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## Hugo Grotius and the Concept of Grotian Moments in International Law

Michael P. Scharf

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# HUGO GROTIUS AND THE CONCEPT OF GROTIAN MOMENTS IN INTERNATIONAL LAW

*Michael P. Scharf\**

## ABSTRACT

The seventeenth-century academic and statesman, Hugo Grotius, had a profound influence on the development of International Law. This article explains why Grotius is often called “the father of international law,” the role played by his great work, *The Law of War and Peace* in transforming the international legal system, and why it is appropriate to characterize fundamental changes to the international system and the rapid formation of customary international law that result therefrom in modern times as “Grotian Moments.”

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## I. INTRODUCTION

Academics have had a profound influence on the development of international law, and one name stands out above all others: Hugo Grotius. In the mid-1600s, at the time that the nation-state was emerging as the fundamental political unit of Europe, Hugo Grotius—theologian, poet, historian, jurist, statesman, diplomat and international lawyer—offered a new concept of international law designed to reflect and progressively develop that new reality. This article explains why Grotius is often characterized as “the father of

international law,” the role played by his great work, *De Jure Belli ac Pacis* (“The Law of War and Peace”) in transforming international law, and why it is appropriate to characterize fundamental changes to the international system and the rapid formation of customary international law that result therefrom as “Grotian Moments.”

## II. BACKGROUND

### A. *The Life and Times of Hugo Grotius*

To comprehend the Grotian legacy, one must know something about the turbulent times in which Grotius lived and wrote.<sup>1</sup> Hugo de Groot (young Hugo would subsequently adopt the Latinized “Grotius”) was born to one of the leading Protestant families of the Dutch City of Delft on April 10, 1583.<sup>2</sup> He grew up during the Eighty Years’ War (1558–1648) between the Dutch Provinces and the Spanish Empire, and as an adult Grotius witnessed the horrors of the Thirty Years’ War (1618–1648), which engulfed the whole of Europe.<sup>3</sup>

Arising out of the Reformation, the Eighty Years’ War began as a revolt of the Seventeen Dutch Provinces, which had embraced Protestantism, against Philip II of Spain, the sovereign of the Habsburg Netherlands.<sup>4</sup> The revolt was a response to King Philip’s heavy-handed efforts to enforce a policy of strict Catholic religious uniformity throughout the Spanish Empire, which at that time included the territory of Spain and its ally, Portugal, as well as Germany, the Netherlands, Belgium, most of Italy, various other principalities of Europe, Mexico, and Peru.<sup>5</sup> Over the years, the fortunes of war

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\* Dean of Case Western Reserve University School of Law since 2013 and Joseph C. Hostetler—BakerHostetler Professor of Law.

1. See generally CHARLES S. EDWARDS, HUGO GROTIUS, THE MIRACLE OF HOLLAND: A STUDY IN POLITICAL AND LEGAL THOUGHT (Nelson-Hall Publishers, 1981); EDWARD DUMBAULD, THE LIFE AND LEGAL WRITINGS OF HUGO GROTIUS (Univ. of Okla. Press, 1969); and C.G. Roelofsen, *Grotius and the International Politics of the Seventeenth Century*, in HUGO GROTIUS AND INTERNATIONAL RELATIONS 98–99 (Hedley Bull et al. eds., 1990), for additional background information on Hugo Grotius’s life and times.
2. EDWARDS, *supra* note 1, at 1; see also Jon Miller, *Hugo Grotius*, STAN. ENCYCLOPEDIA OF PHIL. (Jan. 8, 2021), <https://plato.stanford.edu/entries/grotius/> [<https://perma.cc/4JNM-KMJT>].
3. See Benedict Kingsbury & Adam Roberts, *Introduction: Grotian Thought in International Relations*, in HUGO GROTIUS AND INTERNATIONAL RELATIONS 1 (Hedley Bull et al. eds., 1990).
4. *Eighty Years’ War*, NEW WORLD ENCYCLOPEDIA, [https://www.newworldencyclopedia.org/entry/Eighty\\_Years%27\\_War](https://www.newworldencyclopedia.org/entry/Eighty_Years%27_War) [<https://perma.cc/HZA7-LWMN>].
5. *Id.*

whipsawed back and forth.<sup>6</sup> After the initial Dutch revolt, Philip II's armies regained control over most of the rebelling provinces.<sup>7</sup> Then the Northern provinces, under the leadership of William of Orange, managed to oust the Habsburg armies and establish the Republic of the Seven United Netherlands.<sup>8</sup>

There was a temporary truce between Spain and the Dutch Provinces from 1609 to 1621, followed by a resumption of conflict, which was accompanied by the launch of the Thirty Years' War, involving most of the countries in Europe.<sup>9</sup> Like the Eighty Years' War, the Thirty Years' War initially began as religious hostilities between Protestant- and Catholic-controlled regions of the Holy Roman Empire.<sup>10</sup> It gradually developed into a more general conflict reflecting the Bourbon France-Habsburg Spain rivalry for European political preeminence.<sup>11</sup> Both wars were marked by extensive destruction of entire regions, denuded by the foraging armies.<sup>12</sup> The resulting ruin, famine and disease reduced the populace of the German states by thirty percent on average, while bankrupting most of the combatant powers.<sup>13</sup> Armies were expected to be largely self-funding from loot taken or tribute extorted from the populations where they operated.<sup>14</sup> This encouraged a form of lawlessness that imposed often-severe hardship on inhabitants of the occupied territory. In the words of one historian, during the conflict “[h]uman beings, turned by misery into wild beasts, rivaled the beasts in ferocity and foulness.”<sup>15</sup>

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6. *See id.*

7. *See id.*

8. *Id.*; see also MARIA BROUWER, *The Republic of the Seven United Provinces (1581–1795)*, in GOVERNMENT FORMS AND ECONOMIC DEVELOPMENT 233, 233–234 (Springer Int'l Publ'g, 2016).

9. *Eighty Years' War*, *supra* note 4. See Randall C.H. Lesaffer et al., *From Antwerp to Munster (1609/1648): Truce and Peace Under the Law of Nations*, in THE TWELVE YEARS TRUCE 233, 233–34 (1609) (Randall C.H. Lesaffer ed., 2014), for background information on the temporary truce known as the “Twelve Years' Truce.”

10. *Thirty Years' War*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/event/Thirty-Years-War> [<https://perma.cc/5ALJ-Q9RG>].

11. *See id.*

12. See John W. Foster, *Evolution of International Law*, 18 YALE L.J. 149, 151 (1908), for an account of the brutal effect of the continental warfare on the region.

13. *Thirty Years' War*, NEW WORLD ENCYCLOPEDIA, [https://www.newworldencyclopedia.org/entry/Thirty\\_Years'\\_War](https://www.newworldencyclopedia.org/entry/Thirty_Years'_War) [<https://perma.cc/BFR5-H55V>].

14. *See id.*

15. Foster, *supra* note 12, at 151.

Despite the omnipresent war,<sup>16</sup> Grotius thrived as an exceptionally gifted and well-connected child prodigy. When Grotius was eight, he began writing skillful elegies in Latin; by eleven, he was a student in the Faculty of Letters at the University of Leiden, where his father served as curator.<sup>17</sup> Three years later, he published the first of his nearly sixty books.<sup>18</sup> At age fifteen, he accompanied a friend of his father's, the leading Dutch politician of the day, Johan van Oldenbarnevelt, on a diplomatic trip to France, where Grotius received a Doctorate from the University of Orléans.<sup>19</sup> The French reaction to the accomplished young Grotius was similar to the reception Wolfgang Amadeus Mozart would receive a hundred years later.<sup>20</sup> Thus, when the French monarch, Henry IV, met Grotius during the young man's visit to the royal court, the King of France publicly hailed Grotius as "the miracle of Holland."<sup>21</sup>

Upon his return to The Netherlands, Grotius was admitted to the bar of Holland at the age of sixteen.<sup>22</sup> He established a law practice in The Hague, with clientele that included the Dutch East India Company, Van Oldenbarnevelt (by then the Prime Minister of the United Netherlands), and Maurice of Nassau (the Prince of Orange).<sup>23</sup> Meanwhile, at age eighteen, Grotius was retained by the United Dutch Provinces to write the official chronicle of their history.<sup>24</sup> In 1607 (when he was twenty-four), Grotius was appointed Attorney General of Holland, and in 1613 (at age thirty) he was appointed Governor of Rotterdam.<sup>25</sup> One of Grotius's contemporaries, French scholar and

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16. Notable combat during Grotius's early years included the siege of Antwerp (1585), and the battles of Breda (1590), Zutphen, Deventer, Defzijk Nijmegen (1591), Steenwijk, Coevorden (1592), Geertruidenberg (1593), Groningen (1594), Grol, Enschede, Ootmarsum, Oldenzaal (1597), Dunkirk, Nieuwpoort (1600), and Grave (1602). MICHAEL P. SCHARF, *CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE: RECOGNIZING GROTIAN MOMENTS* 15 (Cambridge Univ. Press, 2013).
  17. *Id.*
  18. Hedley Bull, *The Importance of Grotius in the Study of International Relations*, in HUGO GROTIUS AND INTERNATIONAL RELATIONS 67 (Hedley Bull et al. eds., 1990).
  19. *Id.*; see also SCHARF, *supra* note 16.
  20. See *Visit from the Child Mozart, 1763–1764*, CHÂTEAU DE VERSAILLES, <https://en.chateauversailles.fr/discover/history/key-dates/visit-child-mozart-1763-1764> [https://perma.cc/C485-NANB].
  21. Miller, *supra* note 2.
  22. DUMBAULD, *supra* note 1, at 7.
  23. Miller, *supra* note 2.
  24. *Id.*
  25. *Id.* Grotius was technically given the title of "Pensionary of Rotterdam," which is essentially the same position as Governor in the United States.

