ARTICLE: *Seizing* the *"Grotian Moment"*: Accelerated Formation of Customary International Law in Times of Fundamental Change

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LexisNexis Summary

… In this vein, the example of outer space principles might be discounted because the international community concluded a binding treaty on principles governing the activities of states in outer space in 1967, which has largely (though not entirely) supplanted the 1963 U.N. … From June 26-August 8, 1945, the United States, France, the United Kingdom, and the Soviet Union negotiated the Charter establishing the Nuremberg Tribunal, its subject matter jurisdiction, and its procedures. … Application of JCE at Nuremberg The Nuremberg Charter and Judgment never specifically mention the term "joint criminal enterprise," yet, a close analysis of the Nuremberg Judgment and the holdings of several Control Council Law Number 10 cases reveals that the Nuremberg Tribunal and its progeny applied a concept analogous to JCE, which they called the "common plan" or "common design" mode of liability. … Although the Nuremberg Charter confined common plan liability to Crimes against Peace, the Control Council Law Number 10 tribunals applied a version of common plan liability that they called "common design" to other international crimes. … Principle VI: The crimes hereinafter set out are punishable as crimes under international law: (a) Crimes against peace: (i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances; (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i). … The example of the Cambodia Tribunal's examination of the applicability of JCE demonstrates the potential value of the ***"Grotian Moment"*** concept to explain an acceleration of the custom-formation process and the heightened significance of General Assembly resolutions in response to paradigm -changing events in international law.

Highlight

Growing out of the author's experience as Special Assistant to the International Prosecutor of the Cambodia Genocide Tribunal in 2008, this article examines the concept of ***"Grotian Moment,"*** a term the author uses to denote a paradigm-shifting development in which new rules and doctrines of customary international law emerge with unusual rapidity and acceptance. The article argues that the paradigm-shifting nature of the Nuremberg precedent, and the universal and unqualified endorsement of the Nuremberg Principles by the U.N. General Assembly in 1946, resulted in accelerated formation of customary international law, including the mode of international criminal responsibility now known as Joint Criminal Enterprise (JCE) liability. As such, the Cambodian Genocide Tribunal may properly apply JCE to crimes that occurred in 1975-1979, twenty years before the modern international tribunals recognized JCE as customary international law. The article uses this example to demonstrate the value of the ***"Grotian Moment"*** concept to explain an acceleration of the customary law-formation process and the heightened significance of certain General Assembly resolutions during times of fundamental change.

Text

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[*440]

Introduction

This article examines the concept of ***"Grotian Moment,"*** a term that denotes a paradigm-shifting development in which new rules and doctrines of customary international law emerge with unusual rapidity and acceptance. Though I am an academician, my interest in the concept is not purely academic. During a sabbatical in the fall of 2008, I had the unique experience of serving as Special Assistant to the International Prosecutor of the Extraordinary Chambers in the Courts of Cambodia (ECCC), the tribunal created by the United Nations and government of Cambodia to prosecute the former leaders of the Khmer Rouge for the atrocities committed during their reign of terror (1975-1979). [1] While in Phnom Penh, my most important assignment was to draft the Prosecutor's Brief [2] in reply to the Defense Motion to Exclude Joint Criminal Enterprise (JCE) and, in particular, the extended form of JCE known as JCE III, as a mode of liability from the trial of the five surviving leaders of the Khmer Rouge. [3]

[*441] JCE III is a form of liability somewhat similar to the Anglo-American felony murder rule, [4] by which a person who willingly participates in a criminal enterprise can be held criminally responsible for the reasonably foreseeable acts of other members of the criminal enterprise even if those acts were not part of the plan. Although few countries around the world apply principles of co-perpetration similar to the felony murder rule or JCE III, it has been accepted that JCE III is a mode of liability applicable to international criminal trials since the decision of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the 1998 Tadic case. [5] Dozens of cases before the ICTY, [6] the International Criminal Tribunal for Rwanda (ICTR), [7] the Special Court for Si-

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[1] For background on the creation of the ECCC, see Michael P. Scharf, Tainted Provenance: When, if Ever, Should Torture Evidence be Admissible? 65 Wash. & Lee L. Rev. 129 (2008); Daniel Kemper Donovan, Joint U.N.-Cambodia Efforts to Establish a Khmer Rouge Tribunal, 44 Harv. Int'l L.J. 551 (2003). The Tribunal's constituent instruments, including its Statute, Agreement with the United Nations, and Internal Rules, are available at its website: http://www.eccc.gov.kh.

[2] Case of Ieng Sary, Co-Prosecutors' Supplementary Observations on Joint Criminal Enterprise, No. 002/19-09-2007-ECCC/OCIJ (Dec. 31, 2009). A year later, the Co-Investigating Judges ruled in favor of the Prosecution that the ECCC could employ JCE liability for international crimes within its jurisdiction. See Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, Case No. 002/19-09-2007-ECCC-OCIJ (Dec. 8, 2009). On May 20, 2010, the ECCC Pre-Trial Chamber reversed in part the decision of the Co-Investigating Judges, ruling that the ECCC could employ JCE I and JCE II, but not JCE III, because the Pre-Trial Judges did not believe JCE III was sufficiently enshrined in customary international law as of 1975. See Decision of the Pre-Trial Chamber on the Appeals Against the Co-Investigating Judges' Order on Joint Criminal Enterprise (JCE), Case No. 002/19-09-2007-ECCC/CIJ (PTC38) (May 20, 2010), available at http://www.eccc.gov.kh/english/court doc.list.aspx?courtDocCat= case docs. The issue will not be completely settled until after the final decision of the ECCC Appeals Chamber. The issue of the applicability of JCE also came up in the separate case of Kaing Guek Eav (Duch). In its judgment in the case, the Trial Chamber held that JCE I and JCE II were part of customary international law as of 1975, but since the Co-Prosecutors did not give timely notice of their intent to rely on JCE III, the Chamber said it "consequently considers that it need not generally pronounce on the customary status of the third extended form of joint criminal enterprise during the 1975 to 1979 period" - thus leaving this an open question for the Trial Chamber in the Case of Ieng Sary. See Judgement of the Trial Chamber in the Case of Kaing Guek Eav alias Duch, Case No. 001/18-07-2007-ECCC-TC,paras. 511-512 (July 26, 2010), available at http://www.eccc.gov.kh/english/cabinet/courtDoc/635/20100726 Judgement Case 001 ENG PUBLIC.pdf.

[3] Pursuant to the Co-Investigating Judges' Order of Sept. 16, 2008, the Co-Prosecutors filed the brief to detail why the extended form of JCE liability, JCE III, should be applicable in cases before the ECCC. The Defense Motion argued in part that JCE III, as applied by the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber in the Tadic decision, is a judicial construct that does not exist in customary international law or, alternatively, did not exist in 1975-79. Case of Ieng Sary, Ieng Sary's Motion Against the Application at the ECCC of the Form of Responsibility Known as Joint Criminal Enterprise, Case No. 002/19-09-2007-ECCC/OCIJ, ERN 0208225-00208240, D97 (July 28, 2008). See also Kai Ambos, Amicus Curiae Brief in the Matter of Co-Prosecutor's Appeal of the Closing Order Against Kaing Guek Eav "Duch" Dated 8 August 2008, reprinted in 20 Crim. L.F. 353-388 (2009) (arguing against application of JCE III).

[4] For background about and cases applying the felony murder rule see David Crump & Susan Waite Crump, In Defense of the Felony Murder Doctrine, 8 Harv. J.L. & Pub. Pol'y 359 (1985).

[5] Prosecutor v. Tadic, Case No. IT-94-1-A, Appeals Chamber Judgment, (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999) [hereinafter Tadic Appeals Chamber Judgment].

[6] E.g., Prosecutor v. Brdjanin, Case No. IT-99-36-A, Judgment, P 395 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2007); Prosecutor v. Krjaisnik, Case No. IT-00-39-T, Judgment, P 1082 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 27, 2006); Prosecutor v. Stakic, Case No. IT-97-24-A, Judgment, PP 101-104 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006); Pros-

erra Leone (SCSL) [8] and the Special Panels for the Trial of Serious Crimes in East **[*442]** Timor [9] have recognized and applied JCE liability during the last ten years.

These modern precedents, however, were not directly relevant to the ECCC because the crimes under its jurisdiction had occurred some twenty years earlier. Under the international law principle of nulem crimin sine lege (the equivalent to the U.S. Constitution's ex post facto law prohibition), the Cambodia Tribunal can only apply the substantive law and associated modes of liability that existed as part of customary international law in 1975-1979. [10] Therefore the question at the heart of the Prosecutor's Brief that I drafted was whether the Nuremberg Tribunal precedent and the United Nation's adoption of the Nuremberg Principles were sufficient to establish JCE liability as part of customary international law following World War II.

The attorneys for the Khmer Rouge Defendants argued that Nuremberg and its progeny provided too scant a sampling to constitute the widespread state practice and opinio juris required to establish JCE as a customary international norm as of 1975. [11] In response, the Prosecution Brief maintained that Nuremberg constituted what some commentators call "a ***Grotian Moment***" - an instance in which there is such a fundamental change to the international system that a new principle of customary international law can arise with exceptional velocity. This was the first time in history that the term was used in a proceeding before an international court. [12]

This article explores the concept of "***Grotian Moment***" in the context of the validity of applying JCE to the Cambodia Tribunal's cases. The article begins with a history of the concept of "***Grotian Moment***," while comparing and contrasting the concept with the notion of instant customary international law. Next, the article examines whether the Nuremberg precedent fits within the profile of a legitimate "***Grotian Moment***." It then examines whether the joint plan mode of liability applied by the Nuremberg Tribunal and its Control Council Law Number 10 progeny was equivalent to the modern JCE concept. Finally, assuming Nuremberg did **[*443]** constitute a "***Grotian Moment***," the article addresses the question of whether, in addition to the substantive crimes, the modes of liability applied at Nurem-

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ecutor v. Kvocka, Case No. IT-98-30/1-A, Judgment, PP 96, 100 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28 2005); Prosecutor v. Milosevic, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, P 291 (Int'l Crim. Trib. for the Former Yugoslavia June 16, 2004); Prosecutor v. Krstic, Case No. IT-98-33-A, Judgment, P 144 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004); Prosecutor v. Brdjanin, Case No.IT-99-36-A, Decision on Interlocutory Appeal (Int'l Crim. Trib. for the Former Yugoslavia Mar. 19, 2004); Prosecutor v. Simic, Case No. IT-95-9-T, Judgment, P 149 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 17, 2003); Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgment, PP 96, 100 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 17, 2003); Prosecutor v. Milutinovic, et. al., Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction-Joint Criminal Enterprise Liability (Int'l Crim. Trib. for the Former Yugoslavia May 21, 2003) [hereinafter Milutinovic Decision].

