Appellate No. 10-56739

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DOE I, *et al.*,
Plaintiffs-Appellants,
v.
NESTLE, USA INC., *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California
No. 2:05-cv-05133-SVW-JTL
The Honorable Stephen V. Wilson, Presiding Judge

BRIEF OF AMICI CURIAE NUREMBERG SCHOLARS OMER BARTOV, MICHAEL J. BAZYLER, CHRISTOPHER BROWNING, LAWRENCE DOUGLAS, HILARY EARL, HON. BRUCE EINHORN, RET., DAVID FRASER, SAM GARKAWE, GREGORY S. GORDON, MICHAEL J. KELLY, MATTHEW LIPPMAN, MICHAEL MARRUS, FIONNUALA D. NÍ AOLÁIN, BURT NEUBORNE, CHRISTOPH J.M. SAFFERLING IN SUPPORT OF PLAINTIFFS-APPELLANTS SEEKING REVERSAL

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STATEMENT OF INTEREST AND IDENTITY OF *AMICI CURIAE*[1]

Just over sixty-six years ago on May 8, 1945, Nazi Germany unconditionally surrendered and the Second World War ended in Europe. Even as the war was ending, the Allies began preparing to bring the Nazi leaders to justice. On May 2, 1945, President Harry Truman announced that Justice Robert H. Jackson would be taking a temporary leave from the Supreme Court to serve as the U.S. Chief of Counsel in what eventually became known as the International Military Tribunal ("IMT"), which held its trial from November 1945 to October 1946 of twenty-two high-ranking Nazi officials in Nuremberg, located in the American zone of occupied Germany. After the IMT trial, Justice Jackson returned to the Supreme Court and Brigadier General Telford Taylor succeeded Jackson as Chief of Counsel, to oversee from 1945 to 1948 twelve additional trials of lesser-ranking Nazis pursuant to Allied Control Council Law No. 10. These trials were also held in Nuremberg's Palace

[1] This brief is submitted pursuant to Rule 29 of the Federal Rules of Appellate Procedure for the Ninth Circuit in support of Plaintiffs. The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the *amici* or their counsel made a monetary contribution to this brief's preparation or submission. None of the *amici curiae* in support of this brief are corporations requiring a corporate disclosure statement under Rule 26.1.

of Justice, where the original IMT was conducted, and are known today as the Nuremberg Military Trials (NMT). The British, French, and Soviet allies of the United States conducted similar trials in their own respective occupied zones of Germany pursuant to Control Council Law No. 10.

The jurisprudence that emerged from Nuremberg and the subsequent Nuremberg-era zonal trials remains the core of customary international criminal law today. On November 11, 2005, the International Law Section of the American Bar Association commemorated the 60th anniversary of the commencement of the IMT trial by holding a conference in Washington, D.C., which it rightfully titled: "Nuremberg and the Birth of International Law."[2]

Amici curiae—listed in the Appendix—are experts on the Nuremberg-era trials. They comprise professors from three disciplines: law, history, and political science. *Amici* submit this brief in response to the erroneous decision of the District Court in *Doe, et al. v. Nestle, S.A. et al.,* 748 F. Supp. 2d 1057 (2010). This *amicus* brief seeks to point out grave errors in District Court's decision concerning the Nuremberg-era jurisprudence. First, the District Court opinion is both factually and legally incorrect in stating that the Nuremberg precedent stands for the proposition that corporations cannot be

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[2]The conference is available for viewing on C-SPAN at http://www.c-spanvideo.org/program/189880-1.

punished either criminally or civilly under international law. Second, the District Court erred in holding that the correct *mens rea* standard that the international judges in occupied Germany required to convict various Nazi defendants in the dock was "purpose" – where in fact the *mens rea* standard was "knowledge."

Amici can offer the Court unique expertise on these issues and are concerned that the District Court's decision in this case distorts the legacy of Nuremberg and, in doing so, misconstrues international law. Given the singular importance of Nuremberg, it is particularly crucial that this Court conduct a thorough review of its jurisprudence and (1) recognize that corporations can indeed be punished under international law and (2) adopt the proper standard for aiding and abetting liability that flowed out of the Nuremberg trials.

SUMMARY OF ARGUMENT

The District Court misconstrued the Nuremberg jurisprudence on two fundamental issues. First, the District Court erroneously concluded that, according to Nuremberg precedent, corporations cannot be held liable for human rights violations. Second, the District Court erroneously concluded that, under Nuremberg precedent, the *mens rea* standard for aiding and abetting liability under customary international law is purpose rather than

knowledge.

As to corporate liability, the District Court erred in focusing solely on tribunals set up under Control Council Law No. 10 and, concluding that "the Nuremberg-era tribunals did not impose any form of liability on corporations or organizations as such."[3] The decision in *Nestle,* however, ignored both historical context and other laws and actions taken by the Allies against those accused of international law violations after the Second World War to conclude erroneously that international law that came out of the Nuremberg trials does not impose liability on corporations. In doing so, the District Court ignored that the Allied Control Council—the international body governing occupied Germany—deployed a range of remedial actions to hold both German natural and juristic persons accountable for violations of international law. Such actions included the dissolution of German corporations and the seizure of their assets. Indeed, even before the first Nuremberg trial began, the Control Council had already dissolved the German corporate cartel I.G. Farben[4] and seized its assets. As a result, when the international trial of individual Farben defendants took place pursuant to Control Council Law No. 10, there was no need to put I.G. Farben itself on trial,

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[3] *Nestle*, 748 F. Supp. 2d at 1136.
[4] Interessengemeinschaft Farbenindustrie Aktiengesellschaft ("Syndicate of Dyestuff-Industry Corporations").

since it had already suffered corporate death pursuant to Control Council Law No. 9.

The entire point of the Nuremberg trials was to put individuals in the dock, in Courtroom 600 of the Palace of Justice and other courtrooms throughout occupied Germany. It was to show that Nazi leaders and other perpetrators, including German industrialists, could be held criminally responsible *under international law* as individuals. Punishment of German corporations *under international law* took place outside of the courtroom.

The impression left by the District Court opinion is an historically inaccurate conclusion that international law that came out of the jurisprudence of Nuremberg does not provide for sanctions on corporations. Rather, the international law made by the Allies through the various measures they took, including holding trials of Nazi war criminals, unequivocally shows that corporations, as well as natural persons, are the subjects of international law and can be held accountable, in a variety of ways, for violations of international law. Further the court below ignored the Nuremberg-era reliance on customary international law, which was not defined exclusively in terms of international criminal law.

