LEGAL EVALUATION

I am Professor of Law, Emeritus, Washington College of Law, Washington, D.C., and Professor of the Practice of Law, Emeritus, Duke Law School. I have been a member of several law faculties in the United States and in other countries, as noted on my curriculum vitae, which is attached. I have taught and studied international penal law, penal procedure, and the administration of criminal law for more than forty years. In the recent past, I have taught the subject at the University of Geneva, Switzerland, and at the T.M.S. Asser Institute, The Hague, Netherlands. I have also practiced in this field, most notably in the efforts to prosecute Augusto Pinochet in connection with human rights crimes in Chile, and in the litigation surrounding the forced displacement of the Chagossian people.

I have assisted the Spanish prosecution in Kingdom of Spain v. Pinochet. I have assisted counsel for the United Kingdom in the extradition proceedings concerning Augusto Pinochet. I have been counsel to the Chagos Refugee Group in proceedings in the United Kingdom, United States and Mauritius to fix responsibility for human rights abuses. I have been counsel to victims of the Pinochet regime, in litigation and other proceedings in the United States and elsewhere. As visiting professor at the Faculté de droit, Université Paul Cezanne, Aix-en-Provence, I prepared and delivered over a period of years lectures and classes on penal responsibility for crimes against humanity committed by Klaus Barbie and by the French collaborators Paul Touvier and Maurice Papon. At the University of Geneva and the Asser Institute, I taught courses concerning principles of liability for crimes against humanity and other offenses described in the London Charter. I have advised the African National Congress on the drafting of the new constitution for South Africa, with particular reference to structures for securing human rights. (Please note that in this declaration, I may use the terms “penal” and “criminal” somewhat interchangeably. Civil law systems tend to use these words differently than common law systems, but for present purposes the distinctions do not matter.)

I have also studied, written about and lectured upon, the exercise of prosecutorial discretion in the selection of defendants and charges in criminal cases. I have paid particular attention to exercise of that discretion in “high-profile” or “famous” cases, that is, cases with particular importance to prosecutorial authorities, the relevant community, and interested governments. My studies have included the impact of media attention on publicized cases, and I was principal advocate in the leading United States Supreme Court decision on this issue, Gentile v. State Bar of Nevada. I was also principal advocate in Lefkowitz v. Cunningham, a Supreme Court decision discussed below.

I am making this declaration in connection with the criminal proceedings now pending against John Demjanjuk. I have previously represented Mr. Demjanjuk, most notably in the proceedings that resulted in a final judicial determination that lawyers from the United States Department of Justice Office of Special Investigations were guilty of fraud on the courts. These lawyers were found to have committed fraud in proceedings that almost led to Mr. Demjanjuk being executed for crimes that it is now universally admitted he did not commit. See Demjanjuk v. Petrovsky, 10 F.3d 338.

All of my study, teaching and publication leads to a very definite conclusion: In order to be liable as a matter of criminal (or penal) law for crimes against humanity and related human rights offenses, the prosecution must prove beyond a reasonable doubt that the accused knew of criminal activity, and voluntarily associated himself with the criminal activity, intending to bring about and unlawful result, and by his voluntary and intentional actions contributed to achieving the unlawful result. This definition thus excludes from liability a person who was merely present when unlawful activity was

taking place, even if his presence was voluntary and even if he approved of the illegal conduct. A fortiori, a person whose presence was not voluntary (as a prisoner, for example) would not be liable. As for "approval," there is no evidence in this case on this issue and relating to Mr. Demjanjuk, but as noted below, approval of another's wrongdoing is not enough for liability. I am aware that in some penal codes, there is a duty to assist victims of unlawful activity. E.g., Code Penal (France) arts. 212-1 through 213-5 (former edition, now recodified, but these were the ones applicable to Touvier and Papon). No such provision is at issue in this case, and in any event such provisions are always limited, as in the Code Penal, by judicial interpretations that make clear the nature of participation that will entail liability.

This legal standard embraces two sets of elements, the physical and the mental – actus reus and mens rea. The actus reus of aiding and abetting criminal activity under the law relating to crimes against humanity, war crimes and crimes against the peace is that the accused have rendered substantial assistance to the principal offender; that assistance must "make a significant difference in the commission of the criminal act by the principal." *Prosecutor v. Furundzija,* IT-95-17/1 T (Dec. 10, 1998), reprinted in 38 I.L.M. 317 (1999 (a decision of the International Criminal Tribunal for Yugoslavia). The mens rea, as stated above, requires proof of such a high degree of awareness of the principal's activity and the consequences of action that the accused may be said to have intended to facilitate the commission of the crime. Id.