Advocate-General Jérôme Bignon, declared that Grotius was “the most learned man the world had known since Aristotle.”<sup>26</sup>

Grotius’s string of successes was interrupted in 1619, when a Dutch Calvinist faction staged a *coup d’état*, and Grotius and other leading reformers (known as “Remonstrants”) were charged with treason and imprisoned in Loevestein Castle.<sup>27</sup> During his confinement, Grotius had access to a large collection of books and spent his time at Loevestein deep in study.<sup>28</sup> Two years later, with the help of his wife, Maria van Reigersberg, Grotius was smuggled out of Loevestein in a large trunk and made his way to Paris.<sup>29</sup> There, supported by a pension from the French government, Grotius spent the next few years writing his opus, *De Jure Belli ac Pacis*, which was published by a Parisian press in 1625.<sup>30</sup>

*De Jure Belli ac Pacis* was written in a unique style for the day, with “voluminous references to ancient, medieval, and early modern works.”<sup>31</sup> Grotius relies, in his words, on “the testimony of philosophers, historians, poets, finally also of orators” to refute skepticism about international law and bolster his case for an international society governed by a system of norms.<sup>32</sup> He did not write “a dry textbook for law students but employed the ornaments of eloquence and wit . . . wishing his work to be useful to practical men of affairs.”<sup>33</sup> His style has been described as “penned by a sanguine spirit confident in the triumph of great principles even in a time of darkness, turmoil and confusion, with a moral glow warming the ponderous masses of erudition with which the author overlaid his thoughts.”<sup>34</sup> The book’s content and style

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26. HAMILTON VREELAND, JR., HUGO GROTIUS: THE FATHER OF THE MODERN SCIENCE OF INTERNATIONAL LAW 238 (1917).
27. Miller, *supra* note 2; see also *Loevestein Castle*, HOLLAND.COM, <https://www.holland.com/global/tourism/holland-stories/castles-and-country-houses/loevestein-castle-1.htm> [<https://perma.cc/TJN7-GTFW>].
28. Miller, *supra* note 2.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*; HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES, from the *Prolegomena* § 40, at 23 (James Brown Scott ed., Francis W. Kelsey trans., Oxford Clarendon Press 1925).
33. DUMBAULD, *supra* note 1, at 76.
34. Sir John MacDonell, Address Before the Grotius Society: The Influence of Grotius (May 13, 1919), in 5 TRANSACTIONS OF THE GROTIUS SOCIETY, PROBLEMS OF PEACE AND WAR: PAPERS READ BEFORE THE SOCIETY IN THE YEAR 1919, at xvii, xxi (1919).

struck a chord with political leaders and elites across the continent and made Grotius a household name almost overnight.<sup>35</sup>

Over the next twenty years, Grotius authored five dozen other books, but *De Jure Belli ac Pacis* was his masterpiece.<sup>36</sup> The proliferation of printing presses during the time rendered Grotius's book one of the earliest world-wide "best sellers."<sup>37</sup> During his lifetime and in the years that followed, nearly one hundred editions and translations of the book were published in Latin, Dutch, English, German, Italian, Russian, and French.<sup>38</sup> British author and statesman John Morley wrote that "along with Adam Smith's *The Wealth of Nations* [*De Jure Belli ac Pacis*] 'is one of the cardinal books of European history.'"<sup>39</sup> American diplomat John Foster stated in 1909 that "[i]t has been well said that [*De Jure Belli ac Pacis*] is one of the few books that have changed the history of the world."<sup>40</sup>

Grotius tried to return to the Netherlands in 1631, but the Dutch authorities refused to issue him a pardon and placed a bounty on his head.<sup>41</sup> He then lived briefly in Hamburg, Germany.<sup>42</sup> In 1634, Grotius accepted an appointment by Sweden (one of the superpowers of mid-seventeenth-century Europe allied against Spain) to be the Ambassador to France—a position he held until just before his death eleven years later.<sup>43</sup> His principal diplomatic accomplishment was helping to negotiate a treaty which brought France fully into the Thirty Years' War on the side of Sweden and the Protestant German princes, leading to the defeat of the Habsburg cause and the Peace of Westphalia thirteen years later.<sup>44</sup> Grotius would die of illness following a shipwreck on the way from Stockholm to Germany in 1645, while the Peace of Westphalia was under negotiation.<sup>45</sup>

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35. See Miller, *supra* note 2.

36. *Id.*

37. See Richard Tuck, *Introduction to HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE*, at x (Richard Tuck ed., 2005).

38. *Id.*

39. Bull, *supra* note 18, at 71.

40. Foster, *supra* note 12, at 153.

41. See Miller, *supra* note 2.

42. Andrew Blom, *Hugo Grotius (1583–1645)*, INTERNET ENCYCLOPEDIA PHIL., <https://iep.utm.edu/grotius/> [<https://perma.cc/4K4M-A9LS>].

43. *Id.*

44. See generally Hamilton Vreeland Jr., *Hugo Grotius Diplomatist*, 11 AM. J. INT'L L. 580 (1917) (discussing Grotius's diplomatic maneuvering between France and Sweden).

45. Bull, *supra* note 18, at 67; Blom, *supra* note 42.

*B. De Jure Belli ac Pacis*

In the American Society of International Law's inaugural Grotius Lecture, Judge Christopher Weeramantry of the International Court of Justice observed that "[i]t was an unprecedented situation that faced the newly emerging states of Grotius's time."<sup>46</sup> The medieval era, which the Thirty Years' War brought to a bloody end, had been characterized by "criss-crossing political, legal, religious and moral allegiances" to feudal rulers, to the Holy Roman Empire, and to the Catholic Church.<sup>47</sup> Thus, according to Judge Weeramantry, "[d]etached from their traditional moorings to church, empire, and a higher law, [these new states] were groping for new principles of conduct and interrelationship to provide a compass for the tempestuous waters that lay ahead."<sup>48</sup>

Grotius sought to provide the nations of Europe with what they badly needed in the closing years of the Thirty Years' War—"a rational theory of international relations emancipated from theology and the authority of churches."<sup>49</sup> He was among the first to suggest how the binding force of the law of nations could be preserved and made vital in the kind of anarchic and pluralistic environment that would emerge two decades later from the Peace of Westphalia.<sup>50</sup>

In explaining the motivation for writing *De Jure Belli ac Pacis*, Grotius writes in the book's *Prolegomena*:

Fully convinced . . . that there is a common law among nations, which is valid alike for war and in war, I have had many and weighty reasons for undertaking to write upon this subject. Throughout the Christian world I observed a lack of restraint in relation to war, such as even barbarous races should be ashamed of; I observed that men rush to arms for slight causes, or no cause at all, and that when arms have once been taken up there is no longer any respect for law, divine or human; it is as if, in accordance with a general decree, frenzy had openly been let loose for the committing of all crimes.<sup>51</sup>

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46. Christopher G. Weeramantry, *The Grotius Lecture Series*, 14 AM. U. INT'L L. REV. 1515, 1516 (1999).

47. Mark W. Janis, *Sovereignty and International Law: Hobbes and Grotius*, in *ESSAYS IN HONOR OF WANG TIEYA* 392 (Ronald St. John MacDonald ed., 1994).

48. Weeramantry, *supra* note 46, at 1516.

49. R.W. LEE, HUGO GROTIUS 57 (1930).

50. EDWARD KEENE, BEYOND THE ANARCHICAL SOCIETY: GROTIUS, COLONIALISM AND ORDER IN WORLD POLITICS 2 (2002).

51. GROTIUS, *supra* note 32, at *Prolegomena* § 29.



Grotius further explains that his book was meant as a response to “those who view [international law] with contempt as having no reality except an empty name.”<sup>52</sup>

At the time that Grotius wrote *De Jure Belli ac Pacis*, Machiavellianism had for a century been the prevailing philosophical approach to inter-State relations.<sup>53</sup> In *The Prince*, Niccolò Machiavelli justified the State as a self-sufficient, non-moral entity, and advocated a worldview where international agreements are viewed as no more than temporary arrangements of mutual convenience.<sup>54</sup> During Grotius’s time, “the empire was decaying, the church was corrupted and intolerant, and . . . the Pope encouraged international faithlessness by absolving treaty makers from their oaths.”<sup>55</sup>

Seeing the devastation of the Eighty Years’ War and Thirty Years’ War as confirmation of the folly of the Machiavellian method, Grotius sought to replace it with a notion that States could exist in an international community governed by treaties, which natural law obligated them to honor.<sup>56</sup> Grotius’s book stresses mutual interdependence of States, asserting that there is no State so powerful that it may not at some time require the help of others outside itself, either for trade or mutual defense.<sup>57</sup> This principle that agreements should be carried out—*pacta sunt servanda*—which Grotius advocated, has been described as the *grundnorm* of modern international law.<sup>58</sup>

*De Jure Belli ac Pacis* does not contain any direct reference to Machiavelli; rather Grotius uses the Greek philosopher Carneades as his foil.<sup>59</sup> Nevertheless, “it is principally against Machiavelli that Grotius directs his argument.”<sup>60</sup> And while others—in particular the sixteenth century Spanish theologians, Vitoria and Suarez<sup>61</sup>—had laid the foundations for this approach, Grotius’s unique contribution was

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52. *Id.* § 3.

53. C. Van Vollenhoven, *Grotius and the Study of Law*, 19 AM. J. INT’L L. 1, 3-4 (1925).

54. NICCOLÒ MACHIAVELLI, *THE PRINCE AND THE DISCOURSES* 64 (Lerner ed., 1950).

55. Hamilton Vreeland, Jr., *Hugo Grotius*, 67 U. PA. L. REV. & AM. L. REG. 203, 204 (1919).

56. GROTIUS, *supra* note 32, at bk. II, chs. XI, XII; *see also* Janis, *supra* note 47, at 396.

57. GROTIUS, *supra* note 32, at Prolegomena § 23.

58. MAURICE H. MENDELSON, *THE FORMATION OF CUSTOMARY INTERNATIONAL LAW* 183 (1998).

59. *See, e.g.*, GROTIUS, *supra* note 32, at Prolegomena § 7.

60. W.J. Korab-Karpowicz, *In Defense of International Order: Grotius’s Critique of Machiavellism*, 60 REV. METAPHYSICS 55, 57 (2006).