With regard to the *mens rea,* the District Court reached the erroneous conclusion that the *mens rea* standard for aiding and abetting liability

supported by Nuremberg jurisprudence is purpose rather than knowledge.[5] A detailed analysis of Nuremberg-era jurisprudence confirms, however, that knowledge was the standard applied in all cases, leading to both convictions and acquittals. *The Ministries Case*, cited but not adequately considered by the District Court, does not alter this principle.[6] In that case, the Tribunal applied a *mens rea* of knowledge to all defendants but acquitted one whose actions did not meet the *actus reus* requirement. A thorough examination of Nuremberg jurisprudence makes abundantly clear that this body of law on aiding and abetting criminal liability requires *knowingly* providing substantial assistance to the perpetrator.

ARGUMENT

I. THE DISTRICT COURT MISINTERPRETED THE CONTEXT AND LEGACY OF THE NUREMBERG TRIALS IN RELATION TO CORPORATE LIABILITY UNDER INTERNATIONAL LAW

The first error committed by the District Court in its analysis of the Nuremberg trials was its failure to recognize how those historic proceedings

[5] *Nestle*, 748 F. Supp. 2d at 1087–88 ("the Court concludes that the 'core' definition of aiding and abetting under international law requires the following . . . [that] the aider and abettor . . . 2) acts with the specific intent (i.e., for the purpose) of substantially assisting the commission of that crime.").

[6] *United States v. Von Weizsaecker (The Ministries Case)*, 14 Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10 308 (1949) ("T.W.C").

fit into the context of the entire program that the Allies—the United States, United Kingdom, U.S.S.R., and France—created for defeated Germany at the end of the Second World War. The program had three components: what to do with the German state upon defeat of the Third Reich; what to do with natural persons who committed crimes; and what to do with the German economy and its industrial cartels.

With regard to the defeated German Reich, the Allies first occupied the country by dividing it into four zones and thereafter, as a consequence of the Cold War, into two states: the Federal Republic of Germany, created out of the Western zones, and the German Democratic Republic, created out of the Soviet zone.

With regard to natural persons, the outline of what to do with the Reich leaders and other perpetrators of "atrocities, massacres and executions" was first set out in the Moscow Declaration of November 1, 1943,[7] while the war

[7] "At the time of granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in . . . atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries. . . . German criminals whose offenses have no particular geographical localization . . . will be punished by joint decision of the government of the Allies." Statement of Atrocities, signed by President Roosevelt, Prime Minister Churchill and

was still ongoing, and then confirmed by the London Charter of August 8, 1945, after Nazi Germany's unconditional surrender.[8] The Moscow Declaration left open the decision of what to do with the Reich leaders (including Hitler) until the conclusion of hostilities and the London Charter codified the decision of the Allies to try the so-called major war criminals (now without Hitler, who committed suicide) before an international military tribunal constituted at Nuremberg.

The International Military Tribunal was created by the London Charter to try individuals and announced the international crimes for which these major war criminals would be prosecuted: crimes against peace, war crimes, crimes against humanity, and conspiracy.

No pre-war international treaty set out these crimes (save for war crimes) or made individuals responsible for committing them. As a result, the Allies turned to customary international law. They did so in order to avoid the problem of *nulla crimen sine lege* (no crime without a law), thereby answering the accusation that the defendants in the dock at Nuremberg were being tried *ex post facto*. As Justice Robert Jackson, the chief Nuremberg prosecutor wrote

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Premier Stalin, Moscow, November 1, 1943, 3 Bevans 816, 834 Dep't. St. Bull. (Nov. 6, 1943).

[8] Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Charter"), 59 Stat. 1544, 82 U.N.T.S. 279 (Aug. 8, 1945).

in his Final Report to President Truman:

> We negotiated and concluded an Agreement with the four dominant powers of the earth, signed at London on August 8, 1945, which for the first time made explicit and unambiguous what was theretofore, as the Tribunal has declared, implicit in International Law, namely, that *to prepare, incite, or wage a war of aggression, or to conspire with others to do so, is a crime against international society*, and that to persecute, oppress, or do violence to individuals or minorities on political, racial, or religious grounds in connection with such a war, or to exterminate, enslave, or deport civilian populations; is an international crime, and that for the commission of such crimes individuals are responsible.[9]

The Allied Control Council charged with implementing the agreement made in the London Charter furthered the work of the IMT by enacting Control Council Law No. 10 on December 20, 1945.[10] Under Control Council Law No. 10, each of the Allies could conduct their own international law trials in zones they occupied by following the explicit international law now set out in the London Charter.

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[9] Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London 1945, at 342 (U.S. Dep't of State, Pub. No. 3080, 1949) (italics added), *available at*: http://www.roberthjackson.org/files/thecenter/files/bibliography/1940s/final-report-to-the-president.pdf. *See also Nuremburg Judgment*, 6 F.R.D. 69, 108–110 (1947) (longstanding recognition that international law imposes duties and liabilities upon individuals as well as upon states).

[10] Control Council Law No. 10, *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity* (Dec. 20, 1945), *reprinted in* 1 Enactments and Approved Paper of the Control Council and Coordinating Committee 306, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/Volume-I.pdf.

By failing to consider the IMT and post-IMT trials in the context of pre-Nuremberg customary international law, the District Court made its second error. The District Court is correct that the emphasis on individual as opposed to state liability reflected in the trial of persons at the IMT and the subsequent Nuremberg Military Trials ("NMT") contrasted with the prior view of responsibilities under international law that only states were responsible, as reflected in the Versailles Treaty that followed the First World War. [11]

However, the District Court's assertion in *Nestle*—that *only* individual human persons were prosecuted and faced punishment by the IMT—is incorrect.[12] The London Charter specifically enunciated that groups or organizations could violate international law when it authorized the IMT to designate any group or organization as criminal: "At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization."[13]

[11] *Nestle*, 748 F. Supp. 2d at fn. 66.
[12] *Id*. at 1134 (effect of declaring organizations criminal was to impose "automatic liability on the organizations individual members.")
[13] London Charter, Article 9.

The IMT prosecutors, in addition to the 23 individuals in the dock, also indicted six Nazi organizations: the Reich Cabinet, the *Sturmabteilung* ("SA"), the German High Command, the Leadership Corps of the Nazi Party, the *Schutzstaffel* ("SS") with the *Sicherheitsdienst* ("SD") as its integral part, and the SS. The Nuremberg judges acquitted the first three organizations and designated the last three as criminal. The Nuremberg jurisprudence establishes, therefore, that not only states and natural persons can be liable for international law violations, but also juridical entities.

The District Court argued that the "criminal organization" provision was merely "a mechanism for holding individual members of the organization liable for other members' acts in the same manner that joint criminal enterprise or conspiracy provides for such individual liability."[14] In making this statement, it appears that the District Court was unaware that by the time these organizations were declared to be criminal by the IMT, they were already punished because the Allies had already imposed upon them through international law the most severe punishment of all: juridical death through dissolution as well as the confiscation of their total assets.

