Nos. 19-416 & 19-453

In The Supreme Court of the United States

NESTLE, USA, INC.,

Petitioner,

v.

JOHN DOE I, et al.,

Respondents.

CARGILL, INCORPORATED,

Petitioner,

v.

JOHN DOE I, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE NUREMBERG SCHOLARS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae comprise academicians from three disciplines, law, history, and political science, with particular knowledge about the legal measures taken by the victorious Allies in occupied Germany, including the international trials that took place in Nuremberg, Berlin and other cities of occupied Germany in the aftermath of the Second World War. Given the importance of what can collectively be called Nuremberg-era jurisprudence to the development of international law, it is particularly crucial that this Court understand how international law remedies were applied to privately-owned German corporations in the aftermath of Nazi Germany's unconditional surrender seventy-five years ago in May 1945. *Amici* submit this brief to correct an inaccurate reading of this history found in Petitioners' briefs and multiple *Amici Curiae* briefs submitted in this appeal. Br. Pet'r Nestlé USA, Inc. 37, 49-50; Br. Pet'r Cargill, Inc. 20, 41-43; Br. United States *Amicus Curiae* Supp. Pet'rs 7, 11, 14; Br. Professors of International Law et al. *Amici Curiae* Supp. Pet'rs at 2, 16-19, 26; Br. Cato Institute *Amicus Curiae* Supp. Pet'rs. at 6-7; Br. Coca-Cola Company *Amicus Curiae* Supp. Pet'rs at 21-23.

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[1] This brief is submitted pursuant to Supreme Court Rule 37 in support of Respondents. 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 persons other than the *Amici* or their counsel made a monetary contribution to this brief's preparation or submission.

SUMMARY OF ARGUMENT

An accurate understanding of the Nuremberg-era jurisprudence, including the Nuremberg trials, is critical to the question of whether corporations may be held liable under international law. At the various trials conducted by the Allies between 1945 and 1949 at the Palace of Justice in Nuremberg and in other courtrooms throughout occupied Germany only German industrialists, and not the German private corporations themselves, were criminally prosecuted. However, the Allied Control Council—the international body governing occupied Germany and issuing Control Council Law No. 10 under which the Nuremberg Military Tribunals were held between 1946 and 1949—deployed a range of remedial measures to hold juristic persons, including corporations, accountable for violations of international law. Such measures included the dissolution of corporations and the seizure of their assets that were then used for a system of reparations including to compensate victims. Indeed, even before the first Nuremberg trial began, the Allied Control Council had already dissolved a number of German corporations, including most prominently the world's largest chemical company, *Interessengemeinschaft Farbenindustrie Aktiengesellschaft* ("I.G. Farben"), and seized their assets. When the international trial of the Farben defendants took place pursuant to Control Council Law No. 10, I.G. Farben had already suffered corporate death under international law pursuant to

Control Council Law No. 9. As a result, punishment of German corporations under international law took place outside of the courtroom.

The absence of criminal penalties imposed by an international judicial tribunal against German corporations is more appropriately understood as a choice of forum and method of sanction for such private corporations through other international law mechanisms, rather than through criminal trials. The absence of I.G. Farben and other German private corporate wrongdoers in the Nuremberg dock cannot therefore stand for the proposition that international law lacks authority to hold corporations accountable. To put it plainly, just because there was no German company indicted and pleading *Nicht Shuldig* [Not Guilty] in the thirteen trials held in the Palace of Justice in Nuremberg between 1945-1949 does not mean that international law provides impunity to corporate wrongdoers.

The Allied Powers made international law in occupied Germany not only through the judgments issued at Nuremberg but also through executive decisions in Berlin. The norms which the Allies applied were anchored in international law. This was as true of the Allied occupation courts, such as the International Military Tribunal and the Nuremberg Military Tribunals, as it was of the Allied Control Council laws and directives. Whether at the Palace of Justice courthouse in Nuremberg or at the Allied Control Council headquarters in the Kammergericht courthouse in Berlin, the Allied Control Council officials and Allied judges were all making and

applying international law. Moreover, the Nuremberg judgments issued during the criminal trials of the individual German industrialists confirm that the German corporations headed or assisted by the industrialists in the dock violated international law.

With the exception of the Second Circuit in *Kiobel*, 621 F.3d at 148, all other circuits have concluded that Nuremberg-era jurisprudence supports corporate liability under international law. *Compare Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 148 (2d Cir. 2010) *with Flomo v. Firestone Nat. Rubber Co*. 643 F.3d 1013, 1017-18 (7th Cir. 2011)*, Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 52-53 (D.C. Cir. 2011), *vacated on other grounds*, 527 Fed. App'x 7 (D.C. Cir. 2013) (mem.)*, and Doe I v. Nestlé USA, Inc.*, 766 F.3d 1013, 1020-22 (9th Cir. 2014). The erroneous analysis of the *Kiobel* majority concludes that "[n]o corporation has ever been subject to *any* form of liability (whether civil, criminal, or otherwise) under the customary international law of human rights . . . ." *Kiobel*, 621 F.3d at 148. In reaching this conclusion, the majority narrowly focused on the criminal trials and ignored other actions taken under customary international law against corporations and organizations outside the courtroom. The impression left by the majority opinion in *Kiobel* is an historically inaccurate conclusion that what came out of what we label in shorthand as "Nuremberg-era jurisprudence" is a rule that corporations are immune under international law.

