No. 09-1262

In The
Supreme Court of the United States

PRESBYTERIAN CHURCH OF THE SUDAN, ET AL.,

Petitioners,

v.

TALISMAN ENERGY, INC.,

Respondent.

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

BRIEF OF *AMICI CURIAE* NUREMBERG SCHOLARS OMER BARTOV, MICHAEL J. BAZYLER, DONALD BLOXHAM, CHRISTOPHER BROWNING, VIVIAN CURRAN, LAWRENCE DOUGLAS, HILARY EARL, HON. BRUCE J. EINHORN, RET., DAVID FRASER, STANLEY A. GOLDMAN, GREGORY S. GORDON, MICHAEL J. KELLY, MATTHEW LIPPMAN, MICHAEL MARRUS, FIONNUALA D. NÍ AOLÁIN, BURT NEUBORNE, PIER PAOLO RIVELLO, AND CHRISTOPH J.M. SAFFERLING IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Sixty-five years ago this month – 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 Control Council Law No. 10. The trials were held in Nuremberg's Palace of Justice, where the original IMT was conducted, and are known as

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[1] This brief is submitted pursuant to Supreme Court Rule 37 in support of Petitioners. Counsel of record for all parties received notice at least ten days prior to the due date of the *amici*'s intention to file this brief. The parties have consented to the filing of this brief, and such consents have been lodged with the Court. 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.

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 to inform the Court of a grave error made by the Second Circuit in its *Talisman* opinion, presently before this Court on a petition for a writ of certiorari. Specifically, the *Talisman* court held 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."

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

Amici can offer the Court unique expertise on this issue and are concerned that the recent *Talisman* Panel decision distorts the legacy of Nuremberg and, in doing so, misconstrues customary international law. Given the singular importance of Nuremberg, it is particularly crucial that this Court conduct a thorough review of its jurisprudence and adopt the proper standard for aiding and abetting liability.

SUMMARY OF ARGUMENT

The *Talisman* Panel relies upon a mischaracterization of certain language relating to a single defendant in one Nuremberg case (*The Ministries Case*) to reach the erroneous conclusion that the *mens rea* standard for aiding and abetting liability under customary international law is purpose rather than knowledge. *The Presbyterian Church of Sudan, et al. v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009) ("[A]pplying international law . . . the *mens rea* standard for aiding and abetting liability in ATS actions is purpose rather than knowledge alone."). 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 Panel, does not alter this principle. *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) ("Tr. War Crim."). 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. 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. Despite this overwhelming body of law, the *Talisman* Panel relied upon a single defendant in a single case (*The Ministries Case*) to hold that "international law at the time of the Nuremberg trials recognized aiding and abetting liability only for purposeful conduct." *Talisman*, 582 F.3d at 259. However, a survey of Nuremberg-era jurisprudence leads to the contrary but correct conclusion that knowledge is the standard.

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

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 concentration camp prisoners. *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). 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." 13 Int'l L. Rep. at 252. However, the Judge Advocate rejected that principle 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." *Id.* (emphasis added).[3] The defendants were convicted on this basis.

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[3] "The duty of the Judge Advocate is to advise the Court on matters of law both substantive and procedural, and to sum up

(Continued on following page)

In another case, in the *Trial of Werner Rhode and Eight Others*, the Judge Advocate provided the example of an individual who "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." 5 Law Reports of Trials of War Criminals 54 (Brit. Mil. Ct., Wuppertal, May 39 – June 1, 1946) (emphasis added).

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. *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).

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

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the case. He takes no part in the decision of the Court." *Trial of Josef Kramer and Forty-Four Others (The Belsen Trial)*, 2 War Crimes Trials xxxiv (Raymond Phillips ed., 1949).