As noted by Appellants, on September 20, 1945, it was an international treaty between the Allied countries that dissolved the Nazi Party and related

[14] *Nestle*, 748 F. Supp. 2d at 1135.

entities.[15] This death by dissolution was confirmed by Control Council Law No. 2,[16] which abolished the Nazi Party and affiliated organizations permanently, declared them illegal, and authorized the confiscation of all their property and assets.

To state, therefore, that the effect of London Charter in recognizing the existence of criminal organizations "was not to impose liability on the organization itself"[17] makes little sense, since these very same organizations were *already* punished and liability assessed against them through earlier international accords promulgated by the Allies and their occupation authorities.

[15] Appellants' Opening Brief at 26, citing *Agreement Between Governments of the United Kingdom, United States of America, and Union of Soviet Socialist Republics, and the Provisional Government of the French Republic on Certain Additional Requirements to Be Imposed on Germany*, Art. 38, *reprinted in* Supplement: Official Documents, 40 Am. J. Int'l. L 1, 29 (1946) ("The National Socialist German Workers' Party (NSDAP) is completely and finally abolished and declared to be illegal.").

[16] Control Council Law No. 2, *Providing for the Termination and Liquidation of the Nazi Organizations* (Oct. 10, 1945), *reprinted in* Enactments and Approved Paper of the Control Council and Coordinating Committee, Vol. 1, 131, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/Volume-I.pdf.

[17]*Nestle*, 748 F. Supp. 2d at 1134.

II. NUREMBERG-ERA JURISPRUDENCE SPECIFICALLY IMPOSED SANCTIONS ON CORPORATIONS FOR VIOLATIONS OF CUSTOMARY INTERNATIONAL LAW

A critical issue that faced the Allies upon Nazi Germany's defeat was what to do with the German economy and the major industrial cartels that made the war possible. The District Court's ahistorical analysis of the Nuremberg precedent ignored this issue and failed to account for other steps taken by the Allies *under international law* to address the culpability of corporations and other juristic persons.

The District Court looked to two important Nuremberg decisions in the cases against German industrialists and cited passages explaining how those individuals acted through their corporations to commit illegal acts.[18] However, the international criminal trials of Nazi officials and individual industrialists were only one part of Allied efforts to punish those responsible for Nazi-era atrocities.

The earliest pronouncements of the Allies at Potsdam and Yalta created a framework for action against corporations complicit in the Nazi-era war crimes. The Yalta and Potsdam Agreements envisioned dismantling Germany's industrial assets, public and private, and creating a system of reparations for

[18] *Id.* at 1136 (citing *United States v. Krauch (The I.G. Farben Case)*, 8 T.W.C. 1081 (1948) and *United States v. Krupp (The Krupp Case)*, 9 T.W.C. 1449 (1950)).

states and individuals injured during the Nazi period. Control Council Law No. 10, putting individuals on trial—whether German doctors, jurists, industrialists, or various members of the SS—was only a small part of the Allied plan for post-war Germany that also included the dissolution of private corporations, the seizure of industrial facilities, restitution of confiscated properties, and reparations to both the states and natural persons who had suffered harm.[19]

Before issuing Control Council Law No. 10 on December 20, 1945, the same international occupation authority issued Control Council Law No. 9 on November 30, 1945.[20] This law specifically directed the dissolution of I.G. Farben and the dispersal of its assets.[21]

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[19] Berlin (Potsdam) Conference, Protocol of Proceedings, February 11, 1945, 3 Dept. of State, Treaties and Other International Agreements of the United States of America 1776-1949 at 1013 ("Potsdam Agreement"); Report Signed at Crimea (Yalta) Conference, Feb. 11, 1945, U.S.-U.K.-U.S.S.R., 59 Stat. 1823, 3 Bevans 1005.

[20]Control Council Law No. 9, *Providing for the Seizure of Property Owned By I.G. Farbenindustrie and the Control Thereof* (Nov. 30, 1945), *reprinted in* 1 Enactments and Approved Papers of the Control Council and Coordinating Committee 225, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/01LAW06.pdf.

[21] A subsequent directive, Allied High Commission Law No. 35, *Dispersal of Assets of I.G. Farbenindustrie* of August 17, 1950, provided further details about how the decartelization of Farben would take place. *Reprinted in* Documents on Germany under Occupation, 1945-1954 at 503 (Oxford University Press: 1955).

The basis of Control Council Law No. 9 was the customary international law prohibition of crimes against peace that the Allies cited in the London Charter and used to prosecute Nazi leaders for waging aggressive war. The Preamble to Control Council Law No. 9, titled "*Providing for the Seizure of Property Owned By I.G. Farbenindustrie and the Control Thereof,*" stated its clear purpose before ordering the dissolution of what was regarded as the Allies' principal economic enemy: the I.G. Farben industrial cartel.

> In order to insure 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.[22]

The punishment imposed by the Allied Control Council upon I.G. Farben was seizure. Article II of Control Council Law No. 9 states:

> All plants, properties and assets of any nature situated in Germany which were, on or after 8 May, 1945 owned or controlled by I.G. Farbenindustrie A.G., are hereby seized and the legal title thereto is vested in the Control Council.[23]

This ultimate sanction was as drastic as any that could be imposed on a juristic entity: death through seizure and was as much a pronouncement of international law as Control Council Law No. 10, which was used to prosecute individuals. The extreme sanction of dissolution imposed by Control Council

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[22] Control Council Law No. 9, Preamble.
[23] *Id.* Art. II.

No. 9 is clearly inconsistent with the District Court's ultimate conclusion that international law at the time of Nuremberg did not consider corporations liable for violations of international law norms.

It is unclear why the District Court ignored Control Council Law No. 9 and instead focused exclusively on decisions of the Tribunal. It is clear, however, that criminally prosecuting I.G. Farben alongside the industrialists would have been pointless since it had already been punished under international law in Control Council Law No. 9. Taking both Control Council Law Nos. 9 and 10 together, there is nothing in the historical record to indicate that the Allies believed that corporations could not be punished under international law.