A similar error was repeated by a plurality in *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1398, 1402 (2018), and Petitioners and their *amici* now before this Court. Br. Pet'r Nestlé 37, 49-50; Br. Pet'r Cargill 20, 41-43; Br. U.S. 7, 11, 14; Br. Professors of International Law 2, 16-19, 26; Br. Cato Institute 6-7; Br. Coca-Cola Company 21-23. We respectfully submit that the Founders of Nuremberg and those working with them would have been dismayed by this conclusion. It is time to put it to rest. Justice Robert Jackson in his opening address at the IMT trial noted that no one (juridical or natural person) is beyond the reach of the law.[2] As he eloquently stated: "While it is quite proper to employ the fiction of responsibility of a state or corporation for the purpose of imposing a collective liability, it is quite intolerable to let such a legalism become the basis of personal immunity."[3]

[2] Robert H. Jackson, *Opening Statement Before the International Military Tribunal*, ROBERT H. JACKSON CENTER (Nov. 21, 1945), http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/opening-statement-before-the-international-military-tribunal (last visited October 19, 2020) [*hereinafter* "Jackson Opening Statement"].

[3] *Id.*

ARGUMENT

I. THE ALLIES SPECIFICALLY IMPOSED SANCTIONS IN THE NUREMBERG ERA ON NATURAL PERSONS, ORGANIZATIONS AND CORPORATIONS FOR VIOLATIONS OF CUSTOMARY INTERNATIONAL LAW

An understanding of Nuremberg-era jurisprudence and its application to corporations must begin with an understanding of the broad program enacted by the Allies after the occupation of Germany. The Allies' program to govern Germany for the period immediately following the cessation of hostilities contained three components: what to do with the German state upon defeat of the Third Reich; what to do with natural persons and organizations who committed crimes; and what to do with the German economy and its corporations.

With regard to the defeated German Reich, the Allies first occupied the country by dividing it into four zones and, later, 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 the natural persons and organizations, 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,[4] while the war was still ongoing, and then confirmed by the London Charter of August 8, 1945, after Nazi Germany's unconditional surrender.[5] 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 third issue that faced the Allies upon Nazi Germany's defeat was what to do with the major German corporations that had participated in war crimes and other violations of international law.

The Allies created the quadripartite Allied Control Council (*Alliierter Kontrollrat*) (commonly known as "the Control Council" or "der *Kontrollrat")* to translate its policies into law.[6] Under the Control

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[4] Declaration of German Atrocities, signed by President Roosevelt, Prime Minister Churchill and Premier Stalin, Moscow, Nov. 1, 1943, 3 Bevans 816, 834, Dep't St. Bull.

[5] 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, 59 Stat. 1544, 82 U.N.T.S. 279 ["the London Charter"].

[6] *See* Agreement on Control Machinery in Germany, Nov. 14, 1944, http://docs.fdrlibrary.marist.edu/psf/ box32/t298f04.html; Eli E. Nobleman, *Quadripartite Military Government Organization and Operations in Germany*, 41 Am. J. Int'l. L. 650, 651 (1947) (stating that the supreme governing machinery for Germany is the Allied Control Authority, composed of the Control Council, the Coordinating Committee, the Control Staff and the Allied Secretariat). The Control Council was composed

Council was the Coordinating Committee, which was assisted by ten directorates serving as functional specialists for the Coordinating Committee, including the Finance Directorate, Legal Directorate, Reparation Directorate, and Restitutions Directorate.[7] Some writers at the time noted that the directorates functioned "in a manner similar to the Congressional Committees in the United States."[8]

The Control Council and Coordinating Committee were provided with the "means of legislative action," including laws "on matters of general application," orders to communicate Control Council requirements, and directives used to "communicate policy or administrative decisions of the Control Council."[9] With deterioration in relations

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of Commanders-in-Chief of the Armed Forces of the United States, United Kingdom, Union of Soviet Socialist Republics, and France, and acted "on instructions from their respective governments, with respect to all matters affecting Germany as a whole." *Id.* at 651.

[7] Nobleman, *supra* note 6, at 651-52.

[8] *Id.* at 653.

