No. 16-499

In The
Supreme Court of the United States

JOSEPH JESNER, ET AL.,

Petitioners,

v.

ARAB BANK, PLC,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF *AMICI CURIAE* NUREMBERG SCHOLARS IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*

Amici Curiae respectfully submit this brief pursuant to Supreme Court Rule 37 in support of Petitioners.[1] *Amici* (listed in the Appendix) are respected scholars and academics representing three disciplines – history, law, and political science – who have particular knowledge of the state of international law in the immediate post-World War II period, the motivations behind the concerted actions of the victorious Allies in their capacity as occupying powers, and the jurisprudence generated by the tribunals convened in the various Allied zones of occupation, including at Nuremberg and Tokyo. Among the *Amici* are many experts who filed an *amicus curiae* brief in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013), which raised the issue of the scope of corporate liability under the Alien Tort Statute ("ATS"), but was resolved on alternative grounds with language that implies the viability of ATS suits against corporate and other juridical entities. Given the importance of the post-World War II legal proceedings in the development of international law, and the fact that litigants seek to draw inferences from this historical evidence in ATS cases involving corporate defendants, *Amici* have an interest in this Court accurately assessing the way in which the victorious Allies dealt with the Axis corporations that

[1] No counsel for any party authored this brief in whole or in part, and no such counsel or party made a monetary contribution to fund the preparation or submission of this brief. Counsel of Record for all parties were provided more than 10 days' notice and consented to the filing of this Brief of *Amici Curiae*.

committed international crimes during the War and the industrialists who ran them. Most importantly, *Amici* hope this Court comes away with an understanding that the imposition of individual criminal responsibility at Nuremberg and Tokyo was just one component of the postwar occupations, which also saw the criminalization of certain juridical entities as well as the dissolution, decartelization, and sanctioning of the worst corporate offenders.

SUMMARY OF ARGUMENT

The fact that the International Military Tribunal at Nuremberg ("IMT") did not criminally prosecute any corporations, as such, in the postwar period has been cited in support of a contention that international law does not recognize corporations as being capable of violating international law or of being held accountable for doing so. Indeed, in support of his conclusion that the ATS does not support suits against corporations, Judge Cabranes reasoned that "at the time of the Nuremberg trials, corporate liability was not recognized as a 'specific, universal, and obligatory' norm of customary international law." *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 136 (2d Cir. 2010), *aff'd*, 133 S.Ct. 1659 (2013) ("*Kiobel I*"), *quoting Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004). Subsequent Second Circuit panels have considered themselves bound by this ruling. *In re Arab Bank, PLC Alien Tort Statute Litig.*, 808 F.3d 144, 154-55 (2d Cir. 2015). In contrast, every other Circuit to consider the issue has drawn the

opposite conclusion from the Nuremberg history. *See Flomo v. Firestone Nat'l Rubber Co.*, 643 F.3d 1013, 1017 (7th Cir. 2011); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 52-53 (D.C. Cir. 2011), *aff'd in part, rev'd in part*, 527 Fed. App'x 7 (D.C. Cir. 2013).

While it is true that no corporation was criminally prosecuted in the postwar period, this observation does not categorically foreclose civil liability against corporations before U.S. domestic courts. *Amici* respectfully submit that based upon their study of the era, nothing from the postwar history precludes the conclusion that juridical persons – including, but not limited to, corporations – can violate international law and be held legally accountable for doing so under the ATS or any other applicable domestic legal framework. Indeed, as demonstrated by the scholarship generated by the *Amici* and others, there is much within the Allies' legal, diplomatic, economic, and political responses to corporate abuses committed during the Second World War to support a holding by this Court that corporations are not immune from suit under the ATS.

What this history teaches is that the diplomats and jurists of the era understood that juridical persons can violate international law and can be held legally accountable for doing so through criminal, civil or any other type of remedy depending on the operative jurisdictional framework. As revealed in the documentary record and subsequent scholarship, although the Nuremberg architects believed that imposing a regime of corporate criminal responsibility was legally available to them under international law, they ultimately chose

not to prosecute corporate entities, in part because these institutions were dealt with under different legal frameworks, in part because of shifting political winds in Europe, in part because the Allies saw the need to rebuild the peacetime German economy, and in part because the Allies were already focused on establishing another groundbreaking concept: the principle of individual criminal responsibility. Invoking this latter principle, the Allies prosecuted a range of corporate actors – industrialists, managers, and their staff – who ran the corporations that enabled and profited from the Holocaust and the Nazi program of aggressive war. The judges make plain in their reasoning and their judgments that they considered the major German corporations to have violated international law – in their corporate form – by virtue of their participation in acts of aggression, war crimes, and crimes against humanity.

While no corporation was prosecuted as such, the Allies empowered the IMT to adjudicate a form of organizational criminal liability. *Charter of the International Military Tribunal – Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, Aug. 8, 1945, arts. 9-10, 59 Stat. 1544, 82 U.N.T.S. 280 ("London Agreement"). Under this provision, the IMT indicted six organizations and convicted three. The theory was that in subsequent proceedings, any individual member of one of the criminal organizations would face a rebuttable presumption of guilt. Although some later military tribunals did not uniformly apply this degree of *res*

judicata in quite the way that had been originally envisioned given its guilt-by-association implications, little angst was expressed at the time about the legal viability of organizational criminality. The principle thus stands that the IMT did indict and convict organizations, which supports the ultimate conclusion that corporations – another type of juridical entity – can violate international law and be punished for doing so.

As these individual criminal trials were happening around war-torn Europe, the Allies were also dismantling elements of the Third Reich's military-industrial infrastructure under the authority of international law in their capacity as postwar occupying powers. Although not prosecuted criminally, corporations that utilized concentration camp inmates or Allied prisoners-of-war as slave labor in their factories; that engaged in the plunder, expropriation or spoliation of property in occupied territories; and that supplied the Nazi extermination and war machinery with poison gas and armaments did not escape sanction and were held accountable by the Allies for their rapacious business practices through a whole range of mechanisms suited to their corporate form, including dissolution, sequester, seizure, and reparations. The Allied Powers' goals were to dismantle elements of German and Japanese industry most associated with international crimes; debilitate the future war potential of a nation state that had already ruptured world order twice since the turn of the century; and create a pool of assets for the payment of reparations. All of this state

practice transpired within the framework of international law at the time.

Ultimately, what is most important for the current inquiry is not whether or not corporations were criminally punished at Nuremburg, but rather that the victorious Allies – and the judges whom they entrusted with the unenviable task of adjudicating the worst crimes known to humankind – recognized, and indeed seemed to assume, that corporations can violate international law and that they did so – appallingly and shamefully – during World War II. The Allies also understood that international law put a choice of enforcement means at their disposal – including criminal, civil, and administrative remedies – to address and redress these violations depending on their preferences and unique legal frameworks. Nothing in the Nuremberg history or precedent indicates that international law would preclude a nation from pursuing any or all of these options in the face of corporate violations of international law, including through civil suits under the ATS.

ARGUMENT

I. Corporations Were Integral to Many of the Axis Powers' International Crimes, Which the Allies Were Determined to Redress

The crimes committed by Nazi Germany were distinctive in world history in that they were perpetrated on a massive and systematic scale and required the

coordination of the state bureaucracy, military, and Nazi Party as well as a number of private industries. As noted by U.S. Brigadier General Telford Taylor in his opening statement in the case against principals of the Flick Conglomerate, the Third Reich was built on an "unholy trinity of nazism [sic], militarism, and economic imperialism." *United States v. Flick*, Opening Statement for the Prosecution, VI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 ("TWC") 31, 32 (1952) ("*Flick*"). Corporations – and the industrialists who managed them – were a key component of the Nazi regime's plan for industrial hegemony within Europe and racial purity at home. As a result, many corporations were fully "integrated with the Reich's foreign policy." Matthew Lippman, *War Crimes of German Industrialists: The "Other Schindlers"*, 9 TEMPLE INT'L & COMP. L.J. 173, 233 (1995). In the Pacific Theater, Japanese corporations were also integral to efforts to fulfill expansionist aspirations in the service of Japanese imperialism. W.G. BEASLEY, JAPANESE IMPERIALISM 1894-1945, 7-9 (1987).

Corporations were deeply involved in the commission of international crimes in World War II and they thrived economically from their conduct. For one, German and Japanese corporations exploited captive populations as slave and forced labor in the face of acute labor shortages and crushing production quotas. *See generally* Mark Spoerer & Jochen Fleischhacker, *Forced Laborers in Nazi Germany: Categories, Numbers, and Survivors*, 33 J. INTERDISC. HIST. 169 (2002).