I.G. Farben was not the only corporation subject to the ultimate sanction of dissolution. For example, the Control Council dissolved and liquidated a number of insurance companies under Control Council Law No. 57.[24] The Control Council also issued orders to carry out its mandate to seize the assets of other German corporations, both to dissolve and liquidate them,

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[24] Control Council Law No. 57, *Dissolution and Liquidation of Insurance Companies connected with the German Labor Front* (Sept. 6, 1947), *reprinted in* 8 Enactments and Approved Papers of the Control Council and Coordinating Committee 1, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/Volume-VIII.pdf.

and make them available for reparations.[25] Allied High Commission Law No. 27 provided for the reorganization of German coal, iron, and steel industries.[26]

In the U.S. Zone, the Potsdam Agreement was put into effect through Military Government Law No. 56 (Prohibition of Excessive Concentration of German Economic Power).[27] That ordinance also invoked international law, stating that it was

> Enacted in accordance with Paragraph 12 of the Postdam Agreement in order (i) to prevent Germany from endangering the safety of her neighbors or again constituting a threat to international peace; (ii) to destroy Germany's economic potential to wage war. . . .
>
> To this end it is desirable that . . . concentrations of economic power as exemplified, in particular, by cartels, syndicates, trusts, combines, and other types of monopolistic or restrictive arrangements which could be used by Germany as instruments of political or economic aggression, be eliminated at the earliest practicable date. . . . [28]

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[25] *See* Control Council Directive No. 39, *Liquidation of German War and Industrial Potential* (Oct. 2, 1946), *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/Volume-V.pdf; *see also* Control Council Directive No. 47, *Liquidation and Conversion of War Research Establishments* (Mar. 27, 1947), *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/Volume-VI.pdf.

[26] Allied High Commission Law No. 27, *On the Reorganisation of the German Coal and Steel Industries* (16 May 1950), Official Gazette of the Allied High Commission for Germany No. 20 299 (May 20, 1950).

[27] Military Government Law No. 56, *Prohibition of Excessive Concentration of German Economic Power*, Military Government Gazette, U.S. Zone Issue C (Feb. 12, 1947).

[28] *Id.* Identical language was repeated in British Military Government Ordinance No. 78, 16 Military Government Gazette 412 (Feb. 12, 1947).

In yet another example, Alfried Krupp, the sole owner of Krupp, was sentenced to 12 years imprisonment and ordered to forfeit all his property under Control Council Law No. 10[29] and the entire Krupp concern was confiscated pursuant to Military Government Law No. 52,[30] and General Order No. 3.[31] Also pursuant to Military Government Law No. 52, General Order No. 7 declared that all iron and steel undertakings were "subject to seizure of possession or title, direction, management, supervision or otherwise being taken into control by Military Government."[32]

Given the penalties imposed on these corporations, the distinction in the treatment of the natural persons under Control Council Law No. 10 and the treatment of corporations under Control Council Law No. 9 and the other laws and directives does not support the District Court's conclusion that the Tribunal's references to corporate liability "constitute nothing more than

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[29] *The Krupp Case*, 9 T.W.C. 1449-50 (1950).
[30] Military Government Law No. 52, *Blocking and Control of Property* (May 8, 1945).
[31] Allied Military Government, U.S. Zone, *General Order No. 3 (Pursuant to Military Government Law No. 52): Firma Friedrich Krupp* [General Order No. 3], Military Government Gazette (June 6, 1946).
[32] Allied Military Government, British Zone, *General Order No. 7 (Pursuant to Military Government Law No. 52): Iron and Steel Undertakings*, MGG (Aug. 20, 1946).

dicta"[33] that fails to identify a "norm of corporate liability."[34] The absence of criminal penalties imposed by the Tribunal is more appropriately understood as a choice to sanction corporations through other international law mechanisms.

The District Court's conclusion that the Nuremberg-era jurisprudence did not provide any liability for corporations for violations of customary international law is contrary to the historical record. From the imposition of the ultimate sanction of dissolution to the seizure of assets for reparations, it was understood that corporations could be "made to pay" for their complicity. Subjecting corporations to tort liability for violations of international customary law is consistent with that understanding.

III. CUSTOMARY INTERNATIONAL LAW AS FORMULATED AND APPLIED AT NUREMBERG PROVIDES A KNOWLEDGE STANDARD FOR AIDING AND ABETTING LIABILITY

The cases emerging from trials of Nazi war criminals after the Second World War required that an aider and abettor act with the *mens rea* of knowledge. As the District Court acknowledged, the seminal cases articulating the standard for aiding and abetting liability under international law were issued by military tribunals operating under the rules of the London Charter

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[33] *Nestle,* 748 F. Supp. 2d at 1136.
[34] *Id*.

of the International Military Tribunal at Nuremberg.[35] While the District Court claimed its decision is supported by Nuremberg case law, a review of Nuremberg-era jurisprudence leads to the contrary but correct conclusion that knowledge, and not purpose, is the standard supported by Nuremberg.

A. *The Ministries Case* Is Consistent with the Body of Nuremberg Jurisprudence, Adopting a Knowledge Standard for Aiding and Abetting Liability

Characterized by the District Court as the most important illustration of aiding and abetting liability, *The Ministries Case* merits careful review.[36] Although the District Court noted elsewhere in its decision the difference between *actus reus* and *mens rea*, this distinction is simply overlooked by the District Court in its discussion of *The Ministries Case*.[37] The District Court erroneously stated that it was "unclear" whether *The Ministries Case* addresses *mens rea*, and concluded: "Regardless of how the case is categorized, its holding is plainly relevant with respect to the facts of the present case, particularly when taken in conjunction with similar Nuremberg-era precedents."[38]

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[35] *Id.* at 1088.
[36] *Id.*
[37] Compare discussion at 748 F. Supp. 2d at 1080–88, with *Id*. at 1090 and fn 38.
[38] 748 F. Supp. 2d at fn 38.

An examination of *The Ministries Case* reveals that the NMT conducted distinct *mens rea* and *actus reus* analyses. The Tribunal first analyzed the *mens rea* for banker Karl Rasche and found that he knew that the use of a bank loan was to facilitate slave labor:

> Bankers do not approve or make loans in the number and amount made by the Dresdner Bank without ascertaining, having, or obtaining information or knowledge as to the purpose for which the loan is sought, and how it is to be used. It is inconceivable to us that the defendant did not possess that *knowledge*, and we find that he did.[39]

Only upon reaching this conclusion did the Tribunal then consider whether the *actus reus* requirement had also been met:

> The real question is, is it a crime to make a loan, knowing or having good reason to believe that the borrower will us[e] the funds in financing enterprises which are employed in using labor in violation of either national or international law? . . . Loans or sale of commodities to be used in an unlawful enterprise may well be condemned from a moral standpoint . . . but the *transaction can hardly be said to be a crime*. Our duty is to try and punish those guilty of violating international law, and *we are not prepared to state that such loans constitute a violation of that law*.[40]

The Tribunal's discussion thus emphasized the nature of the act, focusing on whether the loans themselves constituted a violation of international law. The Tribunal neither determined whether Rasche intended to further the crimes nor suggested that such intent would give rise to liability. Thus, in acquitting

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[39] *The Ministries Case* at 622 (emphasis added).
[40] *Id.* (emphasis added).