[9] Control Council Directive No. 10, *Control Council Methods of Legislative Action* (Sept. 2, 1945), *reprinted in* 1 Enactments and Approved Paper of the Control Council and Coordinating Committee 95, *available at* https://www.loc.gov/rr/frd/Military_Law/Enactments/Volume-I.pdf. Control Council Directive No. 51, which replaced Control Council Directive No. 10, states that "the only legislative acts which may contain penalty clauses are laws and orders." Control Council Directive 51, *Legislative and Other Acts of the Control Council* (Apr. 29, 1947), *reprinted in* 7 Enactments and Approved Paper of the Control Council and Coordinating Committee 27, *available at* https://www.loc.gov/rr/frd/Military_Law/Enactments/Volume-VII.pdf.

with the Soviet Union, the three-power Allied High Commission, comprised of representatives of the United States, the United Kingdom and France, replaced in 1949 the four-power Control Council for the Western occupied zones, and the Federal Republic of Germany began to be created out of the Western zones. Under occupation, related laws were also issued for Germany in the different Allied zones, sometimes known as "zonal legislation."

In Part I, we describe how international law was applied in occupied Germany. As we explain in Section A, the Control Council's actions in governing occupied Germany were based on a foundation of customary international law. Sections B and C demonstrate that those international law principles provided the framework for the prosecution of natural persons and organizations. Sections D and E review the legal framework used for the imposition of sanctions on corporations and the means by which that framework was applied to corporations. Part II focuses on the Nuremberg trials and their judgments, which recognized corporate liability in addition to the liability of the industrialists who were in the dock.

A. The Allies Were Acting Pursuant to Customary International Law Norms in All Their Post-War Actions, Including Against Corporations

Scholars to this day differ on whether the customary international law principle of *debellatio*—the law governing complete conquest—was in effect in occupied Germany after unconditional surrender,[10] or whether the Allies were governing according to the customary international law of occupation, as codified in the 1907 Hague Regulations.[11] This debate is not relevant to the issue *sub judici*, however, because the Allies, whether acting inside the various courtrooms in occupied Germany or outside the courtroom, aimed to make their actions conform to international law.

The earliest documents creating the Control Council demonstrate the Allies' commitment to international law norms. For example, the Potsdam

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[10] *See*, *e.g.*, Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* 113-120 (2011); Eyal Benvenisti, *The International Law of Occupation* 91-96 (2004); Yoram Dinstein, *The International Law of Belligerent Occupation* 33 (2009).

[11] *See*, *e.g.*, Regulations Respecting the Laws and Customs of War on Land, annexed to Convention Respecting the Laws and Customs of Land Warfare, Oct. 18, 1907, 36 Stat. 2277, *reprinted in* 2 Supplement to the Am. J. Int'l L. Supp. 90 (1908) [*hereinafter* "Hague Regulations"]. Article 43 required that the laws of the occupied country be respected unless the occupier was "absolutely prevented" from doing so. *Id.* at art. 43. Notably, corporate seizure of private property in occupied territory violated long-standing norms of the 1907 Convention. *Id.* at arts. 46-47, 53.

Agreement made it clear that the "purposes of the occupation of Germany by which the Control Council shall be guided are: (i) [t]he complete disarmament and demilitarization of Germany . . . to dissolve all Nazi institutions . . . [t]o prepare for the eventual reconstruction of German political life . . . and for eventual peaceful cooperation in international life by Germany." Protocol of the Proceedings of the Berlin ("Potsdam") Conference, U.S.-U.K.-U.S.S.R., § II.A.3, Aug. 2, 1945, 3 Bevans 1207, 1220, http://avalon.law.yale.edu/20th_century/decade17.asp[*hereinafter* "Potsdam Agreement"].

The actions of the Control Council both reflected pre-existing customary international law and contributed to the development in the future of such law. Customary international law is found in the "practice of states," *Oppenheim's International Law* at 25, 26 (Sir Robert Jennings & Sir Arthur Watts, eds., 9th ed. 1996), which also encompasses activities such as their external conduct with each other, domestic legislation diplomatic dispatches, internal government memoranda, and ministerial statements. *Id.* at 26. Indeed, judicial decisions are only a secondary source of customary international law, while the practice of states is primary evidence of that law. *See* Statute of the International Court of Justice art. 38(1)(d), Jun. 26, 1945, 59 Stat. 1055, 1060, U.S.T.S. 993 (listing "judicial decisions" as a "subsidiary means for the determination of rules" of international law).

To evaluate the customary international law applied to German corporations, it would be error to

rely only on Nuremberg *judicial* actions, while ignoring the large body of *international state practice* by the Allies that demonstrated that corporations were not considered immune under international law. *See Doe v. Exxon*, 654 F.3d at 19 (noting state practice as a source of customary international law). Further, the actions taken by the Control Council reflect *opinio juris*. As explained above, Article 38(b) of the Statute of the International Court of Justice identifies state practice as a preeminent source of international law.