[7] E.g., Prosecutor v. Nchamihigo, Case No. ICTR-20010630R50, Decision on Defence Motion on Defects in the Form of the Indictment, PP 14, 21 (Sept. 27, 2006); Prosecutor v. Ntakirutimana, Case Nos. ICTR-96-10-A and ICTR-96-17-A, Judgment, PP 461 -484 (Dec. 13, 2004); Prosecutor v. Rwamakuba, Case No. ICTR-98-44-AR72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, PP 14-30 (Oct. 22, 2004); Prosecutor v. Kayishema and Ruzindanda, Case No. ICTR-95-1-A, Judgment, P 193 (June 1, 2001).

[8] E.g., Prosecutor v. Brima, Kamara and Kanue (AFRC Case), Case No. SCSL-04-16-T, Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, PP 308-326 (Mar. 31, 2006); Prosecutor v. Norman, Fofana and Kondewa (CDF Case), Case No. 04 -14-T, Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, P 130 (Oct. 21, 2005).

[9] E.g., Prosecutor v. Jose Cardoso Fereira, Case No. 04/2001, Judgment, PP 367-376 (Dili Dist. Ct. 2003) (finding the accused guilty under JCE theory, applying the Tadic Appeals Chamber Judgment and other ICTY judgments in interpreting UNTAET Regulation 2000/15); Prosecutor v. De Deus, Case No. 2a/2004, Judgment at 13 (Dili Dist. Ct. 2005) (holding that though the accused did not personally beat the victim, he was guilty "as part of a joint criminal enterprise" because he was part of an organized force intent on killing and contributed by carrying a gun, uttering threats, and intimidating unarmed people, thereby strengthening the resolve of the group).

[10] International Law Commission [I.L.C], Principles of International Law Recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal [hereinafter Nuremberg Principles] (1950), available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7 1 1950.pdf.

[11] For the definition of the opinio juris aspect of customary international law, see North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20) at P 77.

[12] See Co-Prosecutors' Supplementary Observations on Joint Criminal Enterprise at P 11, No. 002/19-09-2007-ECCC-OCIJ (Dec. 8, 2009).

berg can be deemed to have crystallized into customary international law by 1975.

Very little has previously been written about the concept of a ***"Grotian Moment."*** Indeed, an exhaustive search of law review databases revealed only sixty-one previous references to the term, and few that use the term in the way it is being employed here. While this article uses the lens of the Khmer Rouge trial to frame the analysis, this piece has implications far beyond the sub-field of international criminal law.

I. Background: The Concept of *"Grotian Moment"*

A. Historical Underpinnings

Dutch scholar and diplomat Hugo Grotius (1583-1645) is widely considered to be the father of modern international law as the law of nations, and has been recognized for having "recorded the creation of order out of chaos in the great sphere of international relations." [13] In the mid-1600s, at the time when the nation-state was formally recognized as having crystallized into the fundamental political unit of Europe, Grotius "offered a new concept of international law designed to reflect that new reality." [14] In his masterpiece, De Jure Belli ac Pacis (The Law of War and Peace), Grotius addressed questions bearing on just war: who may be a belligerent; what causes of war are just, doubtful or unjust; and what procedures must be followed in the inception, conduct, and conclusion of war. [15]

Although New York University Professor Benedict Kingsbury has convincingly argued that Grotius' actual contribution has been distorted through the ages, the traditional view is that his treatise had an extraordinary impact as the first formulation of a comprehensive legal order of interstate relations based on mutual respect and equality of sovereign states. [16] In "semiotic" terms, [17] the ***"Grotian*** tradition" has come to symbolize the advent of the modern international legal regime, characterized by positive **[*444]** law and state consent, which arose from the Peace of Westphalia. [18]

The term ***"Grotian Moment,"*** on the other hand, is a relatively recent creation, coined by Princeton Professor Richard Falk in 1985. [19] Since then, scholars and even the U.N. Secretary-General have employed the term in various

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[13] See Charles S. Edwards, Hugo Grotius: the Miracle of Holland: A Study in Political and Legal Thought (1981).

[14] John W. Head, Throwing Eggs at Windows: Legal and Institutional Globalization in the 21st-Century Economy, 50 Kan. L. Rev. 731, 771 (2002).

[15] Hugo Grotius, De Jure Belli ac Pacis (1625).

[16] See Benedict Kingsbury, A Grotian Tradition of Theory and Practice?: Grotius, Law, and Moral Skepticism in the Thought of Hedley Bull, 17 Quinnipiac L. Rev. 3, 10 (1997).

[17] Semiotics is the study of how meaning of signs, symbols, and language is constructed and understood. Semiotics explains that terms such as "The Peace of Westphalia" or "the Grotian tradition" are not historic artifacts whose meaning remains static over time. Rather, the meaning of such terms changes over time along with the interpretive community or communities. Michael P. Scharf, International Law in Crisis: A Qualitative Empirical Contribution to the Compliance Debate, 31 Cardozo L. Rev. 45, 50 (2009) (citing Charles Sanders Peirce, Collected Papers of Charles Sanders Peirce: Pragmatism and Pragmaticism (Charles Hartshorne & Paul Weiss eds., 1935)).

[18] Michael P. Scharf, Earned Sovereignty: Juridical Underpinnings, 31 Denv. J. Int'l L. & Pol'y 373, 375 n. 20 (2003). The Peace of Westphalia was composed of two separate agreements: (1) the Treaty of Osnabruck concluded between the Protestant Queen of Sweden and her allies on one side, and the Holy Roman Habsburg Emperor and the German Princes on the other; and (2) the Treaty of Munster concluded between the Catholic King of France and his allies on one side, and the Holy Roman Habsburg Emperor and the German Princes on the other. Id. The Conventional view of the Peace of Westphalia is that by recognizing the German Princes as sovereign, these treaties signalled the beginning of a new era; but in fact, the power to conclude alliances formally recognized at Westphalia was not unqualified, and was actually a power that the German Princes had already possessed for almost half a century. Furthermore, although the treaties eroded some of the authority of the Habsburg Emperor, the Empire remained a key actor according to the terms of the treaties. Id. For example, the Imperial Diet retained the powers of legislation, warfare, and taxation, and it was through Imperial bodies, such as the Diet and the Courts, that religious safeguards mandated by the Treaty were imposed on the German Princes. Id.

[19] The Grotian Moment in International Law: A Contemporary Perspective 7 (Richard Falk, et al. eds., 1985), excerpt reprinted in Burns H. Weston et al., International Law and World Order 1087-92 (Thomson/West 2d ed. 1990). See also International Law and World Order 1265-86 (Burns H. Weston, Richard A. Falk, Hilary Charlesworth & Andrew K. Strauss eds., Thomson/West 4th ed. 2006). For the early seeds of this concept of a changing paradigm in Falk's work, see Richard A. Falk, The

ways, [20] but here I use it to denote a transformative development in which new rules and doctrines of customary international law emerge with unusual rapidity and acceptance. [21] Usually this happens during "a period in world history that seems analogous at least to the end of European feudalism … when new norms, procedures, and institutions had to be devised to cope with the then decline of the Church and the emergence of the secular state." [22] Commentators have opined that the creation of the Nuremberg Tribunal at the end of World War II constituted a classic "***Grotian Moment***," on par with the negotiation of the Peace of Westphalia and the establishment of the U.N. Charter. [23]

[*445] Drawing from the writings of Professor Bruce Ackerman, who used the phrase "constitutional ***moment***" to describe the New Deal transformation in American constitutional law, [24] some international law scholars have used the phrase "international constitutional ***moment***" to convey the "***Grotian Moment***" concept. Professors Bardo Fassbender and Jenny Martinez, for example, have written that the drafting of the U.N. Charter was a "constitutional ***moment***" in the history of international law. [25] Professor Leila Sadat has described Nuremberg as a "constitutional ***moment*** for international law." [26] Professors Anne-Marie Slaughter and William Burke-White have used the term "constitutional ***moment***" to argue that the September 11th attacks on the United States demonstrate a change in the nature of the threats confronting the international community, thereby paving the way for rapid development of new rules of customary international law. [27] While the phrase "international constitutional ***moment***" might be quite useful with respect to paradigm-shifting developments within a particular international organization with a constitution-like instrument, the term "***Grotian Moment***" makes more sense when discussing a development that has an effect on international law at large.

B. Comparison of the "***Grotian Moment***" concept and the notion of "Instant Customary International Law"

Normally, customary international law, which is just as binding on states as treaty law, [28] arises out of the slow ac-

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Interplay of Westphalia and Charter Conceptions of the International Legal Order, in The Future of the International Legal Order 1, 32-70 (Richard A. Falk & Cyril E. Black eds., 1969).

[20] E.g., Boutros Boutros-Ghali, The Role of International Law in the Twenty-First Century: A Grotian Moment, 18 Fordham Int'l L. J. 1609, 1613 (1995) (referring to the establishment of the International Tribunal for the former Yugoslavia as part of the process of building a new international system for the twenty-first century).

[21] See Saul Mendlovitz & Merav Datan, Judge Weeramantry's Grotian Quest, 7 Transnat'l L. & Contemp. Probs. 401, 402 (defining the term "Grotian moment").

[22] Burns H. Weston, International Law and World Order, 1369 (3d ed. 1997); see also B.S. Chimni, The Eighth Annual Grotius Lecture: A Just World Under Law: A View from the South, 22 Am. U. Int'l L. Rev. 199, 202 (2007).

[23] See Ibrahim J. Gassama, International Law at a Grotian Moment: The Invasion of Iraq in Context, 18 Emory Int'l L. Rev. 1, 9 (2004) (describing some of history's Grotian moments, including the Peace of Westphalia, the Nuremberg Charter, and the UN Charter); Leila Nadya Sadat & S. Richard Carden, The New International Criminal Court: An Uneasy Revolution, 88 Geo. L.J. 381, 394 (arguing that the Statute of the International Criminal Court constitutes the most recent Grotian moment).

[24] Bruce Ackerman, Reconstructing American Law (1984).

[25] Bardo Fassbender, The United Nations Charter as Constitution of the International Community, 36 Colum. J. Transnat'l L. 529 (1998); Jenny S. Martinez, Towards an International Judicial System, 56 Stan. L. Rev. 429, 463 (2003).

[26] Leila Nadya Sadat, Enemy Combatants After Hamdan v. Rumsfeld: Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror, 75 Geo. Wash. L. Rev. 1200, 1206-07 (2007).

[27] Anne-Marie Slaughter & William Burke-White, An International Constitutional Moment, 43 Harv. Int'l L.J. 1, 2 (2002); see also Ian Johnstone, The Plea of "Necessity" in International Legal Discourse: Humanitarian Intervention and Counter-terrorism, 43 Colum. J. Transnat'l L. 337, 370 (2005) (arguing that 9/11 comprised a "constitutional moment" leading to recognition of a newly emergent right to use force in self-defense against non-state actors operating with the support of third-party states).