Rasche, the Tribunal did not apply a purpose *mens rea*; it merely concluded that the acts in question did not constitute a crime.

It is also noteworthy that, in the same trial, the Tribunal convicted banker Emil Puhl because he "*knew* that what was to be received and disposed of was stolen property and loot taken from the inmates of concentration camps."[41] The Tribunal continued that "long before the deliveries were completed," Puhl was "*informed* that the grisly dental gold and wedding rings were part of it."[42] The Tribunal clearly disavowed a purpose standard, noting that, "[Puhl] neither originated the matter and that it was probably repugnant to him."[43] The Tribunal would not and did not apply a purpose standard to one defendant and a knowledge standard to another in the same case, on the same charges, and based on substantially similar facts.

As in Rasche's case, after concluding that the *mens rea* standard was met, the Tribunal then considered whether Puhl's alleged acts rose to the level of a violation of international law, noting that the "defendant contends that stealing the personal property of Jews . . . is not a crime against humanity."[44] The Tribunal determined that, in contrast to Rasche, Puhl's actions did

[41] *Id*. at 620 (emphasis added).
[42] *Id.* (emphasis added).
[43] *Id.* at 620–21.
[44] *Id.* at 611.

constitute a crime:

> It would be a strange doctrine indeed, if, where part of the plan and one of the objectives of murder was to obtain the property of the victim, even to the extent of using the hair from his head and the gold of his mouth, he who *knowingly* took part in disposing of the loot must be exonerated. . . . Without doubt all such acts are crimes against humanity.[45]

The divergent outcomes —Puhl's conviction and Rasche's acquittal—in this single case thus hinge not on inconsistent *mens rea* standards but rather on the differing nature of the *actus reus* of the defendants.

The Tribunal expressly adopted a knowledge standard for other defendants in *The Ministries Case* as well:

> Von Weizsaecker or Woermann neither originated [the deportation program of Jews], gave it enthusiastic support, nor in their hearts approved of it. The question is whether they *knew* of the program and whether in any substantial manner they aided, abetted or implemented it.[46]

Thus, *The Ministries Case* consistently applied a knowledge standard for aiding and abetting liability. The Rasche verdict did not conflict with this standard; the Tribunal found that the requisite *mens rea* of knowledge had been met but acquitted him on the basis that his actions did not meet the *actus reus* requirement.

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[45] *Id.* (emphasis added).
[46] *Id.* at 478 (emphasis added).

B. The American Nuremberg Military Tribunals Similarly Held that Knowledge Is the Proper *Mens Rea* for Aiding and Abetting Liability

The Nuremberg Military Tribunals created by the United States in its occupied zone in the aftermath of the IMT trial likewise applied a knowledge standard in the twelve subsequent Nuremberg trials held pursuant to Control Council Law No. 10, and the District Court erred in its analysis of *Flick, Krauch*, *Krupp,* and *The Eisatzgruppen Case*.

In *United States v. Flick* [Trial No. 5], the Tribunal convicted two defendants for knowingly assisting the Nazis. Flick, a civilian industrialist, was convicted because he knew of the criminal activities and widespread abuses of the SS and nevertheless contributed money that was vital to its financial existence. Although Flick did not condone SS abuses, the Tribunal found that "[o]ne who *knowingly* by his influence and money contributes to the support [of a violation of the law of nations] thereof must, under settled legal principles, be deemed to be, if not a principal, certainly an accessory to such crimes."[47] Flick and one of his employees were also convicted for increasing the company's production quotas, knowing that forced labor would be required to meet this increase, even though they never "exerted any influence or took any part in the formation, administration or furtherance of the slave-

[47] 6 T.W.C. at 1217 (1947) (emphasis added).

labor program."[48]

The District Court constructed an erroneous explanation of the different outcomes in *The Flick Case* and *The Ministries Case* which simply ignored the Tribunal's analysis. The District Court ignored the distinction between *actus reus* and *mens rea* applied by the Tribunal, stating, "Regardless of whether the holdings are categorized as turning on the defendant's *actus reus* or the *mens rea*, the ultimate conclusion is clear: ordinary commercial transaction[s], without more, do not violate international law."[49] But it is in fact this distinction between *actus reus* and *mens rea* that explains the difference in the outcome of the cases. As described above, the Tribunal found that the commercial bank loan of *The Ministries Case* did not meet the *actus reus* requirement and led to Rasche's acquittal, but that the financial contribution of Flick and Steinbrick to the SS did. Further the Tribunal specifically rested the conviction of *Flick* defendants on the fact that they had knowledge even though they did not share the purpose. The District Court quoted the Tribunal's analysis that defendants "did not approve nor do they now condone the atrocities."[50] The language quoted by the District Court shows a clear distinction between knowledge and purpose and that the *Flick* Tribunal was

[48] *Id.* at 1198.
[49] *Nestle,* 748 F. Supp. 2d at 1090.
[50] *Id.* at 1089 (quoting *Flick* at 1222).

using a knowledge standard for *mens rea*.[51]

Another important case using the knowledge standard for *mens rea* is the case against the I.G. Farben industrialists. In *United States v. Krauch* [Trial No. 6], I.G. Farben executives were acquitted because they did not "*knowingly* participate in the planning, preparation or initiation of an aggressive war;"[52] instead Krauch and others honestly believed that the poison gas they manufactured was used to delouse prisoners and were unaware of the "criminal purposes to which this substance was being put."[53] I.G. Farben pharmaceutical executives charged with sending experimental vaccines to the SS were acquitted because they lacked "guilty *knowledge*" that the SS would infect concentration camp inmates to test the drug.[54] The District Court's analysis of the *Farben* case does not differ, and in fact quotes the case excerpt that "neither the volume of production nor the fact that large shipments were destined to concentration camps would alone be sufficient to lead us to conclude that those who knew of such facts must have had knowledge of the

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[51]The District Court also analyzed Flick's conviction of participation in slave labor, 748 F. Supp. 2d at 1091, but *Amici* agree with the District Court that direct participation is distinct from aiding and abetting.
[52] 8 T.W.C. 1117 (1952) (emphasis added).
[53] *Id.* at 1168–69 ("The evidence does not warrant the conclusion that the executive board or the defendants . . . [had] any significant *knowledge* as to the uses to which its production was being put.") (Emphasis added).
[54] *Id.* at 1171 (emphasis added).

criminal purposes to which this substance was being put."[55] Yet in its analysis, the District Court failed to distinguish between knowledge of a criminal purpose and sharing that purpose.