Not only did the Allies' actions reflect settled practice, but they were carried out because "[t]he States concerned . . . [felt] that they [were] conforming to what amounts to a legal obligation." *North Sea Continental Shelf Cases*, Judgment, 1969 I.C.J. 3, ¶ 77 (Feb. 20). The Allies, as occupiers of Germany between 1945 and 1949, believed that they were acting pursuant to international law and believed they were bound by it in their actions. This is reflected both in the actions taken by the Allies and in the language used in the laws they enacted.

B. The Legal Framework Created by the Allies Provided for Trials Against Natural Persons and Organizations

The London Charter signed seventy-five years on August 8, 1945 created the International Military Tribunal ("IMT")and set out the specific international crimes for which "major war criminals" would be prosecuted: crimes against peace, war crimes, crimes against humanity, and conspiracy.

No pre-war international treaty defined these crimes (save for war crimes) or made natural persons 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 law), thereby answering the accusation that the defendants in the dock at Nuremberg were being tried *ex post facto*. 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, exactly one month after the trial of the major war criminals had begun.[12] 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.

From the first of its laws, the Control Council made clear that corporations were subject to customary international law as implemented by the Control Council. Control Council Law No. 5 set out the plan to seize all German assets abroad "with the intention thereby of promoting international peace and collective security . . . ." The law specifically targeted corporations as well as natural persons, by defining "person" to include "collective" or "juridical"

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[12] 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* https://www.loc.gov/rr/frd/Military_Law/Enactments/Volume-I.pdf [*hereinafter* "Control Council Law No. 10"].

persons or entities.[13]

The references to "individuals" or "persons" in Nuremberg documents were intended to make clear that persons—regardless of their official positions—could be held responsible for state crimes under international law. As Justice Jackson noted in his Opening Address to the IMT:

> The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched.[14]

This emphasis on individual as opposed to state liability also contrasted with the view, ultimately reached by the Allied Powers after the First World War, only to hold states responsible under international law. In their Brief for the United States as *Amicus Curiae* Supporting Petitioners at 30 n. 18, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (No. 10-1491), the U.S. State and Justice

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[13] "[T]he 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), *reprinted in* 1 Enactments and Approved Papers of the Control Council and Coordinating Committee 225, *available at* https://www.loc.gov/rr/frd/Military_Law/Enactments/Volume-I.pdf.

[14] Jackson Opening Statement.

Departments agreed with this position:

> The International Military Tribunal's statement that "[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," see Pet. App. A12, A50 (quoting The Nurnberg Trial (*United States* v. *Goering*), 6 F.R.D. 69, 110 (Int'l Military Trib. at Nuremberg 1946)), has been taken out of context. The Tribunal clearly was rejecting the defendant's argument that only a state could be held liable for violations of international law; it was not making any distinction among actors other than the state.

This historical context corrects the erroneous conclusion that the quotation about the punishment of individuals supported a holding by the Tribunals that corporate liability was not permitted under international law. *See Jesner*, 138 at 1398; Br. Nestlé 37 , 49-50; Br. Cargill 20, 41-43; Br. United States Supp. Pet'rs 7, 11, 14; Br. Professors of International Law Supp. Pet'rs at 2, 16-19, 26; Br. Cato Institute 6-7; Br. Coca-Cola Company 21-23.

Unfortunately, in a short paraphrase and without explanation or context, the U.S. government reversed its position in an *Amicus Curiae* Brief submitted to this Court.[15] This is among a number of reversals without identifying what has changed in the law since its last submission to explain such a dramatic *volte face*. *See generally* Br. Former Government Officials *Amici Curiae* Supp. Resp'ts.

[15] This reversal was a departure from the U.S. position in both *Kiobel* and *Jesner*. *Compare* Brief for the United States as *Amicus Curiae* Supporting Petitioners at 30 n.18, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013)(No. 10-1491) *and* Brief for the United States as *Amicus Curiae* Supporting Neither Party at 13, *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018)(No. 16-499) ("No principle of international law precludes the existence of a norm for the conduct of private actors that applies to the conduct of corporations.") *with* Br. United States Supp. Pet'rs (2020) 11.

C. Organizations Were Indicted and Convicted Pursuant to the London Charter

The London Charter, when it authorized the IMT to designate any group or organization as criminal, specifically enunciated that groups or organizations could violate international law: "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." London Charter, Article 9.

The IMT prosecutors, in addition to the 22 people 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 *Schutzstaffeln* ("SS") with the *Sicherheitsdienst* ("SD") as its integral part, and—separately—the *Geheime Staatspolizei* ("Gestapo"). The Nuremberg judges acquitted the first three organizations and designated the last three as criminal.

