SEIZING THE “GROTIAN MOMENT”: ACCELERATED FORMATION OF CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE

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IN TIMES OF FUNDAMENTAL CHANGE

Michael P. Scharf

ABSTRACT

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 makes the case 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.

I. INTRODUCTION

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). During the time I spent in Phnom Penh, my most important assignment

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Attorney-Advisor for U.N. Affairs at the U.S. Department of State during the Bush I and Clinton
Administrations. In 2005, Scharf and the Public International Law and Policy Group, an NGO dedicated
to international justice which he co-founded, were nominated by six governments and an international
criminal tribunal for the Nobel Peace Prize. Scharf’s most recent book is SHAPING FOREIGN POLICY IN
TIMES OF CRISIS: THE ROLE OF INTERNATIONAL LAW AND THE STATE DEPARTMENT LEGAL ADVISER
(Cambridge University Press, 2010).

2 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.
was to draft the Prosecutor’s brief 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.

JCE III is a form of liability somewhat similar to the Anglo-American “felony murder rule,” in 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, since the decision of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the 1998 Tadic case, it has been accepted that JCE III is a mode of liability applicable to international criminal trials. Dozens of cases before the ICTY, the International Criminal Tribunal for Rwanda (“ICTR”), the Special Court for Sierra Leone (“SCSL”) and the Special Co-Prosecutors’ Supplementary Observations on Joint Criminal Enterprise, Case of Ieng Sary, No. 002/19-09-2007-ECCC/OCIJ, 31 December 2009. A year later, the Co-Investigating Judges ruled in favor of the Prosecution that the ECCC could employ JCE liability for the international crimes within its jurisdiction. See Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 8 December 2009, Case No. 002/19-09-2007-ECCC-OCIJ, 8 December 2009. The issue will not be completely settled until after final decision of the ECCC Appeals Chamber.

Pursuant to the Co-Investigating Judges’ Order of 16 September 2008, the Co-Prosecutors filed the brief to detail why the extended form of JCE liability, “JCE III,” is applicable before the ECCC. The Defense Motion argued in part that JCE III as applied by the Tadic decision of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) Appeals Chamber 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, 28 July 2008, ERN 00208225-00208240, D97.

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).


Panels for the Trial of Serious Crimes in East Timor\textsuperscript{10} 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 \textit{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. Therefore the question at the heart of the 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 \textit{opinio juris} required to establish JCE as a customary norm as of 1975.\textsuperscript{11} In response, the Prosecution brief maintains 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 unusual rapidity. This was the first time in history that the term was used in a proceeding before an international court.

This article explores the concept of “Grotian Moment” in the context of the validity of applying JCE to the Cambodia Tribunal’s cases. It begins with a history of the concept of “Grotian Moment,” while comparing and contrasting it with the notion of “instant customary

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\textit{Prosecutor v. Jose Cardoso Fereira}, Judgment, Case No.: 04/2001, District Court of Dili, 5 April 2003, paras. 367-376 (finding the accused guilty under JCE theory, applying the Tadic Appeals Chamber Judgment and other ICTY judgments in interpreting UNTAET Regulation 2000/15); \textit{Prosecutor v. De Deus}, Judgment, Case No.: 2a/2004, District Court of Dili, 12 April 2005, p. 13. (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).
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\textsuperscript{11} For the definition of customary international law, see \textit{North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)}, Merits, 20 February 1969, ICJ Rep. 3, para. 77.
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international law.” Next, it 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 #10 progeny was equivalent to the modern JCE concept. Finally, assuming Nuremberg did constitute a “Grotian Moment,” the article addresses the question of whether, in addition to the substantive crimes, the modes of liability applied at Nuremberg 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 electronic 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.

II. BACKGROUND: THE CONCEPT OF “GROTIAN MOMENT”

A. ORIGINS OF THE TERM

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 recognised for having “recorded the creation of order out of chaos in the great sphere of international relations.” In the mid-1600s, at the time that 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.” In his masterpiece, De Jure Belli ac Pacis (The Law of War and Peace), Grotius addresses 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.

Although New York University Professor Benedict Kingsbury has convincingly argued that Grotius’ actual contribution has been distorted through the ages, the prevailing view today 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. In “semiotic” terms, the “Grotian tradition” has come to symbolize the advent of the modern

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14 HUGO GROTIEUS, DE JURE BELLI AC PACIS (n.p. 1625).