The enslavement by Axis corporations of millions of foreign workers from occupied territory violated international humanitarian law ("IHL"), as the law of armed conflict is now known. IHL demands humane treatment from occupiers and enjoins them from forcing inhabitants to participate in military operations. *Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land*, Oct. 18, 1907, art. 52, 36 Stat. 2277, 1 Bevans 631 ("1907 Hague Convention"). Prisoners of war ("POWs") were compelled to work in armament industries, and in hazardous and abject conditions, all in violation of special rules devoted to POWs under IHL. *Convention Relative to the Treatment of Prisoners of War*, July 27, 1929, arts. 29-32, 18 Stat. 2021 (1932). In addition to providing the material means to rearm the German *Wehrmacht* (armed forces) in preparation for aggressive war, corporations also supplied the deadly toxin Zyklon B, which was used to murder millions of Jewish persons and other concentration camp inmates, and brutally mistreated individuals under their control. *Trial of Bruno Tesch and Two Others* (The Zyklon B Case), I LAW REPORTS OF TRIALS OF WAR CRIMINALS 93 (Brit. Mil. Ct., Hamburg, Germany, 1946) ("*Tesch*").

Japanese aggression solved the dual dilemmas of a dearth of indigenous raw materials and undeveloped export markets. Although the great corporate conglomerates (*zaibatsu*) did not necessarily come under the control of the Japanese imperialist government to the same degree as seen under Nazi totalitarianism,

corporations did profit mightily from Japanese militarism, particularly as Japan expanded throughout Asia in an effort to seize crucial natural resources and guarantee economic security by force. WYATT WELLS, ANTITRUST AND THE FORMATION OF THE POSTWAR WORLD 141 (Columbia Univ. Press 2002). Japanese corporations utilized forced labor as well, notably from Korea and China. LAW LIBRARY OF CONGRESS, JAPAN: WWII POW AND FORCED LABOR COMPENSATION CASES (Sept. 2008).

The German economy was oriented to serve the political and social goals of National Socialism, including usufructary rights (*Nutznießer*) to commandeer private property at the service of the state. L.M. Stallbaumer, *Between Coercion and Cooperation: The Flick Concern in Nazi Germany Before the War*, *in* 17 ESSAYS IN ECON. AND BUS. HIST. 63, 63 (1999). In an effort to acquire raw materials necessary for the war effort and advance its racialist agenda, the Third Reich committed, encouraged, enabled, and at times (it was argued) forced corporations to commit a range of property crimes at home and in the wake of each act of aggression: everything from forced sales at artificially depressed prices; to looting, spoliation, and plunder; to outright expropriation of Jewish-owned businesses, an odious practice known as "aryanization." Corporate seizures of private property in occupied territory violated long-standing norms of IHL. 1907 Hague Convention, *supra*, at arts. 46-47, 53 (protecting private property and prohibiting pillage).

Even before the war had ended, the Allied governments pledged to bring the perpetrators of these

crimes to justice. This resolve found expression in a tripartite "Declaration of Atrocities," signed by President Franklin D. Roosevelt, Prime Minister Winston Churchill, and Premier Joseph Stalin. Statement of Atrocities, Moscow, Nov. 1, 1943, 3 Bevans 816, 834 Dep't St. Bull. (Nov. 6, 1943) ("Moscow Declaration"). The Moscow Declaration envisioned a two-tiered prosecutorial strategy: war criminals whose crimes had "no particular geographical localisation" would be punished by joint Allied action whereas others who were responsible for, or took "a consenting part in," more localized atrocities would be tried in occupation zones. *Id*. Other contemporaneous pronouncements laid the plans to deal with those corporations that had been involved in acts of aggression and atrocities. Following the tripartite Yalta Conference, the United Kingdom, the United States, and the Union of Soviet Socialist Republics ("U.S.S.R.") announced their coordinated intentions to "[e]liminate or control all German industry that could be used for military production; bring all war criminals to justice and swift punishment and exact reparation in kind for the destruction wrought by Germans." *Crimea Conference Communiqué*, February 3-11, 1945, *in* I ENACTMENTS AND APPROVED PAPERS OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE 1 ("ENACTMENTS").

The Allies established the IMT by agreement among the four victorious powers: France, the U.S.S.R., the United Kingdom, and the United States. London Agreement, *supra*. By contrast, the Tokyo Tribunal was technically established by a special proclamation

issued by the Supreme Allied Commander of the Far East, U.S. General Douglas MacArthur, although with the acquiescence of the other Allies. *Charter of the International Military Tribunal for the Far East*, Jan. 19, 1946, T.I.A.S. No. 1589, 4 Bevans 20 (as amended Apr. 26, 1946, 4 Bevans 27). Even as these tribunals were under construction, a member of the French delegation urged that "[s]ome business people should be included in the list of major war criminals, and that the French prosecutor would present a list of bankers, et cetera, in Germany." *Document 30: Minutes of Conference Session of July 16, 1945*, REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS 246, 253 (1945) ("JACKSON REPORT"). Judicial proceedings before these international institutions were followed by hundreds of trials before military and civilian tribunals in the various zones of occupation throughout Europe and the Pacific Theater under legislation jointly enacted by the Allies that incorporated the international crimes adjudicated by the IMT and the Tokyo Tribunal.

II. The Allies Considered, but Ultimately Did not Pursue, Corporate Criminal Liability in Favor of Individual Criminal Liability

The centerpiece of the Nuremberg and Tokyo trials – and the most far-reaching legal innovation of the era – was the instantiation in international law of the concept of individual criminal responsibility. Prior to this point, orthodox international law had largely been the province of states in their relations with each other.

But see Jordan Paust, *Nonstate Actor Participation in International Law and the Pretense of Exclusion*, 51 VA. J. INT'L L. 977 (2011) (identifying instances in which international law has recognized rights and duties of non-state actors). So, when the IMT famously wrote "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced," their philosophical foil was the idea that only states – *vice* individuals – had rights and obligations under international law. *United States v. Goering*, 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 171, 223 (Int'l Mil. Trib. 1946) ("Nuremberg Judgment").

As the Nuremberg trial was being convened, the Allies did consider the establishment of a regime of corporate criminal liability. Jonathan Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094, 1150-55 (2009). Abraham L. Pomerantz, U.S. Deputy Chief Counsel at Nuremberg in charge of the industrialist cases, floated a proposal dedicated to the concept of prosecuting corporations *qua* corporations. *Id*. at 1247-48 (*reprinting* Memorandum to General Telford Taylor from A.L. Pomerantz, "*Feasibility and Propriety of Indicting I.G. Farben and Krupp as Corporate Entities*" (August 27, 1946)). Nonetheless, for a range of reasons having more to do with pragmatics and the shifting priorities of the Allies, the proposal was not pursued. As Bush has

explained: "Corporate and associational criminal liability was seriously explored, and was never rejected as legally unsound. These theories of liability were not adopted, but not because of any legal determination that it was impermissible under international law." Bush, 109 COLUM. L. REV. at 1239. Rather, the decision not to pursue corporate criminal liability reflected the preferences of the occupation governments to quickly dismantle the most culpable German conglomerates without devastating the postwar German economy. To be sure, "[c]orporate or entity liability would have been novel, but no more so than other features of postwar accountability, starting with the idea of an international criminal trial, liability for a head of state, or for crimes against peace, crimes against humanity, or genocide." *Id*. In any case, as the criminal tribunals were being constituted, the Allies were also implementing a program of decartelization and dissolution, so the worst corporate offenders would effectively cease to exist. Given the scarce judicial resources of the time, it was logical to focus attention on individual industrialists who profited personally from the War and may have conceivably gone on to lead other conglomerates if not sanctioned. Nothing about the history of this era, or this decision to forgo corporate criminal accountability, suggests that the Allies considered corporate criminality to be legally foreclosed by international law.

As a result of these various decisions, no corporate entities as such were ultimately prosecuted, although other types of organizations were declared criminal by

the IMT, as discussed in Section IV below. The Allies, in their capacity as occupying powers, dealt with culpable corporations through other means available under international law, as discussed in Section V below. The Allies did prosecute individuals in the financial and industrial spheres who were deemed most responsible for German aggression and atrocities in Europe. As set out below, although there were individuals in the dock in these trials, the judges made clear in their reasoning and judgments that that they viewed corporations as being capable of breaching international law, including multilateral law-of-war treaties and customary international law.

III. The Tribunals Placed Corporate Responsibility Front and Center as Dozens of Industrialists Were Prosecuted for International Crimes Committed By, and Through, Corporate Entities

Most of these cases occurred in tribunals convened in the Allies' respective zones of occupation under legislation adopted by the quadripartite Allied Control Council, which was composed of the commanders-in-chief of the Allied armed forces and exercised executive and legislative functions. *See* Eli E. Nobleman, *Quadripartite Military Government Organization and Operations in Germany*, 41 AM. J. INT'L L. 650, 651, 654 (1947). The Allies constituted the Control Council to manage the belligerent occupation, give effect to the Moscow Declaration and the London Agreement, and

"establish a uniform basis in Germany for the prosecution of war criminals and other similar offenders" in the various occupation zones. Control Council Law No. 10, *Punishment of Persons Guilty of War Crimes, Crimes Against the Peace and Crimes Against Humanity* (Dec. 20, 1945), *in* I ENACTMENTS 306 ("CCL10").