[28] While customary international law is binding on states internationally, not all states accord customary international law equal domestic effect. A growing number of states' constitutions automatically incorporate customary law as part of domestic law or even accord it a ranking higher than domestic statutes. See Bruno Simma, International Human Rights and General International Law: A Comparative Analysis, in IV-2 Collected Courses of the Academy of European Law 153, 213 (1993). In the United States, customary international law is deemed incorporated into the federal common law of the United States. Some courts, however, consider it controlling only where there is no contradictory treaty, statute or executive act. See Garcia-Mir v. Meese, 788 F.2d 1446, 1453 (11th Cir. 1986) (holding that the Attorney General's decision to detain Mariel Cuban refugees indefinitely without a hearing trumped any contrary rules of customary international law).

cretion of widespread state practice evincing a sense of legal obligation (opinio juris). [29] Under traditional **[*446]** notions of customary international law, ″deeds were what counted, not just words.″ [30] At the same time, a state's practice is not limited to its own acts; practice can consist of acquiescence through failure to protest the acts of other states. [31]

Consistent with the traditional approach, the U.S. Supreme Court has recognized that the process of establishing customary international law can take decades or even centuries. [32] In the 1969 North Sea Continental Shelf Cases, however, the International Court of Justice (ICJ) declared that customary norms can sometimes ripen quite rapidly, and that a short period of time does not necessarily bar finding the existence of a new rule of customary international law, binding on all nations except those that persistently objected during the rule's formation. [33] As contemplated in the North Sea Continental Shelf Cases, a ***″Grotian Moment″*** constitutes an acceleration of the custom-formation process due to states' widespread and unequivocal response to a paradigm-changing event in international law, such as the unprecedented human suffering from the atrocities of World War II and the related recognition that there could be international criminal responsibility for violations of international law.

In an oft-cited 1965 article, Professor Bin Cheng argued that a phenomenon of ″instant customary international law″ could exist. [34] Professor Cheng opined that, not only is prolonged state practice unnecessary, but instant customary international law formation requires no state practice at all, provided that the relevant states clearly establish their opinio juris by, for example, their votes on U.N. General Assembly resolutions. [35] Legal scholars have been largely critical of Cheng's ″instant custom″ theory, at **[*447]** least to the extent that the theory removes the need to demonstrate any state practice other than a country's vote in the U.N. General Assembly. [36]

Three main problems with the ″instant custom″ theory emerge when the theory rests solely on General Assembly resolutions. The first problem is that the U.N. Charter employs the language of ″recommend″ in referring to the General Assembly's powers and functions, as distinct from the Security Council's power to issue binding decisions. [37] The negotiating record of the U.N. Charter confirms that the drafters intended for General Assembly resolutions to be

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[29] For the definition of customary international law, see North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20) at P 77.

[30] See Simma, supra note 28, at 216.

[31] See Michael Akehurst, Custom as a Source of International Law, 47 Brit. Y.B. Int'l L. 1, 10, 23-24, 38-42 (1974-75).

[32] See The Paquete Habana, 175 U.S. 677, 686-700 (1900).

[33] North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20) at P P 71, 73, 74. The Court stated:

Although the passage of only a short period of time is not necessarily… a bar to the formation of a new rule of customary international law..., an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.

Id. at P 74. While recognizing that some norms can quickly become customary international law, the ICJ held that the equidistance principle contained in Article 6 of the 1958 Convention on the Continental Shelf had not become customary international law as of 1969 because so few states recognized and applied the principle.

[34] Bin Cheng, United Nations Resolutions on Outer Space: ″Instant″ International Customary Law? 5 Indian J. Int'l L. 23 (1965). In contrast to Cheng's conception, the ″Grotian Moment″ concept contemplates accelerated formation of customary international law through states' widespread acquiescence or endorsement in response to state acts, rather than instant custom based solely on General Assembly resolutions.

[35] Id. at 36. For examples of other scholars' and commentators' assertions of the possibility of ″instant customary international law″ see Peter Malanczuk, Akehurst's Modern Introduction to International Law 45-46 (7th ed. 1997); Jeremy Levitt, Humanitarian Intervention by Regional Actors in Internal Conflicts: the Cases of ECOWAS in Liberia and Sierra Leone, 12 Temp. Int'l & Comp. L.J. 333 (1998); Benjamin Langille, It's ″Instant Custom″: How the Bush Doctrine Became Law After the Terrorist Attacks of September 11, 2001, 26 B.C. Int'l & Comp. L. Rev. 145 (2003).

[36] See G.J.H. van Hoof, Rethinking the Sources of International Law 86 (1983).

[37] U.N. Charter arts. 10, 11.

merely non-binding recommendations; [38] in fact, at the 1945 San Francisco Conference, when the Philippines delegation proposed that the General Assembly be vested with legislative authority to enact rules of international law, the other delegations voted down the proposal by an overwhelming margin. [39]

The second problem is that states often vote for General Assembly resolutions to embellish their image or curry favor with other states, without the expectation that the international community will deem their votes acceptance of a new rule of law. For example, the United States initially opposed the draft of General Assembly Resolution 1803, which mandated ″appropriate compensation″ following an expropriation, because the United States felt that the correct standard should be ″prompt, adequate, and effective″ compensation, [40] yet, the United States ultimately voted in favor of the resolution in a spirit of compromise. [41] ICJ Judge Stephen Schwebel has referred to this type of practice as ″fake consensus.″ [42]

The third problem with an approach that focuses exclusively on words contained in non-binding General Assembly Resolutions is ″that it is grown like a flower in a hot-house and that it is anything but sure that such creatures will survive in the much rougher climate of actual State practice.″ [43] Elsewhere I have argued that outside of situations covered by treaties **[*448]** with a ″prosecute or extradite″ requirement, the so-called ″duty to prosecute″ crimes against humanity, recognized in non-binding General Assembly resolutions, is a chimera. [44] A ″rule″ that is based only on General Assembly resolutions is unlikely to achieve substantial compliance in the real world and, therefore, will result in undermining rather than strengthening the rule of law. [45]

That is not to suggest that General Assembly resolutions are irrelevant to the determination of the existence and content of customary international law. To the contrary, it is widely recognized that, under certain circumstances, General Assembly resolutions can ″declare existing customs [or] crystallize emerging customs.″ [46] As a 1975 U.S. Department of State pronouncement explained:

> General Assembly resolutions are regarded as recommendations to Member States of the United Nations. To the extent, which is exceptional, that such resolutions are meant to be declaratory of international law, are adopted with the support of all members, and are observed by the practice of states, such resolutions are evidence of customary international law on a particular subject matter. [47]

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[38] E.g., Gregory J. Kerwin, The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts, 1983 Duke L. J. 876 (1983).

[39] See id. at 879.

[40] Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875, 890 (2d Cir. 1981).

[41] See id. (holding that, while General Assembly Resolutions ″are of considerable interest,″ they ″do not have the force of law,″ because expropriation requires ″prompt, adequate, and effective compensation″ rather than the standard of ″appropriate compensation″ reflected in GA Res. 1803).

[42] Stephen M. Schwebel, The Effect of Resolutions of the U.N. General Assembly on Customary International Law, 73 Am. Soc'y Int'l L. Proc. 301, 308 (1979). Schwebel has observed that members of the UN ″often vote casually … . states often don't meaningfully support what a resolution says and they almost always do not mean that the resolution is law. This may be as true or truer in the case of unanimously adopted resolutions as in the case of majority-adopted resolutions. It may be truer still of resolutions adopted by 'consensus.'″ Id. at 302.

[43] Simma, supra note 28, at 217.

[44] Michael P. Scharf, Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti? 31 Texas Int'l L.J. 1, 41 (1996) (citing examples of adverse state practice where amnesty is traded for peace, thus disproving the existence of a customary rule requiring prosecution in the absence of a treaty with a prosecute or extradite provision).

[45] See id.

[46] Anthea Elizabeth Roberts, Traditional and Modern Approaches to Customary International Law: A Reconciliation, 95 Am. J. Int'l L. 757, 758 (2001).

[47] D.J. Harris, Cases and Materials in International Law 62 (5th ed. 1998).

Consistent with this view, both U.S. domestic courts and international tribunals have relied on General Assembly resolutions as evidence of emergent customary rules. [48] Thus, in Siderman de Blake v. Republic of Argentina, the Ninth Circuit confirmed that ″a resolution of the General Assembly of the United Nations … is a powerful and authoritative statement of the customary international law of human rights.″ [49] On several occasions, the ICJ has affirmed that General Assembly resolutions have legal significance, not as independent sources of international law, but as evidence of new customary international law. [50] In its Advisory Opinion **[*449]** on the Construction of a Wall, for example, the ICJ cited ″relevant resolutions adopted pursuant to the U.N. Charter by the General Assembly″ among the ″rules and principles of international law″ that were useful in assessing the legality of the measures taken by Israel. [51] In its judgment in the Case Concerning the Application on the Convention on the Prevention and Punishment of the Crime against Genocide, the ICJ cited General Assembly resolutions referring to ethnic cleansing as a ″form of genocide″ as evidence that ethnic cleansing could constitute acts of genocide in violation of the Genocide Convention. [52]

In deciding whether to treat a particular General Assembly resolution as evidence of a new rule of customary international law, the ICJ has stated that ″it is necessary to look at [the resolution's] content and the conditions of its adoption.″ [53] In examining these factors, courts often consider the type of resolution to be significant. [54] General Assembly resolutions fall within a spectrum, from mere ″recommendations″ (usually given little weight) to ″declarations″ (used to impart increased solemnity) to ″affirmations″ (used to indicate codification or crystallization of law). [55] Courts also consider the words used in the resolution; for example, language of firm obligation versus aspiration. [56] Another consideration is the vote outcome. [57] Courts accord resolutions passed unanimously or by sizable majorities more weight than resolutions adopted over significant dissent or abstentions. [58] Moreover, the position of important players relative to the subject matter of the resolution is of particular significance. [59] Further, courts may discount consensus resolutions (adopted without an actual vote) because countries often face pressure to remain silent so as not

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[48] E.g., Filartiga v. Pena-Irala, 630 F.2d 876, 883 (2d Cir. 1980); Jafari v. Islamic Republic of Iran, 539 F.Supp. 209, 215 (N.D. Ill. 1982); Lareau v. Manson, 507 F.Supp. 1177, 1188 (D. Conn. 1980); Fernandez v. Wilkinson, 505 F.Supp. 787, 797-98 (D. Kan. 1980); International Arbitral Tribunal: Dispute between Texaco Overseas Petroleum Co. and Libyan Arab Republic, Jan 19, 1977, 17 I.L.M. 1, 9.

[49] Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 719 (9th Cir. 1992).