16 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
international legal regime, characterized by positive law and state consent, which arose from the Peace of Westphalia.\textsuperscript{17}

The term “Grotian Moment,” on the other hand, is a relatively recent creation, coined by Princeton Professor Richard Falk in 1985.\textsuperscript{18} Since then, scholars and even the U.N. Secretary-General have employed the term in a variety of ways,\textsuperscript{19} but here the author is using it to denote a transformative development in which new rules and doctrines of customary international law emerge with unusual rapidity and acceptance.\textsuperscript{20} 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.”\textsuperscript{21} Commentators have opined that the creation of the Nuremberg


\textsuperscript{17} Michael P. Scharf, Earned Sovereignty: Juridical Underpinnings, 31 DENVER J. INT’L L. 373, 373 n. 20. 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 the 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 the one side, and the Holly Roman Habsburg Emperor and the German Princes on the other. 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 in fact 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. For example, the Imperial Diet retained the powers of legislation, warfare, and taxation, and it was through Imperial bodie3s, such as the Diet and the Courts, that religious safeguards mandated by the Treaty were imposed on the German Princes.


\textsuperscript{20} Saul Mendlovitz & Marev Datan, Judge Weeramantry’s Grotian Quest, 7 TRANSNATIONAL L. & CONTEP. PROBS. 401, 402 (defining the term “Grotian moment”).

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.22

Drawing from the writings of Professor Bruce Ackerman, who used the phrase “constitutional moment” to describe the New Deal transformation in American constitutional law,23 some international law scholars have used the phrase “international constitutional moment” to convey the “Grotian Moment” concept. Professors Bardo Gassbender and Jenny Martinez, for example, have written that the drafting of the UN Charter was a “Constitutional moment” in the history of international law.24 Professor Leila Sadat has described Nuremberg as a “constitutional moment for international law.”25 And Professors Anne Marie Slaughter and William Burke-White have used the term “constitutional moment” in making the case that the September 11th attacks on the United States evidence 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.26 While the phrase “international constitutional moment” might be quite useful with respect to paradigm-shifting developments within a particular international organization with a constitutive instrument that acts like a constitution, the term “Grotian Moment” makes more sense when speaking of a development that has an effect on international law at large.

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B. Comparing the “Grotian Moment” concept to the notion of “Instant Customary International Law”

Normally, customary international law, which is just as binding on States as treaty law,\textsuperscript{27} arises out of the slow accretion of widespread state practice evincing a sense of legal obligation (opinio juris).\textsuperscript{28} Under traditional notions of customary international law, “deeds were what counted, not just words.”\textsuperscript{29} 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.\textsuperscript{30}

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.\textsuperscript{31} In the 1969 \textit{North Sea Continental Shelf Cases}, however, the International Court of Justice declared that customary norms can sometimes ripen quite rapidly, and that a short period of time is not a bar to finding the existence of a new rule of customary international law, binding on all the countries of the world, save those that persistently objected during its formation.\textsuperscript{32} As

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\textsuperscript{27} While customary international law is binding on states internationally, not all states accord customary international law equal domestic effect. A growing number of states’ constitutionals automatically incorporate customary law as part of the law of the land and even accord it a ranking higher than domestic statutes. \textsc{Bruno Simma, International Human Rights and General International Law: A Comparative Analysis} 165, 213 (1995). 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 (11\textsuperscript{th} Circ. 1986) (holding that Attorney General’s decision to detain Mariel Cuban refugees indefinitely without a hearing trumped any contrary rules of customary international law).
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\textsuperscript{28} For the definition of customary international law, see \textit{North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)}, Merits, 20 February 1969, ICJ Rep. 3, para. 77.
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\textsuperscript{29} \textsc{Bruno Simma, supra} note 27, at 216.
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\textsuperscript{30} \textsc{Akehurst, Custom as a Source of International Law}, 47 Brit. Y.B. Int’l L. 1, 10, 23-24, 38-42 (2974-75).
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\textsuperscript{31} \textsc{The Paquete Habana}, 175 U.S. 677, 700 (1900).
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\textsuperscript{32} \textit{North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)}, Merits, 20 February 1969, ICJ Rep. 3, paras. 71, 73, 74. The Court stated:
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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.”
\end{quote}
contemplated in the *North Sea Continental Shelf Cases*, a “Grotian Moment” is a situation where there is an acceleration of the custom-formation process due to the widespread and unequivocal response of States 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 there could be such thing as “instant customary international law.”\(^{33}\) Professor Cheng opined that it was not only unnecessary that state practice should be prolonged, but there need be no state practice at all provided that the *opinio juris* of the States concerned can be clearly established by, for example, their votes on UN General Assembly resolutions.\(^{34}\) Legal scholars have been largely critical of Cheng’s “instant custom” theory, at least to the extent that it does away with the need to demonstrate any state practice other than a country’s vote in the U.N. General Assembly.\(^{35}\)

There are three main problems with the “instant custom” theory when it is based solely on General Assembly resolutions. The first is that the U.N. Charter employs the language of “recommend” in referring to the powers and functions of the General Assembly, as distinct from the powers granted to the Security Council to issue binding decisions.\(^{36}\) The negotiating record of the U.N. Charter confirms that the drafters intended for General Assembly resolutions to be merely non-binding recommendations. In fact, at the San Francisco Conference in 1945, 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.\(^{37}\)

*Id.* at para. 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 done so as of 1969 because so few States recognized and applied the principle.