Declaring organizations to be criminal served a goal of facilitating the prosecution of members of the organization. However, Petitioners' *Amici* Law Professors err in their assertion that the conviction of the organizations was only for this purpose. Br. Law Professors Supp. Pet'rs 16-17. As Justice Jackson stated, criminalizing the organization would also serve to protect against the threat they posed; this goal was seen as broader than what would be served by prosecuting only members. Report of Robert H.

Jackson, United States Representative to the International Conference on Military Trials, London 1945, at 130 (U.S. Dep't of State, Pub. No. 3080, 1949), available at https://www.loc.gov/rr/frd/Military_Law/pdf/jackson-rpt-military-trials.pdf. Justice Jackson addressed collective guilt and the inefficiency of individual prosecutions, then specifically discussed the criminal character of the organizations:

> We are quite ready, of course, to agree that these organizations have no present legal existence, but that does not prevent the effectiveness of a trial concerning their criminal character in the past when concededly they were in fact in existence, nor prevent use of membership as evidence of conspiracy.

Id. In addition to the condemnation by the international tribunals, Nazi organizations were subjected to other action by the Control Council. As indicated by Justice Jackson, by the time these organizations were declared to be criminal by the IMT, they had been punished under international law because the Allies had already imposed upon them the most severe punishment of all: juridical death through dissolution as well as the confiscation of all their assets.

What is critical is that the Allies carried out this punishment under international law. It was an international treaty that dissolved the Nazi Party and its related entities on September 20, 1945 (following the London Charter on August 8, 1945 and

before the IMT trial began on November 20, 1945). 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 (Sept. 20, 1945), *reprinted in* 40 Supplement 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.").

This death by dissolution was confirmed by Control Council Law No. 2, which abolished the Nazi Party and affiliated organizations permanently, declared them illegal, and authorized the confiscation of all their property and assets. Control Council Law No. 2, *Providing for the Termination and Liquidation of the Nazi Organizations* (Oct. 10, 1945), *reprinted in* 1 Enactments and Approved Paper of the Control Council and Coordinating Committee 131, *available at* https://www.loc.gov/rr/frd/Military_Law/Enactments/Volume-I.pdf.

Control Council Law No. 43 also provided for the prosecution of organizations themselves. Control Council Law No. 43, *Prohibition of the Manufacture, Import, Export, Transport and Storage of the Materials* (Dec. 20, 1946), reprinted in 5 Enactments and Approved Paper of the Control Council and Coordinating Committee 194, available at https://www.loc.gov/rr/frd/Military_Law/Enactments/Volume-V.pdf. ("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.")

Nuremberg-era jurisprudence, both inside and outside the courtroom, establishes that not only states and natural persons can be liable for international law violations, but also juridical entities.

D. The Legal Framework Created by the Allies Provided for Actions Under International Law Against Corporations

The earliest pronouncement of the Allies at Potsdam and Yalta created a multinational framework for action against corporations complicit in the Nazi-era war crimes. As Judge Richard Posner noted, the Allies took action "on the authority of customary international law." *Flomo*, 642 F.3d at 1017. The Yalta and Potsdam Agreements envisioned dismantling Germany's industrial assets, public and private, and creating a system of reparations for states and persons injured during the Nazi period. The Allied plan for post-war Germany was known as the "de" program, usually identified as demilitarization, decartelization, denazification and democratization. Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* 25 (2001).

The program originated in the Potsdam Agreement, which stated, "At the earliest practicable date, the German economy shall be decentralized for the purpose of eliminating the present excessive concentration of economic power as exemplified in particular by cartels, syndicates, trusts and other monopolistic arrangements." Potsdam Agreement § II.B.12. As a central component of this program, corporations faced demilitarization, deconcentration, and decartelization, as the Allies sought the elimination or control of all German industry that could be used for military production. There were two related objectives: the elimination of German's war potential[16] and the payment of reparations.[17]

The Control Council was charged with the "inflexible purpose" to "destroy German militarism and Nazism and to ensure that Germany will never again be able to disturb the peace of the world." Crimea Conference Communiqué (Feb. 2-11, 1945), *reprinted in* 1 Enactments and Approved Paper of the Control Council and Coordinating Committee 2, *available at*

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[16] "In order to eliminate Germany's war potential, the production of arms, ammunition and implements of war as well as all types of aircraft and sea-going ships shall be prohibited and prevented. Production of metals, chemicals, machinery and other items that are directly necessary to a war economy shall be rigidly controlled and restricted to Germany's approved post-war peacetime needs to meet the objectives stated in Paragraph 15. Productive capacity not needed for permitted production shall be removed in accordance with the reparations plan recommended by the Allied Commission on Reparations and approved by the Governments concerned or if not removed shall be destroyed." Potsdam Agreement § II.B.11.