Government Court of the French Occupation in Germany in the *Roechling* case. *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 Tr. War Crim. 1097 (1949). The French military 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. In fact, the French appellate tribunal went further and noted that guilt can be based even on presumed knowledge, using the standard of criminal negligence.[4]

The French appellate tribunal then confirmed the conviction of Hermann Roechling, head of the

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[4] *"The defense of lack of knowledge* – No superior may prefer this defense indefinitely; for it is his duty to know what occurs in his organization, and lack of knowledge, therefore, can only be the result of criminal negligence. For the rest, the acceptance of superior orders on the other hand, and the lack of knowledge as to their execution by subordinates, on the other, would lead to the abolishment of any penalty; the executing agents would seek cover behind his lack of knowledge and say: 'I had no knowledge of that.'" *Roechling Judgment on Appeal*, at 1106.

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, *id.* at 1113, and improper seizure of booty goods. *Id.* at 1117-18. 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." *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. *Id.* at 1136.

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.

In the *Einsatzgruppen* trial [Trial No. 9], defendant Waldemar 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." 4 Tr. War Crim. 569 (1949). 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. *Id.*

Defendant Lothar Fendler, an intelligence officer whose primary function was to draft intelligence reports, likewise was convicted because he "*knew* that [summary] executions were taking place" and failed to intervene though "[i]t is not contended by the Prosecution, nor does the evidence show that Fendler, himself, ever conducted an execution." *Id.* at 208 (emphasis added). The fact that the *mens rea* of knowledge was sufficient to convict Fendler is confirmed by the Tribunal's rejection of the "I didn't know" defense: "Fendler asserted over and over that he only learned by accident of executions and that, generally, he did not know what was taking place. Fendler's assertion runs counter to normal every day experience because it is simply incredible that a

high-ranking officer in a unit would not know of the principal occupation of that unit." *Id.*

Defendant Heinz Jost, as head of Einsatzgruppen A, was convicted because he was "*aware* of the criminal purpose to which that organization was put, and, as its commander, cannot escape responsibility for its acts." *Id.* at 134 (emphasis added).

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." 6 Tr. War Crim. 1217 (1947) (emphasis added). 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-labor program." *Id.* at 1198.

Similarly, 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." 8 Tr. War

Crim. 1117 (1952) (emphasis added). In contrast to the defendants in *Zyklon B*, 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." *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). 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. *Id.* at 1171 (emphasis added).

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

II. *THE MINISTRIES CASE* IS CONSISTENT WITH THE BODY OF NUREMBERG JURISPRUDENCE, ADOPTING A KNOWLEDGE STANDARD FOR AIDING AND ABETTING LIABILITY

The *Talisman* Panel did not consider the preceding cases and relied on a mischaracterization of *The Ministries Case* [Trial No. 11] to conclude that purpose is the proper standard for aiding and abetting liability. *Talisman*, 582 F.3d at 259 (characterizing the

case as "declining to impose criminal liability on a bank officer who made a loan with the knowledge, but not the purpose, that the borrower would use the funds to commit a crime") (citing *The Ministries Case* at 662 [sic]). *The Ministries Case* therefore merits careful review, as the *Talisman* Panel failed to recognize that banker Karl Rasche's acquittal for complicity in forced labor did not rest on the application of a *mens rea* of purpose, but rather on the fact that his actions did not meet the requisite *actus reus*.

The Tribunal in *The Ministries Case* conducted distinct *mens rea* and *actus reus* analyses. The Tribunal first applied a knowledge standard to the *mens rea* inquiry and determined that Rasche met that standard because he knew that the loan was being used 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.

The Ministries Case at 622 (emphasis added). 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*.

Id. (emphasis added). 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 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 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." *Id.* at 620 (emphasis added). 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." *Id.* (emphasis added). The Tribunal again disavowed a purpose standard, noting that Puhl "neither originated the matter and that it was probably repugnant to him." *Id.* at 620-21. 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." *Id.* at 611. The Tribunal determined that, in contrast to Rasche, Puhl's actions did 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.

Id. (emphasis added). 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.

Id. at 478 (emphasis added). 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.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the Second Circuit Panel erred in concluding that Nuremberg-era jurisprudence applied a purpose rather than a knowledge standard for aiding and abetting liability. *Amici* urge review to correct this fundamental misunderstanding and to adopt the knowledge standard mandated by customary international law.

Dated: May 20, 2010

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