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 their votes will be deemed 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. Yet, the United States ultimately voted in favor of the resolution in a spirit of compromise. ICJ Judge Stephen Schwebel has referred to this type of practice as “fake consensus.”

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.” Elsewhere I have argued that outside of situations covered by treaties 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. A “rule” that is based only on General Assembly resolutions is unlikely to achieve substantial compliance in the real world, and therefore will end up undermining rather than strengthening the rule of law.

That is not to suggest that General Assembly resolutions are not relevant 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.” As a 1975 U.S. Department of State pronouncement explained:

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38 Banco Nacional de Cuba v. Chase Manhattan Bank, 638 F.2d , 875, 890 (2d Cir. 1981) (Opining that General Assembly Resolutions “are of considerable interest” but they “do not have the force of law,” the Court held that expropriation requires “prompt, adequate, and effective compensation” rather than the standard of “appropriate compensation” reflected in GA Res. 1803).

39 Stephen Schwebel, The Effect of Resolutions of the U.N. General Assembly on Customary International Law, 73 PROC. OF THE AM. SOC’Y OF INT’L L. 301, 308 (1979). Schwebel has observed that members of the UN “often vote casually…. States often don’t meaningful 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.

40 SIMMA, supra note 27, at 217.

41 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).

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.\(^{43}\)

Consistent with this view, both U.S. domestic courts and international tribunals have relied on General Assembly resolutions as evidence of an emergent customary rule. Thus, in *Siderman de Blake v. Republic of Argentina*, the 9\(^{th}\) 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.”\(^{44}\) On several occasions, the International Court of Justice has affirmed that General Assembly resolutions have legal significance, not as an independent source of international law, but as evidence of new customary international law.\(^{45}\) In its Advisory Opinion on the *Construction of a Wall*, for example, the International Court of Justice cited “relevant resolutions adopted pursuant to the U.N. Charter by the General Assembly” among the “rules and principles of international law” which were useful in assessing the legality of the measures taken by Israel.\(^{46}\) In its judgment in the *Case Concerning the Application on the Convention on the Prevention and Punishment of the Crime against Genocide*, the International Court of Justice 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.\(^{47}\)

In deciding whether to treat a particular General Assembly resolution as evidence of a new rule of customary international law, the International Court of Justice has stated that “it is necessary to look at its content and the conditions of its adoption.”\(^{48}\) In examining these factors,


\(^{46}\) Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 171 (July 9).


\(^{48}\) Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 254-55.
courts often consider the type of resolution to be significant. General Assembly resolutions fall within a spectrum, from mere “recommendations” (usually given little weight) to “Declarations” (used to import increased solemnity) to “affirmations” (used to indicate codification or crystallization of law).\footnote{Office of International Standards and Legal Affairs, General Introduction to the Standard-Setting Instruments of UNESCO, Recommendations, available at: \url{http://portal.unesco.org/en/ev.php-url_ID=237772&URL_DO=DO_Topic&URL_Sectrion+201.html#4}; see also Noelle Lenoir, \textit{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); Major Robert A. Ramey, \textit{Armed Conflict on the Final Frontier: The Law of War in Space}, 48 A.F.L. REV. 1, 110n485 (2000).} Courts also consider the words used in the resolution; for example, language of firm obligation verses aspiration.\footnote{Robert Rosenstock, \textit{The Declaration of Principles of International Law Concerning Friendly Relations: A Survey}, 65 AM. J. INT’L L. 713, 715-16 (1971).} Another consideration is the vote outcome. Resolutions passed unanimously or by sizable majorities are accorded more weight than those adopted over significant dissent or abstentions.\footnote{Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 255.} Moreover, the position of important players relative to the subject matter of the resolution is of particular significance.\footnote{Nguyen Thang Loi v. Dow Chem. Co. (In re Agent Orange Prod. Liab. Litig.), 373 F. Supp. 2d 7, 126-27 (E.D.N.Y. 2005).} Consensus resolutions (adopted without an actual vote) may be discounted because countries often are pressured to remain silent so as not to break consensus.\footnote{Stephen Schwebel, \textit{The Effect of Resolutions of the U.N. General Assembly on Customary International Law} 73 PROC. OF THE AM. SOC’Y OF INT’L L. 301,302 (1979).} The International Court of Justice has also indicated that if a State expressly mentions, while voting for a particular G.A. Resolution, that it regards the text as being merely a political statement without legal content, then that resolution may not be invoked against it.\footnote{Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 106-07 (June 27).}