[50] E.g., Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27); Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 254-55 (July 8); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 171 (July 9); Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7 (Sept. 25); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 45 I.L.M. 271, 308-09, (Dec. 19, 2005); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 46 I.L.M. 188, 190, (Feb. 26, 2007).

[51] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 171 (July 9).

[52] Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 46 I.L.M. 188, 190 (Feb. 26, 2007).

[53] Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 254-55 (July 8).

[54] See Noelle Lenoir, Universal Declaration on the Human Genome and Human Rights: The First Legal and Ethical Framework at the Global Level, 30 Colum. Hum. Rts. L. Rev. 537, 551 (1999).

[55] Office of International Standards and Legal Affairs, General Introduction to the Standard-Setting Instruments of UNESCO, Recommendations, available at http://portal. unesco.org/en/ev.php-url ID=237772&URL DO=DO Topic&URL Sectrion+201.html #4; see also Lenoir, supra note 54, at 551; Major Robert A. Ramey, Armed Conflict on the Final Frontier: The Law of War in Space, 48 A.F. L. Rev. 1, 110 n.485 (2000).

[56] See Robert Rosenstock, The Declaration of Principles of International Law Concerning Friendly Relations: A Survey, 65 Am. J. Int'l L. 713, 715-16 (1971).

[57] Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 254-55 (July 8).

[58] Id. at 255.

[59] See In re Agent Orange Prod. Liab. Litig., 373 F. Supp.2d 7, 126-27 (E.D.N.Y. 2005).

to break consensus. [60] The ICJ has also indicated that if a state expressly mentions, while voting for a particular General Assembly resolution, that it regards the text as merely a political statement without legal content, then **[*450]** that resolution may not be invoked against it. [61]

In addition to these considerations, the ***"Grotian Moment"*** concept may be helpful to a court examining whether a particular General Assembly resolution should be deemed evidence of an embryonic rule of customary international law, especially in a case lacking the traditional level of widespread and repeated state practice. In periods of fundamental change - whether by technological advances, the commission of new forms of crimes against humanity, or the development of new means of warfare or terrorism - rapidly developing customary international law as crystallized in General Assembly resolutions may be necessary for international law to keep up with the pace of other developments.

A few examples of some recent potential ***"Grotian Moments"*** provide a useful focal point for examining the validity of the concept. One such situation arose when the United States and Soviet Union first developed the abilities to launch rockets into outer space and to place satellites in earth's orbit. [62] In response to this new technological development, the U.N. General Assembly adopted the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, which provides that: the provisions of the U.N. Charter, including limitations on the use of force, apply to outer space; outer space and celestial bodies are not subject to national appropriation by claim of sovereignty; states bear responsibility for parts of space vehicles that land on the territory of other states; the state of registry of a spacecraft has exclusive jurisdiction over it and any personnel it carries; and states shall regard astronauts as envoys and shall accord them assistance and promptly return them to the state of registry. [63] Though state practice was scant in the early years of space exploration, ICJ Judge Manfred Lachs concluded that "it is difficult to regard the 1963 Declaration as a mere recommendation: it was an instrument which has been accepted as law." [64]

A second situation involved the 1999 NATO intervention in Serbia in an effort to prevent a potential genocide of ethnic Kosovar Albanians. Significantly, the situation unfolded just five years after the U.N. failed to take action to halt genocide in Rwanda. When Russia and China prevented the Security Council from authorizing the use of force against Serbia, NATO proceeded to commence a seventy-eight day bombing campaign without U.N. approval. [65] The near universal consensus, however, was that the circumstances **[*451]** justified the intervention, leading commentators to label the situation "unlawful but legitimate." [66] The international reaction to the 1999 NATO intervention prompted the General Assembly and Security Council to endorse a new doctrine known as "Responsibility to Protect," which would authorize humanitarian intervention in certain limited circumstances in the future. [67]

Finally, the systematic terrorist attacks against the World Trade Center and Pentagon on September 11, 2001 and the in-

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[60] See Schwebel, supra note 42, at 302.

[61] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 106-07 (June 27).

[62] See John O'Brien, International Law 463-464 (2001); Cheng, supra note 34, at 23.

[63] Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, G.A. Res. 1962, 1280th plen. mtg., UN Doc. A/RES/1962 (Dec. 13, 1963).

[64] Manfred Lachs, The Law of Outer Space: An Experience in Contemporary Law-Making 138 (1972) (There were only four successful space flights during this period: Sputnick in 1957, Explorer in 1958, Luna 2 in 1959, and Vostok 1 in 1961).

[65] Richard A. Falk, Kosovo, World Order, and the Future of International Law, 93 Am. J. Int'l L. 847, 850 (1999) ("In the months before the war, China and Russia appeared ready to veto any call for UN intervention, as well as any mandate that conferred upon NATO or any other entity such a right.").

[66] E.g., The Independent International Commission on Kosovo, The Kosovo Report 4 (Oxford University Press, 2000).

[67] See Report of the International Commission on Intervention and State Sovereignty, The Responsibility to Protect (2001), available at http://www.iciss-ciise.gc.ca/report2-en.asp; G.A. Res. 60/1, UN Doc. A/Res/60/1 (Sept. 15, 2005) (world's Heads of State unanimously affirmed the Responsibility to Protect Doctrine); S.C. Res. 1674, UN Doc. S/RES/1674 (Apr. 28, 2006) (reaffirms the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity).

ternational community's reactions to those attacks have had a profound impact on the global order [68] and transformative "consequences for international law." [69] Whereas the ICJ previously opined in the 1986 Nicaragua Case that states could not resort to force in response to attacks by non-state actors operating in other states, [70] a few days after the September 11th attacks, the U.N. Security Council adopted Resolution 1368, which was widely viewed as confirming the right to use force in self-defense against al Qaeda in Afghanistan, [71] and there was little international protest when the United **[*452]** States invaded Afghanistan shortly thereafter. [72] Invoking the term "constitutional ***moment***" to describe these developments, Professor Ian Johnstone concludes that "in contrast to where the law stood in 1986 … it is a 'fair inference' today that self-defense may be invoked against non-state actors." [73]

Commentators and courts should exercise caution, however, in characterizing situations as "***Grotian Moments***." As one scholar warns, "it is always easy, at times of great international turmoil, to spot a turning point that is not there." [74] In this vein, the example of outer space principles might be discounted because the international community concluded a binding treaty on principles governing the activities of states in outer space in 1967, which has largely (though not entirely) supplanted the 1963 U.N. Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space in the regulation of outer space activities. [75] The meaning of the responsibility to protect doctrine, in turn, is still under debate, and the international community has yet to employ the doctrine in a situation where U.N. approval for the use of force is absent. [76] Finally, while there appears to be growing state practice buttressing the right to use force in self-defense against non-state actors, the ICJ has encumbered recognition of such a principle through its 2004 advisory opinion in the Legal Consequences of the Construction of a Wall [77] and its 2005 judgment in the Armed Activities on the Territory of the Congo. [78] **[*453]** While these ex-

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[68] Slaughter & Burke-White, supra note 27, at 2 (quoting British Foreign Secretary Jack Straw's address at the International Institute of Strategic Studies entitled "Order out of Chaos: The Future of Afghanistan," in which Straw commented, "Few events in global history can have galvanized the international system to action so completely in so short a time.").

[69] Antonio Cassese, Terrorism is Also Disrupting Some Crucial Legal Categories of International Law, 12 Eur. J. Int'l L. 993, 993 (2001).

[70] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.) 1986 I.C.J. 14, 148-49 (June 27). The ICJ ruled that US support for the Contras infringed on Nicaragua's territorial sovereignty in contravention of international law, but concluded that the evidence did not demonstrate that the United States "actually exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf." Id.

[71] S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001) (The resolution unequivocally condemns the terrorist attacks of September 11, 2001, "calls on all states to work together urgently to bring to justice the perpetrators, organizers and sponsors" of the attacks, and reaffirms the inherent right of self-defense in accordance with Art. 51 of the UN Charter in the context of the September 11 terrorist attacks); S.C. Res. 1378, U.N. Doc. S/RES/1378 (Nov. 14, 2001) (Resolution 1378, adopted by the Security Council after the U.S. invasion, "condemned the Taliban for allowing Afghanistan to be used as a base for the export of terrorism by the Al-Qaida network and other terrorist groups and for providing safe haven to Usama Bin Laden, Al-Qaida and others associated with them, and in this context supported the efforts of the Afghan people to replace the Taliban regime." The resolution further endorsed U.S. efforts to set up a post-Taliban government in Afghanistan.).

[72] E.g., Anand Giridharadas, 9/11: The Day that Shook the World, in Afghanistan and 9/11: Anatomy of a Conflict 9, 47-50 (2002) (explaining that support for the invasion of Afghanistan was widespread and that supporters included countries often hostile to U.S. foreign affairs, such as Russia and China).

[73] Johnstone, supra note 27, at 370; see also Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 45 I.L.M. 271, 370 separate opinion of Judge Simma at para. 11 (Dec. 19, 2005), (concluding that "Security Council Resolutions 1368 (2001) and 1373 (2001) cannot but be read as affirmations of the view that large-scale attacks by non-State actors can qualify as 'armed attacks' within the meaning of Article 51").

[74] Ibrahim J. Gassama, International Law at a Grotian Moment: The Invasion of Iraq in Context, 18 Emory Int'l L. Rev. 1, 30 (2004).

[75] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, available at http://cns.miis.edu/inventory/pdfs/ospace.pdf.

[76] See Carlo Focarelli, The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine, 13 J. Conflict & Sec. L. 191, 210 (2008).

[77] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 194 (July 9), (opining in dicta that using force under the right of self-defense against non-state actors in the territory of another state requires evidence that the attack was imputable to that state).