The most recent and authoritative source of law with respect to the mens rea for aiding and abetting is the Rome Statute of the International Criminal Court, article 25, requires (depending on the context) proof of intentional commission of a crime, or action for the purpose of facilitating the commission of the crime.

I also conclude that in order to be held excluded from criminal liability, it is not necessary for an accused person to testify in his own defense. That is, he does not have to waive his right not to be compelled to be a witness against himself.

The remainder of this declaration discusses the history behind the above conclusion, and provides a detailed basis for it in international conventions, settled international custom, state practice, and *opinio juris* (that is, judicial decisions and writings of recognized scholars). Some of the legal principles IO discuss are so basic as to be peremptory norms, *jus cogens*. With respect to the matters at issue here, these basic sources must be regarded as controlling, even in a municipal tribunal. This is because the very idea of accountability for serious breaches of human rights and humanitarian law grew from the four sources I have mentioned, and in the context of the international community. This view of matters has been endorsed by the German government, as I show below. However, towards the end of this declaration, I will also discuss how the principles of international law have been consistently interpreted and applied in Germany. I am prepared to testify to the contents of this declaration.

I understand that it is common ground (agreed between the parties) that Mr. Demjanjuk was a soldier in the Soviet army during the Second World War. He was captured by Nazi German forces. He was interned in one or more prison camps, against his will. It is also undisputed that millions of Soviet prisoners of war perished in the Nazi holocaust. Generally, the treatment of Soviet POWs was well below the standards mandated by the Geneva Conventions. Hitler saw the war against the USSR has somewhat different from other military adventures. Nazi rhetoric spoke of the "Jewish Bolshevik" state, and evidence abounds that Soviet POWs were routinely treated in the most barbaric way. For

example, suspected political commissars were summarily executed. Such departures from Geneva Conventions standards were in addition to the more "routine" practice of executing prisoners who sought to escape, and of course the entire program of Nacht und Nebel by which untold thousands were "disappeared." This court has already heard evidence of the coercion and brutality exercised against Soviet POWs.

Even though Nazi Germany was not formally a party to the Geneva Conventions, there were those who believed that it ought to accord proper treatment to Soviet POWs, more than 500,000 of whom had been killed as the result of "special measures," and many tens of thousands more otherwise perished kn the Holocaust. In opposition to Nazi policy and actions, Admiral Canaris cited general principles of international law and military tradition in urging compliance with the Geneva accords. It was Marshal Keitel himself who rejected such suggestions, writing "These scruples accord with the soldierly concepts of a chivalrous war! Here we are concerned with the extermination of an ideology. That is why I approve of and defend this measure." The policy of which Keitel wrote goes a long way towards explaining why a Soviet POW would not express political views hostile to the Reich. (It was this memo from Keitel that provided key evidence at Nuremberg that he was not a bureaucrat who simply bent himself to Hitler's will, and this evidence was an important part of the Tribunal's decision to condemn Keitel to hang.)

It is established that the death camp apparatus of Sobibor was a part of the Nazi holocaust, although there is evidence that portions of the camp were support units not directly involved in the mass killings, and that even in the areas devoted to mass killings there were personnel not directly involved in the killings. There is also evidence that some of the prisoners who were not POWs cooperated in various ways with their captors in order to escape death. The issue therefore arises as to the penal liability of persons who were present in the camp during its operation, including for example cooks, doctors, carpenters and so on. The issue of penal liability for aiding and abetting arises in all Western legal systems, and the basic principles are fairly uniform among the members of the European Union, the United States, and most other nation-states. In addition, the principles of aiding and abetting have been developed and applied in criminal prosecutions for violations of international human rights and international humanitarian law norms. The Model Penal Code, drafted by the American Law Institute, adopts the "intention" view of the menal state required for complicity. The Code has been adopted in one form or another by a majority of states in the United States, and has had great influence world-wide.

It is important to note that penal (or criminal) liability principles are markedly different from those applicable to civil actions. This principle has been well-understood for at least five centuries. In earlier times, the distinction was not so clear, as delictual liability encompassed both aspects of what is today as two separate domains – tort and crime.