The United States took the lead on the industrialist cases under CCL10, an international law instrument that allowed for the prosecution of the same violations of international law adjudicated by the IMT. CCL10, *supra*, at arts. II(1)(b)-(c). Prosecutors indicted individuals for abuses committed by, and through, corporations. Acts of slave and forced labor were charged as the crimes against humanity of deportation and enslavement and the war crime of deporting members of the civilian population from occupied territories into slave labor. The Allies charged all manner of property crimes – systemic plunder and spoliation – as war crimes when committed in occupied territory and as crimes against humanity when committed on persecutory grounds against protected groups. The prohibition of plunder under international law was applied to both tangible property and intangible property, such as shares of stock. *United States v. Krauch*, Decision and Judgment of the Tribunal, VIII TWC 1081, 1134 (1951) ("*Farben*"). When considering these various charges, the tribunals noted that international law is binding on private actors as well as government officials and military personnel, and that criminal liability can attach regardless of a defendant's rank, status, or character. *United States v. Krupp*, Opinion and Judgment

of Military Tribunal III, IX TWC 1327, 1374-76, 1374-76 (1950) ("*Krupp*"); *United States v. Flick*, IV TWC 1187-1223, 1192 (1947) ("*Flick*") ("International law, as such, binds every citizen just as does ordinary municipal law. Acts adjudged criminal when done by an officer of the government are criminal also when done by a private individual.").

Although the industrialist cases all involved individual defendants, the judgments reveal that the judges considered corporations themselves to be actors capable of violating international law and equally responsible for the harms that result. Indeed, one Tribunal noted that its task was to determine how to translate this *corporate* criminality under international law into *individual* criminal responsibility with respect to the defendants in the dock: "One cannot condone the activities of Farben in the field of Spoliation. If not actually marching with the Wehrmacht, Farben at least was not far behind. But translating the criminal responsibility to personal and individual criminal acts is another matter." *Farben*, VIII TWC at 1153. The judges situated corporate culpability within corporate policies and knowledge of abuses and then identified "some positive conduct" on the part of the individual defendant that "constitute[d] ordering, approving, authorizing, or joining in the execution of a policy or act which is criminal in character." *Id*. at 1157. In several cases, the individual is conceptualized as an accomplice to a corporate principal.

For example, with regard to I.G. Farben's activities in occupied territory, the Tribunal found that "the proof

establishes beyond a reasonable doubt that offences against property as defined in Control Council Law No. 10 were committed by Farben, and that these offences were connected with, and an inextricable part of the German policy for occupied countries." *Farben*, VIII TWC at 1140. Indeed, the *Farben* Tribunal found no difficulty in determining that a company was legally capable of breaching the 1907 Hague Convention:

> Where private individuals, including *juristic persons*, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action, not being expressly justified by any applicable provision of the Hague Regulations, is in violation of international law. . . . Similarly, where a private individual or a *juristic person* becomes a party to unlawful confiscation of public or private property by planning and executing a well-defined design to acquire such property permanently, acquisition under such circumstances subsequent to the confiscation constitutes conduct in violation of the Hague Regulations.

Id. at 1132-33 (emphasis added); *Krupp*, IX TWC at 1345, 1352-53 ("the confiscation of the . . . plant based upon German inspired anti-Jewish laws and its subsequent detention by the Krupp firm constitute a violation of Article 43 of the Hague Regulations"). The *Farben* Tribunal observed that, "[t]he action of Farben and its representatives . . . cannot be differentiated from acts of plunder or pillage committed by officers, soldiers, or public officials of the German Reich. . . .

Such action on the part of Farben constituted a violation of the Hague Regulations. It was in violation of the rights of private property, protected by the laws and customs of war. . . ." *Farben*, VIII TWC at 1140. The Tribunal found that Farben was not motivated by a desire to maintain the German occupation army or protect the indigenous economy of German occupied territory, as was argued in defense, but rather to enrich its enterprise. *Id*. at 1140-41.

The judges recognized the major role played by corporate policies in perpetuating abuses. In rendering its *Krupp* opinion, the Tribunal repeatedly referred to the collective intent of the firm: "the initiative for the acquisition of properties, machines, and materials in the occupied countries was that of the Krupp firm and . . . it utilized Reich government and Reich agencies whenever necessary to accomplish its purpose. . . ." *Krupp*, IX TWC at 1372; *see also id*. at 1440 ("the Krupp firm . . . had manifested not only its willingness but its ardent desire to employ forced labor."). In its discussion of the use by Krupp of compulsory labor – including POWs, foreign civilians, and concentration camp inmates – the Tribunal catalogued mistreatment at Krupp-owned factories where malnourished workers "were beaten as part of their daily routine. The beatings took place in the Krupp plants and in the camps. The victims were beaten by the camp leaders . . . and by ordinary workers. Weapons with which they were beaten were supplied by the Krupp firm." *Id*. at 1409. In this way, the judges considered the responsibility of the corporation *qua* corporation, even while

they could only ascribe individual criminal liability by virtue of the terms of their constitutive instrument.

Meanwhile, other Allies launched similar efforts in their zones of occupation. A British military court, for example, prosecuted Bruno Tesch and two colleagues from the firm of Tesch & Stabenow, a chemical manufacturer and a supplier of Zyklon B poison gas to Nazi concentration camps. *Tesch*, *supra*, at 93-94. The prosecutor brought war crimes charges under a British Royal Warrant alleging that the defendants supplied ever-increasing quantities of poison gas to the Nazis for the purpose of exterminating interned Allied nationals (although no British subjects were among the victims). *Id*. at 93, 102. The evidence revealed that the firm was aware of, and tried to cover up, the purpose to which its toxic product was being put. *Id*. at 94-96. For their part, the French tried individuals associated with the Roechling Company, which had been involved in the expropriation of French assets. Although acquitted of crimes against the peace, the more senior defendants were convicted of plunder and spoliation in Alsace Lorraine, and Hermann Roechling himself was convicted of deporting workers from occupied territory and consigning them to forced labor alongside prisoners of war in German iron and steel firms. *See The Roechling Case*, Judgment (Superior Military Government Court of the French Occupation Zone Occupation in Germany), *reprinted in* XIV TWC 1097 (1951).

Although trials of industrialists were not as central to the postwar prosecutions in the Pacific Theater, the British did prosecute Japanese civilian officials of

the Nippon Mining Company on the basis of allegations that they had forced British POWs to dig for copper in the Kinkaseki Mine in Taiwan. British War Crimes Court Number 5 in Hong Kong found eight of nine defendants – ranging from production managers to foremen – guilty as charged. In so doing, the court rejected defendants' argument that the Japanese military was responsible for the treatment of POWs. *See* Suzannah Linton, *Rediscovering Hong Kong's War Crimes Trials*, 13 MELB. J. OF INT'L L. 284, 328-31 (2012).

IV. Other Juridical Entities Were Criminally Prosecuted at Nuremberg

Although no corporations were criminally prosecuted in the postwar era, the Allies did implement a form of criminal organizational liability that involved both the dissolution of organizations that were essential to the Third Reich accompanied by judicial declarations of their criminality. Under phase one of a plan conceived by Colonel Murray C. Bernays, a lawyer from the U.S. Department of War, the Prosecution would indict and seek to convict implicated organizations – such as the Gestapo – before the IMT. In phase two, members of those organizations would be subject to arrest and prosecution before national courts based solely upon their membership in a convicted organization. As Col. Bernays envisioned it, once the organizational criminality was established, "[p]roof of membership, without more, would establish guilt of participation in the . . . conspiracy." *See*

BRADLEY F. SMITH, THE AMERICAN ROAD TO NUREMBERG, THE DOCUMENTARY RECORD 1944-1945, Document 16 (1982); Minutes of Conference Session of July 2, 1945, JACKSON REPORT, *supra*, at 129 (recounting deliberations over organizational liability). The IMT's declaratory judgment would thus be *res judicata* in individual proceedings against the organizations' members. TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 36, 281-83 (1992). The burden would then shift to the defendants to prove either that their membership was involuntary or that they did not know the organization's criminal object and purpose. The penalty would be based upon the degree of complicity with the actions of the indicted organization. *Id*. at 42. Although some resistance was expressed to the idea of group criminality, pragmatism eventually prevailed in light of concerns that the organizations' members would go free in the absence of specific evidence of personal wrongdoing. JACKSON REPORT, *supra*, at 133. The Nuremberg Charter thus contained many features of the original United States two-phased proposal. London Agreement, *supra*, at arts. 9-10.