61. Janis, *supra* note 47, at 395.

that he “secularized” international law, fashioning a system that would appeal to Catholics, Protestants, and those outside the Christian tradition alike.<sup>62</sup> It was partly for this reason that the Catholic Church banned Grotius’s book for nearly 275 years.<sup>63</sup>

Although Grotius’s observations and arguments were not completely original, *De Jure Belli ac Pacis* is said to have “commended itself to the conscience of the age. It restated the wisdom of the ancients and applied it to the unprecedented circumstances of the world of the Renaissance and Reformation.”<sup>64</sup> Yet Grotius, the experienced diplomat and politician, was no mere idealist. He acknowledged that war was a natural feature of inter-State relations.<sup>65</sup> At the same time he advocated for application of law to initiating war and to waging it once commenced.<sup>66</sup>

Grotius organized *De Jure Belli ac Pacis* as three books, totaling hundreds of pages.<sup>67</sup> Following the *Prolegomena*, in which Grotius articulates and defends his philosophical approach, Book I advances his conception of war and natural justice, arguing that there are some circumstances in which war is justifiable.<sup>68</sup> Book II identifies three just causes for war: self-defense, reparation of injury, and punishment.<sup>69</sup> And Book III takes up the question of what rules govern the conduct of war once it has begun; Grotius argued that all parties to war are bound by such rules, whether their cause is just or not.<sup>70</sup>

One can easily connect the dots from Book III of *De Jure Belli ac Pacis* to President Lincoln’s 1863 “Lieber Code”—the first codified laws

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62. Hersch Lauterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT’L L. 1, 24 (1946). Grotius writes: “A question frequently raised concerning treaties is whether they are lawfully entered into with those who are strangers to the true religion. According to the law of nature this is in no degree a matter of doubt. For the right to enter into treaties is so common to all men that it does not admit of a distinction arising from religion.” GROTIUS, *supra* note 32, at bk. II, ch. 15, § 8.

63. Pope Urban VIII placed *De Jure Belli ac Pacis* on the Papal Index on February 4, 1627, and it was forbidden to all Catholics until the ban was lifted in 1901 by Pope Leo XIII following the Papal delegation’s exclusion from the Hague Peace Conference of 1899 in response to the ban of a book that contained the foundational principles of international law. VREELAND, *supra* note 26, at 167.

64. Cornelius F. Murphy, Jr., *The Grotian Vision of World Order*, 76 AM. J. INT’L L. 477, 482 (1982).

65. SCHARF, *supra* note 16, at 21.

66. *Id.*

67. *See* Blom, *supra* note 42.

68. GROTIUS, *supra* note 32, at bk. I.

69. *See id.* at bk. 2.

70. *See id.* at bk. 3.

for the conduct of war;<sup>71</sup> to the Martens Clause in the Hague Convention of 1899—the natural law-inspired provision of the first multinational convention codifying the laws of war;<sup>72</sup> and ultimately to the four Geneva Conventions of 1949—the comprehensive set of modern rules for warfare.<sup>73</sup> At a commemoration of Grotius during the 1899 Hague Peace Conference, the American representative, Andrew White, stated:

Of all works not claiming divine inspiration, [*De Jure Belli ac Pacis*], by a man proscribed and hated both for his politics and his religion, has proved the greatest blessing to humanity. More than any other it has prevented unmerited suffering, misery and sorrow; more than any other it has promoted the blessings of peace and diminished the horrors of war.<sup>74</sup>

### C. *The Grotian Legacy*

*De Jure Belli ac Pacis* is celebrated for much more than providing the scholarly underpinning for the development of the laws of war. Indeed, many scholars contend that Grotius's famous book laid the intellectual foundation for the general approach embodied in the Peace of Westphalia, which ended the Eighty Years' War and Thirty Years'

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71. See Andrew D. White, *Debt Due to Hugo Grotius*, 61 *ADVOC. OF PEACE* 186, 186, 186–90 (1899) (reprinting White's address delivered on July 4, 1899, in Delft, Holland, at the celebration given by the American Commission in honor of Grotius). General Orders No. 100: Instructions for the Government of Armies of the United States in the Field (Apr. 24, 1863), reprinted in 2 FRANCIS LIEBER, *CONTRIBUTIONS TO POLITICAL SCIENCE* 245, 247–74 (1881).

72. The Martens Clause is a catch-all provision of the Hague Regulations (repeated in the 1907 Hague Convention) that provides: "Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience." JAMES B. SCOTT, *THE HAGUE PEACE CONFERENCES OF 1899 AND 1907*, at 113 (1909).

73. See generally GROTIUS, *supra* note 32, at bk. III; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

74. White, *supra* note 71, at 189.

War in 1648 and inaugurated the modern international legal system.<sup>75</sup> As James Bryce writes:

When by the Peace of Westphalia a crowd of petty principalities were recognized as practically independent states, the need of a body of rules to regulate their relations and intercourse became pressing. Such a code (if one may call it by that name) Grotius and his successors compiled out of the principles which they found in the Roman law, then the private law of Germanic countries, thus laying the foundation whereon the system of international jurisprudence has been built up during the last three centuries.<sup>76</sup>

The Peace of Westphalia was history's first general peace settlement, resulting from a six-year diplomatic conference with 109 participating delegations, including the Holy Roman Emperor, the House of Habsburg, the Kingdom of Spain, the Kingdom of France, the Swedish Empire, the Dutch Republic, the Princes of the Holy Roman Empire, and sovereigns of the free imperial cities.<sup>77</sup> The agreement was embodied in two separate accords: the Treaty of Osnabrück 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;<sup>78</sup> and the Treaty of Münster concluded between the Catholic King of France and his allies on the one side, and the Holy Roman Habsburg Emperor and the German Princes on the other.<sup>79</sup>

Aside from establishing fixed territorial boundaries for many of the countries involved in the conflict, the important provisions of these treaties were the recognition of the independent sovereignty of the States of Europe;<sup>80</sup> their right to exercise exclusive jurisdiction within their own territories;<sup>81</sup> the establishment of religious toleration;<sup>82</sup> the right of each State to negotiate its own treaties;<sup>83</sup> and the recognition

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75. SCHARF, *supra* note 16, at 22.

76. JAMES BRYCE, *THE HOLY ROMAN EMPIRE* 436 (Norwood Press 1907).

77. *See generally* R. B. MOWAT, *HISTORY OF EUROPEAN DIPLOMACY 1451–1789*, at 104–14 (1928) (tracing the diplomatic negotiation of the Peace of Westphalia).

78. *Id.*

79. For the full text of the Osnabrück and Münster Treaties, in both their Latin and English versions, see 1 CONSOLIDATED TREATY SERIES 119, 270 (C. Parry, ed., 1969).

80. MOWAT, *supra* note 77.

81. *See id.*

82. *Peace of Westphalia*, BRITANNICA, <https://www.britannica.com/event/Peace-of-Westphalia> [<https://perma.cc/AF94-BHA5>].

83. *Id.*

that such treaties were binding.<sup>84</sup> The Peace of Westphalia changed the relationship of subjects to their rulers.<sup>85</sup> In earlier times, people had tended to have overlapping political and religious loyalties.<sup>86</sup> Through Westphalia, it was agreed that the citizenry of a respective nation were to be subjected first and foremost to the laws and whims of their own respective government rather than to those of neighboring powers, be they religious or secular.<sup>87</sup> This allowed the rulers of the Imperial States to independently decide their religious worship, and it reaffirmed the authority of the State over the church. Protestants and Catholics were redefined as equal before the law, Calvinism was given legal recognition, and neither the Pope nor the Holy Roman Emperor was permitted to interfere with the administration of the independent States.<sup>88</sup>

The conventional view is that by recognizing the German Princes as sovereign, with the right to negotiate their own treaties which would be binding upon them, the Peace of Westphalia signaled the beginning of a new era reflecting the Grotian conception of international community regulated by universal principles.<sup>89</sup> Thus, one of the primary authors of the United States Constitution, James Madison, declared that Grotius “is not unjustly considered . . . the father of the modern code of nations.”<sup>90</sup> Stephen Field, one of the most eminent of nineteenth-century U.S. Supreme Court Justices, similarly proclaimed Grotius to be the “father” of modern international law, a moniker that has been repeated by other high court judges.<sup>91</sup> More recently, Professor David Bederman of Emory University School of Law wrote that Grotius certainly “earned” the title “father of international law,” and major international statesmen and women of the 21st century—former U.N. High Commissioner for Human Rights Mary Robinson and former U.N.

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84. *See id.*

85. See Leo Gross, *The Peace of Westphalia, 1648–1948*, 42 AM. J. INT’L L. 20, 22–23 (1948), for a discussion of the expanded liberties that subjects of the European monarchies received after the Peace of Westphalia, both in its immediate aftermath and for centuries to come.

86. *See, e.g., Thirty Years’ War, supra* note 10.

87. *See, e.g.,* SCHARF, *supra* note 16, at 23.

88. *See* Murphy, *supra* note 64, at 478–79.

89. *But cf.* Stéphane Beaulac, *The Westphalian Legal Orthodoxy—Myth or Reality?*, 2 J. HIST. INT’L L. 148 (2000) (describing an emerging critique of this conventional view).

90. JAMES MADISON, *An Examination of the British Doctrine, Which Subjects to Capture a Neutral Trade, Not Open in Time of Peace*, in 2 LETTERS AND OTHER WRITINGS OF JAMES MADISON 1794–1815, at 229, 234 (1865).

91. Charles J. Reid, Jr., *Hugo Grotius—A Case of Dubious Paternity*, U. ST. THOMAS L. LEGAL STUD. RSCH. PAPER NO. 07–13, at 109 (2009).

Secretary-General Boutros Boutros-Ghali to name two—have made similar pronouncements.<sup>92</sup>

To those who accept this view of history, the year 1648 marked a fundamental turning point for international law and relations. In light of the intellectual foundations Grotius provided for this historic development, we could call it the first “Grotian Moment” in international law.