The modern history of crimes against the law of nations begins with the treatment of piracy on the high seas. The criminal law of piracy brings into play all the themes that are played out in the cases that have arisen in the 20th and 21st centuries: state sponsorship, defenses of superior orders, and (most relevant to this case) complicity. A pirate ship was operated on the basis of articles, that is a contract signed amongst those on board respecting their conduct, duties and compensation. A pirate ship was a classic unlawful enterprise, which existed outside the law of nations. It was engaged in conduct offensive to the entire civilized world, and therefore any nation might legitimately take pirates into custody and try them. Indeed, Sir William Blackstone opined that it was the duty of any nation to try

pirates that it captured, lest it be thought that the pirates were what we would today call "state-sponsored terrorists."

However, as an enterprise, a pirate ship required the services of cooks, physicians and carpenters. The practitioners of such arts were sometimes not found among those willing to "sign the articles." Therefore, the history of piracy records that cooks, and more often musicians, surgeons and carpenters, found on ships captured by the pirate crew were pressed into service as a condition of sparing their lives. These men were often not required to sign the articles formally agreeing to the ship discipline. The reports of cases where pirate ships were captured and brought into port reveal that those surgeons and carpenters, and occasionally practitioners of other arts, were acquitted of piracy because their participation in the pirate venture was not voluntary and intentional. The cases include those of Thomas Davis, acquitted in Boston in 1717 (perhaps with the intercession of the famous cleric Cotton Mather), Jonathan Clarke, and the Scottish physician Dr. John Hincher. The basic legal principles that emerged from the piracy cases are still relevant.

However, the main basic source of legal doctrine since 1945 has been the law applied by the International Military Tribunal at Nuremberg. I have discussed the basic principle of accountability in Michael E. Tigar, et al, Paul Touvier and the Crime Against Humanity, 30 Tex. Int'l L. J. 286 (1995). A masterful summary of relevant principles appears in Judge Katzman's opinion in Khulumani v. Barclay National Bank, 504 F.3d 254 (2d Cir. 2007)(the litigation in which Daimler Benz is also named as a defendant). Judge Katzman's views have now been adopted as the law of the Second Circuit, see Presbyterian Church of Sudan v. Talisman Energy, 582 F.3d 244 (2d Cir. 2009). Judge Katzman begins by restating the basic principle that I mentioned above (citations omitted):

> I conclude that the recognition of the individual responsibility of a defendant who aids and abets a violation of international law is one of those rules "that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern." Recognized as part of the customary law which authorized and was applied by the war crimes trials following the Second World War, it has been frequently invoked in international law instruments as an accepted mode of liability. During the second half of the twentieth century and into this century, it has been repeatedly recognized in numerous international treaties, most notably the Rome Statute of the International Criminal Court, and in the statutes creating the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"). Indeed, the United States concedes, and the defendants do not dispute, that the concept of criminal aiding and abetting liability is "well established" in international law.

He then lays out the historical background of his opinion, again in agreement with my earlier discussion (again, most citations omitted):

> The London Charter, which established the International Military Tribunal at Nuremberg, was entered into by the allied powers of World War II, "acting in the interests of all the United Nations," to establish a tribunal to punish violations of international law. *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, pmbl., Aug. 8, 1945, E.A.S. 472 (hereinafter London Charter). . . . Moreover, other courts, international bodies, and scholars have recognized that the principles set out in the London Charter and applied by the International Military Tribunal are significant not only because they have garnered broad acceptance, but also because they were viewed as reflecting and crystallizing preexisting customary international law. . . . Indeed, shortly after the conclusion of the initial war crimes trials, the General Assembly of the United Nations unanimously approved a

resolution affirming "the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal." Affirmation of the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal, G.A. Res. 95(I), at 188, U.N. Doc. A/236 (Dec. 11, 1946) (hereinafter Nuremberg Principles Resolution I).

The London Charter extended individual responsibility for crimes within its jurisdiction not only to "[l]eaders, organizers, [and] instigators" but also to "accomplices participating in the formulation or execution of a common plan or conspiracy to commit" any of the crimes triable by the Tribunal. London Charter art. 6. While the Charter's language taken "literally ... would seem to imply that the complicity rule did not apply to crimes perpetrated by individual action," as opposed to by common plan, in practice the Tribunal "applied general principles of criminal law regarding complicity." International Law Commission, Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with commentaries, G.A.O.R., 5th session, Supp. No. 12, U.N. Doc. A/1316, ¶¶ 126-27 (1950) ("ILC Principles"). Accordingly, when the International Law Commission ("ILC") formulated the "principles recognized in the Charter ... and in the judgment of the Tribunal" at the direction of the General Assembly, *see* Nuremberg Principles Resolution I, it omitted any indication of a limitation on accomplice liability. Principle VII provides that "[c]omplicity in the commission of a crime against peace, a war crime, or a crime against humanity ... is a crime under international law." ILC Principles, Principle VII. The ILC's formulation of the principles is considered to be an authoritative rendering of the formal holdings of the Nuremberg Tribunal and is consulted as an authoritative source of customary international law by the ICTY and ICTR.