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 where there is not 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 to keep up with the pace of developments. A few examples of some recent potential “Grotian Moments” may provide a helpful lens for examining the validity of the concept.
One such situation arose when the United States and Soviet Union first developed the ability to launch rockets into outer space and place satellites in earth orbit.\(^{55}\) 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 provided 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.\(^{56}\) 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.”\(^{57}\)

A second situation involved the NATO intervention into Serbia in an effort to prevent a potential genocide of ethnic Kosovar Albanians in 1999. It was significant that the situation was unfolding 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 78-day bombing campaign without U.N. approval.\(^{58}\) The near universal consensus, however, was that the intervention was justified under the circumstances, leading commentators to label the situation “unlawful but legitimate.”\(^{59}\) 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.\(^{60}\)


\(^{58}\) Richard A. Falk, *Kosovo, World Order, and the Future of International Law*, 93 Am. J. Int’l L. 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.”)


Finally, the systematic terrorist attacks against the World Trade Center and Pentagon on September 11, 2001, and the international community’s reactions to those attacks, have had a profound impact on the global order and “shattering consequences for international law.” Whereas the International Court of Justice had 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, a few days after the September 11 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, and there was little international protest when the United States invaded Afghanistan shortly thereafter. 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.”

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63 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)[1986] ICJ Rep 14. 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.”

64 UN SCOR, 56th sess, 4370th mtg, UN Doc S/RES/1368 (2001). The resolution unequivocally condemns the terrorist attacks of 11 September 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-defence in accordance with art 51 of the UN Charter in the context of the September 11 terrorist attacks. Resolution 1378, adopted by the Security Council after the U.S. invasion, “condemn[ed] the Taliban for allowing Afghanistan to be used as a base for the export of terrorism by the Al-Qaeda network and other terrorist groups and for providing safe haven to Osama bin Laden, Al-Qaeda and others associated with them, and in this context support[ed] 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. UN SCOR, 56th sess, 4415th mtg., UN Doc S/RES/1378 (2001).

Commentators and courts should exercise caution, however, in characterizing situations as “Grotian Moments.” As one scholar has warned, “[i]t is always easy, at times of great international turmoil, to spot a turning point that is not there.” 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 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. The meaning of the “responsibility to protect” doctrine, in turn, is still under debate, and the doctrine has not yet been employed by the international community in a situation where U.N. approval for the use of force is absent. Finally, with respect to the right to use force in self-defense against non-state actors, the International Court of Justice has put the breaks on recognition of such a rule through its 2004 Advisory Opinion in the Legal Consequences of the Construction of a Wall and its 2005 judgment in the Armed Activities on the Territory of the Congo case. As established below, Nuremberg, in contrast, was a prototypical “Grotian Moment.”

III. 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 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

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69 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9), at p. 194 (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).

70 Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 45 I.L.M. 271, 308-09, Dec. 19, 2005 (DRC v. Uganda), at paras. 143-147 (holding that Uganda could not rely on self-defense to justify its military operation in the Congo because (1) Uganda 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).
were incarcerated without trial; it progressively 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; it 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.\footnote{Michael P. Scharf, Balkan Justice, 3-4 (1997).}

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 their first preference. The British and Soviet governments initially advocated summary execution for the Nazi leaders, but the United States persuaded them to jointly establish the world’s first international criminal tribunal for four reasons: First, judicial proceedings would avert future hostilities which 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, they 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.\footnote{Id. at 5.}

The Charter establishing the Nuremberg Tribunal, its subject matter jurisdiction, and its procedures, was negotiated by the United States, France, the United Kingdom and the Soviet Union from June 26-August 8, 1945.\footnote{London Agreement of 8 August 1945, the Charter of the International Military Tribunal, and the Nuremberg Tribunal’s Rules of Procedure are reproduced in 2 Virginia Morris and Michael Scharf, An Insider’s Guide to the International Criminal Tribunal for the Former Yugoslavia 675-691 (1995).} Nineteen other States signed onto the Charter, rendering the Nuremberg Tribunal a truly international judicial institution.\footnote{Greece, Denmark, Yugoslavia, the Netherlands, Czechoslovakia, Poland, Belgium, Ethiopia, Australia, Honduras, Norway, Panama, Luxembourg, Haiti, New Zealand, India, Venezuela, Uruguay, and Paraguay.} 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 No. 10 by military tribunals in occupied zones in Germany and in the liberated or Allied Nations.\footnote{Michael P. Scharf, Balkan Justice, 10 (1997).
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. Prior to Nuremberg, the only subjects of international law were States, and what a State did to its own citizens within its own borders was its own business. 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.”76 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.”77