This view of the Peace of Westphalia as a sudden paradigm-shifting<sup>93</sup> event inspired by the writings of Grotius is not entirely accurate, however. While co-existing with empires, the State system had emerged a hundred years before Westphalia.<sup>94</sup> Moreover, 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.<sup>95</sup> 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.<sup>96</sup> 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.<sup>97</sup>

These nuances are perhaps beside the point. While the results of Westphalia may have been simplified by the lens of history, and Grotius’s role may have been exaggerated,<sup>98</sup> Westphalia has unquestionably emerged as a symbolic marker and Grotius as an emblematic figure of changing historical thought. To understand how and why that perception has grown to be more important than reality, one can turn to the theory of semiotics.<sup>99</sup> Derived from the Greek word *semesion*, meaning sign, semiotics was developed by Charles Peirce in the nineteenth century as the study of how meaning of signs, symbols,

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92. David J. Bederman, *World Law Transcendent*, 54 EMORY L.J. 53, 55 (2005); Mary Robinson, *The Fifth Annual Grotius Lecture Shaping Globalization: The Role of Human Rights*, 19 AM. U. INT’L L. REV. 1, 2 (2003); Boutros Boutros-Ghali, *A Grotian Moment*, FORDHAM INT’L L.J. 1609, 1609 (1995).
93. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 150 (1970) (coining the phrase paradigm shift).
94. Stéphane Beaulac, *The Westphalian Model in Defining International Law: Challenging the Myth*, 8 AUSTL. J. LEGAL HIST. 181, 205 (2004).
95. *Id.*
96. *Id.* at 208.
97. Michael P. Scharf, *Earned Sovereignty: Juridical Underpinnings*, 31 DENV. J. INT’L L. 373, 375 n.20; Beaulac, *supra* note 89, at 167–68.
98. KEENE, *supra* note 50, at 45–52.
99. Halina Sendera Mohd. Yakin & Andreas Totu, *The Semiotic Perspectives and Saussure: A Brief Comparative Study*, 155 SOC. & BEHAV. SCIS. 4, 4 (2014).

and language is constructed and understood.<sup>100</sup> Semiotics begins with the assumption that phrases, such as “the Peace of Westphalia” or “the Grotian tradition,” are not historic artifacts whose meanings remain static over time.<sup>101</sup> Rather, semiotics posits that the meanings of such terms change over the years along with the interpretive community or communities.<sup>102</sup> Thus, the legend and mystique that surround Grotius and the Peace of Westphalia have attained their own significance, by which Grotius is now widely viewed as “the patron saint of the modern states-system.”<sup>103</sup> The fact that the legend suffers from historical inaccuracy does not diminish its usefulness as a metaphor for critical turning points in international law and relations.<sup>104</sup>

Ultimately, the Grotian tradition,<sup>105</sup> while widely acclaimed, proved incapable of bringing order and stability to the destructive rivalries inherent in the nation-state system.<sup>106</sup> And in the centuries after the publication of his celebrated book, Grotius’s reputation experienced great decline during the rise of positivism, and later of anti-colonialism, in international law.<sup>107</sup> Yet, there has been renewed interest in the salience of Grotius’s political thought to the world of today. Although Grotius did not foresee the advent of an international organization like the United Nations, he did envision a community of nations, and his just war approach is reflected in Chapter VII of the U.N. Charter.<sup>108</sup> His concept that international law might properly be enforced through punishment by third States<sup>109</sup> anticipated the collective sanctions schemes of the League of Nations and U.N. Charter. His natural law approach presaged the modern concept of jus cogens—peremptory

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100. *Id.*

101. See Dan Li, *Critical Media Literacy: A Social Semiotic Analysis and Multimodal Discourse of Corporacy*, 19 INT’L J. EDUC. ARTS, Sept. 25, 2018, at 1, 4.

102. See 5 CHARLES SANDERS PEIRCE, COLLECTED PAPERS OF CHARLES SANDERS PEIRCE: PRAGMATISM AND PRAGMATICISM (Charles Hartshorne & Paul Weiss eds., 1935); UMBERTO ECO, A THEORY OF SEMIOTICS 8 (1976).

103. MARTINE JULIA VAN ITTERSUM, PROFIT AND PRINCIPLE: HUGO GROTIUS, NATURAL RIGHTS THEORIES AND THE RISE OF DUTCH POWER IN THE EAST INDIES 1595–1615, at xxxviii (2006).

104. SCHARF, *supra* note 16, at 26.

105. Lauterpacht, *supra* note 62, at 19; MARY ELLEN O’CONNELL, THE POWER AND PURPOSE OF INTERNATIONAL LAW 5 (Oxford Univ. Press 2008).

106. Murphy, *supra* note 64, at 492.

107. Edward Keene, *The Reception of Hugo Grotius in International Relations Theory*, 20/21 GROTIANA 135, 154 (1999); KEENE, *supra* note 50, at 33; A. Claire Cutler, *The ‘Grotian Tradition’ in International Relations*, 17 REV. INT’L STUD. 41, 54 (1991).

108. U.N. Charter ch. VII.

109. GROTIUS, *supra* note 32, at bk. II, ch. XX, §§ XX, XL.

norms as to which States cannot by treaty derogate.<sup>110</sup> Grotius's justification for humanitarian intervention (he argues that the State that is oppressive and egregiously violates basic human rights forfeits its moral claim to full sovereignty),<sup>111</sup> is at the heart of the modern "Responsibility to Protect" doctrine. His notion that individuals and non-State actors could be subjects of international law<sup>112</sup> is relevant to modern human rights law and international criminal law, as well as notions of self-defense against terrorist groups.<sup>113</sup> And his defense of the force of international law is used today to dispute neo-realist claims that international law is not binding.<sup>114</sup>

While Grotius's contributions go back nearly 500 years, the term "Grotian Moment" is a relatively recent creation, coined by Princeton Professor Richard Falk in 1985.<sup>115</sup> Since then, scholars and even the U.N. Secretary-General have employed the term in a variety of ways,<sup>116</sup> but even more frequently it has been used to denote a transformative development in which new rules and doctrines of customary international law emerge with unusual rapidity and acceptance.<sup>117</sup> Usually this happens during "a period in world history that seems analogous at least to the end of European feudalism . . . when new

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110. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331 (defining *jus cogens* norms as laws such as the prohibitions on the use of force and genocide "accepted and recognized by the international community of States as a whole . . . from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.").
111. GROTIUS, *supra* note 32, at bk. II, ch. II, § XIX.
112. *Id.* at bk. I, ch. I, § I; *id.* at bk. III, ch. XXIII, § II.
113. Yaroslav Shiryayev, *The Right of Armed Self-Defense in International Law and Self-Defense Arguments Used in the Second Lebanon War*, 31 ACTA SOCIETATIS MARTENSIS 80, 93 (2007/2008).
114. O'CONNELL, *supra* note 105, at 3.
115. Richard Falk, *Some Thoughts on the Decline of International Law and Future Prospects*, 9 HOFSTRA L. REV. 399, 408–09 (1981). For the early seeds of this concept of a changing paradigm in Falk's work, see Richard A. Falk, *The Interplay of Westphalia and Charter Conceptions of International Legal Order*, in 1 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 32 (Richard A. Falk & Cyril E. Black eds., 1969).
116. Boutros-Ghali, *supra* note 92, at 1613 (referring to the establishment of the International Criminal Tribunal for the Former Yugoslavia as part of the process of building a new international system for the 21st century).
117. Saul Mendlovitz & Merav Datan, *Judge Weeramantry's Grotian Quest*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 401, 402 (1997) (defining the term "Grotian moment"); Milena Sterio, *Humanitarian Intervention Post-Syria: A Grotian Moment?*, 20 ILSA J. INT'L & COMP. L. 343, 344 (2014).



norms, procedures, and institutions had to be devised to cope with the then decline of the Church and the emergence of the secular state.”<sup>118</sup>

### III. THE GROTIAN MOMENT CONCEPT

#### A. *Defining and Identifying Grotian Moments*

Professor Myres McDougal famously described the customary international law formation process as one of continuous claim and response.<sup>119</sup> Out of this process of claim and response, and third-party State support, acquiescence or repudiation, rules emerge or are superseded.<sup>120</sup> Just “as pearls are produced by the irritant of a piece of grit entering an oyster’s shell, so the interactions and mutual accommodations of States produce the pearl—so to speak—of customary law.”<sup>121</sup> Like the slow creation of a pearl, usually this process of customary international law formation takes many decades.<sup>122</sup> Under the traditional view, the formation of customary rules is so gradual that it is often described as “crystallization.”<sup>123</sup> But sometimes, world events

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118. BURNS H. WESTON ET AL., INTERNATIONAL LAW AND WORLD ORDER 1369 (3d ed. 1997); B.S. Chimni, *A Just World Under Law: A View from the South*, 22 AM. U. INT’L L. REV. 199, 201 (2007).

119. See generally Myres S. McDougal & Norbert A. Schlei, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security*, 64 YALE L.J. 648 (1955) (tracing the history of America’s decision to test atomic bombs in the late 1940s and 1950s, when it was unprecedented in international relations).

120. Michael P. Scharf, *Accelerated Formation of International Law*, 20 ILSA J. INT’L & COMP. L. 305, 314 (2014).

121. MENDELSON, *supra* note 58, at 195.

122. See Vincy Fon & Francesco Parisi, *Customary Law and Articulation Theories: An Economic Analysis*, GEO. MASON UNIV. L., WORKING PAPER NO. 02–24, at 5 (2000), [https://www.law.gmu.edu/assets/files/publications/working\\_papers/02-24.pdf](https://www.law.gmu.edu/assets/files/publications/working_papers/02-24.pdf) [<https://perma.cc/D6ZX-6APM>]; G.I. Tunkin, *Remarks on the Judicial Nature of Customary Norms in International Law*, 49 CALIF. L. REV. 419, 420 (1961); Manley O. Hudson, *Article 24 of the Statute of the International Law Commission, Ways and Means for Making the Evidence of Customary International Law More Readily Available*, [1950] Y.B. Int’l L. Comm’n 24, U.N. DOC. A/CN.4/16.

123. SCHARF, *supra* note 16, at 211.

are such that customary international law develops quite rapidly.<sup>124</sup> Those instances have come to be known as “Grotian Moments.”<sup>125</sup>

By tradition, jurists and scholars have looked exclusively to two factors: (1) widespread State practice, and (2) manifestations of a conviction that the practice is required or permitted by law—to decide whether an emergent rule has attained customary international law status.<sup>126</sup> The Grotian Moment concept compels consideration of a third factor—a context of fundamental change—that can serve as an accelerating agent, enabling customary international law to form much more rapidly and with less positive State practice than is normally the case.