That the London Charter's use of the term "accomplice" was understood to include those who aid and abet a crime is further confirmed by the law applied in the war crimes trials held in the United States zone of occupation following World War II. War criminals in the United States zone of occupation were tried under Control Council Law No. 10, an act promulgated by the joint allied body that coordinated the governance of post-war Germany.

To underscore these points, the question is what degree of participation and with what intent will make one an accessory or aider and abettor. As noted above, this liability requires substantial assistance to the principal offender, knowledge of the offender's unlawful activity, and the intent to commit the underlying offense. Passive participation is never enough, and even expressed approval of the offender's conduct is not enough for liability. As an old English authority, Hale's Pleas of the Crown, has it: "And therefore words that sound in bare permission make not an accessory." Quoted by Judge Benjamin Cardozo in People v. Swersky, 216 N.Y. 471 (1916).

See also the work of Israeli jurist Karin Calvo-Goller, The Trial Proceedings of the International Criminal Court 182-83, 188-89, 192-94. Dr. Calvo-Goller, in addition to supporting the views I have expressed above, makes clear the generally-accepted view that penal laws are to be construed strictly, and that all doubts must be resolved in favor of the accused.

The most recent official German government position on international criminal liability, at least of which I am aware, is the December 18, 2009 declaration filed in the apartheid complicity litigation penidng in the United States court of appeals in New York. In this document, the German government deals with the question of corporate criminal liability under international law. The German

government takes the position that Daimler Benz AG could not be criminally liable, as an entity, for its complicity in the crimes of the apartheid regime. This particular conclusion is not relevant to the present case, but the government's method of analysis is relevant. The German government takes the position that criminal liability under international legal norms can only exist if there is a consistent, widespread, "settled" state practice that imposes such liability. The German government claims there is no such state practice. Applying this test to the present case, an accused cannot be guilty of participation in human rights offenses unless guilt is tested by standards that amount to settled state practice. As I have shown, the settled state practice (to the extent it exists), requires proof beyond a reasonable doubt of the mental and physical elements discussed above, and any lesser proof will not suffice. (Of course, this conclusion is also supported by all the other sources of international law in addition to state practice.) One might, of course, detect an inconsistency of view between government shielding of Daimler Benz, and its vigorous pursuit of this defendant, held against his will under the conditions that the evidence reveals. (Indeed, Germany takes a narrower view of liability than France. The French Penal Code provides that juridical persons may be liable for crimes against humanity.)

The requirement of rigorous proof in order to convict someone of complicity is a characteristic of all modern legal systems. Some systems, such as those based on the Russian Federation penal code, require express proof that the accused caused social harm. A distinguished American jurist, John Marshall Harlan, has expressed requirement as "guilt is personal," and that liability can only attach when there is proof of intentional conduct that furthers an unlawful aim. See Scales v. United States, 367 U.S. 203 (1961). The United States Court of Appeals for the Second Circuit cautioned us not to "substitute a feeling of collective culpability for a finding of individual guilt." United States v. Bufalino, 285 F.2d 408 (2d Cir. 1960).

This legal idea was even applied in order to acquit the defendants Torgler, Dimitrov, Tanev and Popov in the Reichstag Fire Trial. In the informing light of history, we know that trial to have been distinctly unfair. The trial court nonetheless acquitted Torgler and the three Bulgarians, saying that it had no doubt that the fire was caused by "radical left-wing elements." The court also found that the defendants were part of a treasonable group among those elements. But, without a shred of proof that the defendants did anything, or intended to become personally involved in the setting the fire, they must be found not guilty. This result was reached even though there was some evidence that Torgler, who was a member of the Reichstag, had access to the building, though he was not near it when the fire was set. It seems that, at least in 1933, Hitler and Goering, who stage-managed the Reichstag trial, could not get a German court to abandon the principles of law dealing with complicity. See generally Tigar & Mage, The Reichstag Fire Trial, 1933-2008: The Production of Law and History, Monthly Review, March 2009, p. 24.