[17] Potsdam Agreement §§ II.B.19, III.

http://www.loc.gov/rr/frd/Military_Law/Enactments/Volume-I.pdf. To meet that goal, the Control Council was instructed to "eliminate 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 . . . ." *Id.* Its authority to confiscate property and provide for reparations, necessarily emanated from international law and not from local German law.[18]

E. Control Council and Other Allied Laws, Orders and Directives Addressed Corporations

Before issuing Control Council Law No. 10 on December 20, 1945, which set up the Nuremberg international tribunals, the occupation authority issued Control Council Law No. 9 on November 30, 1945. 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*
https://www.loc.gov/rr/frd/Military_Law/Enactments/Vol

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[18] In their attempt to distinguish criminal adjudication from acts of dissolution taken against IG Farben, *Amici* Law Professors assert that these actions were not international law but were "military occupation" measures, ignoring direct legal authority that the law of occupation is international law. Br. Professors of International Law et al. *Amici Curiae* Supp. Pet'rs 17.

ume-I.pdf [*hereinafter* Control Council Law No. 9]. This law specifically directed the dissolution of I.G. Farben and the dispersal of its assets.

Control Council Law No. 9 was based on 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.[19] 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 concern: "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 . . . ."[20]

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[19] The Kellogg-Briand Pact made the planning and waging of aggressive war both illegal and criminal. Sheldon Glueck, *The Nuernberg Trial and Aggressive War*, 59 Harv. L Rev. 396, 407-12 (1946).

[20] Control Council Law No. 9, *available at* https://www.loc.gov/rr/frd/Military_Law/Enactments/Volume-I.pdf; *see also* Memorandum from Bernard Bernstein to Office of Military Government, United States (Germany), *reprinted in Elimination of German Resources for War: Hearings before a Subcommittee of the Senate Committee on Military Affairs Pursuant to S. Res. 107 and S. Res. 146*, 79th Cong., 1st Sess. (1945) (describing "program adopted by the Allied Powers at Potsdam to strip Germany of all of her external assets in the interest of future world security and to use such assets for the relief and rehabilitation of countries devastated by Germany in

To implement this international law norm, the punishment imposed by the Allied Control Council upon I.G. Farben was seizure. Article I 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."[21]

This ultimate sanction was as drastic as any that could be imposed on a juridical entity: death through seizure and as much a pronouncement of international law as Control Council Law No. 10, which was used to prosecute natural persons and organizations. The extreme sanction of dissolution imposed by Control Council No. 9 is clearly inconsistent with a conclusion that international law at the time of Nuremberg did not consider corporations liable for violations of international law norms.

A subsequent directive provided further details about how the decartelization of Farben would take place. Allied High Commission Law No. 35, *Dispersal of Assets of I.G. Farbenindustrie* (Aug. 17, 1950), *reprinted in* Documents on Germany under Occupation, 1945-1954 at 503 (1955). Article 2 of Law No. 35 specified that "[u]ntil the Council of the Allied

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her attempt at world conquest. . . . [T]he primary purpose of the Allied Powers in acquiring all German holdings in other countries is to prevent their use by Germany in waging a third world war. . . .").

[21] Control Council Law No. 9 art. I, *available at* https://www.loc.gov/rr/frd/Military_Law/Enactments/Volume-I.pdf.

High Commission has otherwise decided, the British, French and United States I.G. Farben Control Officers shall continue to exercise all rights and powers of seizure and control over the assets subject to this Law *conferred by any Occupation Legislation*." *Id.* (emphasis added).

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. Control Council Law No. 57, *Dissolution and Liquidation of Insurance Companies Connected with the German Labor Front* (Aug. 30, 1947), *reprinted in* 8 Enactments and Approved Paper of the Control Council and Coordinating Committee 1, *available at* https://www.loc.gov/rr/frd/Military_Law/Enactments/Volume-VIII.pdf. This law was enacted pursuant to Control Council Law No. 2, which targeted Nazi organizations. Other longstanding insurance companies such as Allianz were dismantled under Military Government Law No. 52. Military Government Law No. 52, Military Government-Germany, United States Zone, *Blocking and Control of Property* (May 8, 1945), amended version *reprinted in* U.S. Military Government Gazette, Germany, Issue A, at 24 (June 1, 1946). *See* Gerald D. Feldman, *Allianz and the German Insurance Business, 1933-1945* 497-98 (2001).