In analyzing the *Krupp* case, the District Court mistakenly stated that it held that criminal liability required "personal involvement" of the defendants.[56] In fact, the Tribunal first reviewed the evidence offered by the defendants that the "firm was not in accord with the attitude of the Nazi regime toward the Jews," but concluded that the same evidence established defendants' knowledge.[57] The evidence of knowledge met the prosecution's burden in the first instance. To which defendants responded with a claim of necessity,[58] but the Tribunal found that evidence of defendants' participation refuted the necessity defense.[59] In ignoring the Tribunal's analysis, the District Court mistakenly interpreted the facts that contradicted Krupp's claims of necessity as setting a standard for liability, and thereby misstated the knowledge standard of the *Krupp* case.[60]

In *The Einsatzgruppen Trial* [Trial No. 9], defendant Waldemar

[55] *Nestle*, 748 F. Supp. 2d at 1091.
[56] *Id*. at 1093.
[57] *Krupp*, 9 T.W.C. at 1435.
[58] *Id.*
[59] *Id.* at 1439–48.
[60] *Id.*

Klingelhoefer, an interpreter for and commander of the Nazi mobile killing squads in the Soviet Union, was convicted because he was "*aware* that the people [whose names of Communist party functionaries he discovered through his Russian-language interrogations and gave to his superiors] would be executed when found."[61] The District Court asserted that this case is an example of a case which "tend[s] to blur the distinction between 'command responsibility' and aiding and abetting."[62] However, even though the Tribunal noted that Klingelhoefer was also an "active leader and commander," it also noted that "[i]n this function [of interpreter], therefore, he served as an accessory to the crime" since his interpreting skills facilitated executions.[63]

C. The Nuremberg-Era British and French Military Courts Found that Knowledge Was the Proper *Mens Rea* for Aiding and Abetting Liability

In its analysis of a decision from the British military court, the District Court erred in its analysis of the *mens rea* standard. In *The Zyklon B Case*, a British military court sentenced to death two industrialists who supplied poison gas to the Nazis "with *knowledge*" that it would be used to kill

61 4 T.W.C. 569 (1949).
62 *Nestle*, 748 F. Supp. 2d at 1108.
63 4 T.W.C. 569 .

concentration camp prisoners.[64] Counsel for the defendant Tesch argued that "since the accused was not charged with the extermination of human beings but merely with supplying the means of doing so, his conduct would be contrary to the laws and usages of war only if it could be shown that Zyklon B gas was necessarily intended for such extermination."[65] However, the Judge Advocate rejected that principle[66] and stated that the three facts that needed to be proven were that Allied nationals had been gassed by Zyklon B, that the accused's firm had supplied the gas and third, "that the accused *knew* that the gas was to be used for the purpose of killing human beings."[67] The defendants were convicted on this basis. The District Court simply ignored the explicit articulation and application of the knowledge standard.

The District Court failed to analyze other important decisions of the British and French courts. In another case, in the *Trial of Werner Rhode and Eight Others*, the Judge Advocate provided the example of an individual who

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[64] *See In re Tesch* (*The Zyklon B Case*), 13 Int'l L. Rep. 250 (1947) (Brit. Mil. Ct., Hamburg, Mar. 1–8, 1946) (emphasis added); *see also* Matthew Lippmann, *War Crimes Trials of German Industrialists: The "Other Schindlers,"* 9 Temp. Int'l & Comp. L.J. 173, 181–82 (1995).
[65] *The Zyklon B. Case,* 13 Int'l L. Rep. at 252.
[66] "The duty of the Judge Advocate is to advise the Court on matters of law both substantive and procedural, ..." *Trial of Josef Kramer and Forty-Four Others* (*The Belsen Trial*), 2 War Crimes Trials xxxiv (Raymond Phillips ed., 1949).
[67] *The Zyklon B. Case,* 13 Int'l L. Rep. at 252 (emphasis added).

"was not actually present when the murder was done, if he was taking part . . . with the *knowledge* that the other man was going to put the killing into effect, then he was just as guilty as the person who fired the shot or delivered the blow."[68]

The knowledge standard is by no means a low bar to liability. In *Schonfeld*, another British military court acquitted two drivers who had provided substantial assistance by driving men to a house where they executed three Allied airmen, because both drivers claimed to have followed instructions without knowing the aim of the mission. Despite the physical contribution to the crime, the accused had no knowledge of the contribution to the offence and they were thus acquitted.[69]

That knowledge was a sufficient and appropriate standard to convict individuals in the Nuremberg-era tribunals is confirmed by the Judgment on Appeal of January 25, 1949 of the Superior Military Government Court of the French Occupation in Germany in the *Roechling* case.[70] The French military

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[68] 5 Law Reports of Trials of War Criminals 54 (Brit. Mil. Ct., Wuppertal, May 39–June 1, 1946) (emphasis added).

[69] *Trial of Franz Schonfeld and Nine Others*, 11 Law Reports of Trials of War Criminals 64, 66–67 (Brit. Mil. Ct., Essen, June 11–26, 1946).

[70] *Government Commissioner of the General Tribunal of the Military Government for the French Zone of Occupation in Germany v. Roechling, Judgment on Appeal to the Superior Military Government Court of the French Occupation Zone in Germany* (*Roechling Judgment on Appeal*), 14 T.W.C. 1097 (1949).

government in occupied Germany put on trial the industrialist Hermann Roechling and four of his associates in the Roechling iron and steel concern. The Tribunal confirmed in an initial section titled "Fundamental Considerations" that an individual can be convicted under jurisprudence developed by the IMT solely on the basis of the individual's knowledge of the criminal activity.[71]

The French Appellate Tribunal then confirmed the conviction of Hermann Roechling, head of the Roechling concern, for war crimes based on a number of criminal acts, all of which used the *mens rea* of knowledge or presumed knowledge. First, Roechling was convicted of war crimes for taking over and profiting from the factories in Nazi-occupied Poland and then in Nazi-occupied France, including knowingly accepting stolen goods[72], and improper seizure of booty goods.[73] The Appellate Tribunal also found Roechling guilty of war crimes for the inhumane use of forced labor in his factories—likewise based on the knowledge standard. According to the Tribunal, Hermann Roechling, as "the chairman of the RVE [the Reich Association of Iron] *knew* in what way such foreign workers were supplied."[74]

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[71] *Id.* at 1106.
[72] *Id.* at 1113.
[73] *Id.* at 1117–18.
[74] *Id*. at 1130 (emphasis added).