Importantly, on 11 December 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).78 This G.A. Resolution had all the attributes of a


The General Assembly,

Recognizes the obligation laid upoin 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.
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.\textsuperscript{79}

The International Court of Justice,\textsuperscript{80} the International Criminal Tribunal for the Former Yugoslavia,\textsuperscript{81} the European Court of Human Rights,\textsuperscript{82} and several domestic courts\textsuperscript{83} have cited the General Assembly Resolution affirming the principles of the Nuremberg Charter and judgments as an authoritative declaration of customary international law. Referring to General Assembly Resolution 95 (I), the Israeli Supreme Court stated in the 1962 \textit{Eichmann} case that “if fifty-eight nations 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 what is existing law.”\textsuperscript{84}

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. 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 international law,” which included the substantive law and modes of liability embodied in “the Charter of the

\begin{footnotes}
\footnotetext[79]{See supra notes 48-54, and accompanying text.}
\footnotetext[80]{Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 172 (July 9).}
\footnotetext[81]{ICTY (\textit{Tadić}, Opinion and Judgment, Trial Chamber, 7 May 1997, para. 623; and \textit{Tadić}, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, para. 141).}
\footnotetext[82]{The European Court of Human Rights recognized the “universal validity” of the Nürnberg principles in \textit{Kolk and Kislyiy v. Estonia}, in which it 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 humanity was subsequently confirmed by, \textit{inter alia}, resolution 95 of the United Nations General Assembly (11 December 1946) and later by the International Law Commission.” \textit{Kolk and Kislyiy v. Estonia}, Decision on Admissibility, 17 January 2006.}
\footnotetext[83]{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, Supreme Court of Canada (1994), 1 S.C.R. 701; Prosecutor v. Ivica Vrdoljak, Court of Bosnia and Herzegovina, 10 July 2008); Leila Sadat Wexler, \textit{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 \textit{Touvier} and \textit{Barbie} cases in French courts).
\footnotetext[84]{Attorney-General of Israel \textit{v} Eichmann, 36 I.L.R. 277 (29 May 1962) [hereinafter Eichmann II], para. 11.}
\end{footnotes}
International Military Tribunal of 8 August 1945.”  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. As Ciara Damgaard documents, “the origins of the JCE Doctrine can be found in the events surrounding the end of World War II.”

**B. 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 reveal 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.

Prior to Nuremberg, liability for participation in a common plan had existed in some form in the national legislation or jurisprudence of numerous common law and civil law countries since at least the nineteenth century. Indeed, several States recognized modes of co-perpetration similar to JCE III; these included conspiracy, the felony murder doctrine, the concept of *association de malfaiteurs* and numerous other doctrines of co-perpetration.

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87 This Law was based on the Nuremberg Charter and governed subsequent war crimes trials. Control Council Law Number 10, in *Official Gazette of the Control Council for Germany* (1946), vol. 3, at 50. 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.” UN War Crimes Commission, *XV Law Reports of Trials of War Criminals* 92 (1949).

88 See *Pinkerton v. U.S.*, 328 U.S. 640 (1946) (establishing the Pinkerton rule, in which a conspirator can be convicted of the reasonably foreseeable consequence of the unlawful agreement).

89 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. Antonio Cassese, *International Criminal Law* (Second ed., 2008), at 202. 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 LAFAVE & AUSTIN SCOTT, *CRIMINAL LAW* (1972), at p. 515-516.

90 Professor van Sliedregt notes that the concept of “*association de malfaiteurs,*” which has been used in France and The Netherlands to deal with mob violence by overcoming causality problems, “inspired the drafters of the Nuremberg Statute to penalize membership of a criminal organization.” Eliese van
The drafters of the Nuremberg Charter, like the drafters of the ICTY Statute forty-eight years later, recognized that the unique nature of atrocity crimes justifies and requires a correspondingly unique mode of liability. This was explained by the Appeals Chamber of the ICTY in *Tadic*:

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.  

This passage has been quoted in a number of subsequent judgments of the ICTY, and in *Karemera* the ICTR Trial Chamber articulated a similar rationale for the JCE doctrine:

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.