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 and

make the assets available for reparations.[22] Control Council Directive No. 39 noted that "the Potsdam decisions call for the liquidation of German war and industrial potential." *See* Control Council Directive No. 39. The Principles followed in the "Rules for Liquidation" of war plants noted that buildings were to be "destroyed, declared available for reparations, or left for the peace-time economy in cases where they can be used for the peacetime economy. . . ." *Id.*

Corporations deemed to represent a threat of future international law violations were also subjected to sanctions short of dissolution. For example, identical versions of Law No. 75 were issued by both the Office of the Military Government of the United States and the British zonal authorities. These laws set the framework for the redistribution of shares of German heavy industrial companies to their owners (after breaking the companies into smaller entities subject to Military Government Laws Nos. 52 and 56). However, the preamble of these parallel documents declared that the Military Government "will not allow the restoration of a

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[22] *See* Control Council Directive No. 39*, Liquidation of Ger- man War and Industrial Potential* (Oct. 2, 1946), *reprinted in* 5 Enactments and Approved Paper of the Control Council and Coordinating Committee 1, *available at* https://www.loc.gov/rr/frd/Military_Law/Enactments/Volume-V.pdf [*hereinafter* Control Council Directive No. 39]; Control Council Directive No. 47, *Liquidation of German War Research Establishments* (Mar. 27, 1947), *reprinted in* 6 Enactments and Approved Paper of the Control Council and Coordinating Committee 95, *available at* https://www.loc.gov/rr/frd/Military_Law/Enactments/Volume-VI.pdf.

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, *reprinted in Documents on International Affairs, 1949-50* 637-45 (Margaret Carlyle, ed. 1953). The language of these documents demonstrates the punitive intention of the Allied deconcentration policy.

In 1950, Allied High Commission Law No. 27 replaced Military Government Law No. 75 in the three Western Zones and provided for the reorganization of German coal, iron, and steel industries, with the goal of "preventing the development of a war potential. . . ." Allied High Commission Law No. 27, *On the Reorganisation of the German Coal and Steel Industries* (May 16, 1950), Official Gazette of the Allied High Commission for Germany No. 20 299 (May 20, 1950); *see also* Allied Military Government, British Zone, *General Order No. 7 (Pursuant to Military Government Law No. 52): Iron and Steel Undertakings*, Military Government Gazette (Aug. 20, 1946). Article 2 of Law No. 27 provided: "The enterprises listed or described in Schedule A shall be liquidated and reorganized with a view to the elimination of excessive concentrations of economic power which constitute a

threat to international peace. . . ." Allied High Commission Law No.27 art. 2.

Examples of deconcentration pursuant to Law No. 27 were the actions taken against German heavy industry. Large iron and steel conglomerates such as Krupp, Flick, and Vereinigte Stahlwerke AG were forcibly reorganized and broken down into 24 considerably smaller companies. *See* Law No. 27, Schedule A; Isabel Warner, *Steel and Sovereignty: The Deconcentration of the West German Steel Industry, 1949-54,* 6-7 (1996). In the U.S. Zone, elimination of concentrated economic power was explicitly linked to prevention of future violations of international law. Military Government Law No. 56 stated that it was enacted pursuant to the Potsdam Agreement in order to prevent Germany from endangering the safety of her neighbors or again constituting a threat to international peace. Military Government Law No. 56, *Prohibition of Excessive Concentration of German Economic Power*, Military Government Gazette, U.S. Zone Issue C (Feb. 12, 1947). Identical language was repeated in British Military Government Ordinance No. 78, 16 Military Government Gazette 412 (Feb. 12, 1947). A Liquidation Commission set up by the quadripartite Control Council required that the Dresdner Bank close roughly half of its branches, including all branches east of the Oder-Neisseline.[23]

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[23] *Dresdner Bank from 1872 to 2009*, COMMERZBANK, https://www.commerzbank.com/media/en/konzern_1/konzerninfo/marke/dresdner_bank_geschichte.pdf; s*ee also War Crimes of the Deutsche Bank and the Dresdner Bank: Office of Military Government (U.S.) Reports* 255 (Christopher Simpson, ed. 2002). The bank was also broken into ten smaller units.

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, *United States v. Krupp (The Krupp Case)*, 9 Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10 1, 1449-50 (1950), and the entire Krupp concern was confiscated pursuant to Military Government Law No. 52, and General Order No. 3. Allied Military Government, U.S. Zone, *General Order No. 3 (Pursuant to Military Government Law No. 52): Firma Friedrich Krupp*, Military Government Gazette (June 6, 1946).

The penalties imposed on these corporations, the distinction in the treatment of 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 indicate that the principle of non-state liability for violations of international law applied both to natural persons as well to "juridical" persons such as private corporations.

Of course, many of the actions taken to punish the corporations by the Allied Control Council and the Allied High Commission during the occupation were later undercut (or reversed) by the Western Powers as part of their campaign to make West Germany economically strong as a bulwark against further encroachment of Communism. However, the political decisions made during the early years of the Cold War to avoid wiping out particular corporations or to allow those corporations to regroup in other

forms do not negate the import of the many actions indicating a recognition that corporations had violated international law and that, under that law, could be held liable in multiple ways. As part of that same Cold War agenda, the Western Powers also commuted the sentences of the industrialists convicted at Nuremberg. However, such commutation does not take away from the principle that those industrialists convicted at Nuremberg committed crimes under international law.