[78] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 45 I.L.M. 271, 306, at paras. 143-147 (Dec. 19, 2005) (holding that Uganda could not rely on self-defense to justify its military operation in the Congo because (1) Uganda

amples are worthy of further scrutiny, Nuremberg, in contrast, was an exemplary ***"Grotian Moment."***

II. Did the Nuremberg Precedent Establish JCE as Customary International Law?

A. Nuremberg as a ***"Grotian Moment"***

The events that prompted the formation of the Nuremberg Tribunal in 1945 are probably more familiar to most than those events that led to the creation of the modern day international tribunals (ICTY, ICTR, SCSL, ECCC, and ICC) a half century later. Between 1933 and 1940, the Nazi regime established concentration camps where Jews, Communists, and opponents of the regime were incarcerated without trial; the regime prohibited Jews from engaging in employment and participating in various areas of public life, stripped them of citizenship, and made marriage or sexual intimacy between Jews and German citizens a criminal offense; the regime forcibly annexed Austria and Czechoslovakia; it invaded and occupied Poland, Denmark, Norway, Luxembourg, Holland, Belgium, and France; and then it set in motion "the final solution to the Jewish problem" by establishing death camps, such as Auschwitz and Treblinka, where six million Jews were exterminated. [79]

As Allied forces pressed into Germany and an end to the fighting in Europe came into sight, the Allied powers faced the challenge of deciding what to do with the surviving Nazi leaders who were responsible for these atrocities. Holding an international trial, however, was not the Allies' first preference. [80] The British and Soviet governments initially advocated summary execution of the Nazi leaders, but the United States persuaded Britain and the Soviet Union to jointly establish the world's first international criminal tribunal for four reasons. First, judicial proceedings would avert future hostilities that would likely result from the execution, absent a trial, of German leaders. Second, legal proceedings would bring German atrocities to the attention of all parts of the world, thereby legitimizing Allied conduct during and after the war. Third, legal proceedings would individualize guilt by identifying specific perpetrators instead of leaving Germany with a sense of collective guilt. Finally, such a trial would permit the Allied powers, and the world, to exact a penalty from the Nazi leadership rather than from Germany's civilian population. [81]

From June 26-August 8, 1945, the United States, France, the United Kingdom, and the Soviet Union negotiated the Charter establishing the Nuremberg Tribunal, its subject matter jurisdiction, and its procedures. [82] **[*454]** Nineteen other states signed onto the Charter, rendering the Nuremberg Tribunal a truly international judicial institution. [83] The trial of twenty-two high ranking Nazi leaders commenced on November 20, 1945 and ten months later on October 1, 1946 the Tribunal issued its judgment, convicting nineteen of the defendants and sentencing eleven to death by hanging. The judgment of the Nuremberg Tribunal paved the way for the trial of over a thousand other German political and military officers, businessmen, doctors, and jurists under Control Council Law Number 10 by military tribunals in occupied zones in Germany and in the liberated or Allied Nations. [84]

The United Nations' International Law Commission (ILC) has recognized that the Nuremberg Charter, Control Council Law Number 10, and the post-World War II war crimes trials gave birth to the entire international paradigm of individual criminal responsibility. [85] Prior to Nuremberg, states were the only subjects of international law, and a

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did not immediately report to the Security Council following its use of force as required by Article 51, (2) Uganda's actions were disproportionate to the threat, and (3) there was no evidence from which to impute the attacks against Ugandan villages by rebel groups operating out of the Congo to the government of Congo).

[79] Michael P. Scharf, Balkan Justice, 3-4 (1997).

[80] Id. at 4-5.

[81] Id. at 5-6.

[82] Virginia Morris & Michael Scharf, An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia 675-691 (1995) (containing the London Agreement of Aug. 8, 1945, the Charter of the International Military Tribunal, and the Nuremberg Tribunal's Rules of Procedure).

[83] Signatories included Greece, Denmark, Yugoslavia, the Netherlands, Czechoslovakia, Poland, Belgium, Ethiopia, Australia, Honduras, Norway, Panama, Luxembourg, Haiti, New Zealand, India, Venezuela, Uruguay, and Paraguay.

[84] Michael P. Scharf, Balkan Justice 10 (1997).

[85] E.g., Documents of the 2nd Session including the report of the Commission to the General Assembly, [1950] Y.B. Int'l L. Comm'n 13-17, U.N. Doc. A/CN.4/SER.A/1950.

state's treatment of its own citizens within its own borders was its own business. [86] Nuremberg fundamentally altered that conception. ″International law now protects individual citizens against abuses of power by their governments [and] imposes individual liability on government officials who commit grave war crimes, genocide, and crimes against humanity.″ [87] The ILC has described the principle of individual responsibility and punishment for crimes under international law recognized at Nuremberg as the ″cornerstone of international criminal law″ and the ″enduring legacy of the Charter and Judgment of the Nuremberg Tribunal.″ [88]

Importantly, on December 11, 1946, in one of the first actions of the newly formed United Nations, the U.N. General Assembly unanimously affirmed the principles from the Nuremberg Charter and Judgments in Resolution 95(I). [89] This General Assembly resolution had all the attributes of **[*455]** a resolution entitled to great weight as a declaration of customary international law: it was labelled an ″affirmation″ of legal principles; it dealt with inherently legal questions; it was passed by a unanimous vote; and none of the members expressed the position that it was merely a political statement. [90]

The International Court of Justice, [91] the International Criminal Tribunal for the Former Yugoslavia, [92] the European Court of Human Rights, [93] and several domestic courts [94] have cited the General Assembly resolution affirming the principles of the Nuremberg Charter and judgments as an authoritative declaration of customary international law.

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[86] See id. at 17.

[87] Slaughter & Burke-White, supra note 27, at 13.

[88] Report of the International Law Commission on the Work of its Forty-Eighth Session, May 6-July 26, 1996, Official Records of the General Assembly, Fifty-First Session, Supplement No. 10, at p. 19, available at http://www.un.org/law.ilc/index.htm.

[89] Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, G.A. Res. 95(I), U.N. GAOR, 1st Sess., U.N. Doc A/236, (Dec. 11, 1946), pt. 2, at 1144, available at http://untreaty.un.org/cod/avl/ha/ga 95-I/ga 95 -I.html. The Resolution states in whole:

The General Assembly,

Recognizes the obligation laid upon it by Article 13, paragraph 1, sub-paragraph a, of the Charter, to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification;

Takes note of the Agreement for the establishment of an International Military Tribunal for the prosecution and punishment of the major war criminals of the European Axis signed in London on 8 August 1945, and of the Charter annexed thereto, and of the fact that similar principles have been adopted in the Charter of the International Military Tribunal for the trial of the major war criminals in the Far East, proclaimed at Tokyo on 19 January 1946;

Therefore,

Affirms the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal;

Directs the Committee on the codification of international law established by the resolution of the General Assembly of 11 December 1946, to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offenses against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal.

[90] Id.

[91] Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 172 (July 9).

[92] See Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, P 623 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997); Prosecutor v. Tadic, Case No. IT-94-1-T, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, P 140 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

[93] See Kolk and Kislyiy v. Estonia, App. No. 23052/04, 24018/04, Eur. Ct. H.R. (Jan. 17, 2006), available at http://www.echr.coe.int/eng (recognizing the ″universal validity″ of the Nuremberg principles. The ECHR stated: ″Although the Nuremberg Tribunal was established for trying the major war criminals of the European Axis countries for the offences they had committed before or during the Second World War, the Court notes that the universal validity of the principles concerning crimes against

Referring to General Assembly Resolution 95(I) in the 1962 Eichmann case, the Israeli Supreme Court stated that ″if fifty-eight nations [i.e., all members of the UN at the time] unanimously agree on a statement of existing law, it would seem that such a declaration would be all but conclusive evidence of such a rule, and agreement by a large majority would have great value in determining **[*456]** what is existing law.″ [95]

Finally, in submitting the draft statute for the ICTY to the Security Council in 1993, the United Nations Secretary-General emphasized the customary international law status of the principles and rules emanating from the Nuremberg Trial and other post-World War II jurisprudence. [96] Specifically, he stated that the Statute had been drafted to apply only the ″rules of international humanitarian law which are beyond any doubt part of customary law,″ which included the substantive law and modes of liability embodied in the Charter of the International Military Tribunal of August 8, 1945. [97] Logic dictates that this 1993 statement about the content of customary international law also holds true for the time of the crimes in question before the ECCC (1975-1979), as there were no relevant major developments in international humanitarian law between 1975 and the establishment of the ICTY in 1993. [98] As Ciara Damgaard documents, ″the origins of the JCE [doctrine] can be found in the events surrounding the end of World War II.″ [99]

B. Application of JCE at Nuremberg

The Nuremberg Charter and Judgment never specifically mention the term ″joint criminal enterprise,″ [100] yet, a close analysis of the Nuremberg Judgment and the holdings of several Control Council Law Number 10 [101] cases reveals that the Nuremberg Tribunal and its progeny applied a concept analogous to JCE, which they called the ″common plan″ or ″common design″ mode of liability. [102]

[*457] Prior to Nuremberg, ″liability for participation in a common plan [had] existed in some form in the national legislation of numerous countries since at least the [nineteenth] century.″ [103] Indeed, several states recognized

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humanity was subsequently confirmed by, inter alia, resolution 95 of the United Nations General Assembly (11 December 1946) and later by the International Law Commission.″ Id.

[94] The General Assembly Resolution Affirming the Nuremberg Principles has been cited as evidence of customary international law in cases in Canada, Bosnia, France, and Israel. See R. v. Finta, [1994] 1 S.C.R. 701 (Can.); Prosecutor v. Ivica Vrdoljak, No. X-KR-08/488, Court of Bosnia and Herzegovina, (July 10, 2008); Leila Sadat Wexler, The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again, 32 Colum. J. Transnat'l L., 289 (1994) (summarizing Touvier and Barbie cases in French courts).

[95] Attorney-General of Israel v. Eichmann, 36 I.L.R. 277, P 11 (May 29, 1962) [hereinafter Eichmann II] (quoting F. Blaine Sloan, The Binding Force of a 'Recommendation' of the General Assembly of the United Nations, 25 Brit. Y.B. Int'l L. 1 (1948) (Sloan was an international law scholar and former director of the U.N. General Legal Division)).

[96] See Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, Security Council, PP 34-35, U.N. Doc. S/25704 (May 3, 1993).

[97] See id.

[98] E.g., Virginia Morris & Michael Scharf, An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A documentary History and Analysis 1-15 (1997).

[99] Ciara Damgaard, Individual Criminal Responsibility for Core International Crimes, 132 (2008).

[100] See Allison M. Danner & Jenny S. Martinez, Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law, 93 Cal. L. Rev. 75, 103 (2005).

[101] This Law was based on the Nuremberg Charter and governed subsequent war crimes trials. Control Council Law Number 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, Dec. 20, 1945, 3 Official Gazette Control Council for Germany 50 (1946). Because Control Council Law Number 10 sought to ″establish a uniform legal basis in Germany for the prosecution of war criminals″, Article I of the law explicitly incorporated the Nuremberg Tribunal Charter as an ″integral part″ of the Law. Pursuant to Article I, all the military commissions (U.S., British, Canadian, and Australian) adopted implementing regulations, rendering a defendant responsible under the principle of ″concerted criminal action″ for the crimes of any other member of that ″unit or group.″ Law Reports of Trials of War Criminals, United Nations War Crimes Commission (UNWCC), vol. 15, at 92 (1949).

[102] See Danner & Martinez, supra note 100, at 117-18.