The Appellate Tribunal also found Roechling's son-in-law Lothar von Gemmingen-Hornberg guilty of war crimes on the basis that von Gemmingen-Hornberg, as the president of the board of directors of the Roechling company, knew of the inhumane treatment of the deported workers in the Roechling plant, had authority to change that labor regime, but did nothing about it.[75]

D. *The Hechingen and Haigerloch Case* Does Not Reflect Customary International Law on Aiding and Abetting

The District Court mistakenly relied on *The Heichengen and Haigerloch Case* as support for its argument that under international law, the "purpose" *mens rea* is required for aiding abetting.[76] In *The Heichengen and Haigerloch Case*, a German court tried German citizens for events occurring in Germany.[77] Although it was contemporaneous with the IMT and the tribunals established under Control Council Law No. 10, and looked to Law No. 10 to define the criminal conduct, there is no indication that the national court was applying an international standard of secondary liability. Further an examination of the decision does not support the District Court's assertion that a *mens* rea of purpose was required in those cases. The appellate court stated clearly: "Intentionality as accessory (*Gehilfenvorsatz*) did not require that the accused

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[75] *Id*. at 1136.
[76] *Id.* at 1084.
[77] *The Hechingen and Haigerloch Case, translated in Modes of Participation in Crimes Against Humanity,* 7 J. Int'l Crim. Just. 131 (2009).

acted from racial motives and further did not require that they had an awareness of the illegality (*Bewusstsein der Rechtswidrigkeit*) of their actions, as has already been explained in the judgment on accused."[78] The judgment further explained: "The accused had to have the awareness of having infringed a law or otherwise doing wrong."[79] The convictions of defendants Ho., K., and B were overturned because they lacked awareness of the criminal nature of their conduct.

> Moreover, as the judgment also explicitly finds, they did not have an awareness of the illegality (*Bewusstsein der Rechts-widrigkeit*) of what they were doing. They are accordingly not guilty, whether under Law No. 10 or in German criminal law.[80]

Throughout the Nuremberg-era jurisprudence, the decisions make clear that knowledge was the standard for aiding and abetting and the District Court clearly erred in concluding otherwise.

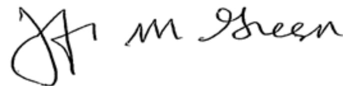
CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that the District Court in its analysis of Nuremberg-era jurisprudence made two grave errors: (1) concluding that such jurisprudence did not recognize the liability of

[78] 7 J. Int'l Crim. Just. at 145–46.
[79] *Id.* at 150.
[80] *Id.* at 151.

corporations under international law and (2) concluding that such jurisprudence applied a purpose rather than a knowledge standard for aiding and abetting liability. Since the Nuremberg precedent is so important to international law, *Amici* Nuremberg Scholars urge this Court to correct these fundamental misunderstandings.

July 1, 2011 Respectfully submitted,



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APPENDIX

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Omer Bartov

Professor 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, Omer 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

[1] Affiliations are provided for identification purposes only.

University Press, 2000); and *Germany's War and the Holocaust* (Cornell University Press, 2003) have all been preoccupied with various aspects of these questions.

Michael J. Bazyler

Professor 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 the forthcoming *Forgotten Trials of the Holocaust* (University of Wisconsin Press).

Christopher Browning

Professor Browning joined the University of North Carolina-Chapel Hill faculty in the fall of 1999. His publications include: *Origins of the Final Solution: The Evolution of Nazi Jewish Policy, September 1939-March 1942* (University of Nebraska Press, 2004); *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland* (HarperCollins, 1992); *The Path to Genocide* (Cambridge University Press, 1992); *Fateful Months: Essays on the Emergence of the Final Solution* (Holmes & Meier, 1985); and *The Final Solution and the German Foreign Office* (Holmes & Meier, 1978). In the spring of 1999, he gave the George Macaulay Trevelyan Lectures at Cambridge University, which have been published under the title *Nazi Policy, Jewish Workers, German Killers* (Cambridge University Press, 2000). In the spring of 2002, he delivered the first of the George Mosse Lectures at the University of Wisconsin, which has been published as *Collected Memories: Holocaust History and Postwar Testimony* (University of Wisconsin Press, 2003). He is also working on a case study, based on nearly 265 survivor testimonies, of the Jewish factory slave labor camps in Starachowice in central Poland.

Lawrence Douglas

Professor Douglas is the James J. Grosfeld Professor of Law, Jurisprudence and Social Thought at Amherst College. He holds degrees from Brown (A.B.), Columbia (M.A.), and Yale Law School (J.D.); and has received major fellowships from the Institute for International Education (ITT-Fulbright) and the National Endowment for the Humanities. He is the author of three books: *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (Yale University Press, 2001), a widely acclaimed study of war crimes trials; *Sense and Nonsensibility* (Simon and Schuster, 2004), a parodic look at contemporary culture co-authored with Amherst colleague Alexander George; and *The Catastrophist* (Other Press, 2006; Harcourt, 2007), a novel. In addition, he has co-edited ten books on current legal topics. His writings have appeared in numerous journals and magazines including *The Yale Law Journal*, *Representations*, *The New Yorker*, *The New York Times Book Review*, *The Washington Post*, and *The Times Literary Supplement*. He is currently at work on a book about the cultural afterlife of war crimes trials to be published by Princeton University Press.

Hilary Earl

Professor Earl is Associate Professor in the Department of History at Nipissing University in North Bay, Ontario, Canada. She received her Ph.D. in 2002 from University of Toronto in European History, her M.A. in 1992 from University of New Brunswick in European History, and her B.A. in 1989 from University of New Brunswick in History. Dr. Earl's book, *The Nuremberg SS-Einsatzgruppen Trial, 1945-1958: Atrocity, Law, and History*, was published in June 2009 with Cambridge University Press. In 2009, she won a Research Achievement award at Nipissing University and won the University's Chancellor's Award for Excellence in Teaching. Additional awards and fellowships include 2005-2006 Nipissing University Internal Research Grant; 2003 Fellowship Research Seminar: Interpreting Testimony, Center for Advanced Holocaust Studies, United States Holocaust Memorial Museum, Washington, D.C. (co-investigator); 2001-2002 Center for Advanced Holocaust Studies Research Fellowship, United States Holocaust Memorial Museum, Washington, D.C.; 1994-2000 University of Toronto Open Fellowship; 1997-1998 Leonard and Kathleen O'Brien Humanitarian Trust Fellowship; 1997-1998 Joint Initiative for German/European Studies Dissertation Award; and 1994-1998 New Brunswick Women's Doctoral Fellowship.

Hon. Bruce J. Einhorn, ret.

The Honorable Bruce Einhorn is Adjunct Professor of Law and Director of the Asylum Clinic at Pepperdine University School of Law. He served as a federal immigration judge for seventeen years before retiring in 2007. Prior to his service on the court, he served as a special prosecutor and as Chief of Litigation for the U.S. Department of Justice's Office of Special Investigations. He regularly teaches a course on International Criminal Law.

David Fraser

Professor 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), winner of 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).