### *B. The Importance of Customary International Law*

To understand the significance of the Grotian Moment concept, one must begin by recognizing the continuing vigor of customary international law. To paraphrase Mark Twain, reports of the death of customary international law are greatly exaggerated.<sup>127</sup> Despite its widespread codification in treaties during the last century, the unwritten norms, rules, and principles of customary law continue to play a crucial role in international relations.<sup>128</sup> There are three primary reasons for customary international law’s ongoing vitality.

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124. Rapid formation of customary international law during a Grotian Moment is not the same as so-called “instant custom.” Both State practice and *opinio juris* are required, though the time period may be quite brief. Int’l Law Comm’n, Draft Conclusions on Identification of Customary International Law, with Commentaries, U.N. DOC. A/73/10, at 138, 122, 136 (2018) (“Provided that the practice is general, no particular duration is required.”) [hereinafter Int’l Law Comm’n Draft Conclusions]; *North Sea Continental Shelf (Ger. v. Den., Ger. v. Neth.)*, Merits, 1969 I.C.J. 3, ¶¶ 71, 73–74 (Feb. 20).

125. See generally SCHARF, *supra* note 16, at 212; MICHAEL P. SCHARF ET AL., *THE SYRIAN CONFLICT’S IMPACT ON INTERNATIONAL LAW* 173 (2020). Other scholars have called these international constitutional moments. See e.g., Leila Nadya Sadat, *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200, 1206 (2007) (describing Nuremberg as an international “constitutional moment”); Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT’L L.J. 1, 1–2 (2002) (describing 9/11 as an “international constitutional moment”).

126. Int’l Law Comm’n Draft Conclusions, *supra* note 124, at 123.

127. Mark Twain (Samuel Longhorne Clemens), *Cable from London to the Associated Press (1897)*, in BARTLETT’S FAMILIAR QUOTATIONS 625 (Emily Morison Beck ed., 15th ed. 1980); David Bederman, *Acquiescence, Objection and the Death of Customary International Law*, 21 DUKE J. COMP. INT’L L. 31, 43 (2010).

128. Their definitions vary, but in ordinary usage the terms norms, principles and rules of customary international law are often used interchangeably,

First, in some ways, customary international law possesses more jurisprudential power than does treaty law. Unlike treaties, which bind only the parties thereto, once a norm is established as customary international law, it is binding on all States, even those new to a type of activity, so long as they did not persistently object during its formation.<sup>129</sup> Since some international law rules co-exist in treaties and custom, customary international law expands the reach of the rules to those States that have not yet ratified the treaty. In addition, the customary international law status of the rules can apply to actions of the treaty parties that pre-dated the entry into force of the treaty.<sup>130</sup> Moreover, States that were not even in existence at the time the norm evolved, such as colonies or former parts of a larger State, and therefore never had an opportunity to express their positions as a particular rule emerged, are nonetheless generally deemed to be bound by the entire corpus of customary international law existing upon the date they become sovereign States.<sup>131</sup> Finally, unlike some treaties which by their terms permit withdrawal, customary international law does not recognize a unilateral right to withdraw from it.<sup>132</sup>

Second, while one might tend to think of customary international law as growing only slowly, in contrast to the more rapid formation of treaties, the actual practice of the world community in modern times suggests that the reverse is more often the case. For example, negotiations for the Law of the Sea Convention began in 1973, the Convention was concluded in 1982, and did not enter into force until it received its sixtieth ratification in 1994—a period of twenty-one

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as they are here. Niels Petersen, *Customary Law Without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation*, 23 AM. U. INT'L. L. REV. 275, 276 (2007).

129. INT'L L. ASS'N, LONDON CONFERENCE: REPORT OF THE INTERNATIONAL LAW ASSOCIATION, COMMITTEE ON FORMATION OF CUSTOMARY (GENERAL) INTERNATIONAL LAW 25, 27 (2000).

130. SCHARF, *supra* note 16, at 30.

131. David Koplow, U.N. Inst. for Disarmament Rsch., *International Legal Standards and the Weaponization of Outer Space*, in SPACE: THE NEXT GENERATION—CONFERENCE REPORT, 159, 161 (2008).

132. Professors Bradley and Gulati criticize customary international law for failing to recognize a right to subsequently withdrawal from a customary rule in parallel with the right to withdraw from a treaty. See Curtis A. Bradley & Mitu Gulati, *Customary International Law and Withdrawal Rights in an Age of Treaties*, 21 DUKE J. INT'L & COMP. L. 1, 1 (2010). Note, however, that not all treaties permit withdrawal. Moreover, there are situations, such as in a fundamental change of circumstances, where a State can be excused for failing to comply with a customary rule. HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 271, 271 (1933).

years.<sup>133</sup> Similarly, negotiations for the Vienna Convention on the Law of Treaties began in 1949, the Convention was concluded in 1969, and did not enter into force until it received its thirty-fifth ratification in 1980—some thirty-one years.<sup>134</sup> And the International Law Commission (“ILC”) began its work on the Statute for an International Criminal Court in 1949; several preparatory committees then worked on it, and it was finally concluded in Rome in 1998 and entered into force upon receipt of its sixtieth ratification in 2002—a span of fifty-three years from start to finish.<sup>135</sup> As we shall see below, customary international law often forms at a much faster pace, especially with respect to areas of technological or other fundamental change.<sup>136</sup>

Finally, while one might assume that treaty law offers the benefit of greater clarity and precision in the articulation of the legal obligations, this is not always the case. Rather, the provisions of treaties, especially multinational conventions, are also often subject to what H. L. A. Hart called a “penumbra of uncertainty”<sup>137</sup> resulting from the need to bridge language, cultural, legal, and political divides between diverse parties. In some areas, customary rules may provide greater precision since they evolve in response to concrete situations and cases, and are often articulated in the written decisions of international courts.<sup>138</sup>

### *C. Nuremberg as the Prototypical Grotian Moment*

During a sabbatical in the fall of 2008, the author of this article had the privilege of serving as Special Assistant to the International Prosecutor of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”), the tribunal created by the U.N. and government of Cambodia to prosecute the former leaders of the Khmer Rouge for the

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133. John A. Duff, *The United States and the Law of the Sea Convention: Sliding Back from Accession and Ratification*, 11 OCEAN & COASTAL L. J., no. 1, 2005, at 5–6.

134. See Vienna Convention on the Law of Treaties, *supra* note 110.

135. *Establishment of an International Criminal Court*, UNITED NATIONS (1998), <https://legal.un.org/icc/general/overview.htm> [<https://perma.cc/MNU2-EYT7>].

136. In contrast to earlier times, in the modern era of instantaneous electronic communications, and a proliferation of diplomatic conferences, organizations and other forums for multinational diplomatic exchanges, state practice is being generated at an increasing pace, while information about state practice is becoming more and more widely disseminated over the internet. This means that the requisite quantity of claims and responses can be reached much more quickly than in the past leading to a general acceleration of the formation of customary rules. Tullio Treves, *Customary International Law*, MAX PLANCK ENCYC. PUB. INT’L L. (2012), ¶ 25.

137. H.L.A. HART, *THE CONCEPT OF LAW* 12 (2d ed. 1994).

138. Int’l Law Comm’n Draft Conclusions, *supra* note 124, at 20.

atrocities committed during their reign of terror 1975 to 1979.<sup>139</sup> While in Phnom Penh, the author was assigned to write the Prosecutor's brief<sup>140</sup> in response to the Defense Motion to Exclude Joint Criminal Enterprise ("JCE") liability as a mode of liability from the trial of the five surviving leaders of the Khmer Rouge.<sup>141</sup>

JCE is a form of liability somewhat similar to the Anglo-American "felony murder rule"<sup>142</sup> and "Pinkerton rule,"<sup>143</sup> 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. Originally called "common design" liability, it was first applied by an international tribunal at Nuremberg following World War II.<sup>144</sup> Although only a few countries around the world apply principles of co-perpetration similar to the felony murder rule or Pinkerton rule,<sup>145</sup> since

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139. For background on the creation of the ECCC, see generally Michael P. Scharf, *Tainted Provenance: When, If Ever, Should Torture Evidence be Admissible?*, 65 WASH. & LEE L. REV. 129 (2008).
140. Case of Ieng Sary, Case No. 002/19-09-2007-ECCC/OCIJ, Co-Prosecutors' Supplementary Observations on Joint Criminal Enterprise (Dec. 31, 2008). 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 Case of Ieng Sary, Case No. 002/19-09-2007-ECCC/OCIJ, Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise (Dec. 8, 2009).
141. Pursuant to the Co-Investigating Judges' September 16, 2008 Order, 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 Tadić 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 from 1975 to 1979. Case of Ieng Sary, Case No. 002/19-09-2007-ECCC/OCIJ, Ieng Sary's Motion Against the Application at the ECCC of the Form of Responsibility Known as Joint Criminal Enterprise, ¶ 29 (July 28, 2008).
142. For background about, and cases applying the felony murder doctrine, see generally David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL'Y 359 (1985).
143. For background about, and cases applying the Pinkerton Rule, see generally Matthew A. Pauley, *The Pinkerton Doctrine and Murder*, 4 PIERCE L. REV. 1 (2005).
144. Agreement for the Prosecution and Punishment of Major German War Criminals of the European Axis art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279; U.N. WAR CRIMES COMM'N, XV LAW REPORTS OF TRIALS OF WAR CRIMINALS 97-98 (1949) (summarizing the jurisprudence of the Nuremberg and Control Council Law Number 10 trials).
145. The French and Dutch concept of "association de malfaiteurs" is somewhat similar to JCE. The Indian Penal Code imposes individual liability for unlawful acts committed by several persons in furtherance of

the decision of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the 1999 Tadić case,<sup>146</sup> it has been accepted that JCE is a mode of liability applicable to international criminal trials. Dozens of cases before the Yugoslavia Tribunal, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and the Special Tribunal for Lebanon have recognized and applied JCE liability during the last twenty-five years.<sup>147</sup>

These modern precedents, however, were not relevant to the Cambodia Tribunal because the crimes under its jurisdiction had occurred some twenty years earlier. Under the international law principle of *nullum crimen sine lege*<sup>148</sup> (the equivalent to the U.S. Constitution's *ex post facto* law prohibition), the Cambodia Tribunal could only apply the substantive law and associated modes of liability that existed as part of customary international law in 1975.<sup>149</sup> Therefore, the question at the heart of the Prosecution's Brief was whether the Nuremberg Tribunal precedent and the U.N.'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 norm as of 1975.<sup>150</sup> In response, the Prosecution Brief

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a common plan. And the Canadian Criminal Code punishes persons who "form a common intention to prosecute any unlawful purpose." SCHARF, *supra* note 16, at 70 n.20.