[103] R. Provost, Amicus Curiae Brief on Joint Criminal Enterprise in the Matter of the Co-Prosecutors' Appeal of the Closing Order Against Kaing Guek Eav ″Duch″ dated Aug. 8, 2008, 20 Crim. L.F. 331, 339 (2009).

modes of co-perpetration similar to JCE III; these included conspiracy, [104] the felony murder doctrine, [105] the concept of association de malfaiteurs, [106] and numerous other doctrines of co-perpetration. [107]

The drafters of the Nuremberg Charter, like the drafters of the ICTY Statute forty-eight years later, recognized that the unique nature of mass atrocity crimes justifies and requires a correspondingly unique mode of liability. In Tadic, the ICTY Appeals Chamber explained this:

Most of the time these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less - or indeed no different - from that of those actually carrying out the acts in question. [108]

A number of subsequent ICTY judgments have quoted this passage, [109] and in Karemera the ICTR Trial Chamber articulated a similar rationale for the JCE doctrine:

[*458]

To hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility. [110]

Similarly, Antonio Cassese, the former President of the ICTY, has opined:

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[104] See Pinkerton v. U.S., 328 U.S. 640, 646-47 (1946) (establishing the Pinkerton rule, in which a conspirator can be convicted of the reasonably foreseeable consequence of the unlawful agreement).

[105] The felony murder doctrine, first enunciated by Lord Coke in 1797, has been applied in the United Kingdom, the United States, New Zealand, and Australia. See Antonio Cassese, International Criminal Law 202 (2d. ed., 2008). The rule allows a defendant to be ″held accountable for a crime because it was a natural and probable consequence of the crime which that person intended to aid or encourage.″ Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law 515-16 (1972).

[106] Elies van Sliedregt, Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide, 5 J. Int'l Crim. Just. 184, 199 (2006) (Professor van Sliedregt noting that the concept of ″association de malfaiteurs,″ which France and The Netherlands had used to deal with mob violence by overcoming causality problems, ″inspired the drafters of the Nuremberg Statute to penalize membership of a criminal organization.″).

[107] The Indian Penal Code of 1860 imposed individual liability for unlawful acts committed by several persons in furtherance of a common plan. W. Morgan and A.G. MacPherson, Indian Penal Code (Act XLV. of 1860 § 34), With Notes, (1861). Similarly, Section 61(2) of the Canadian Criminal Code of 1893 punishes persons who ″form a common intention to prosecute any unlawful purpose,″ and makes each ″a party to every offense committed by any one of them in the prosecution of such common purpose.″ Canada Criminal Code, R.S.C., ch. 34, § 21(2) (1970). Provost, supra note 103, at 341.

[108] Tadic Appeals Chamber Judgment, P 191.

[109] E.g., Prosecutor v. Kvocka et al., Case No. IT-98-30/1-A, Appeal Judgment, P 80 (Feb. 28, 2005); Prosecutor v. Krnojelac, Case No. IT-97-25-A, Appeal Judgment, P 29 (Sep. 17, 2003); Prosecutor v. Blagojevic et al., Case. No. IT-02-60-T, Trial Judgment, P 695 (Jan. 17, 2005).

[110] Prosecutor v. Karemera et al., Case No. ICTR-98-44-T, Decision on the Preliminary Motions by the Defence of Joseph Nziorera, Edouard Karemera, Andre Rwamakuba and Mathieu Ngirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise, P 36 (May 11, 2004).

International crimes such as war crimes, crimes against humanity, genocide, torture, and terrorism share a common feature: they tend to be expression of collective criminality, in that they are perpetrated by a multitude of persons: military details, paramilitary units or government officials acting in unison or, in most cases, in pursuance of a policy. When such crimes are committed, it is extremely difficult to pinpoint the specific contribution made by each individual participant in the criminal enterprise or collective crime… . The notion of joint criminal enterprise (JCE) denotes a mode of criminal liability that appears particularly fit to cover the criminal liability of all participants in a common criminal plan. [111]

Thus, both the unique threats posed by organized criminality and the unique challenge of prosecuting such perpetrators justify JCE liability.

Consistent with the doctrine's historic origins in an international agreement (the 1945 London Charter establishing the Nuremberg Tribunal) and the jurisprudence of international judicial bodies (the Nuremberg and Control Council Law Number 10 Tribunals), Professor Elies van Sliedregt concludes that ″JCE is a merger of common law and civil law. JCE in international law is a unique (sui generis) concept in that it combines and mixes two legal cultures and systems.″ [112] Specifically, the major powers sought to create an approach in the Nuremberg Charter that would combine the Anglo-American conspiracy doctrine with the French and Soviet approach, which does not recognize conspiracy as a crime. [113] Thus, Article 6 of the London Charter implemented a modified form of the initial American proposal to include conspiracy, providing that ″leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.″ [114]

During the Nuremberg Trial, Justice Robert Jackson, the Chief U.S. Negotiator of the Nuremberg Charter and Chief U.S. Prosecutor at Nuremberg **[*459]** explained to the Tribunal the meaning of ″common plan,″ as distinct from the U.S. concept of conspiracy:

The Charter did not define responsibility for the acts of others in terms of ″conspiracy″ alone. The crimes were defined in non-technical but inclusive terms, and embraced formulating and executing a ″common plan″ as well as participating in a ″conspiracy.″ It was feared that to do otherwise might import into the proceedings technical requirements and limitations which have grown up around the term ″conspiracy.″ There are some divergences between the Anglo-American concept of conspiracy and that of either Soviet, French, or German jurisprudence. It was desired that concrete cases be guided by the broader considerations inherent in the nature of the social problem, rather than controlled by refinements of any local law. [115]

In harmony with this statement, the Nuremberg Tribunal [116] and the Control Council Law Number 10 Tribunals adopted their own version of the ″common design or plan″ concept, thereby transforming it into what has now be-

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[111] Cassese, supra note 105, at 191.

[112] van Sliedregt, supra note 106, at 199.

[113] See Stanislaw Pomorski, Conspiracy and Criminal Organizations in The Nuremberg Trial and International Law, 213, (George Ginsburgs & V.N. Kudriavtsev eds., 1990).

[114] Prosecution and Punishment of Major War Criminals of European Axis, Aug. 8, 1945, 82 U.N.T.S. 279 at art. 6(c) (emphasis added).

[115] Robert H. Jackson, The Law Under Which Nazi Organizations are Accused of Being Criminals (1946) 108, reprinted in The Nurnberg Case: As Presented by Robert Jackson (Alfred A. Knopf 1947).

[116] See 1 Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg 14 November 1945-1 October 1946, 226 (1947).

come known as the doctrine of JCE. [117] These tribunals found that ″the difference between a charge of conspiracy and one of acting in pursuance of a common design is that the first would claim that an agreement to commit offences had been made while the second would allege not only the making of an agreement but the performance of acts pursuant to it.″ [118] In other words, conspiracy is a crime in its own right, while acting in pursuance of a common design or plan, like JCE, is a mode of liability that attaches to substantive offences. In developing JCE liability from pre-existing approaches in domestic jurisdictions, the Nuremberg Tribunal declared that its conclusions were made ″in accordance with well-settled legal principles, one of the most important of which is that criminal guilt is personal, and that mass punishments should be avoided.″ [119]

While the Nuremberg Tribunal tried the twenty-two highest ranking surviving members of the Nazi regime, the Allied Powers jointly promulgated Control Council Law Number 10 to govern subsequent trials of the next level of suspected German war criminals by U.S., British, Canadian, and Australian military tribunals, as well as German courts, in occupied Germany. [120] Under the authority of Control Council Law Number 10, these tribunals followed the Charter and jurisprudence of the Nuremberg **[*460]** Tribunal. [121] As such, the case law from those tribunals is viewed as an authoritative interpretation of the Nuremberg Charter and Judgment and a reflection of customary international law. [122]

An analysis of several of the Control Council Law Number 10 cases supports the conclusion that, in 1946-1947, those tribunals did in fact employ the JCE doctrine. [123] Although the Nuremberg Charter confined common plan liability to Crimes against Peace, the Control Council Law Number 10 tribunals applied a version of common plan liability that they called ″common design″ to other international crimes. In reaching the conclusion in Tadic that JCE has existed in customary international law since the Nuremberg judgments, the ICTY Appeals Chamber relied partly on ten different post-World War II cases: six regarding JCE I, [124] two regarding JCE II, [125] and two regarding JCE III. [126] Most of these cases were published in summary form in the 1949 Report of the UN War Crimes Commission. [127] In addition to these ten, we included in the Prosecution's Brief another sixteen cases published in the 1949 UN War Crimes Commission Report and the U.S. Nuremberg War Crimes Tribunal Report in which the Control Coun-

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[117] See Danner & Martinez, supra note 100, at 117-18.

[118] Law Reports of Trials of War Criminals, UNWCC, vol. 15, at 97-98 (1949) (summarizing the jurisprudence of the Nuremberg and Control Council Law Number 10 trials).

[119] See 1 Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg 14 November 1945-1 October 1946, 256 (1947).

[120] Control Council Law Number 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, Dec. 20, 1945, 3 Official Gazette Control Council for Germany 50 (1946).

[121] See id.

[122] See Prosecutor v. Kupreskic, Case No. IT-95-16-T, Trial Judgment, P 541 (Jan. 14, 2000) (″It cannot be gainsaid that great value ought to be attached to decisions of such international criminal courts as the international tribunals of Nuremberg or Tokyo, or to national courts operating by virtue, and on the strength, of Control Council Law no. 10, a legislative act jointly passed in 1945 by the four Occupying Powers and thus reflecting international agreement among the Great Powers on the law applicable to international crimes and the jurisdiction of the courts called upon to rule on those crimes. These courts operated under international instruments laying down provisions that were either declaratory of existing law or which had been gradually transformed into customary international law.″).

[123] See Danner & Martinez, supra note 100, at 117-18.

[124] Trial of Otto Sandrock and three others; Hoelzer and others; Gustav Alfred Jepsen and others; Franz Schonfeld and others; Feurstein and others; Otto Ohlenforf and others. (JCE I requires proof that the perpetrators share a common criminal purpose).

[125] Dachau Concentration Camp Case (Trial of Martin Gottfried Weiss and thirty-nine others); the Belsen Case (Trial of Josef Kramer and forty-four others). (JCE II applies in the setting of concentration camps where all members of the camp's staff are presumed to share a common criminal purpose).

[126] See Trial of Erich Heyer and Six Others (Essen Lynching Case), British Military Court for the Trial of War Criminals, Essen, Dec. 18-19 and 21-22, 1945, UNWCC, Vol. 1 (1947); Maximilian Koessler, Borkum Island Tragedy and Trial, 47 J. Crim. L., Criminology, & Pol. Sci., 183 (1956). For JCE III, the Appeals Chamber also cited several unpublished Italian decisions.