Sam Garkawe

Sam Garkawe is an Associate Professor at the School of Law and Justice at Southern Cross University in New South Wales, Australia. He has two Masters of Laws degrees from London University and Sydney University, and is admitted to the State Bar of California. Sam has published widely in the field of victimology, including issues concerning the role of victims in international justice mechanisms, such as the International Criminal Court and the South African Truth and Reconciliation Commission, and more recently on the need for a binding International Convention in support of victims. His published work includes a chapter entitled "The role and rights of victims at the Nuremberg International Military Tribunal" in the book *The Nuremberg Trials: international criminal law since 1945: 60th anniversary international conference*. He presently teaches victimology, human rights, criminal law and procedure, and international criminal law. In July 2003 he was appointed to the United Nations Liaison Committee of World Society of Victimology (WSV), and in this capacity he has represented the WSV at United Nations Crime Congresses in Bangkok, Thailand (2005) and Salvador, Brazil (2010). Sam is a life member of the WSV and in 2009 was elected to its Executive Committee.

Gregory S. Gordon

Professor Gordon is the Director of the University of North Dakota Center for Human Rights and Genocide Studies and teaches human rights and international and criminal law at the University of North Dakota School of Law. Before joining the legal academy, he was a Senior Trial Attorney for the U.S. Department of Justice's Office of Special Investigations. He previously worked with the Office of the Prosecutor for the International Criminal Tribunal for Rwanda, where he served as Legal Officer and Deputy Team Leader for the landmark media cases, the first international post-Nuremberg prosecutions of radio and print media executives for incitement to genocide. His scholarship has been published in leading international publications and focuses on both the substantive and procedural aspects of human rights and international criminal law.

Michael J. Kelly

Professor Kelly is Professor of Law and Associate Dean for International Programs and Faculty Research at Creighton University School of Law. He has served as chair of the Association of American Law Schools (AALS) Section on National Security Law and is president of the U.S. National Chapter of L'Association International du Droit Pénal, a Paris-based society of

international criminal law scholars, judges, and attorneys founded in 1924 that enjoys consultative status with the United Nations. His research and teaching focuses on the fields of international and comparative law and Native American law. He is the author and co-author of four books and over thirty articles and book chapters in these areas. He has taught International Criminal Law for over a decade.

Matthew Lippman

Professor Lippman is 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 trial and on other post-World War II prosecutions of Nazi war criminals. He teaches courses on international criminal law and 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 which 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. He has been cited or excerpted in leading international law texts and in various texts on criminal procedure as well as by the International Court of Justice and other international tribunals.

Michael Marrus

Professor Marrus is the Chancellor Rose and Ray Wolfe Professor Emeritus of Holocaust Studies and a Fellow of Massey College. A Fellow of the Royal Society of Canada and a member of the Order of Canada, he received an M.A. and Ph.D. from the University of California at Berkeley – and more recently, a Master of Studies in Law at the University of Toronto. He has been a visiting fellow of St. Antony's College, Oxford; the Institute for Advanced Studies of the Hebrew University of Jerusalem; and has taught as a visiting professor at University of California, Los Angeles and the University of Cape Town, South Africa. His recent teaching, both in Law and History, focuses on political trials. He is the author several books, including *Vichy France and the Jews* (with Robert Paxton) (Basic Books, 1981); *The Unwanted: European Refugees in the Twentieth Century* (Oxford University Press, 1985); *The Holocaust in History* (New American Library, 1989); and *The Nuremberg War Crimes Trial, 1945-46* (Bedford Books, 1997). He has recently published a book on the Holocaust-era

restitution campaign of the 1990s, entitled *Some Measure of Justice* (University of Wisconsin Press, 2009).

Fionnuala D. Ní Aoláin

Professor Ní Aoláin is concurrently the Dorsey & Whitney Chair in Law at the University of Minnesota Law School and a Professor of Law at the University of Ulster's Transitional Justice Institute in Belfast, Northern Ireland. In 2008, she was invited to participate as an expert in an Expert Seminar organized by the Working Group "Protecting human rights while countering terrorism" of the United Nations Counter-Terrorism Implementation Task Force. She has previously been Visiting Scholar at Harvard Law School (1993-94); Visiting Professor at the School of International and Public Affairs, Columbia University (1996-2000); Associate Professor of Law at the Hebrew University in Jerusalem, Israel (1997-99); and Visiting Fellow at Princeton University (2001-02). Her most recent book, *Law in Times of Crisis* (Cambridge University Press, 2006), was awarded the American Society of International Law's preeminent prize in 2007: the Certificate of Merit for creative scholarship. She is also the author of "Sex-Based Violence and the Holocaust – A Re-evaluation of Harms and Rights in International Law," 12 *Yale J.L. & Feminism* 43 (2000). She was a representative of the Prosecutor at the International Criminal

Tribunal for the Former Yugoslavia at domestic war crimes trials in Bosnia (1996-97). In 2003, she was appointed by the Secretary-General of the United Nations as Special Expert on promoting gender equality in times of conflict and peace-making. She has been nominated twice by the Irish government to the European Court of Human Rights, in 2004 and 2007, the first woman and the first academic lawyer to be thus nominated. She was appointed by the Irish Minister of Justice to the Irish Human Rights Commission in 2000 and served until 2005.

Burt Neuborne

Professor Neuborne is Inez Milholland Professor of Civil Liberties and Legal Director, Brennan Center for Justice at New York University School of Law. He has acted as plaintiffs' lead co-counsel and is special court-appointed settlement counsel in the recent Holocaust-era litigation against the Swiss banks, and also served as plaintiffs' lead co-counsel in the litigation against German industry for Holocaust-era crimes. He was also a commentator and advisor to Court TV for their 50th anniversary commemoration of the Nuremberg trials. A former National Legal Director of the American Civil Liberties Union, he is a graduate of Harvard Law School from where he received an LL.B in 1964.

Christoph J.M. Safferling

Professor Safferling is professor of criminal law, criminal procedure, international criminal law, and public international law at the Philipps-University of Marburg, in Marburg, Germany. At the University of Marburg, he also serves as the Director of the International Research and Documentation Center for War Crimes Trials. He is also the Whitney R. Harris International Law Fellow of the Jackson Center, Jamestown, New York, and a member of the advisory board to the city of Nuremberg regarding the "Memorial Nuremberg Trials." Alongside several articles in the fields of criminal law, international law, and human rights law, he has published *Towards an International Criminal Procedure* (Oxford University Press, 2003); *The Nuremberg Trials: International Criminal Law Since 1945* (Saur, 2006); and edited the German translation of Whitney Harris' *Tyranny on Trial [Tyrannen vor Gericht]* (BWV 2009).

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