146. Prosecutor v. Tadić, Case No. IT-94-1-I, Judgment (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).
147. See, e.g., Prosecutor v. Kvočka, Case No. IT-98-30/1-A, Appeal Judgment, ¶ 80 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2005); Prosecutor v. Karemera, Case No. ICTR-98-44-T, Decision on the Preliminary Motions by the Defence Challenging Jurisdiction in Relation to Joint Criminal Enterprise, ¶ 36 (Int'l Crim. Trib. for Rwanda May 14, 2004); CDF Case, Case No. SCSL-04-14-T, Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, ¶ 130 (Special Court for Sierra Leone Oct. 21, 2005); Prosecutor v. Ayyash, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/1, ¶¶ 259-61 (Special Trib. for Lebanon Appeals Chamber Feb. 16, 2011).
148. *Nullum crimen sine lege*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/nullum\\_crimen\\_sine\\_lege](https://www.law.cornell.edu/wex/nullum_crimen_sine_lege) [<https://perma.cc/X5XD-DF45>].
149. Case of Ieng Sary, Case No. 002/19-09-2007-ECCC/OCIJ, Ieng Sary's Motion Against the Application the ECCC of the Form of Responsibility Known as Joint Criminal Enterprise, ¶ 33 (Extraordinary Chambers in the Courts of Cambodia July 28, 2008).
150. *Id.* ¶¶ 18-24. For the definition of "customary international law," see North Sea Continental Shelf (Ger. v. Den. & Neth.), Judgment, 1969 I.C.J. 3, ¶ 77 (Feb. 20).

maintained that Nuremberg constituted “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.<sup>151</sup> Despite the dearth of State practice, the Cambodia Tribunal ultimately found JCE applicable to its trials based on the Nuremberg precedent and U.N. General Assembly endorsement of the Nuremberg Principles.<sup>152</sup>

While the Nuremberg trials were not without criticism, there can be no question that Nuremberg represented a paradigm-shifting<sup>153</sup> development in international law. The ILC has recognized that the Nuremberg Charter and Judgment gave birth to the entire international paradigm of individual criminal responsibility.<sup>154</sup> Prior to Nuremberg, the concept of international criminal responsibility of individuals did not exist, and what a State did to its own citizens within its own borders was deemed its own business.<sup>155</sup> 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.”<sup>156</sup> 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.”<sup>157</sup>

Importantly, on December 11, 1946, in one of the first actions of the newly formed United Nations, the General Assembly unanimously

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151. Scharf, *supra* note 120, at 332.

152. In Case 002, the ECCC Pre-Trial Chamber later confirmed that JCE I and JCE II reflected customary international law as of 1976 but questioned whether JCE III was actually applied at Nuremberg, and therefore was not applicable to the ECCC trial. Case No. 002/19-09-2007-ECCC/TC, Decision on the Appeals Against the Co-Investigative Judges’ on Joint Criminal Enterprise (JCE), ¶ 45 (Extraordinary Chambers in the Courts of Cambodia Pre-Trial Chamber May 20, 2010).

153. As defined by Thomas Kuhn, a paradigm shift is a change in the basic assumptions within the ruling theory of science. While Kuhn opined that the term should be confined to the context of pure science, it has since been widely used in numerous nonscientific contexts to describe a profound change in a fundamental model or perception of events. *See* KUHN, *supra* note 93, at 138.

154. Scharf, *supra* note 16, at 65.

155. Edoardo Greppi, *The Evolution of Individual Criminal Responsibility Under International Law*, 81 INT’L REV. RED CROSS 531, 536–37 (1999).

156. Slaughter & Burke-White, *supra* note 125, at 13.

157. *See* Int’l L. Comm’n, Rep. of the International Law Commission on the Work of Its Forty-Eight Session (May 6–July 26, 1996), U.N. Doc. A/51/10, at 19 (1996).

affirmed the principles from the Nuremberg Charter and judgments in Resolution 95(I).<sup>158</sup> This General Assembly Resolution had all the attributes of a resolution entitled to great weight as a declaration of customary international law<sup>159</sup>: It was labeled 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.<sup>160</sup>

Despite the fact that Nuremberg and its Control Council Law No. 10 progeny consisted of only a dozen separate cases tried by a handful of courts over a period of just three years, the ICJ,<sup>161</sup> the International Criminal Tribunal for the Former Yugoslavia,<sup>162</sup> the European Court of Human Rights,<sup>163</sup> and several domestic courts<sup>164</sup> have cited the General

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158. G.A. Res. 95(I), Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal, at 188 (Dec. 11, 1946).

159. In deciding whether to treat a particular General Assembly resolution as evidence of an emergent 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.” Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 255 (July 8). For a discussion of and authorities related to the importance of wording, vote outcome, and explanation of votes in this regard, see SCHARF, *supra* note 16, at 54–56.

160. Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal, *supra* note 158, at 188.

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

162. *See, e.g.*, Prosecutor v. Tadić, Case No. IT-94-1-I, Opinion and Judgment, Trial Chamber, ¶ 623 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997); Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 141 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

163. The European Court of Human Rights recognized the “universal validity” of the Nuremberg principles in *Kolk & Kislyiy v. Estonia*, which 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, *inter alia*, resolution 95 of the United Nations General Assembly (11 December 1946) and later by the International Law Commission.

*Kolk & Kislyiy v. Estonia*, App. No. 23052/04, 2006-I Eur. Ct. H.R. 399, 410 (2006).

164. 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, 709–10



Assembly Resolution affirming the principles of the Nuremberg Charter and judgments as an authoritative declaration of customary international law.

Nuremberg, then, represented a prototypical Grotian Moment. The Tribunal's formation was in response to the most heinous atrocity in the history of humankind—the extermination of six million Jews and several million other “undesirables” by the Nazi regime.<sup>165</sup> From a conventional view of customary international law formation, the amount of State practice was quite limited, consisting only of the negotiation of the Nuremberg Charter by four States, its accession by nineteen others, the judgment of the Tribunal, and a General Assembly Resolution endorsing (though not enumerating) its principles.<sup>166</sup> Moreover, the time period from the end of the war to the General Assembly endorsement of the Nuremberg Principles was a mere year, a drop in the bucket compared to the amount of time it ordinarily takes to crystallize customary international law. Yet, despite the limited State practice and minimal time, the ICJ, European Court of Human Rights, and four international criminal tribunals have confirmed that the Nuremberg Charter and Judgment immediately ripened into customary international law.<sup>167</sup>

The Grotian Moment concept rationalizes this outcome. Nuremberg reflected a novel solution to unprecedented atrocity in the context of history's most devastating war. Beyond the Nuremberg trial, there was a great need for universal implementation of the Nuremberg Principles.<sup>168</sup> Yet, on the eve of the Cold War, it was clear that a widely ratified multilateral convention would not be a practicable near-term solution. In fact, it would take half a century before the international community was able to conclude a widely ratified treaty transforming the Nuremberg model into a permanent International Criminal Court.<sup>169</sup> It is this context of fundamental change and great need for a timely response that explains how Nuremberg could so quickly and universally be accepted as customary international law.

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(Can.); Prosecutor v. 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 the *Touvier* and *Barbie* cases in French courts).

165. SCHARF, *supra* note 16, at 67.

166. Scharf, *supra* note 120, at 334.

167. *See supra* notes 76–90.

168. Scharf, *supra* note 120.

169. *Id.* at 334–45.

*D. Examples of Grotian Moments Since World War II*

As the Max Planck Encyclopedia of Public International Law has observed, “[r]ecent developments show . . . that customary rules may come into existence rapidly.”<sup>170</sup> The venerable publication goes on to explain:

This can be due to the urgency of coping with new developments of technology, such as, for instance, drilling technology as regards the rules on the continental shelf, or space technology as regards the rule on the freedom of extra-atmospheric space . . . Or it may be due to the urgency of coping with widespread sentiments of moral outrage regarding crimes committed in conflicts such as those in Rwanda and Yugoslavia . . . that brought about the rapid formation of a set of customary rules concerning crimes committed in internal conflicts.<sup>171</sup>

These are not the only examples of Grotian Moments since World War II, but each follow the pattern of Nuremberg. Let us examine each of these examples in turn, beginning with the rapid formation of the law of the continental shelf. In 1945, U.S. President Truman issued a proclamation that the resources on the continental shelf off the coast of the United States belonged to the United States.<sup>172</sup> This represented a major departure from the existing customary international law of the sea, under which the seabed outside of twelve nautical miles was considered free for exploitation by any State.<sup>173</sup> The Truman Proclamation was driven by technological developments enabling exploitation of offshore oil and gas supplies and the intense post-war demand for such resources for a rebuilding world.<sup>174</sup> Though the United States recognized that it was acting as a custom pioneer,<sup>175</sup> it was careful to couch its justification in legal terms that would render the action easier to accept and replicate by other States. Despite the far-reaching change it represented, the Truman Proclamation was met with no protest;<sup>176</sup> rather, within five years, thirty coastal States had made

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170. Treves, *supra* note 136, ¶ 24; *accord* INT’L L. ASS’N, *supra* note 129, at 20.

171. Treves, *supra* note 136, ¶ 24.

172. Proclamation No. 2667, 10 Fed. Reg. 12,305 (Sept. 28, 1945).

173. *See* BARRY BUZAN, SEABED POLITICS 8 (1976).

174. *Id.* at 7; *see also* JAMES B. MORELL, THE LAW OF THE SEA: AN HISTORICAL ANALYSIS OF THE 1982 TREATY AND ITS REJECTION BY THE UNITED STATES 4 (1992).