Of course, almost all the cases involving human rights abuses have involved relatively major figures. Until now, nobody had thought to prosecute conscripted soldiers, those held captives by force of arms, or even active participants who were not shown to have personally committed significant acts in the service of major human rights abuses. I discuss this issue in more detail later.

The ICTY prosecution of Milan Multinovic, who was President of Serbia, is instructive. Case No. IT-05-87-T, Judgment of 26 February 2009 (English text authentic). I note that I have carefully studied the work of the ICTY, in part because of my long association with the Chief Prosecutor, Richard Goldstone; my work with Justice Goldstone began in the late 1980s, and continued during his service on the Constitutional Court of South Africa.

Multinovic and his codefendants were charged with several crimes under the ICTY charter, with deportation, forcible transfer, murder, and persecutions. The claimed basis of liability was participation in a joint criminal enterprise and aiding and abetting. The trial chamber acquitted Multinovic on all charges, and on both theories of liability. It applied the principles of law discussed above. However, the Tribunal found that his "powers were not extensive," that he lacked the "charisma" necessary to be a true encourager of unlawful action. Milosevic and not Multinovic held the real power. Judgment para. 274. Multinovic had given speeches that encouraged the perpetrators of crime, but the prosecution did not prove that he intended by these and other actions to achieve goals by unlawful means. Paras. 275-76. With respect to aiding and abetting liability, the Tribunal found that although he certainly knew of unlawful activity, he was not proven to have had a substantial effect on the commission of crimes. On the mental element, the Tribunal was not satisfied that the only inference from his conduct and knowledge was that of guilt. Para. 281. This last conclusion is particularly important in a case such as the present one, when the knowledge and intentions of persons who acted decades ago are necessarily difficult to reconstruct at this late hour.

The Milutinovic case is filled not only with similarities to the present one, but with contrasts that make it even more compelling. Milutinovic was charged with persecution, and one theory of liability was that he was an accomplice or aider and abettor. His acquittal came despite proof that is completely absent in the present case: For example, Milutinovic was shown to have approved of his codefendants' ideology and goals; he lived where he chose, not as a captured prisoner; he occupied a position that he had sought and for which he had striven; he was near the top of the decision mechanism of the system of which he was a part, not at the bottom.

A contrast to the Milutinovic case is that of Maurice Papon, who served the Vichy France government during the wartime period. The Cour de Cassation, in its judgment of 23 January 1997 rejecting Mr. Papon's contentions, found sufficient basis to try him as an accomplice. Here is my partial translation of the report of the Cour de Cassation decision (La Semaine Juridique, 09 avril 1997, No 14 - II 22812), showing the extent of action and intention necessary to make one an accomplice.

> The Cour de Cassation found that the illegal arrests, detentions and internments were carried out under the direction of the Kommando der Sicherheitpolizei und der Sicherheitsdients (SIPO-SD), operating in Bordeaux, and that these events occurred with Papon's active participation, given his authority over prefectural police, over the detention camp itself, and specifically over Jewish Questions. Papon personally issued orders for arrest between July 1942 and May 1944. The services over which he had control kept a list of Jews and conducted its activities at times without waiting for specific instructions from the central Vichy government.
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> The court also found that Maurice Papon would have had a precise knowledge of the anti-Jewish policy conducted by the Vichy government ever since the signature of the armistice [which created Vichy France]. He would have this knowledge because of his having become Vichy Minister of the Interior beginning October 1940, and he accepted his post in the Bordeaux prefecture knowing that the Jewish Questions service would be under his direction and would follow an anti-Jewish policy. He would therefore know that arrest, detention and deportation of Jews towards the East would lead inevitably to their deaths, even if he remained ignorant of the details of their suffering and the means by which they were put to death.
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> Given these facts, Papon voluntarily and knowingly assisted acts perpetrated by the Nazis.

In sharp contrast, the grocer who supplies food, or any other supplier of goods and services, is not liable for the principal's crime unless he takes steps to associate himself with the venture. Judge Learned Hand expressed this view in United States v. Peoni, 100 F.2d 401 (2d Cir. 1938). Nor can penal liability be attached to a status or condition. This has been the uniform view of all civilized states

and of international tribunals. Israel, which has been a major force in defining and prosecuting crimes against humanity, has interpreted the law to prosecute only those with major and unarguably intentional participation.