Before the IMT, the United States took the lead on presenting the case against the six organizations indicted for crimes against the peace, crimes against humanity, war crimes, and criminal conspiracy. As a result, in addition to the 22 individuals sitting in the dock, the IMT prosecuted the *Schultzstaffeln* ("SS"), the *Sicherheitsdienst* ("SD") and the *Geheime Staatspolizei* ("Gestapo") (two units within the Reich Main Security Office), the *Sturmabteilungen* ("SA"),

the Reich Cabinet, the Leadership Corps of the Nazi Party, and the General Staff and High Command of the German Military. By the end of the war, the SS had evolved to encompass military, police, and security functions – an empire of oppression ruled by Heinrich Himmler – and orchestrated campaigns of persecution, oppression, and extermination in Germany and beyond. The SD originated as the intelligence arm of the SS with a particular focus on rooting out resistance within the Nazi Party ranks; it later became a full-time security service. RAUL HILBERG, THE DESTRUCTION OF THE EUROPEAN JEWS 70-71, 100-03 (Rev. ed. 1985). The SA (usually translated as "Stormtroopers") was a Nazi Party security formation that was charged with protecting Nazi meetings and generally terrorizing anyone who opposed Adolf Hitler. In the 1930s, German industrialists and bankers, among others, provided substantial financial support to the SS, particularly through the "Circle of Friends of Heinrich Himmler." *Flick*, *supra*, at 1217-20.

Ultimately, the Tribunal declared three of the indicted organizations to be criminal: the Leadership Corps of the Nazi Party, the Gestapo/SD, and the SS. Nuremberg Judgment, *supra*, at 505, 511, 516-17. The Reich Cabinet was acquitted because it was a small group of senior personnel who could be prosecuted individually. Nuremberg Judgment, *supra*, at 520. With respect to the General Staff/High Command, the Tribunal determined that it was an instrumentality of the state rather than a membership organization or institutional entity. *Id*. at 522. The Tribunal acquitted the

SA because its criminal actions fell outside the temporal jurisdiction of the IMT. *Id*. at 519.

On the authority of CCL10, which served as the basis for prosecutions of lesser defendants in occupation courts throughout Germany and penalized "membership in . . . a criminal group or organization declared criminal" by the IMT, hundreds of trials went forward in occupation courts against members of the groups declared criminal at Nuremberg. CCL10, *supra*, Article II(1)(d). The judges revealed themselves to be somewhat uncomfortable with the task at hand. They never expressed any concern about the legality *vel non* of indicting a juridical entity; rather, they were clearly troubled by the guilt-by-association implications of phase two of Bernays's process. Accordingly, in the subsequent proceedings, some prosecutors were required to make an independent showing of knowledge on the part of the individual defendant of the criminal purpose of the organization. This knowledge, however, could be presumed given the notoriety of the organization and the status or rank of the defendant. By way of example, Josef Altstötter, a Ministry of Justice official, was convicted only under Count IV – membership in a criminal organization. *See United States v. Josef Altstötter & Others*, Opinion and Judgment, III TWC 954, 1176-77 (1951) ("the activities of the SS and the crimes which it committed . . . are of so wide a scope that no person of the defendant's intelligence, and one who had achieved [his] rank . . . , could have been unaware of its illegal activities"). Although approach largely nullified the goal of a streamlined process for the

subsequent trials, it did not impugn or dislodge the earlier findings of organizational criminality.

The criminal proceedings against the organizations most associated with the Third Reich under CCL10 reveal that the Nuremberg jurists believed that juridical persons, as such, could be legally culpable through theories of organizational criminal liability. To be sure, most of the indicted organizations all had a "political" or "security" quality to them, and the High Command and Gestapo were arms of the Third Reich. The Nazi Party leadership, on the other hand, like the Party's paramilitary arm, the SA, was at least in principle the leadership echelon of a private political organization. Although the Nazi Party was legally recognized as the only political party in the Third Reich (and became intertwined in practice through the unified leadership structure of party and state under Hitler), it remained a private entity. There is nothing to indicate that international law at the time made what would have been an exceedingly fine distinction between private entities that are political or security-oriented versus ones that have an economic focus.

Furthermore, although the effect of declaring an organization to be criminal did facilitate the prosecution of individuals who were members of the organization, this was not the sole aim. The point of criminalizing the organization was also to protect the state and society against the threat posed by the existence of such organizations and to capture the expressive function of the criminal law. JACKSON REPORT, *supra*, at 131. The impact of, and message conveyed by,

criminalizing these Nazi-era organizations could not be achieved by simply prosecuting individual members.

V. The Allies Dealt With Corporations Deemed Responsible for International Crimes Through Other Legal Means During the Occupation

A. Corporate Entities Most Associated with Axis Acts of Aggression and Atrocities Were Dissolved, Fined, or Otherwise Neutralized

Although the World War II Allies focused their prosecutorial energies on corporate officials and criminal organizations, corporations that stood accused of the commission of international crimes did not escape censure. Exercising their international law powers as occupiers in the postwar period, the Allies subjected culpable corporations to an array of corrective measures under the authority of multilateral legal instruments. Some firms were dissolved or dismantled (subjected to "the corporate death penalty," *Doe*, 654 F.3d at 52); some had their assets sequestered, seized, and liquidated; and still others were subject to fines, forfeiture, and the exaction of reparations. *See* 1907 Hague Convention, *supra*, at art. 53 (allowing occupying powers to take possession of property that may be used for military operations, "even though belonging to Companies [sic] or to private purposes"). These efforts reflected multiple objectives: trying to eliminate excessive concentrations of economic power, prevent yet another German rearmament, inhibit any residual war

potential, and eliminate Nazi instrumentalities of aggression and repression.[2]

Following Germany's unconditional surrender on May 7, 1945, treaties among the Allies dedicated to managing all manner of issues during the aftermath of the War and the ensuing occupation put this process of corporate accountability in motion. The tripartite Potsdam Agreement – which outlined a coordinated set of actions to dismantle the Third Reich – laid the groundwork for the so-called "de-program" whereby occupied Germany would be subjected to demilitarization, denazification, decartelization, and democratization. *Protocol of the Proceedings of the Berlin Conference*, U.S.-U.K.-U.S.S.R., Aug. 2, 1945, 3 Bevans 1207, 1210 ("Potsdam Agreement"). Given the perceived link between cartelization among industrial firms and the rise of National Socialism, the Potsdam Agreement memorialized Allied intentions to bring about "the complete disarmament and demilitarization of Germany and the elimination or control of all German industry that could be used for military production." *Id*. at II.3.i, 3 Bevans at 1210. It further declared that "the German economy shall be decentralized for the purpose of eliminating the present excessive concentration of economic power as exemplified in particular by

[2] Events in the Pacific Theater transpired somewhat differently. There, some viewed Japanese businesses as a "logical counterweight to militarism"; others insisted that Japanese businesses participated in, and benefited from, Japanese aggression on par with their German counterparts. WELLS, *supra*, at 140-1. Similar dissolutions and reorganizations occurred in Japan with respect to the *zaibatsu*.

cartels, syndicates, trusts and other monopolistic arrangements." *Id*. at II.12, 3 Bevans at 1212. The dismantling and liquidation of Germany's industrial assets – public and private – was to underwrite reparations for the harms caused. *Id*. at III, 3 Bevans at 1213-14. This decartelization effort reached U.S. shores as well; once the war was over, the Department of Justice brought antitrust actions against U.S. firms with ties to German conglomerates, a move that marked the emergence of U.S. extraterritorial regulation. TONYA L. PUTNAM, COURTS WITHOUT BORDERS: LAW, POLITICS, AND U.S. EXTRATERRITORIALITY 117 (2016) (citing *U.S. v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945)).

By way of example, Control Council Law No. 43 prohibited the manufacture of specific war materials in order to prevent a third German rearmament. Control Council Law No. 43, *Prohibition of the Manufacture, Import, Export, Transport and Storage of War Materials* (Dec. 20, 1946), *in* V ENACTMENTS 194. Any legal entity found to be in breach of these manufacturing restrictions could be criminally prosecuted before occupation courts: "Any organization violating, or attempting to violate any of the provisions of this law or of any regulations hereunder shall be liable to prosecution before a Military Government Court and upon conviction shall be dissolved and its property confiscated by order of the Court." *Id*. at Article VI(2). Control Council Law No. 5 envisioned the seizure of all German assets abroad "with the intention thereby of promoting international peace and collective security."

Article X(a) defined "persons" broadly to include corporations: "the term person shall include any natural person or collective person or any juridical person or entity under public or private law having legal capacity to acquire, use, control or dispose of property or interests therein." Control Council Law No. 5, *Vesting and Marshalling of German External Assets* (Oct. 30, 1945), *in* I ENACTMENTS 176.