[127] Notably, the JCE III Borkum Island Case was not included in the Report of the U.N. War Crimes Commission, but the charging instrument, transcript, and other documents of the case have been publicly available from The United States Archives. See Publication Number M1103, Records of United States Army War Crimes Trials, United States of America v. Goebel, et. al., Febru-

cil Law Number 10 tribunals also applied the common plan or design/JCE concept. [128] Each of these cases clarified the meaning of Nuremberg's common plan liability - the forerunner of JCE. **[*461]** Summing up this extensive case law and explaining the difference between common design and simple co-perpetration, the U.N. War Crimes Commission Report states: ″the prosecution has the additional task of providing the existence of a common design, [and] once that is proved the prosecution can rely upon the rule which exists in many systems of law that those who take part in a common design to commit an offence which is carried out by one of them are all fully responsible for that offence in the eyes of the criminal law.″ [129] Consistent with this explanation, the Appeals Chamber of the Yugoslavia Tribunal in the Milutinovic case, after considering extensive filings by the parties on whether JCE is part of customary international law, found that JCE and common plan liability are one and the same. [130]

Given that JCE III is the most controversial [131] type of JCE liability, the three Control Council Law Number 10 cases dealing with that mode of JCE liability are worth examining in some detail. The first is the trial of Erich Heyer and six others, known as the Essen Lynching Case. [132] According to the official summary of the trial published in the U.N. War Crimes Commission Report, this case concerned the lynching of three British prisoners of war by a mob of Germans. Though a British military court tried the case, the court did so under the authority of Control Council Law Number 10, and it was therefore ″not a trial under English law.″ One of the accused, Captain Heyer, placed three prisoners under the escort of a German soldier, Koenen, who was to take them for interrogation. As Koenen left, Heyer, within earshot of a waiting crowd, ordered Koenen not to intervene if German civilians molested the prisoners and stated that the prisoners deserved to be and probably would be shot. The crowd beat the prisoners, and one German corporal fired a revolver at a prisoner, wounding him in the head. One prisoner died instantly when the prisoners were thrown over a bridge, and the remaining two were killed by shots from the bridge and by members of the crowd who beat them to death. The court did not accept the defence argument that the prosecution needed to prove that each of the accused - Heyer, Koenen and five civilians - had intended to kill the prisoners. The prosecution argued that, in order to be convicted, the accused need only have been ″concerned in the killing″ of the prisoner. Both Heyer and Koenen were convicted of committing a war crime in that they were concerned in the killing of the three prisoners; three of the five accused civilians were convicted for the same reason. Even though the prosecution did not prove which of the civilians delivered the fatal shots or blows, the civilians were convicted because ″from the ***moment*** they left those barracks, the men were doomed and the crowd knew they were **[*462]** doomed and every person in that crowd who struck a blow was both morally and criminally responsible for the deaths of the three men.″ [133]

A second example that the U.N. War Crimes Commission specifically found analogous to the Essen Lynching Case is the Trial of Hans Renoth and Three Others. [134] In that case, two policemen (Hans Ronoth and Hans Pelgrim) and two customs officials (Friedrich Grabowski and Paul Nieke) were accused of committing a war crime in that they ″were concerned in the killing of an unknown Allied airman, a prisoner of war.″ According to the allegations, the pilot crashed on German soil unhurt, and was arrested by Renoth, then attacked and beaten with fists and rifles by a number of people while the three other defendants witnessed the beating but took no active part to stop it or to help the pilot. Renoth also stood by for a while, and then shot and killed the pilot. ″The case for the Prosecution was that there was a common design in which all four accused shared to commit a war crime, [and] that all four accused were aware of this common design and that all four accused acted in furtherance of it.″ All the accused were found guilty, presumably based on the foreseeability that the pilot would eventually be killed during the beating at the

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ary 6-March 21, 1946, and United States of America v. August Haesiker, June 26, 1947 (1981). For a detailed account and analysis of the Borkum Island Case, see Koessler, supra note 126.

[128] See Co-Prosecutors' Supplementary Observations on Joint Criminal Enterprise at P 19 n.47, No. 002/19-09-2007-ECCC/OCIJ (Dec. 31, 2009).

[129] Law Reports of Trials of War Criminals, UNWCC, vol. 15, at 96 (1949).

[130] See Milutinovic Decision, P 36.

[131] See, e.g., Hector Olasolo, Joint Criminal Enterprise and its Extended Form: A Theory of Co-perpetration Giving Rise to Principal Liability, a Notion of Accessorial Liability, or a Form of Partnership in Crime?, 20 Crim. L. Forum 263, 283 (2009).

[132] Trial of Erich Heyer and Six Others (Essen Lynching Case), British Military Court for the Trial of War Criminals, Essen, Dec. 18-19 and 21-22, 1945, UNWCC, Vol. 1, at 88 (1947).

[133] Id. at 89-92.

[134] See Trial of Hans Renoth and Three Others, Case No. 68, British Military Court, Jan. 8-10, 1946, UNWCC, Vol. 11 (1949).

hands of the crowd or by one of them. [135]

A third example is the case of Kurt Goebell et. al (the Borkum Island Case). Although not published in the Report of the U.N. War Crimes Commission, a detailed record of this case is publicly available through the U.S. National Archives Microfilm Publications. [136] Moreover, a comprehensive report of the trial (based on trial transcripts) was published in the Journal of Criminal Law in 1956. [137] According to that report, the mayor of Borkum and several German military officers and soldiers were convicted of the assault and killing of seven American airmen who had crash -landed. [138] The prosecution argued that the accused were ″cogs in the wheel of common design, all equally important, each cog doing the part assigned to it.″ [139] The prosecution further argued that ″it is proved beyond a reasonable doubt that each one of the accused played his part in mob violence which led to the unlawful killings″ and ″therefore, under the law each and every one of the accused is guilty of murder.″ [140] After deliberating in closed session, the judges rendered an oral verdict in which they convicted the mayor and several officers of the killings and assaults. [141] From the arguments and evidence submitted, it is apparent that the accused were **[*463]** convicted pursuant to a form of common design liability equivalent to JCE III. [142] Essentially, the court decided that though certain defendants had not participated in the murder nor intended for it to be committed, they were nonetheless liable because the murder was a natural and foreseeable consequence of their treatment of the prisoners. [143]

International judicial decisions, like domestic court cases, can evince state practice and opinio juris, establishing customary international law. [144] The attorneys for the Khmer Rouge Defendants objected that these Control Council Law Number 10 cases are ″unpublished cases″ or, in some instances, mere summaries of unwritten verdicts, [145] - suggesting that the ECCC could not validly rely on the cases to glean the substance of customary international law because Khmer Rouge defendants could not be deemed to have constructive knowledge of unpublished works with respect to the doctrine of ignorantia juris non excusat (ignorance of the law is no excuse). It is significant, however, that two of the three Control Council Law Number 10 JCE III cases described above were published in summary form in the official U.N. War Crimes Commission Report in 1949. [146] According to the U.N. publication's foreword, the ″main object of these Reports [was] to help to elucidate the law, i.e., that part of International Law which has been called the law of war.″ [147] This authoritative and widely disseminated multi-volume account of the trials, in which the war crimes tribunals recognized and applied JCE liability, supports the argument that the Khmer Rouge leaders had sufficient constructive notice in 1975-1979 that their mass atrocity crimes would attract criminal responsibil-

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135 Id. at 76-77.

136 The United States Archives, Publication Number M1103, Records of United States Army War Crimes Trials, United States of America v. Goebell, et. al., 6 February-21 March 1946. The Appeals Chamber in Tadic stated that a copy of these case materials are on file in the ICTY's Library. Tadic Appeals Chamber Judgment, P 93.

137 Koessler, supra note 126, at 183.

138 See id. at 192-93.

139 Goebell, supra note 136, at 1188.

140 Id. at 1190.

141 Koessler, supra note 126, at 192-93.

142 See id. at 194-96.

143 See id.

144 In 1950, the International Law Commission listed the following sources as forms of evidence of customary international law: treaties, decisions of national and international courts, national legislation, opinions of national legal advisors, diplomatic correspondence, practice of international organizations. Rep. of the Int'l Law Comm'n to the General Assembly, 364, 367-72, U.N. Doc. A/CN.4/Ser.A/1950/Add.1 (1957).

145 See Case of Ieng Sary, Ieng Sary's Reply to the Co-Prosecutor's Response to Ieng Sary, Ieng Thirith and Khieu Samphan's Appeals on Joint Criminal Enterprise, No. 002/19-09-2007-ECCC-OCIJ (PTC35) (March 18, 2010) available at http://www.eccc.gov.kh/english/cabinet/courtDoc/570/D97 14 14 EN.pdf.

146 See generally Trial of Erich Heyer and Six Others, British Military Court for the Trial of War Criminals, Essen, Dec. 18-19 and 21-22, 1945, UNWCC, Vol. 1 (1947); see also Trial of Hans Renoth and Three Others, Case No. 68, British Military Court, Jan. 8-10, 1946, UNWCC, Vol. 11 (1949).

147 UNWCC, Law Reports of Trials of War Criminals, Foreword, xv, vii (1949). While the U.N. War Crimes Commission recognizes that where ″there is no reasoned judgment … it is difficult in some cases to specify precisely the grounds on which the

ity under the JCE doctrine. [148] In objecting that the case synopses in the U.N. War Crimes Commission's volumes are mere two to three page summaries rather than lengthy and detailed decisions, the attorneys for the Khmer Rouge defendants overlook the fact that in most countries around **[*464]** the world, particularly those of the civil law tradition, judicial opinions are often of this length and form.

While the Report of the U.N. War Crimes Commission did not include the Borkum Island Case, it is significant that the charging instrument, transcript (including oral bench judgment), and other documents of the case have been publicly available from The United States Archives. [149] Additionally, as mentioned above, a detailed account and analysis of the Borkum Island Case was published in 1956 in the Journal of Criminal Law. [150] It may be an open question whether a judgment that was the subject of a scholarly article in a widely read prestigious publication and which was available in public archives years before the Khmer Rouge launched its genocidal campaign can be viewed as a published judicial decision for this purpose; however, Borkum Island is just one of several Nuremberg-era cases that applied JCE. [151]

During the Cold War years following the Nuremberg trials, there were very few national trials for mass atrocities and thus, it is unsurprising that there is scant precedent supporting JCE until the establishment of the Yugoslavia Tribunal in the 1990s. The most notable exceptions are the Jerusalem District Court and Israeli Supreme Court's decisions in Eichmann. Those decisions demonstrate that, as of 1961, domestic courts recognized JCE as developed by the immediate post-World War II laws and jurisprudence. [152] The Jerusalem District Court's approach to determining Adolf Eichmann's individual responsibility for participating in a common criminal plan to extinguish the Jews in Europe closely resembled the approach used in the Control Council Law Number 10 cases cited above (several of which the Jerusalem District Court cited). [153] The court's statement clearly demonstrates this resemblance:

Hence, everyone who acted in the extermination of Jews, knowing about the plan for the Final Solution and its advancement, is to be regarded as an accomplice in the annihilation of the millions who were exterminated during the years 1941-1945, irrespective of the fact of whether his actions spread over the entire front of the extermination, or over only one or more sectors of that front. [Eichmann's] responsibility is that of a ″principal offender″ who perpetrated the entire crime in co-operation with the others. [154]

The District Court found that Eichmann was made aware of the criminal plan to exterminate the Jews in June of 1941; he actively furthered this plan via his central role as Referent for Jewish Affairs in the Office for Reich Security as early as August of 1941; and he possessed the requisite intent **[*465]** (specific intent here, because the goal was genocide) to further the plan as evidenced by ″the very breadth of the scope of his activities″ undertaken to achieve the biological extermination of the Jewish people. [155] On the basis of these findings, Eichmann was held criminally liable for the ″general crime″ of the Final Solution, which encompassed acts constituting the crime ″in which he took an active part in his own sector and the acts committed by his accomplices to the crime in other sec-

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courts gave their decision.″ The Commission goes on to state: ″the difficulty is, however, to a large extent surmounted in [such cases] by examining carefully the indictment, the speeches of the counsel on both sides and the judgment.″ Id.