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

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

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91 The Indian Penal Code of 1860 imposed individual liability for unlawful acts committed by several persons in furtherance of a common plan. Walter Morgan and A.G. MacPherson, *Indian Penal Code* (XLV, 1860) (London: GC Hay Co. 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”. Section 21(2) of the Criminal Code, R.S.C. 1970, C-34.

92 *Tadic* Appeals Chamber Judgment, para 191.


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 denotes a mode of criminal liability that appears particularly fit to cover the criminal liability of all participants in a common criminal plan.\textsuperscript{95}

Thus, the underpinnings of the JCE liability are to be found in considerations of public policy; that is, the need to protect society against persons who (1) join together to take part in criminal enterprises, (2) while not sharing the criminal intent of those participants who intend to commit serious crimes outside the common enterprise, nevertheless are aware that such crimes may be committed, and (3) do not oppose or prevent their commission.\textsuperscript{96} As the High Court of England and Wales has noted, “[e]xperience has shown that criminal enterprises only too readily escalate into the commission of greater offences.”\textsuperscript{97} Consequently, JCE liability is justified by both the unique threats posed by organized criminality and the unique challenge of prosecuting such perpetrators.

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 (\textit{sui generis}) concept in that it combines and mixes two legal cultures and systems.”\textsuperscript{98} Specifically, the Major Powers sought to create an approach in the Nuremberg Charter that would combine the Anglo-American conspiracy doctrine with the approach in France and the Soviet Union where conspiracy was not recognized as a crime.\textsuperscript{99} 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 \textit{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.”\textsuperscript{100}


\textsuperscript{100} Agreement for the Prosecution and Punishment of Major German War Criminals of the European Axis, art. 6, 59 Stat. 1544, 82 U.N.T.S. 279.
During the Nuremberg Trial, Justice Robert Jackson, the Chief U.S. Negotiator of the Nuremberg Charter and Chief U.S. Prosecutor at Nuremberg 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.\(^\text{101}\)

In harmony with this statement, the Nuremberg Tribunal\(^\text{102}\) 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 become known as the doctrine of JCE. 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.”\(^\text{103}\) In other words, conspiracy is a crime in its own right, while acting in pursuance of a common design or plan, like JCE, was 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.”\(^\text{104}\)

While the Nuremberg Tribunal tried the 22 highest ranking surviving members of the Nazi regime, Control Council Law Number 10 was jointly promulgated by the Allied Powers 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. Under the authority of Control Council Law Number 10, the tribunals were to follow the Charter and jurisprudence of the Nuremberg Tribunal.\(^\text{105}\) As such, the case law from those tribunals is


\(^\text{103}\) XV Law Reports of Trials of War Criminals 97-98, UN War Crimes Commission, 1948 (summarizing the jurisprudence of the Nuremberg and Control Council Law Number 10 trials).

\(^\text{104}\) International Military Tribunal, Judgment in the Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg, 14 November 1945, 1 October 1947, p.256.

viewed as an authoritative interpretation of the Nuremberg Charter and Judgment and a reflection of customary international law.\textsuperscript{106} An analysis of several of the Control Council Law Number 10 cases supports the conclusion that the JCE doctrine was in fact employed by those tribunals in 1946–1947. Although the Nuremberg Charter had confined “common plan” liability to Crimes against Peace, the Control Council Law Number 10 tribunals applied a version of it which they called “common design” to other international crimes. In reaching its conclusion that JCE has existed in customary international law since the Nuremberg judgments, the Appeals Chamber of the Yugoslavia Tribunal in \textit{Tadic} relied partly on ten different post-World War II cases—six regarding JCE I,\textsuperscript{107} two regarding JCE II,\textsuperscript{108} and two regarding JCE III.\textsuperscript{109} Most of these cases were published in summary form in the 1949 Report of the UN War Crimes Commission.\textsuperscript{110} 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 Council Law Number 10 tribunals also applied the common plan or design/JCE concept. All of these cases clarified the meaning of Nuremberg’s common plan liability – the forerunner of JCE. Summing up this extensive case law and explaining the difference between common design and simple co-perpetration, the UN 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

\textsuperscript{106} \textit{Prosecutor v. Kupreskic}, Judgment, Case No: IT-95-16-A, ICTY Trial Chamber, 14 January 2000, para 541: “It cannot be gainsaid that great value ought to be attached to decisions of such international criminal courts as the international tribunals of Nuremberg and Tokyo, or to national courts operating by virtue, and on the strength, of Control Council Law Number 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.”

\textsuperscript{107} \textit{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).