Many German companies were subject to dissolution, or the "corporate death penalty." Control Council Directive No. 39 created "a concrete plan for the systematic liquidation of [German] war potential." Control Council Directive No. 39, *Liquidation of German War and Industrial Potential* (Oct. 2, 1946), *in* V ENACTMENTS 1. Pursuant to this Directive, factories were seized, destroyed, liquidated for reparations, or converted to exclusively peacetime use. Another enactment noted that the Allies would "not allow the restoration of a pattern of ownership in these industries which would constitute excessive concentration of economic power and will not permit the return to positions of ownership and control of those persons who have been found, or may be found, to have furthered the aggressive designs of the National Socialist Party." United Kingdom and United States Military Government Law No. 75, *Reorganization of German Coal and Iron and Steel Industries* (Nov. 10, 1948), 19 Dep't St. Bull. 704 (1948); replaced by Allied High Commission Law No. 27, *Reorganization of the German Coal and Steel Industries* (May 16, 1950), 20 Official Gazette of the Allied High Commission for Germany 299 (1950)

(liquidating and reorganizing enterprises "with a view to the elimination of excessive concentrations of economic power which constitute a threat to international peace."). The occupation powers also set up a Military Security Board "to advise on policies related to the prevention of possible future aggression" and then later an International Authority for the Ruhr to create "an instrument of international control over the West German heavy industry." This legislation would outlast Allied occupation and become a precursor to the European common market and, ultimately, the European Union. M.G., *The West German Coal and Steel Industries Since the War*, 8 THE WORLD TODAY 111, 116 (1952). Similar actions were taken against banks and insurance companies. *See* Control Council Law No. 57, *Dissolution and Liquidation of Insurance Companies Connected with the German Labour Front* (Aug. 30, 1947), *in* VIII ENACTMENTS 1.

Other agreements and occupation enactments abolished the German military forces, the Nazi Party, and a number of related organizations and authorized the confiscation of their property. *Agreement Between the Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic on Certain Additional Requirements to be Imposed on Germany*, Sept. 20, 1945, art. 1, 3 Bevans 1254; Control Council Law No. 2, *Providing for the Termination and Liquidation of the Nazi Organization*, Articles I and II (Oct. 10, 1945), I ENACTMENTS 131. Pursuant to this latter pronouncement, the six

organizations indicated by the IMT had been dissolved by the time they were declared criminal, attesting to the added significance of those penal proceedings.

In addition to criminal prosecutions of individuals and these corporate penalties, the Allies instituted a denazification program proposed by the United States. *See* Elmer Plischke, *Denazification Law and Procedure*, 41 AM. J. INT'L L. 807 (1947). The Potsdam Agreement required that "[a]ll members of the Nazi Party who have been more than nominal participants in its activities and all other persons hostile to Allied purposes be removed from public and semi-public office, and from positions or responsibility in important private undertakings." Potsdam Agreement, *supra*, at II.A.6. Industrialists were not exempt. Accordingly, it was decreed that: "[i]t shall be unlawful for any business enterprise to employ any member of the Nazi party or its affiliate organizations in any supervisory or managerial capacity, or otherwise than in ordinary labor." Allied Military Government, U.S. Zone, Law No. 8, *Prohibition of Employment of Members of Nazi Party in Positions in Business Other than Ordinary Labor and for Other Purposes*, Military Government Gazette (Sept. 26, 1945). Millions of individuals who were not criminally prosecuted were subjected to various forms of lustration. Plischke, 41 AM. J. INT'L L. at 826. To a certain extent, the denazification program replaced the planned trials of members of the convicted organizations. JACKSON REPORT, *supra*, at VII.

All told, these various actions and outcomes reflect the fact that the Allies viewed juridical entities as being capable of violating international law and their dissolution or neutralization as an essential component of the postwar agenda to prevent Germany from again threatening world order. Throughout this process, the Allies invoked international law to judge corporate behavior and devise solutions to promote future international peace and security. *Flomo*, 643 F.3d at 1017 ("At the end of the Second World War the allied powers dissolved German corporations that had assisted the Nazi war effort . . . and did so on the authority of customary international law.").

B. The Fate of I.G. Farben – Perhaps the Most Notorious of the German Corporations – Reveals the Multi-Faceted Character of Postwar Corporate Accountability

The postwar fate of I.G. Farben is instructive of the way in which the Allies invoked international law to address corporate malfeasance. *Interessengemeinschaft Farbenindustrie Aktiengesellschaft* ("I.G. Farben") was a major German chemical and pharmaceutical manufacturer – the world's largest at the time – whose productive capacity was crucial to the Reich. During the war, it profited royally from a system of slave and forced labor in its factories (including a factory it built adjacent to Auschwitz concentration camp) and confiscated property in German-occupied territory. Alberto L. Zuppi, *Slave Labor in Nuremberg's I.G. Farben Case: The Lonely Voice of Paul M. Hebert*, 66 LA. L.

REV. 495, 502 (2006). Twenty-three members of the company's supervisory board (*Vorstand*) and several executives were indicted for "acting through the instrumentality of Farben" to commit crimes against the peace, crimes against humanity, and war crimes. Some were also charged with membership in the SS. *Farben*, Indictment, VII TWC at 10, 59. At the time of the industrialists' trials, I.G. Farben itself had already suffered a corporate death under Control Council Law No. 9, which dissolved the company and liquidated or redistributed its assets with the goal of ensuring that "Germany will never again threaten her neighbors or the peace of the world, and taking into consideration that I.G. Farbenindustrie knowingly and prominently engaged in building up and maintaining the German war potential." Control Council Law No. 9, *Providing for the Seizure of Property Owned by I.G. Farbenindustrie and the Control Thereof* (Nov. 30, 1945), *in* I ENACTMENTS 225. Factories used exclusively for war-making purposes were to be destroyed; others were seized for the purpose of paying damages. *Id*. at Article III. After the War in fact, the I.G. Farben headquarters in Frankfurt am Main was taken over by the Supreme Allied Command.

As I.G. Farben was being liquidated in 1950, it issued a call to creditors as was required under German law. This circular came to the attention of one Norbert Wollheim, a survivor of the forced labor program at Auschwitz, who subsequently sued Farben in Germany. Joachim Rumpf, *Norbert Wollheim's Lawsuit against I.G. Farbenindustrie AG i.L.*, J.W. Goethe

Universität/Fritz Bauer Institut, Frankfurt am Main (2010). Representatives of the company unsuccessfully attempted to place all blame for Wollheim's treatment on the SS, who ran the camp. The lower court ordered Farben to pay damages to Wollheim, who by this point had settled in the United States, for his pain and suffering. *Decision in Wollheim v. I.G. Farben in Liquidation*, Frankfurt District Court, June 10, 1953, court file no. 2/3/0406/51. Another newly naturalized U.S. citizen, Rudolf Wachsmann, had also sued I.G. Farben, this time in the American court of the Allied High Commission in Mannheim, which had been set up to decide complaints against U.S. military personnel stationed in occupied Germany. In 1954, that case quietly settled. Rumpf, *supra*, at 15.

While an appeal was pending in the Wollheim matter, negotiations between representatives of the Allies, the U.S. State Department, a consortium of victims' advocates, the I.G. Farben supervisory board, and the German Government succeeded in generating a settlement fund to compensate forced laborers from I.G. Farben's residual funds. These suits helped to inspire further negotiations with Jewish organizations to establish a larger claims program involving other industrial companies, Swiss banks, and other corporate entities implicated in the exploitation of forced labor and other abuses as discussed below. *See* BENJAMIN B. FERENCZ, LESS THAN SLAVES: JEWISH FORCED LABOR AND THE QUEST FOR COMPENSATION 34-61 (First Indiana Univ. Press 2002).

The case of I.G. Farben was somewhat unique given the company's size and the full scope of its criminality. It cannot be gainsaid that other accountability efforts against the Axis corporations and the industrialists who ran them were less far-reaching. Some individual industrialists were fully or partially acquitted; others received relatively light sentences and were eventually rehabilitated. Many of the impugned corporations were allowed to reconstitute themselves. What is important for present purposes, however, is that these reversals of fortune were not due to second thoughts about the culpability of these corporations or their agents under international law, or about the international legal authority to dissolve or prosecute them in the first place. Rather, as the political winds shifted direction and the Cold War chill began to set in, Western Powers recognized the value of a strong West Germany as a buffer against the U.S.S.R., an erstwhile ally turned adversary. Likewise, Japan was allowed to reindustrialize as a bulwark against the rise of communist influence in Asia. Furthermore, time and resources were limited. These geopolitical and pragmatic realities do not undermine the international law authorities invoked by the Allies in dealing with culpable corporations.