II. CORPORATE LIABILITY WAS RECOGNIZED BY THE NUREMBERG TRIBUNALS

Petitioners and a number of their *amici* argue that the choice not to criminally prosecute argues against corporate liability under the Alien Tort Statute,[24] but it is critical to note that the reasons for this decision never included a belief that the claims were legally precluded. As one scholar cited by Petitioner has noted,

> [C]orporate 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. Instead, their rejection was the result

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[24] Br. Nestlé 37 , 49-50; Br. Cargill 20, 41-43; Br. United States Supp. Pet'rs 7, 11, 14; Br. Professors of International Law Supp. Pet'rs 2, 16-19, 26; Br. Cato Institute 6-7; Br. Coca-Cola Company 21-23.

> of the wishes of the occupation governments for handling the corporations and the coincidence that the first defendants tried were companies with the structures of Flick, Krupp, and Farben.[25]

In fact, the Tribunals emphasized the culpability of the corporations themselves in their rulings. 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.

In the prosecution of the twenty-four directors of I.G. Farben [Trial No. 6], the NMT explicitly noted that corporations were legally responsible even though they were not before the court:

> Where *private individuals, including juristic persons,* proceed to exploit the military occupancy . . . 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 . . . acquisition . . . subsequent to the confiscation

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[25] Jonathan A. Bush, The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said, 109 Colum. L. Rev. 1094, 1239 (2009); *see* Br. Nestlé 37.

> constitutes conduct in violation of [international law].[26]

This is one example of where a Tribunal found the individual as an accomplice to a corporate principal.[27] Describing Farben's activities, the NMT wrote that, "We find that the proof establishes beyond a reasonable doubt that offences against property as defined in Control Council Law No. 10 were committed by Farben, . . . The action of Farben and its representatives, under these circumstances, cannot be differentiated from acts of plunder or pillage committed by officers, soldiers, or public officials of the German Reich."[28]

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 resulting harms. Indeed, the Tribunal noted that its task was to determine how to translate this *corporate* criminality under international law into *individual* criminal

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[26] *United States v. Krauch* [Trial No. 6], U.N. War Crimes Comm'n, 10 Law Reports of Trials of War Crimes 1, 44 (1949). (emphasis added).

[27] A number of *Amici* on this brief have also submitted an *Amicus Curiae* on aiding and abetting liability earlier in these proceedings. Brief of Nuremberg Scholars as *Amici Curiae* in Support of Plaintiff-Appellants, *Doe v. Nestlé, USA*, 766 F.3d 1013 (9th Cir. 2014) (No. 10-56739), 2011 WL 2679959; *see also* Br. International Law Professors and Practitioners *Amici Curiae* Supp. Resp'ts (detailing Nuremberg history of aiding and abetting liability).

[28] U.N. War Crimes Comm'n, 10 Law Reports of Trials of War Crimes 1, 49-50 (1949).

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 [of Farben] to personal and individual criminal acts is another matter." *The Farben Case*, 8 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 1, 1153(1952), *available at* https://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-VIII.pdf.

Similar to the *Farben* case, in the *Krupp* case the NMT examined the actions of the corporation itself and likewise found them to be criminal. Although the Krupp firm was not itself on trial, the judges recognized the major role played by corporate policies in perpetuating abuses and condemned Krupp's used of forced labor, including concentration camp prisoners, POWs and foreign civilians. The Tribunal describes beatings of workers as "part of their daily routine . . . in Krupp plants . . . [while] [w]eapons with which they were beaten were supplied by the Krupp firm." *Krupp*, 9 Trials of War Criminals at 1409. 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." *Id.* at 1372; *see also id.* at 1440 ("[T]he Krupp firm had

manifested not only its willingness but its ardent desire to employ forced labor."). The Court also specifically referenced the Hague Convention.

> [T]he confiscation of the Austin plant . . . and its subsequent detention by the Krupp firm constitute a violation of Article 43 [and] Article 46 of the Hague Regulations . . . [T]he Krupp firm, through defendants . . . , voluntarily and without duress participated in these violations . . . .[29]

These opinions make clear that the Tribunal judges understood that the international law they were applying also applied to corporations themselves, and in the specific contexts of slavery and forced labor, even though the corporate heads and officers were the only ones in the dock. Nothing in the record supports the assertions by the *Jesner* plurality, Petitioners or their *amici* that the Tribunal decisions should support corporate immunity.

[29] *The Krupp Case*, 9 Trials of War Criminals at 1352-53.

CONCLUSION

Amici respectfully submit that the actions taken by the victorious Allies both inside and outside the courtrooms of occupied Germany recognized that private corporations, like individuals and other organizations, can be held responsible for violations of international law. *Amici* Nuremberg Scholars request that the Court reject the contrary positions proposed by Petitioners and some of their *amici* that Nuremberg-era jurisprudence provides impunity to corporations.

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