\textsuperscript{108} \textit{Dachau Concentration Camp Case} (Trial of Martin Gottfied Weiss and thirty-nine others); the \textit{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).

\textsuperscript{109} \textit{Essen Lynching Case}; \textit{Borkum Island Case}. For JCE III, the Appeals Chamber also cited several unpublished Italian decisions.

\textsuperscript{110} Notably, the JCE III \textit{Borkum Island Case} was not included in the Report of the UN 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., 6 February–21 March 1946. In addition, a detailed account and analysis of the \textit{Borkum Island Case} was published in 1956 in Maxilimian Koessler, \textit{Borkum Island Tragedy and Trial}, 47 Journal of Criminal Law 183–196 (1956).
which is carried out by one of them are all fully responsible for that offence in the eyes of the criminal law.”\textsuperscript{111} Consistent with this explanation, the Appeals Chamber of the Yugoslavia Tribunal in the \textit{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.\textsuperscript{112}

Given that JCE III is the most controversial 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 \textit{Essen Lynching Case}. According to the official summary of the trial published in the UN War Crimes Commission Report, this case concerned the lynching of three British prisoners of war by a mob of Germans.\textsuperscript{113} Though the case was tried by a British military court, it 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, had 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 prisoners were beaten by the crowd and one German corporal fired a revolver at a prisoner, wounding him in the head. One died instantly when they 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 defence argument that the prosecution needed to prove that each of the accused—Heyer, Koenen and five civilians—had intended to kill the prisoners was not accepted by the court. The prosecution argued that in order to be convicted the accused had to 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, as were three of the five accused civilians. Even though it was not proven which of the civilians delivered the fatal shots or blows, they were convicted because “[f]rom the moment they left those barracks, the men were doomed and the crowd knew they were doomed and every person in that crowd who struck a blow was both morally and criminally responsible for the deaths of the three men.”\textsuperscript{114}

A second example (surprisingly not cited in \textit{Tadic}), which the UN War Crimes Commission specifically found analogous to the \textit{Essen Lynching Case}, is the \textit{Trial of Hans Renoth and Three Others}.\textsuperscript{115} 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


\textsuperscript{112} Milutinovic Decision, para. 36.


\textsuperscript{114} Id., at 97.

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.”116 All the accused were found guilty, presumably based on the foreseeability that the pilot would eventually be killed during the beating at the hands of the crowd or by one of them.

A third example is the case of Kurt Goebell et. al (the Borkum Island Case). Although not published in the Report of the UN War Crimes Commission, a detailed record of this case is publicly available through the U.S. National Archives Microfilm Publications.117 Moreover, a detailed report of the trial (based on trial transcripts) was published in the Journal of Criminal Law in 1956.118 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 crashed-landed. 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.” It 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.” 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. From the arguments and evidence submitted, it is apparent that the accused were convicted pursuant to a form of common design liability equivalent to JCE III. 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 it was a natural and foreseeable consequence of their treatment of the prisoners.

International judicial decisions, like domestic court cases, can evince state practice and opinio juris, establishing customary international law.119 The attorneys for the Khmer Rouge

116 Id., at 76.

117 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 states that a copy of these case materials are on file in the ICTY’s Library. Tadic Appeals Chamber Decision, p. 93.

118 Maxilimian Koessler, Borkum Island Tragedy and Trial, 47 JOURNAL OF CRIMINAL LAW 183-196 (1956).

119 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. This list, which was not intended to be exhaustive, is useful as a starting point and a basis for discussion.” ( [1950] 2 Y.B. INT’L L. COMM’N 367, U.N. Doc. A/CN.4/Ser.A/1950/Add.1 (1957)).
Defendants objected that these Control Council Law Number 10 cases are “unpublished cases” or, in some instances, mere summaries of unwritten verdicts. The suggestion being that the Court could not validly rely on them to glean the substance of customary international law because 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 #10 JCE III cases described above were published in summary form in the official U.N. War Crimes Commission Report in 1949. 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.” 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 1975–79 that their mass atrocity crimes would attract criminal responsibility under the JCE doctrine. 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 the world, particularly those of the civil law tradition, judicial opinions are often of this length and form.

While the *Borkum Island Case* was not included in the Report of the UN War Crimes Commission, 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. In addition, as mentioned above a detailed account and analysis of the *Borkum Island Case* was published in 1956 in the *Journal of Criminal Law*. 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 their genocidal campaign can be viewed as a published judicial decision for this purpose. However, this is just one of several Nuremberg-era cases that applied JCE.