175. ANN L. HOLLICK, U.S. FOREIGN POLICY AND THE LAW OF THE SEA 30 (1981) (citing unpublished manuscripts on file with the National Archives and Records information).

176. BUZAN, *supra* note 173, at 8.

similar claims to the resources of their continental shelves,<sup>177</sup> leading commentators to declare that the continental shelf concept had become virtually instant customary international law.<sup>178</sup> By 1969, the ICJ had confirmed that the Truman Proclamation quickly generated customary international law binding on States that had not ratified the 1958 Geneva Convention on the Continental Shelf.<sup>179</sup>

Next, let us look at the formation of outer space law, which rapidly emerged from the great leaps in rocket technology in the 1960s, led by the Soviet Union and the United States, inaugurating the era of space flight.<sup>180</sup> Rather than treat outer space like the high seas (open to unregulated exploitation), the international community embraced a unique set of rules to govern this new area as codified in the General Assembly Declaration on Outer Space, which was unanimously approved in 1963.<sup>181</sup> Though the amount of State practice was limited to a few dozen space flights launched by two States and the lack of protest by the States over which these rockets passed, States and scholars have concluded that the 1963 Declaration represented an authoritative statement of customary international law that rapidly formed in response to new technologies requiring a new international law paradigm.<sup>182</sup>

Finally, let us turn to the customary international humanitarian law that rapidly emerged from the Yugoslavia Tribunal in the 1990s. The establishment of the Yugoslavia Tribunal was made possible because of a unique constellation of events at the end of the Cold War, which included the break-up of the Soviet Union,<sup>183</sup> Russia's assumption of the Soviet seat in the Security Council,<sup>184</sup> and the return of genocide

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177. MORELL, *supra* note 174, at 2.

178. Hersch Lauterpacht, *Sovereignty over Submarine Areas*, 27 BRIT. Y.B. INT'L L. 376, 376-77 (1950).

179. North Sea Continental Shelf (Germ. v. Den. & Neth.), Judgment, 1969 I.C.J. 3, ¶ 47 (Feb. 20).

180. SCHARF ET AL., *supra* note 125, at 27.

181. G.A. Res. 1280 (XVIII), Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, at 15 (Nov. 27, 1963).

182. MANFRED LACHS, *THE LAW OF OUTER SPACE: AN EXPERIENCE IN CONTEMPORARY LAW-MAKING* 138 (1972).

183. *See generally The Collapse of the Soviet Union*, OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1989-1992/collapse-soviet-union> [https://perma.cc/RVQ7-GXYF].

184. *See generally* Yehuda Z. Blum, *Russia Takes over the Soviet Union's Seat at the United Nations*, 3 EUR. J. INT'L L. 354 (1992).

to Europe for the first time since Nazi Germany.<sup>185</sup> In its inaugural case, the Appeals Chamber of the Yugoslavia Tribunal rendered a revolutionary decision that for the first time held that individuals could be held criminally liable for violations of Common Article 3 and Additional Protocol II of the Geneva Conventions for war crimes committed in internal conflict.<sup>186</sup> This decision closed a gap in the coverage of international humanitarian law and was soon thereafter affirmed by the Rwanda Tribunal<sup>187</sup> and the Special Court for Sierra Leone.<sup>188</sup> It was codified in the 1998 Statute of the International Criminal Court, which has been ratified by 123 States.<sup>189</sup>

While there are no legal consequences to calling something a Grotian Moment, these case studies suggest that the Grotian Moment concept has several practical applications. It can explain the rapid formation of customary rules in times of flux, thereby imbuing those rules with greater repute. It can counsel governments when to seek the path of a U.N. General Assembly resolution as a means of facilitating the formation of customary international law, and how to craft such a resolution to ensure that it is viewed as a capstone in the formation of such customary rules. It can, in apt circumstances, strengthen the case for litigants arguing the existence of a new customary international rule. It can also furnish international courts and international organizations with the confidence to recognize new rules of customary international law in appropriate cases, despite a relative paucity and short duration of State practice. That is what happened in the case of use of force against ISIS.

*E. A Modern Grotian Moment: Use of Force Against Non-State Actors*

Had the Max Plank Encyclopedia been written today, it would likely have added the international community's about-face on the legality of the use of force against non-State actors as another example of a Grotian Moment. In 2014, a militant group known as ISIS rapidly

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185. See generally *The Bosnian Genocide*, MONTREAL HOLOCAUST MUSEUM, <https://museeholocauste.ca/en/resources-training/the-bosnian-genocide/> [<https://perma.cc/B697-EBCP>].

186. Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 89 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

187. U.N. Secretary-General, *Rep. of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955*, ¶ 12, U.N. Doc. S/1995/134 (Feb. 13, 1995).

188. Statute of the Special Court for Sierra Leone art. 3, Jan. 16, 2002, 2178 U.N.T.S. 145.

189. Rome Statute of the International Criminal Court art. 8, July 17, 1998, 2187 U.N.T.S. 90 (distinguishing between “international armed conflict” in paragraph 2(b) and “armed conflict not of an international character” in paragraphs 2(c)–(f)).

took over more than thirty percent of the territory of Syria and Iraq.<sup>190</sup> In the process, it captured oil fields and refineries worth billions of U.S. dollars,<sup>191</sup> bank assets and antiquities,<sup>192</sup> and tanks and armaments,<sup>193</sup> and became one of the greatest threats to peace and security in the Middle East.<sup>194</sup> In an effort to “degrade and defeat” ISIS, the United States, assisted by a handful of other Western and Arab countries, launched thousands of bombing sorties and cruise missile attacks against ISIS targets in Iraq and Syria starting in August 2014.<sup>195</sup> While the Iraqi government had consented to foreign military action against ISIS within Iraq, the Syrian government did not consent to foreign military action within its territory.<sup>196</sup> Rather, Syria protested that the air strikes in Syrian territory were an unjustifiable violation of international law.<sup>197</sup>

The United States claimed that the airstrikes in Syria were lawful acts of collective self-defense on behalf of the government of Iraq.<sup>198</sup> Use of force in self-defense has traditionally not been viewed as lawful against non-State actors in a third State unless they are under the effective control of that State,<sup>199</sup> but the United States argued that since

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190. Mattisan Rowan, *ISIS After the Caliphate*, WILSON CTR. (Nov. 28, 2017), <https://www.wilsoncenter.org/article/isis-after-the-caliphate-0> [<https://perma.cc/LC9K-F33W>].
191. *Syria Iraq: The Islamic State Militant Group*, BBC (Aug. 2, 2014), <https://www.bbc.com/news/world-middle-east-24179084> [<https://perma.cc/SS2C-DUYD>].
192. *Id.*
193. *Id.*
194. Brian Katulis, Hardin Lang & Vikram Singh, *Defeating ISIS: An Integrated Strategy to Advance Middle East Stability*, CTR. FOR AM. PROGRESS (Sep. 10, 2014), <https://www.americanprogress.org/issues/security/reports/2014/09/10/96739/defeating-isis-an-integrated-strategy-to-advance-middle-east-stability> [<https://perma.cc/9LPS-JTGC>].
195. CLAIRE MILLS, *ISIS/DAESH: THE MILITARY RESPONSE IN IRAQ AND SYRIA* 4–7 (2017).
196. HOUSE OF COMMONS LIBR., *ISIS AND THE SECTARIAN CONFLICT IN THE MIDDLE EAST* 54 (2015). The United States did warn the Assad regime about the imminent launch of airstrikes in September 2014 but did not request the regime’s permission.
197. *Id.* at 55.
198. Letter from Samantha J. Power, Rep. of United States to the United Nations to Ban Ki-moon, Secretary-General of the United Nations (Sept. 23, 2014).
199. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Merits, 1986 I.C.J. 14, ¶ 195 (June 27); *Oil Platforms* (Iran v. U.S.), Judgment, 2003 I.C.J. 161, ¶¶ 71–72 (Nov. 6); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory

the infamous 9/11 attacks by al-Qaeda,<sup>200</sup> such force can be justified where a government is unable or unwilling to suppress the threat posed by the non-State actors operating within its borders.<sup>201</sup>

At first, the United States was isolated in its position. Its allies pointed out that the International Court of Justice had repeatedly held that unless the acts of non-State actors are attributable to the territorial State, use of force against non-State actors in that State is unlawful.<sup>202</sup> Reaffirming its previous precedent, in its 2005 *Armed Activities on the Territory of the Congo* case, the ICJ required the responsibility of the Congo for the attacks of Ugandan rebels operating from the Congolese territory in order to find Uganda's right to self-defense lawful.<sup>203</sup> The post-9/11 case signaled the ICJ's "determination to counter a more permissive reading of Article 51" brought on by the international community's reaction to 9/11.<sup>204</sup>

Scholars<sup>205</sup> and certain members of the International Court of Justice were highly critical of the ICJ's continued insistence after 9/11 that self-defense can only be claimed in cases where the attack by non-State actors can be attributed to the territorial State.<sup>206</sup> Writing separately in the *Congo* case, Judge Kooijmans noted that in the era of al Qaeda, it is "unreasonable to deny the attacked State the right to self-defence merely because there is no attacker State."<sup>207</sup> Judge Simma similarly concluded in his separate opinion in the *Congo* case that "Security Council resolutions 1368 (2001) and 1373 (2001) cannot but

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Opinion, 2004 I.C.J. 136, ¶ 139 (July 9); *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, ¶¶ 146–47 (Dec. 19).

200. Jonathan I. Charney, *The Use of Force Against Terrorism and International Law*, 95 AM. J. INT'L L. 835, 835 (2001).
201. Ashley S. Deeks, "Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense, 52 VA. J. INT'L L. 483, 497 (2012).
202. Thomas M. Franck, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT'L L. 839, 839–40 (2001).
203. Dem. Rep. Congo v. Uganda, 2005 I.C.J. 168, ¶¶ 145–47 (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 vastly 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).
204. Theresa Reinold, *State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11*, 105 AM. J. INT'L L. 244, 261 (2011).
205. *See id.*
206. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 136, ¶ 33 (separate opinion of Higgins, J.).
207. Dem. Rep. Congo v. Uganda, 2005 I.C.J. 168, ¶ 30 (separate opinion of Kooijmans, J.).