148 See generally id.

149 See Publication Number M1103, Records of United States Army War Crimes Trials, United States of America v. Goebel, et. al., (Feb. 6-Mar. 21, 1946).

150 Koessler, supra note 126, at 183.

151 See Trial of Erich Heyer and Six Others, British Military Court for the Trial of War Criminals, Essen, Dec. 18-19 and 21-22, 1945, UNWCC, Vol. 1 (1947).

152 See Attorney-General of Israel v. Eichmann, 36 I.L.R. 5 (Dec. 11, 1961) [hereinafter Eichmann], aff'd, Eichmann II.

153 Id.

154 Id. at P 194.

155 See id. at PP 182, 195.

tors on the same front." [156] In so holding, the District Court ruled that full awareness of the scope of the plan's operations was not necessary, noting that many of the principal perpetrators, including the defendant, may have possessed only compartmentalized knowledge. [157] Particularly significant is the fact that the Israeli Supreme Court cited the 1946 General Assembly Resolution affirming the Nuremberg principles as authority in applying the forerunner of the JCE doctrine. [158]

C. Did the Nuremberg Principles Include JCE?

One might wonder whether the customary international law growing out of the Nuremberg Judgments and General Assembly Resolution 95(1) encompasses the theories of liability as well as the substantive crimes applied at Nuremberg. Indeed, when the International Law Commission began its project of formulating the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, it initially made a distinction between (1) the principles strict sensu (which included the liability of accomplices, the precedence of international law over inconsistent domestic law, the denial of immunity for individuals who acted in an official capacity, the prohibition of the defense of superior orders, and the right to a fair trial) and (2) the substantive offenses (crimes against peace, war crimes, and crimes against humanity). [159]

The ILC abandoned this distinction, however, when it enumerated the following seven Nuremberg principles in 1950:

Principle I: Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment.

Principle II: The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

[*466] Principle III: The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.

Principle IV: The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

Principle V: Any person charged with a crime under international law has the right to a fair trial on the facts and law.

Principle VI: The crimes hereinafter set out are punishable as crimes under international law:

(a) Crimes against peace:

(i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;

(ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

(b) War crimes:

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[156] Id. at P 195 (emphasis added).

[157] Id. at PP 193, 195, 197.

[158] See Eichmann II at PP 11, 14, 15 (concerning universal jurisdiction for crimes against humanity, rejection of the act of state defense, and rejection of the superior orders defense, respectively).

[159] See International Law Commission, [I.L.C.], Report on the Formulation of Nurnberg Principles, 131-33, A/CN.4/22 (Apr. 12, 1950) (prepared by Mr. Spiropoulos), available at http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC 1949 v1 e.pdf.

Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

(c) Crimes against humanity:

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.

Principle VII: Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law. [160]

As set forth above, the ILC's enumeration of the Nuremberg Principles includes substantive offenses, modes of liability, and limitations on certain defences, all of which the modern international tribunals have applied. [161]

[*467] Although the ILC's 1950 formulation neither specifically references nor specifically excludes joint criminal enterprise liability, the formulation does make clear that anyone who ″commits″ a crime against peace, a war crime, or crime against humanity, is criminally liable. [162] It is noteworthy in this regard that the ICTY, the ICTR, and the SCSL have all read the word ″committed″ in their Statutes as including participation in the realization of a common design or purpose. [163]

The U.N. General Assembly did not pass a resolution endorsing the ILC's 1950 enumeration of the Nuremberg Principles because, four years earlier, the General Assembly had already confirmed the status of the Nuremberg Principles as international law. Instead, the General Assembly directed the ILC to codify the Nuremberg Principles in an ″International Code of Offences against the Peace and Security of Mankind.″ [164] It is significant in this regard that the ILC's first draft of the Code in 1956 specifically included ″the principle of individual criminal responsibility for formulating a plan or participating in a common plan or conspiracy to commit a crime,″ [165] thus indicating that the ILC in fact perceived the common plan concept to be part of the Nuremberg Principles.

Conclusion

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[160] International Law Commission [I.L.C], Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal [hereinafter Nuremberg Principles] (1950), available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7 1 1950.pdf.

[161] E.g., Fred L. Morrison, The Significance of Nuremberg for Modern International Law, 149 Mil. L. Rev. 207, 213-15 (1995).

[162] Nuremberg Principles, supra note 160, at Principle IV.

[163] E.g., Prosecutor v. Fofana & Kondewa [CDF Case], Case No. SCSL-04-14-T, Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, P 130 (Oct. 21, 2005) (″The Chamber recognizes, as a matter of law, generally, that Article 6(1) of the Statute of the Special Court does not, in its proscriptive reach, limit criminal liability to only those persons who plan, instigate, order, physically commit a crime or otherwise, aid and abet in its planning, preparation or execution. Its proscriptive ambit extends beyond that to prohibit the commission of offenses through a joint criminal enterprise, in pursuit of the common plan to commit crimes punishable under the Statute.″).

[164] On the recommendation of the Sixth Committee, the General Assembly, by a vote of 42 to none, with 6 abstentions, adopted resolution 488 (V) on November 14, 1950. By this resolution, the General Assembly decided to send the formulation of the Nuremberg Principles to the Governments of Member States for comments, and requested the ILC, in preparing the draft Code of Offences against the Peace and Security of Mankind, to take account of the observations received from Governments. The ILC did not submit the draft Code to the General Assembly until 1996.

[165] International Law Commission [I.L.C], Report on the Work of its Forty-Eighth Session, May 6-July 26, 1996, Official Records of the General Assembly, Fifty-First Session, Supplement No. 10, at p. 21, available at http://www.un.org/law.ilc/index.htm.

As discussed above, in periods of extraordinary change, whether by technological advances, the commission of new forms of crimes against humanity, or the development of new means of warfare or terrorism, a concept that rationalizes accelerated formation of customary rules is required if international law is to keep pace with such developments. Unlike the oft-criticized notion of ″instant customary international law,″ the concept of ***″Grotian Moment″*** does not do away with the requirement of state practice or rely solely on General Assembly resolutions; rather, the ***″Grotian Moment″*** minimizes the extent and duration of the state practice that is **[*468]** necessary during such transformative times, provided there is an especially clear and widespread expression of opinio juris.

In the case of JCE, the paradigm-shifting nature of the Nuremberg precedent, and the universal and unqualified endorsement of the Nuremberg Principles by the nations of the world in 1946 crystallized this doctrine into a mode of individual criminal liability under customary international law, despite the initially limited number of cases reflecting state practice. [166]

Because JCE became customary international law in 1946, in accordance with Article 15(2) of the International Covenant on Civil and Political Rights, the Cambodia Genocide Tribunal may lawfully try international crimes using internationally recognized modes of liability regardless of whether such crimes or forms of liability were recognized in the domestic law at the time of their commission. [167] It follows from the above that, in addition to international and hybrid tribunals, domestic courts may legitimately apply the JCE doctrine in criminal prosecutions of war crimes, genocide, and crimes against humanity, and perhaps even terrorism cases.

It is potentially portentous, however, that the Cambodia Tribunal's Co-Investigating Judges' ruling on JCE stated that JCE liability is only applicable to the international crimes within the jurisdiction of the Tribunal and not to those other crimes within the Statute that are based solely on Cambodian criminal law. [168] The recently established Special Tribunal for Lebanon, which has jurisdiction over crimes under Lebanese law related to the 2005 car bombing of former Prime Minister Rafiq Hariri and twenty-two others and is the most recently created hybrid tribunal, will need to address the question of whether JCE and other doctrines of international criminal liability are applicable to crimes of terrorism. [169] That case will turn on whether terrorism, as an international crime, should be governed by principles developed by the Nuremberg Tribunals to deal with perpetrators **[*469]** of war crimes and crimes against humanity - a subject for greater exploration at another time.

In the final analysis, this article has demonstrated that JCE (including JCE III) does in fact have a venerable lineage, anchored securely in the customary international law established during the ***″Grotian Moment″*** of Nuremberg. The example of the Cambodia Tribunal's examination of the applicability of JCE demonstrates the potential value of the ***″Grotian Moment″*** concept to explain an acceleration of the custom-formation process and the heightened significance of General Assembly resolutions in response to paradigm-changing events in international law. While the article uses the lens of the Cambodia Genocide trial to frame the analysis, this piece has implications with respect to some of today's most important issues facing the United States, such as whether there is a right to use force against terrorist groups acting in third-party states and whether there is a right to resort to humanitarian intervention to halt genocide.

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[166] See Frank Lawrence, The Nuremberg Principles: A Defense for Political Protesters, 40 Hastings L.J. 397, 397, 408-410 (1989) (disputing the argument that ″more than a single event is necessary for a proposed principle to be considered part of customary law″). In 2006, the European Court of Human Rights recognized the ″universal validity″ of the Nuremberg Principles. Kolk and Kislyiy v. Estonia, App. No. 23052/04, 24018/04, Decision on Admissibility, Eur. Ct. H.R. (Jan. 17, 2006), available at http://www. echr.coe.int/eng.

[167] International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/RES/2200A(XXI) Art. 15(2) (Dec. 19, 1966), (″Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.″). See also Milutinovic Decision, PP 41, 42 (noting that application of JCE to crimes in Bosnia was legitimate even though the former Yugoslavia did not recognize that mode of liability).

[168] Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, Case No. 002/19-09-2007-ECCC-OCIJ (Dec. 8, 2009).

[169] See Statute of the Special Tribunal for Lebanon, S.C. Res. 1757, U.N. Doc. S/RES/1757 (May 30, 2007); see also Melia Amal Bouhabib, Power and Perception: The Special Tribunal for Lebanon, 3 Berkely J. Mid. East. & Islamic L. (forthcoming Spring 2010).

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