In light of the nature of international crimes and mass atrocities, the rationale behind the existence of JCE and the relative infrequency with which trials for such crimes arise, it is unsurprising that there are few examples of national jurisprudence applying forms of JCE liability in the years after Nuremberg. The most notable example is the Jerusalem District Court and Israeli Supreme Court’s decisions in the *Eichmann case*. Those decision demonstrate that, as of 1961, domestic courts recognized JCE as developed by the immediate post-World War II
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 that applied by the Control Council Law Number 10 cases cited above (several of which were cited by the Jerusalem District Court). This can be seen clearly in its statement:

Hence, everyone who acted in the extermination of Jews, knew 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. His responsibility is that of a ‘principal offender’ who perpetrated the entire crime in co-operation with the others.\textsuperscript{124}

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 (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.\textsuperscript{125} 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 sectors on the same front.”\textsuperscript{126} 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.\textsuperscript{127} Particularly significant is the fact that the Israeli Supreme Court cited the 1946 General Assembly Resolution affirming the Nuremberg principles for authority in applying the forerunner of the JCE doctrine.\textsuperscript{128}

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


\textsuperscript{124} Eichmann, para. 194.

\textsuperscript{125} Id., para. 182.

\textsuperscript{126} Id., para. 197 (emphasis added).

\textsuperscript{127} Id., para. 193.

\textsuperscript{128} Eichmann II, para. 11 (concerning universal jurisdiction for crimes against humanity), para. 14 (concerning rejection of the act of state defence), and para. 15 (concerning rejection of the superior orders defence).
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).  

This distinction was, however, abandoned by the International Law Commission 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 therefor 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.

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:
Violations of the laws or customs of war 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.

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(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 connexion 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.130

As set forth above, the ILC’s enumeration of the Nuremberg Principles include substantive
offenses, modes of liability, and limitations on certain defences, all of which have been applied
by the modern international tribunals.

Although the ILC’s 1950 formulation neither specifically references nor specifically
excludes Joint Criminal Enterprise liability, it does make clear that anyone who “commits” a
crime against peace, a war crime, or crime against humanity, is criminally liable. It is of note 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.131

The UN General Assembly did not pass a resolution endorsing the ILC’s 1950
enumeration of the Nuremberg Principles, presumably because the General Assembly had four
years earlier already confirmed the status of the Nuremberg Principles as international law.
Instead, it directed the International Law Commission to codify them in an “International Code
of Offences against the Peace and Security of Mankind.”132 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”133 – thus indicating that the ILC in fact perceived the common plan concept to be part of
the Nuremberg Principles.


131 See e.g., CDF Case, Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, Case No.
SCSL-04-14-T, 21 October 2005, para. 130: “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.”

132 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.

133 See Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May–26
III. CONCLUSION

It was thus 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, rather than the number of cases applying JCE liability at the time, that crystallized this doctrine into a mode of individual criminal liability under customary international law. As such, 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 recognised modes of liability whether or not such crimes or forms of liability were recognized in the domestic law at the time of their commission.

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 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 the other crimes within the Statute that are based solely on Cambodian criminal law. The question of whether JCE and other doctrines of international criminal liability are applicable to crimes of terrorism will need to be addressed by the Special Tribunal for Lebanon, the most recently created hybrid tribunal, which has jurisdiction over crimes under Lebanese law related to the 2005 car bombing of former Prime Minister Rafiq Hariri and twenty-two others.

In the final analysis, this article has demonstrated that JCE III does in fact have a venerable lineage, anchored securely in the customary international law established during the

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134 See Frank Lawrence, “The Nuremberg Principles: A Defense for Political Protesters”, 40 Hastings L. J. 397, (1989), pp. 397 & 408-410 (disputing the argument that “more than a single event is necessary for a proposed principle to be considered part of customary international law”). In 2006, the European Court of Human Rights recognized the “universal validity” of the Nuremberg principles Kolk and Kislyiy v. Estonia, Decision on Admissibility, 17 January 2006.

135 ICCPR, Art. 15(2): “Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognized by the community of nations.” Prosecutor v. Milan Milutinovic, Nikola Sainovic & Dragoljub Odjanic, Appeals Chamber Decision on Ojdanic’s Motion Challenging Jurisdiction – Joint Criminal Enterprise, Case No.: IT-99-37-AR72, 21 May 2003, paras. 41-42 [hereinafter Ojdanic JCE Decision] (noting that application of JCE to crimes in Bosnia was legitimate even though the former Yugoslavia did not recognize that mode of liability).

136 Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 8 December 2009, Case No. 002/19-09-2007-ECCC-OCIJ, 8 December 2009.

“Grotian Moment” of Nuremberg. The example of the Cambodia Tribunal’s recognition of JCE demonstrates the enormous 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.