VI. The Allies Recognized that Victims Had Legal Claims Against Corporations

These postwar prosecutions and corporate dissolutions are not the end of the story. The Allies contemplated that entities of the Third Reich might be liable

to pay damages to their victims. In 1946, eighteen nations entered into a treaty on reparations that permitted signatories to obtain a percentage of the total assets seized to serve as reparations for war-related damages. The reparations were to cover "all its claims and those of its nationals against the former German Government and its Agencies, of a governmental or private nature, arising out of the war." *Agreement on Reparation from Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold*, Jan. 14. 1946, art. 2(A), 61 Stat. 3157, 555 U.N.T.S. 69 ("Paris Reparations Treaty"). However, before the Paris Reparations Treaty could be fully implemented, a controversy arose between the Western Powers and U.S.S.R. Fearing that the seizure and dismantling of German industrial assets would undermine efforts to rebuild the German economy, the Western Powers discontinued the reparations program in May of 1946. In 1953, they signed the London Debt Agreement which, among other things, deferred reparations claims – including by individuals – until a final peace could be reached. *Agreement on German External Debts*, Feb. 27, 1953, 4 U.S.T. 443, 333 U.N.T.S. 3 ("London Debt Agreement").

Various German courts have since found that the language of Article 5(2), particularly the reference to "agencies of the Reich," includes claims under international and domestic law brought by slave and forced laborers against private corporate defendants. *See Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 454 (D.N.J. 1999) ("Specifically, German courts have held

that, pursuant to Article 5(2) of the London Debt Agreement, private corporations that utilized unpaid labor during World War II were entitled to the same deferral defense as the German government.") (citing German cases). Article 5(2) suggests that the international community in 1953 recognized that WWII victims of international law violations had viable claims against private corporations. *See Iwanowa*, 67 F. Supp. 2d at 454 n.38 ("The [German] Supreme Court found that . . . its drafters intended Article 5(2) to protect not only the German government, but also the F.R.G.'s industry and currency from forced labor claims.").

Peace officially returned to Europe in 1990 with the ratification of the Two-Plus-Four Treaty between the Federal Republic of Germany and the German Democratic Republic on one side and the United States, the United Kingdom, France, and the U.S.S.R. on the other. *Treaty on the Final Settlement with Respect to Germany*, Sept. 12, 1990, 1696 U.N.T.S. 115. This lifted the moratorium established by the London Debt Agreement. World War II victims began filing legal claims, including against private corporations, in courts around the world. Many of these modern cases settled. To the extent that the victims' claims were dismissed, it was on statute of limitations, treaty waiver, or non-justiciability grounds and not due to theories that corporations could not be liable under international law then or now. Even though most cases did not go to judgment, these proceedings can be credited with creating the political space for broad-based settlements and reparation schemes with surviving

victims. *See* STUART EIZENSTAT, IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II (2003).

Most importantly, in a deal brokered by the United States, Germany created the "Remembrance, Responsibility and Future" Foundation to make funds available to victims of National Socialism. More than 6,000 firms, banks, and insurance companies contributed to the establishment of the fund that was used to pay damages to individuals subjected to forced and slave labor and other abuses during the Nazi period. Law on the Creation of a Foundation "Remembrance, Responsibility and Future" (Aug. 2, 2000), Fed. L. Gazette I 1264. The Foundation and its partners disbursed more than 8 billion Deutschmarks to victims, who had to renounce any World War II claims. *See* Foundation EVZ, *Information on the Payments to Forced Labourers*. Although not all the firms admitted legal responsibility, there is no question that the goal of the Foundation was to achieve a comprehensive "legal peace" in the face of mounting lawsuits around the world. The international community brokered additional settlements and compensation programs involving other countries and corporate enterprises implicated in abuses. *See generally* MICHAEL J. BAZYLER AND ROGER P. ALFORD, HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY (2005).

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CONCLUSION

At the close of World War II, the Allies were faced with the prospect of bringing to justice potentially thousands of war criminals from all sectors of German society. To respond to these unprecedented events, the Americans and their Allies looked to international law. They convened the first international and military tribunals with jurisdiction over individuals and organizations accused of committing international crimes. They prosecuted industrialists alongside government officials – public and private actors, heads of state and the rank-and-file – for their involvement in these international crimes. They declared certain public and private organizations to be criminal and subsequently prosecuted individual members under *res judicata* theories of varying intensity. And they dismantled, liquidated, sequestered, or otherwise sanctioned those corporations that were central to Axis aggression and atrocities, at times for the purpose of paying reparations to victims. This history supports the conclusion reached by all the other Circuit Courts of Appeals to consider the issue: that corporations do not enjoy immunity under international law, even though only individuals were criminally prosecuted. Indeed, the legal actions of the Allies, in and out of the courtroom, all reveal that corporations are capable of

violating international law and of being held accountable for doing so.

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APPENDIX

LIST OF *AMICI CURIAE*[1]

Omer Bartov

Professor Omer Bartov is the Chair of the Department of History, John P. Birkelund Distinguished Professor of European History, and Professor of History and Professor of German Studies at Brown University and is the author of seven books and the editor of three volumes on the Holocaust. His work has been translated into several languages. Born in Israel and educated at Tel Aviv University and St. Antony's College, Oxford, Professor Bartov began his scholarly work with research on the Nazi indoctrination of the German *Wehrmacht* under the Third Reich and the crimes it committed during the war in the Soviet Union. This was the main concern of his books THE EASTERN FRONT, 1941-1945 (St. Antony's College Series, 2001) and HITLER'S ARMY: SOLDIERS, NAZIS AND WAR IN THE THIRD REICH (Oxford University Press, 1991). He has also studied the links between World War I and the genocidal policies of World War II, as well as the complex relationship between violence, representation, and identity in the twentieth century. His books MURDER IN OUR MIDST: THE HOLOCAUST, INDUSTRIAL KILLING, AND REPRESENTATION (Oxford University Press, 1996); MIRRORS OF DESTRUCTION: WAR, GENOCIDE AND MODERN IDENTITY (Oxford University Press, 2000); and GERMANY'S WAR AND THE HOLOCAUST (Cornell University

[1] Affiliations are provided for identification purposes only.

Press, 2003) have all been preoccupied with various aspects of these questions.

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Professor Michael Bazyler is Professor of Law and The "1939" Club Law Scholar in Holocaust and Human Rights Studies at Chapman University School of Law. He is also a research fellow at the Holocaust Education Trust in London and the holder of previous fellowships at the United States Holocaust Memorial Museum and Yad Vashem in Jerusalem (The Holocaust Martyrs' and Heroes' Remembrance Authority of Israel), where he was the holder of the Baron Friedrich Carl von Oppenheim Chair for the Study of Racism, Antisemitism, and the Holocaust. He is the author of numerous books, book chapters, and articles on the relationship of law and the Holocaust, including HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS (New York University Press, 2003) and FORGOTTEN TRIALS OF THE HOLOCAUST (University of Wisconsin Press, 2015, with Frank M. Tuerkheimer).

Morten Bergsmo

Morten Bergsmo is Director of the Centre for International Law Research and Policy and Visiting Professor at Peking University Law School. He has authored or edited more than 70 academic publications in international law, including 20 books. He was lead editor of the five-volume series HISTORICAL ORIGINS OF INTERNATIONAL CRIMINAL LAW. He has held several academic

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David Cohen

Professor David Cohen is Director of the WSD Handa Center for Human Rights and International Justice and the WSD Handa Professor for Human Rights and International Justice at Stanford University. Professor Cohen has published widely on international criminal law, transitional justice, human rights, and the jurisprudence of the World War II war crimes trials. A book now in press at Cambridge University Press analyzes the jurisprudence of the International Military Tribunal for the Far East at Tokyo in comparison with its European counterpart, the International Military Tribunal at Nuremberg. Other relevant publications include: *The Legacy of Nuremberg*, RECHTSHISTORISCHES JOURNAL 531 (1995); *Beyond Nuremberg: Individual Responsibility for War Crimes*, *in* C. Hesse and R. Post, eds., HUMAN RIGHTS IN TRANSITION 53 (1999); *Bureaucratic*

Responsibility in the World War II War Crimes Trials, RECHTSHISTORISCHES JOURNAL 313 (1999); *Oeffentliche Errinerung und Kriegsverbrecherprozesse in Asien und Europa*, *in* Klinkhammer and Schwentker, eds., DIKTATUR, KRIEG, UND ERRINERUNG IN DEUTSCHLAND, ITALIEN, UND JAPAN (2004); *Nuremberg's Legacy: Models of Command Responsibility*, GUERRA AI CIVILI (2005); *The Jurisprudence of the Tokyo Trial and its Legacy*, *in* Mochizuki and Daqing, eds., THE TOKYO TRIBUNAL: JUSTICE, POWER, AND SOCIETY (2010); and *Dissent at Tokyo: The Opinion of Justice Bernard at the IMTFE*, *in* L. Daqun and B. Zhang eds., HISTORICAL WAR CRIMES TRIALS IN ASIA 77 (2016).