There has apparently been some confusion in this trial about the role of coercion in the assessment of penal responsibility. This is an important issue, because of the conditions under which Soviet POWs were held, and the evidence that they were threatened with death if they did not do what their German masters wished. Three basic principles must be recognized:

First, the prosecutor has the burden of proving criminal acts and voluntariness. This burden never shifts to the defendant. Evidence of the coercion routinely exercised against Soviet POWs and others in the camps negates the mental element of any criminal offense related to human rights and humanitarian law. This principle has been repeatedly emphasized in the Nuremberg jurisprudence, in postwar Germany, and in later cases such as those in the International Criminal Tribunal for Yugoslavia and such cases as that of Maurice Papon. Indeed, the coercive environment that surrounded the exercise of Nazi power has repeatedly been cited as a basis for nonprosecution and for acquittals.

Second, the accused may choose to interpose an affirmative defense of coercion or of conditions that deprived him or her of free choice. The accused has right to present a defense. The accused has the right to summon witnesses, to present documentary evidence, and to confront and cross-examine the prosecution's witnesses. The accused may do this in order to establish that there exists grounds to exclude criminal liability. It is a fundamental error to to insist that the accused personally testify in order for the court to consider excluding criminal liability. As a practical matter, an accused such as Mr. Demjanjuk may suffer from physical and mental conditions as a result of age, confinement or illness. To insist that such a person testify in order to raise a defense is obviously unfair. This unfairness is greater when the prosecution is relying on alleged events that happened decades ago, at a time when if there had been a trial the accused would have been able to testify. In this very case, one recalls that Mr. Demjanjuk did testify in the Israeli proceedings, and it turned out that his testimony was completely accurate and that all the prosecution witnesses were mistaken or not telling the truth.

However, there is an important legal principle in addition to the practical considerations. An accused has the right to present a defense. The accused has the right not to be compelled to testify. He cannot be forced to give up the right not to testify in order to gain the right to present his defense. Such a forced choice is improper. There is a dramatic illustration of this rule in the jurisprudence of the United States Supreme Court. In Lefkowitz v. Cunningham, 431 U.S. 801 (1977), a New York statute required political officials to waive their right not to testify if called in an official proceeding. If they refused, they were deprived of their political office. The Supreme Court held that this forced choice violated the principle of "unconstitutional conditions," and it held the New York statute to be in violation of the constitution. So here – as a matter of German and European Convention law, the accused has these two rights and is entitled fully to exercise both of them.

I find support for my position in the Rome Statute of the International Criminal Court. As pointed out by Professor Kai Ambos, Journal of International Criminal Justice, September 2006, the Rome Statute incorporates principles of penal law derived from both the continental and common law systems. It follows the continental system most closely by not using the Anglo-American terminology of "affirmative defense." Rather, article 31 speaks of "excluding criminal responsibility." Among the grounds for exclusion are duress and necessity. Article 31 provides that "the Court shall determine the applicability of the grounds for excluding criminal responsibility." This is a mandatory duty, and the language of article 31 recognizes that the accused has the right to have the court consider the issue.

One must also mention the "Ministries case," a postwar (1949) prosecution of (among others) bankers who had made loans that assisted the Nazi cause. One defendant, Rasche, was a prominent banker, an officer in the SS, a member of the Nazi party and a member of the Himmler Circle of Friends. He was acquitted largely because supplying banking arrangements is the sort of ordinary business practice that goes on regardless of whether customer is committing genocide or doing something innocent.

There is of course an enormous distinction between criminal liability and financial liability. Knowledge of criminality and acceptance of the benefits of crime has been held insufficient to establish criminal liability. However, the German government in 2000 established a foundation to provide compensation to slave and forced laborers; this was an acceptance of responsbility, but hardly suggests that every German who participated in recruiting and using slave and forced laborers would be a criminal. And we have already seen that corporate actors are, under the German view, not criminally liable

under any theory. Individual corporate officers may be convicted of crimes against humanity if they actively use the corporate structure to commit substantial acts of assistance, and if they act with the forbidden mental state. This was holding of the I.G. Farben case.

Other cases from this period are also helpful. In the Krupp case, a necessity defense (or exclusion of liability) was raised but rejected. The court found that the defendants had expressed not only a willingness but an ardent desire to employ slave labor. In the Flick case, four defendants were acquitted because they were "conscious of the fact that it was both futile and dangerous to object" to the use of slave labor. And these defendants were not even POWs threatened with death! See Byrne, When In Rome: Aiding and Abetting in Wang Xiaoning v. Yahoo, 34 Brooklyn J. Int'l Law 151, 177-78 (2008).

