the larger needs of the international community.”)(citing LAUTERPACHT, FUNCTIONS OF LAW IN THE INTERNATIONAL COMMUNITY).
- 80 FUNDAMENTALS OF UNIVERSAL JURISDICTION, PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 28 (2001), https://lapa.princeton.edu/hosteddocs/unive_jur.pdf (Principle 1.1).
- 81 *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-PT, Decision on Defense Motion Challenging the Exercise of Jurisdiction by the Tribunal, at ¶¶ 46, 31 (Int’l Crim. Trib. for the Former Yugoslavia, October, 9 2002).
- 82 *See, e.g.*, The Hague Convention for the Protection of Cultural Property (1954) and its Second Protocol (1999); the Convention against Torture (1984); International Convention for the Protection of All Persons from Enforced Disappearance (2006).
- 83 *Eichmann Case, supra* note 3, at ¶ 12 (a).
- 84 *Id.*
- 85 The United Nations War Commission underscored this emphasis on the nature of the crime: “Under the doctrine of the Universality of Jurisdiction over war crimes, international law

- takes account of the crime itself rather than (a) the nationality of the victim (provided that he can be regarded as an Allied national or treated as such), or (b) the nationality of the accused (provided that he can be regarded as having identified himself with the enemy), or (c) the place of the offence.” *supra* at 43 (Citations omitted).
- 86 Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, 2002 I.C.J. Rep. at 63, ¶¶ 56, 59 (Separate Opinion of Judges Higgins, Kooijmans, Buergethal).
- 87 *Id.* at ¶¶ 51, 52.
- 88 Grotius had already observed in 1625: “It is proper also to observe that Kings and those who are possessed of sovereign power have a right to exact punishment *not only for injuries* affecting immediately themselves or their own subjects, *but for gross-violations of the law of nature and of nations, done to other states and subjects.*” HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE*, 247 (A.C. Campbell, A.M., ed. & trans. from Latin 1901) (emphasis added).
- 89 Press Release from UN General Assembly 6th Committee (October 10, 2018), <https://www.un.org/press/en/2018/gal3571.doc.htm>.
- 90 Vanni E. Treves, *Jurisdictional Aspects of the Eichmann Case*, 47 MINN. L. REV. 557, 589 (1963).
- 91 *Eichmann Case Dist. Ct.*, *supra* note 47, at ¶ 30.
- 92 *Id.* at ¶ 32
- 93 *Id.*
- 94 *Id.* at ¶ 33.
- 95 *Id.* (emphasis added).
- 96 *Id.* at ¶ 35.
- 97 Hersch Lauterpacht, *Activities by Private Persons Against Foreign States*, 22 AM. J. INT’L L. 105, 253 (1928).
- 98 See Terrence McCoy, *How U.S. intelligence agencies used 1,000 Nazis as Cold War spies — then covered it up*, WASHINGTON POST (Oct. 28, 2014), <https://www.washingtonpost.com/news/morning-mix/wp/2014/10/28/how-u-s-intelligence-agencies-used-1000-nazis-as-cold-war-spies-then-covered-it-up/>.
- 99 LUCY DAWIDOWICZ, *THE WAR AGAINST THE JEWS 1933-1945* (1986).
- 100 Judy Feiner, *Report by Otto von Bolschwing in THE OFFICE OF SPECIAL INVESTIGATIONS: STRIVING FOR ACCOUNTABILITY IN THE AFTERMATH OF THE HOLOCAUST* 259 (Mark M. Richard ed.2006).
- 101 Eric Lichtblau, *In Cold War, U.S. Spy Agencies Used 1,000 Nazis*, N.Y. TIMES (Oct. 26, 2014), <https://www.nytimes.com/2014/10/27/us/in-cold-war-us-spy-agencies-used-1000-nazis.html>.
- 102 Françoise S. Ouzan, *The Eichmann Trial and American Jewry: A Reassessment*, 19 JEWISH POL. STUD. REV. 1-2 (2007).
- 103 ARTHUR HERTZBERG, *A JEW IN AMERICA: MY LIFE AND A PEOPLE’S STRUGGLE FOR IDENTITY* 267 (2002).
- 104 Opening Statement for the United States of America by Telford Taylor (1947), <https://digitalcommons.law.uga.edu/nmt4/2/>.
- 105 All escaped to South America.

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