Lawrence Douglas

Professor Lawrence Douglas teaches at Amherst College, where he is the James J. Grosfeld Professor of Law, Jurisprudence and Social Thought. He earned his J.D. at Yale Law School and his B.A. from Brown University. Professor Douglas is the author of six books, including THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST *and* THE RIGHT WRONG MAN: JOHN DEMJANJUK AND THE LAST GREAT NAZI WAR CRIMES TRIAL, published by Princeton University Press in January 2016 and selected by the *New York Times* as an "Editor's Choice." He has co-edited fifteen books on contemporary legal issues. His articles and essays have appeared in numerous publications, including, *The New York Times, The Washington Post, The Yale Law Journal, The Los Angeles Times, Frankfurter Allgemeine Zeitung, The Irish Times,* and

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Professor Hilary Earl is Professor of European History and Comparative Genocide at Nipissing University in North Bay, Ontario, Canada. She received her Ph.D. in 2002 from the University of Toronto in European History, her M.A. in 1992 from the University of New Brunswick in European History, and her B.A. in 1989 from University of New Brunswick in History. She has published in a variety of journals and essay collections including two collections on the Nuremberg trials: REASSESSING THE NUREMBERG MILITARY TRIBUNALS: TRANSITIONAL JUSTICE, TRIAL NARRATIVES, AND HISTORIOGRAPHY (Oxford University Press, 2014) and DIE NÜRNBERGER MILITÄRTRIBUNALE ZWISCHEN GESCHICHTE, GERECHTIGKEIT UND RECHTSCHÖPFUNG (Hambuger Edition, 2013). Dr. Earl's book, THE NUREMBERG SS-EINSATZGRUPPEN TRIAL, 1945-1958: ATROCITY, LAW, AND HISTORY (Cambridge Press 2009), won the 2010 Hans Rosenberg Prize for best book in German history. She also co-edited LESSONS AND LEGACIES XI: EXPANDING

PERSPECTIVES ON THE HOLOCAUST IN A CHANGING WORLD published with Northwestern University Press in 2014 and she is in the process of co-editing THE WILEY-BLACKWELL HANDBOOK ON THE HOLOCAUST expected out in 2018. She has won numerous awards and held relevant fellowships, including with the Holocaust Educational Foundation and the Mandel Center for Advanced Holocaust Studies.

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Professor David Fraser is Professor of Law and Social Theory at the University of Nottingham. His primary research focus is on legal systems under National Socialism and law and the Holocaust generally. In 2003, he was a Charles H. Revson Foundation Fellow at the Center for Advanced Holocaust Studies at the United States Holocaust Memorial Museum in Washington, D.C. He is the author of THE FRAGILITY OF LAW: CONSTITUTIONAL PATRIOTISM AND THE JEWS OF BELGIUM, 1940-1945 (Routledge, 2009); which won the Hart Socio-Legal Book Prize, 2010, awarded for the most outstanding piece of socio-legal scholarship; LAW AFTER AUSCHWITZ: TOWARDS A JURISPRUDENCE OF THE HOLOCAUST (Carolina Academic Press, 2005); and THE JEWS OF THE CHANNEL ISLANDS AND THE RULE OF LAW, 1940-1945 (Sussex Academic Press, 2000).

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Jennifer M. Green is an Associate Professor and Director of the Human Rights Litigation and Advocacy Clinic at the University of Minnesota Law School. Previously, she was the clinic project supervisor at the Human Rights Program at Harvard Law School, where she received her J.D. in 1991. She is the author of numerous publications on the use of customary international law in United States courts and prosecuting human rights violators in international tribunals such as the international criminal tribunals for the former Yugoslavia and Rwanda and the Inter-American human rights system. One particular focus of her scholarship has been legal access to remedies for international human rights violations, including those committed by corporations and corporate officers. Recent publications include *Nuremberg-era Jurisprudence Redux: The Supreme Court in* Kiobel v. Royal Dutch Petroleum Co. *and the Legal Legacy of Nuremberg*, 7 CHARLESTON LAW REVIEW 23 (Fall 2012) (Supreme Court Review edition) (with Michael J. Bazyler). She and Professor Bazyler are at work on a forthcoming article to update the CHARLESTON publication.

Kevin Jon Heller

Kevin Jon Heller is currently Professor of Criminal Law at SOAS, University of London, and Associate Professor of Public International Law at the University of Amsterdam. He was previously Associate Professor and Reader at Melbourne Law School, where he

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Charles Jalloh

Dr. Charles C. Jalloh is Professor of Law at Florida International University (FIU). Before academia, he was engaged in national and international legal practice. Called to the Bar of Ontario, Canada in June 2004, he served as Counsel in the Canadian Department of Justice and the Department of Foreign Affairs of International Trade. He has also been an Associate Legal Officer in the United Nations International Criminal Tribunal for Rwanda; a Legal Advisor and Duty Counsel in the Special Court for Sierra Leone; and a Visiting Professional in the International Criminal Court. Professor Jalloh is Founding Editor-in-Chief of the AFRICAN JOURNAL OF LEGAL STUDIES and the AFRICAN JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE. He has published widely. Recent books include AFRICA AND THE INTERNATIONAL CRIMINAL COURT (Oxford University Press, forthcoming 2017, with Ilias Bantekas, as editors); THE INTERNATIONAL CRIMINAL COURT IN AN EFFECTIVE GLOBAL SYSTEM (Edward Elgar Publishers, 2016, with Linda Carter and Mark Ellis); THE SIERRA LEONE SPECIAL COURT AND ITS LEGACY: THE IMPACT FOR AFRICA AND INTERNATIONAL CRIMINAL LAW (Cambridge University Press, 2013 and 2015 editions); SHIELDING HUMANITY: ESSAYS IN INTERNATIONAL LAW IN HONOUR OF JUDGE ABDUL KOROMA (2015, with Olufemi Elias); PROMOTING ACCOUNTABILITY UNDER INTERNATIONAL LAW FOR GROSS HUMAN RIGHTS VIOLATIONS IN AFRICA: ESSAYS IN HONOUR OF PROSECUTOR HASSAN BUBACAR JALLOW (2015, with Alhagi Marong).

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Professor Nina H. B. Jørgensen is with the Law Faculty at the Chinese University of Hong Kong. She is a qualified barrister and previously worked for eight years in different capacities (prosecution, judges' chambers, and defence) at the Special Court for Sierra Leone in Freetown and The Hague; the Extraordinary Chambers in the Courts of Cambodia in Phnom Penh; and the International Criminal Tribunals for the Former Yugoslavia and Rwanda in The Hague and Arusha, respectively. She now writes and teaches in the area of public international law with an emphasis on international criminal justice. Her book, THE RESPONSIBILITY OF STATES FOR INTERNATIONAL CRIMES, based on her D.Phil. from the University of Oxford, was published by Oxford University Press in 2000. Her scholarship includes articles on substantive international criminal law, international criminal procedure, and legal history.

Michael J. Kelly

Professor Michael J. Kelly holds the Senator Allen A. Sekt Endowed Chair in Law at Creighton University School of Law, where he also serves as Associate Dean for Faculty Research and International Programs. He is the author of PROSECUTING CORPORATIONS FOR GENOCIDE (Oxford University Press, 2016) as well as five other books and over forty articles. He currently serves as a member of the international board of directors,

and president of the U.S. National Section, of *L'Association Internationale de Droit Pénal* (AIDP), a Paris-based society of international criminal law scholars, judges, and attorneys founded in 1924 that enjoys consultative status with the United Nations. Professor Kelly leads the annual summer abroad program "From Nuremberg to The Hague," co-sponsored with Friedrich-Alexander-Universität Erlangen-Nürnberg, that educates American and German law students on the Holocaust and international criminal law and procedure. He currently co-chairs the American Bar Association's (ABA) Task Force on Internet Governance and was previously a member of the president's Advisory Committee on Global Engagement and chair of the National Security Law Section at the Association of American Law Schools (AALS). Professor Kelly has taught international criminal law for two decades.

Suzannah Linton

Professor Suzannah Linton is Distinguished Professor of International Law at Zhejiang Gongshang University and holds a Thousand Talent Award from the People's Republic of China. She was previously Chair of International Law at Bangor University in the United Kingdom. Professor Linton's work on legal redress following World War II includes advising the Claims Resolution Tribunal for Dormant Accounts in Switzerland and an academic focus on the war crimes trials held in the Far East (notably the trials held in Hong Kong from 1946-1948), and efforts to achieve redress for the victims of the Japanese "comfort stations" across the

Asia-Pacific region. Professor Linton's research project on the 1946-1948 war crimes trials held in Hong Kong led to the publication of the book HONG KONG'S WAR CRIMES TRIALS by Oxford University Press in 2012, the creation of the Hong Kong's War Crimes Trials Collection database at the University of Hong Kong, and the publication of *Rediscovering Hong Kong's War Crimes Trials*, 13 MELBOURNE JOURNAL OF INTERNATIONAL Law 284 (2012).