Based on all the above, and with my knowledge of the evidence in this case, I conclude that John Demjanjuk is not guilty of any criminal offense. Specifically, he is not an "accomplice" or "aider and abettor," as those terms are used in all civilized countries, in general principles of international law, in treaties, and in the opinion of all respected jurists. To conclude otherwise is to distort the meaning of penal law in ways that pose grave dangers to human rights.

In this connection, I emphasize that criminal liability under principles accepted in all civilized countries requires the kind of active conduct and participation, done with the mental state discussed above. Anything less would make criminals of every soldier conscripted into the army of a power engaged in aggressive war, or even of those who stood in public squares and shouted approval of regimes such as the Third Reich, or the Apartheid government of South Africa.

Trials in human rights cases are didactic, whether the prosecuting authority wishes this or not. That is, almost every such trial is the subject of intense media attention. The Nuremberg trials were seen by the Allies as a means of making an indisputable historical record of the Nazi holocaust, as well as reinforcing a principle of accountability. In France, whose system I have studied intensively, the trials of Touvier and Papon occurred only after a long campaign to put the crime against humanity into the French Penal Code. Then, there was political opposition to trying Vichy France officials as collaborators. It took several years to bring Touvier to trial, and many more years before Papon was in the dock. The trials of these two figures became a national (and international) lesson about the extent of French officials' collaboration with the Nazi regime.

One could make similar observations about the efforts to bring the Chilean military junta to justice, as well as about the litigation over responsibility for apartheid, and the ongoing controversy over the role of bankers in hiding assets of human rights violators.

I raise this point because human rights cases illustrate with particular force the observation that "the law is not what it says but what it does." Most human rights criminal cases involve figures who have achieved a certain notoriety or visibility. This is not, however, universally the case. Touvier was prosecuted in France, not so much because his actions had great significance in the overall scheme of things but because his public conduct after the war had made him quite visible. The selection of defendants to prosecute is an exercise of sovereign power and the criteria of choice are always a legitimate subject of comment. I have dealt with this issue in the Reichstag fire article cited elsewhere.

The fact that Mr. Demjanjuk was prosecuted in Israel and acquitted is well-known. It was not a matter

of reasonable doubt. The undisputed evidence is that he was not “Ivan the Terrible” of Treblinka, and everybody now acknowledges this. His trial and sentence were widely covered by the media. The courts of the United States held that the Department of Justice Office of Special Investigations had committed fraud on the courts for their role in sending him to Israel to be tried, condemned and hanged. That is the basis of his notoriety. John Demjanjuk may be the first person in history to be singled out for prosecution because of what he provably did not do rather than based on a credible idea of his being an important cog in the Nazi machine. I am aware that Mr. Demjanjuk has been subjected to a civil denaturalization proceeding in the United States. That should have no relevance in this criminal proceeding, for both the standards of liability and the burden of proof are very different. Moreover, the United States legal system may well be in the process of reconsidering the legal standard even for civil pursuit of alleged persecutors. In the legal context of Mr. Demjanjuk's civil case, there could at the time of his trial be liability without any showing of fault or intention. However, in 2009, under a closely analogous but different statutory framework, the Supreme Court decided an important case, Negusie v. Holder, 129 S.Ct. 1159 (2009). The Court held that persecution liability leading to deportation for someone whose conduct was not truly voluntary was legally erroneous. It left to the administrative agency a responsibility for formulating a more precise legal standard, but its opinion charted a new path. The Court recognized that “persecution” presumes moral blameworthiness, which means that in order to be responsible for it even in a civil context must involve voluntary conduct. More importantly, the Court rested its interpretation in part on recognition that standards of international law developed in more recent years gave support to its analysis. This citation of international law is of course important, for it is a general principle that domestic (municipal) law must whenever possible be interpreted in harmony with international legal principles.

I have made many careful studies of how defendants are selected for trials that are designed to teach a public lesson. This study is the legitimate province of scholarship in faculties of law. I have written and lectured on this topic. Sometimes, the choice of who shall be a defendant reflects noble aims. Sometimes, the choice reveals an improper, biased and discriminatory goal; and when that revelatoin is made, governments are often slow and reluctant to acknowledge impropriety. History provides many examples.

When evidence first came to light that John Demjanjuk could not have been Ivan the Terrible, and that the United States Department of Justice had withheld evidence, and put Mr. Demjanjuk at risk of being hanged, the U.S. government did not acknowledge its errors. It denied them. In the sometimes laudable zeal to fix responsibility for the Nazi holocaust, the governmental officials ignored their duties as lawyers and as responsible government officials. In judicial proceedings in the United States, a judge asked me why these officials might have behaved in this way. I could only speculate that perhaps John Ruskin's words described them: “No more dangerous snare is set by the fiends for human frailty than the belief that our own enemies are also the enemies of God.” The Department of Justice was responsible not only for withholding exculpatory evidence, but for “faking” a supposed eyewitness identification of Mr. Demjanjuk. We all understand that supposed eyewitness identifications, even based on recent observation, may be seriously flawed. Mr. Demjanjuk's Israel trial provides many dramatic examples of “identifications” that simply cannot have been true, no doubt because of the passage of time and the influences brought to bear upon witnesses. This is of course one reason why not only is proof of conduct required, but doubts are always resolved in favor of the accused.

I have mentioned the Reichstag fire trial, which again showed a selection of defendants, made to serve an ignoble purpose of Germany's then-government. There is a further observation to be made here.

This case has received wide publicity. A leading article that seeks to explain its purpose appeared in Der Spiegel, on 20 May 2009. The article began

> The Germans are responsible for the industrial-scale mass murder of 6 million Jews. But the collusion of other European countries in the Holocaust has received surprisingly little attention until recently. The trial of John Demjanjuk is set to throw a spotlight on Hitler's foreign helpers.

It carried two pictures side by side, one of Hitler himself and the other that was said to be of Mr. Demjanjuk. The message of this article is that blame for the Nazi holocaust should be spread around, and that much of it should fall on those such as Soviet prisoners of war like Mr. Demjanjuk. What I have said in this declaration shows that this falsification of history could not succeed in this trial unless the principles of penal liability are distorted beyond recognition. Nor could it succeed without ignoring the victimization of Soviet POWs that is shown the evidence.

This is not, however, the first occasion on which Der Spiegel has been the forum for rewriting history in order to palliate the guilt of the Nazi leadership. My colleague's and my research on the Reichstag fire trial revealed that Der Spiegel's effort to shift blame for the fire was fundamentally flawed.

The actual operation of German criminal law with respect to crimes against humanity was documented by Dr. Ingo Mueller in Furchtbare Juristen: Die unbewältigte Vergangenheit unserer Justiz, published in the United States as Hitler's Justice (1991). Dr. Mueller shows that the millions who played responsible roles in perpetrating the Nazi holocaust were not considered proper subjects for criminal punishment. In Chapters 22 through 31 of his carefully-documented study, Dr. Mueller shows beyond doubt that Federal Republic of Germany criminal law in the post-war period was extremely lenient even with those who had been high-ranking perpetrators of the Nazi holocaust and had been personally involved in deportations, persecutions and exterminations. Indeed, judges, military officers, academics and government officials who had loyally served the Nazi cause and who had intentionally committed substantial acts of assistance occupied high places in the postwar FRG government. Indeed, in many legal systems the failure to prosecute and convict the principal offenders precludes proceeding against alleged accomplices.

The legislative, prosecutorial and judicial actions described by Dr. Mueller are complicated. However, taken as a whole they show that actual German state practice is in accord with that of the rest of the international community in rejecting liability without rigorous proof according to the strictly-construed definitions of complicity. And even then, with specific reference to Germany, the history of non-prosecution of those who clearly, substantially and voluntarily participated in major crimes deprives the present case of all rational support. My colleague and I summarized other evidence on this issue in the Reichstag Fire article cited above.

One thinks in this context of Hjalmar Horace Greeley Schacht, acquitted at Nuremberg and thoroughly rehabilitated. He had accepted posts in the Nazi government, and his career may be said to embody his "getting along by going along." While his later career showed that he may have had redeeming characteristics, there is no doubt of his material assistance to the Nazi cause right up until 1944. His acquittal therefore marks out the extent to which significant assistance is the true actus reus of Holocaust-related crimes, and unambiguous intention the hallmark of the required mental state.

This discussion is not designed to single out the Federal Republic of Germany. As a matter of history, there is little doubt that many French citizens supported the Nazi occupation and the Nazi control over French life during the Second World War. My article on the Touvier case indicates the way in which Nazi ideology had permeated the Vichy establishment, and particularly such elements as the Milice. Yet, French law in practice was never thought to extend penal liability to anyone who had not committed wrongful acts, such as Touvier, or who like Papon had actively assisted such acts by provable and specific behaviors that contributed to the Nazi crimes.

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