Matthew Lippman

Professor Lippman is Emeritus Professor of Criminology, Law, and Justice at the University of Illinois at Chicago, where he is a Master Teacher in the College of Liberal Arts and Sciences. He is also an Adjunct Professor of Law at John Marshall Law School in Chicago. Professor Lippman is a leading expert on the law of genocide and has written extensively on the Nuremberg trials and on other post-World War II prosecutions of Nazi war criminals. He teaches courses on international criminal law, genocide, and the Holocaust. His most recent work centers on the legal profession in Nazi Germany, the extradition of Nazi war criminals, and on the Genocide Convention. He recently completed a series of ten articles that review the post-World War II trials of German industrialists, lawyers, doctors, concentration camp officials, diplomats, and military leaders. Dr. Lippman is also one of the leading legal writers on genocide and the 1948 Convention on the Punishment and Prevention of the Crime of Genocide.

Patrick J. Keenan

An expert in human rights and international law, Professor Patrick Keenan of the University of Illinois at Urbana-Champagne College of Law focuses his research and scholarship on the connections between human rights, economic development, and business. He has published articles examining conflict minerals, human trafficking and tourism, China's role in Africa, the human rights potential of sovereign wealth funds, the International Finance Corporation's investments in Africa and the Caribbean, among other topics. Professor Keenan has taught courses on human rights, business and human rights, international criminal law, and the responsibilities of lawyers. In addition to teaching at the University of Illinois, he served as a visiting professor at the University of Chicago Law School and lectured at the Chuo University School of Law in Tokyo. Professor Keenan graduated from Yale Law School and Tufts University, clerked for Judge Myron H. Thompson of the U.S. District Court for the Middle District of Alabama, and served in the Peace Corps in the Democratic Republic of Congo. His scholarship on business and human rights includes: *Conflict Minerals and the Law of Pillage*, 14 CHICAGO JOURNAL OF INTERNATIONAL LAW 524 (2014); *Business, Human Rights, and Communities: The Problem of Community Consent in Economic Development*, 37 FORDHAM INTERNATIONAL LAW JOURNAL ONLINE 44 (2014); and *International Institutions and the Resource Curse*, 3 PENN STATE JOURNAL OF LAW AND INTERNATIONAL AFFAIRS 216 (2014).

Tim McCormack

Tim McCormack is a Professor of Law at the Melbourne Law School and an Adjunct Professor of Law at the University of Tasmania Law School. He was until recently a Fulbright Senior Scholar and the Charles H. Stockton Distinguished Scholar-in-Residence at the Stockton Center for the Study of International Law at the U.S. Naval War College in Newport, Rhode Island. He is also the Special Adviser on International Humanitarian Law to the Prosecutor of the International Criminal Court in The Hague. He has written extensively on international humanitarian law (the law of armed conflict) and the World War II era. He is the general editor (with Christopher Greenwood of the London School of Economics/International Court of Justice) of the world's first academic book series dedicated to international humanitarian law and has recently co-edited the thirtieth volume of the series: BEYOND VICTOR'S JUSTICE: THE TOKYO TRIAL REVISITED. He has also served on a number of Australia's multilateral treaty negotiation delegations – including to the Rome Conference where the International Criminal Court was drafted – and as an *amicus curiae* to the International Criminal Tribunal for the former Yugoslavia.

Fionnuala D. Ní Aoláin

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Kim Christian Priemel

Dr. Kim Christian Priemel is Assistant Professor at the Institute of History at Humboldt University Berlin, Germany. He studied History, Law, and English Literature at the Universities of St. Andrews and Freiburg where he received an M.A. and Ph.D. He has been a

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Lisa M. Stallbaumer-Beishline

Professor Lisa Stallbaumer-Beishline earned a Ph.D. in European History at the University of Wisconsin-Madison and is Professor of History at Bloomsburg University of Pennsylvania. Her research on Nazi business practices led her to archival records of the Friedrich Flick Concern, a conglomeration of coal and steel enterprises. The business records include those seized by the United States Occupation Military Government (OMGUS); trial records from the International Military Tribunal; post-war trial investigations including affidavits, trial transcripts, and testimony; archival records of the post-war investigation and decartelization of the Friedrich Flick Concern; and documents used as evidence in the trial of *U.S. vs. Friedrich Flick, et al*. Topics examined included the exploitation of forced labor by Harpener Bergbau, a Flick-owned mining company (1990 Masters Thesis, Wichita State University); the "aryanization" of Jewish property by the Flick Concern in the pre-war years, leading to a dissertation and three article publications, and continuing research into Flick's trusteeship over Rombacher Hüttenwerke, a steel production company located in occupied France during World War II. She has also reviewed several monographs that research German business practices during the Nazi era. Additional publications include: *Friedrich Flick's Opportunism and Expediency*, 13(2) DIMENSIONS: A JOURNAL OF HOLOCAUST STUDIES 19 (1999); *Big Business and the Persecution of the Jews: The Flick Concern and the 'Aryanization' of Jewish Property before the War*, 13(1)

HOLOCAUST AND GENOCIDE STUDIES 1 (Spring 1999); *Between Coercion and Cooperation: The Flick Concern in Nazi Germany before the War*, 17 ESSAYS IN ECONOMIC AND BUSINESS HISTORY: THE JOURNAL OF THE ECONOMIC AND BUSINESS HISTORICAL SOCIETY 63 (1999).

Milena Sterio

Professor and Assistant Dean Sterio of the Cleveland-Marshall College of Law earned her law degree, *magna cum laude*, from Cornell Law School in 2002. At Cornell, she was Order of the Coif, general editor of the CORNELL INTERNATIONAL LAW JOURNAL and a member of Phi Beta Kappa. In 2003, she earned a master's degree, *cum laude*, in Private International Law from the University Paris I-Pantheon-Sorbonne; in 2002, she earned a *Maitrise en droit franco-americain cum laude*, also from the Sorbonne. Her research interests are in the field of international law, international criminal law, international human rights, law of the sea, and in particular maritime piracy, as well as private international law. She has published in the AMERICAN UNIVERSITY LAW REVIEW, the CONNECTICUT INTERNATIONAL LAW JOURNAL, the FORDHAM INTERNATIONAL LAW JOURNAL, the CARDOZO JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW, the DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY, the FLORIDA JOURNAL OF INTERNATIONAL LAW, and the UC DAVIS OF INTERNATIONAL LAW AND POLICY. In her capacity as expert on maritime piracy law, she has participated in the meetings of the United Nations Contact Group on Piracy off the Coast

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James Stewart

Professor James Stewart joined the University of British Columbia Law Faculty in August 2009, after spending two years as an Associate-in-Law at Columbia Law School in New York. Prior to joining the academy, Professor Stewart was an Appeals Counsel with the Office of the Prosecution of the United Nations International Criminal Tribunal for the former Yugoslavia. He has also worked for the Legal Division of the International Committee of the Red Cross and the Office of the Prosecution of the International Criminal Tribunal for Rwanda. His principal scholarly interests and current research projects focus on the relationship between atrocity, commerce, and international criminal justice. He is the author of a report for the Open Society Justice Initiative on CORPORATE WAR CRIMES: PROSECUTING PILLAGE OF NATURAL RESOURCES, a detailed exploration of the law governing pillage of natural resources for war crimes prosecutors, judges, governments and civil society, which formed the basis of an international conference on the topic co-sponsored by the Dutch and Canadian Ministries of Justice between 29 and 30 October 2010. He also published *The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute*, 47 N.Y.U. JOURNAL OF INTERNATIONAL LAW AND POLITICS 121 (2014). Professor

Stewart graduated from Victoria University of Wellington, New Zealand, with degrees in both law and philosophy. Since then, he completed a *Diplôme d'études approfondies* in international humanitarian law at the Université de Genève and a JSD at Columbia Law School.

Ruti Teitel

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In 2012, she published HUMANITY'S LAW (Oxford University Press, 2012) setting out a paradigm shift in international affairs since the World War II era. Her latest book is GLOBALIZING TRANSITIONAL JUSTICE (Oxford University Press, 2015) which explores the last decade in the evolution of the field.

Yuma Totani

Yuma Totani earned her Ph.D. in history from the University of California, Berkeley, in 2005, and presently holds the position of a professor of Japanese history at the University of Hawaii. She specializes in the studies of post-World War II Allied war crimes trials in the Asia-Pacific region. Her representative publications include THE TOKYO WAR CRIMES TRIAL: THE PURSUIT OF JUSTICE IN THE WAKE OF WORLD WAR II (2008); THE PRISONER-OF-WAR CAMP TRIALS (2013); INTERNATIONAL MILITARY TRIBUNALS AT TOKYO, 1946-1949 (2014); CRIMES AGAINST ASIANS IN COMMAND RESPONSIBILITY TRIALS (2015); and JUSTICE IN ASIA AND THE PACIFIC REGION, 1945-1952: ALLIED WAR CRIMES PROSECUTION (2015).

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