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.<sup>208</sup>

But it was not until ISIS bombed a Russian jetliner over the Sinai desert on October 31, 2015<sup>209</sup> and attacked a Paris stadium and concert hall on November 13, 2015,<sup>210</sup> that the situation was ripe for a Grotian Moment. A week after these attacks, the U.N. Security Council unanimously adopted Resolution 2249, which determined that ISIS is “a global and unprecedented threat to international peace and security,” and called for “all necessary measures” to “eradicate the safe haven [ISIS] established” in Syria.<sup>211</sup>

The October 31 and November 13 ISIS attacks were a game changer, killing and injuring hundreds of people, including nationals of Russia, France, and twenty-two other countries.<sup>212</sup> The attacks showed that ISIS—the richest and most technologically advanced terrorist organization in the world—was no longer confining its objectives to territorial acquisition in Syria and Iraq, but had adopted the tactics of other terrorist groups, focusing on attacking vulnerable targets outside the Levant.<sup>213</sup> Moreover, Russia was now just as much a target as the West.

It is important to recognize that Resolution 2249 did not provide a new stand-alone legal basis or authorization for use of force against ISIS in Syria.<sup>214</sup> Unlike past Security Council resolutions that have authorized force, Resolution 2249 does not mention Article 42, or even Chapter VII, of the U.N. Charter, which are the Article and Chapter

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208. *Dem. Rep. Congo v. Uganda*, 2005 I.C.J. 168, ¶ 11 (separate opinion of Simma, J.).

209. Gwyn Topham, Matthew Weaver & Alec Luhn, *Egypt Plane Crash: Russia Says Jet Was Bombed in Terror Attack*, THE GUARDIAN (Nov. 17, 2015), <https://www.theguardian.com/world/2015/nov/17/egypt-plane-crash-bomb-jet-russia-security-service> [<https://perma.cc/4QUM-GLVX>].

210. *Paris Attacks: What Happened on the Night*, BBC (Dec. 9, 2015), <https://www.bbc.com/news/world-europe-34818994> [<https://perma.cc/SE7Q-77VD>].

211. S.C. Res. 2249, pmbl. ¶ 5 (Nov. 20, 2015).

212. Topham, Weaver & Luhn, *supra* note 209 (reporting 224 passengers killed on Russian jet); Mary B. Marcus, *Injuries from Paris Attacks Will Take Long to Heal*, CBS NEWS (Nov. 19, 2015), <https://www.cbsnews.com/news/injuries-from-paris-attacks-will-take-long-to-heal/> [<https://perma.cc/JV4X-GAJG>] (reporting 129 killed and 368 injured in Paris attacks).

213. *Beyond Iraq and Syria, ISIS’ Global Reach: Hearing Before S. Comm. on Foreign Relations*, 105th Cong. 1 (2017) (statement of Sen. Bob Corker, Chairman, S. Comm. on Foreign Relations).

214. ARABELLA LANG, LEGAL BASIS FOR UK MILITARY ACTION IN SYRIA 8 (2015), <https://www.voltairenet.org/IMG/pdf/CBP-7404.pdf> [<https://perma.cc/2ML7-8WCD>].

under which the Security Council can permit States to use force as an exception to Article 2(4) of the U.N. Charter.<sup>215</sup> Nor does the Resolution use the word “authorizes” or even “decides” in relation to use of force.<sup>216</sup> These textual differences led Professor Marc Weller to conclude that “[t]his language suggests that the resolution does not grant any fresh authority for states seeking to take action.”<sup>217</sup>

But the resolution does stand as a confirmation by the Security Council that use of force against ISIS in Syria is permissible under the inherent right of self-defense. Importantly, the French Security Council Representative, who had sponsored Resolution 2249, stated in his explanation of vote on the resolution that “collective action could now be based on Article 51 [self-defense] of the United Nations Charter.”<sup>218</sup> With a unanimous confirmation, Resolution 2249 has played an important role in crystallizing the new rule of customary international law regarding use of force in self-defense against non-State actors—a phenomenon colorfully described by Professor David Koplow as “helping to midwife the development of new norms of [customary international law].”<sup>219</sup>

Resolution 2249 immediately changed government attitudes about the legality of use of force against autonomous non-State actors. Within two weeks of its adoption, the UK parliament voted to approve, by a vote of 397 to 223, participating in airstrikes against ISIS in Syria—despite the earlier views of many of those same MPs that such action could not be legally justified.<sup>220</sup> Immediately thereafter, the UK joined the United States and several other States in bombing ISIS targets throughout Syria.<sup>221</sup>

#### IV. CONCLUSION: RESPONDING TO THE CRITIQUES

Ordinarily, customary international law takes many decades to crystallize. In this context, sixteen years, the time period from the 9/11 attacks to the Security Council confirmation that force could be used

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215. *Id.* at 5–7.

216. *See* S.C. Res. 2249, *supra* note 211.

217. LANG, *supra* note 214, at 7.

218. Press Release, Security Council, Security Council ‘Unequivocally’ Condemns ISIL Terrorist Attacks, Unanimously Adopting Text that Determines Extremist Group Poses ‘Unprecedented’ Threat, U.N. Press Release SC/12132 (Nov. 20, 2015).

219. Koplow, *supra* note 131, at 162.

220. Steven Erlanger & Stephen Castle, *British Jets Hit ISIS in Syria After Parliament Authorizes Airstrikes*, N.Y. TIMES (Dec. 2, 2015), [https://www.nytimes.com/2015/12/03/world/europe/britain-parliament-syria-airstrikes-vote.html?\\_r=0](https://www.nytimes.com/2015/12/03/world/europe/britain-parliament-syria-airstrikes-vote.html?_r=0) [<https://perma.cc/NCK2-ABGW>].

221. *Id.*



in self-defense against ISIS, is an extremely short duration for the development of a new rule of customary international law. Historically, there has been a series of other instances of so-called Grotian Moments, where a context of fundamental change served as an accelerating agent, enabling customary international law to form much more rapidly, and with less State practice, than is normally the case. What do these historic situations have in common? Each represented a radical legal development. In each, the development was ushered in by the urgency of dealing with fundamental change. In some cases, the change was the advent of new technology, such as with offshore drilling and outer space flight. In others, it was in the form of pervasive moral outrage regarding shocking revelations of crimes against humanity, as preceded the Nuremberg Tribunal and the Yugoslavia Tribunal. And in each case, the new rule was confirmed by an international judicial decision, or a widely supported resolution of an international organization, or both.

The changing law governing use of force against non-State actors follows this pattern. ISIS and al Qaeda were widely viewed as representing a new kind of threat, in which a non-State actor possesses many of the attributes of a State: massive wealth, large numbers of personnel, sophisticated training and organization, and access to destructive weaponry.<sup>222</sup> To respond to the fundamental change presented by these uber-terrorist groups, the United States argued that it is now lawful to attack such non-State actors when they are present in States that are unable or unwilling to curb them.<sup>223</sup> While States and the International Court of Justice were initially reluctant to embrace this new view of self-defense, in the aftermath of the attacks against the Russian airliner and Parisian concert hall and stadium, Security Council Resolution 2249 confirmed that use of force in self-defense is permissible against non-State actors where the territorial state is unable to suppress the threat that they pose.<sup>224</sup> In the words of the Institute of International Law, “where a rule of customary law is (merely) emerging or there is still some doubt as to its status” a unanimous non-binding resolution of the General Assembly or Security Council “can consolidate the custom and remove doubts which might have existed.”<sup>225</sup> Resolution 2249 capped a Grotian Moment and reaffirmed the importance of this concept in international law.

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222. See FREDERICK W. KAGAN ET AL., *AL QAEDA AND ISIS: EXISTENTIAL THREATS TO THE U.S. AND EUROPE* (2016).

223. Elena Chachko & Ashley Deeks, *Which States Support the ‘Unwilling and Unable’ Test?*, *LAWFARE* (Oct. 10, 2016, 1:55 PM), <https://www.lawfareblog.com/which-states-support-unwilling-and-unable-test> [<https://perma.cc/FNY2-Y29D>].

224. See S.C. Res. 2249, *supra* note 211.

225. INT’L L. ASS’N, *supra* note 129, at 775 n.177.

In closing, the article addresses five critiques that the author has encountered at conferences and workshops where he has presented the Grotian Moment concept.

The first critique asks whether the case studies discussed are perhaps more evolutionary than the author characterizes them. For example, the argument that States can use force against independent non-State actors was used by the United States for over a decade to justify its Predator drone strikes against al Qaeda throughout the Middle East before its attacks on ISIS in Syria.<sup>226</sup> As such, does the Grotian Moment concept really just represent the tipping point that every rule of customary international law encounter as they ripen? To some extent that is true, but what makes a Grotian Moment extraordinary is the context of fundamental change behind the tipping point, laying the foundation for more than an incremental change.

The second critique suggests that greater historic perspective is necessary to discern whether a development really constitutes a Grotian Moment. Admittedly, during times of international flux, it may be easy to perceive a turning point that is not really there.<sup>227</sup> We will certainly have a clearer picture of the state of law regarding use of force against non-State actors with the benefit of a decade or two of confirming State practice. For example, does it apply to all terrorist groups, or just ISIS? Does it apply to pirates, narco-traffickers and other violent non-State actors or just terrorist groups? Does it apply in all States where such non-State actors are present, or just partially-failed States like Syria? But international scholars and courts do not always have the luxury of taking a position only once the law is crystal clear, as the International Court of Justice has recognized in its 1996 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*<sup>228</sup> and in its 2019 *Advisory Opinion on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*.<sup>229</sup> Past examples of Grotian Moments may serve as a useful benchmark for assessing the rapid formation of new customary rules in other areas of international law.

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226. Kate Martin, *Are U.S. Drone Strikes Legal?*, CTR. FOR AM. PROGRESS (Apr. 1, 2016, 6:14 PM), <https://www.americanprogress.org/issues/security/reports/2016/04/01/134494/are-u-s-drone-strikes-legal/> [https://perma.cc/JM2E-VC5L].

227. Ibrahim J. Gassama, *International Law at a Grotian Moment: The Invasion of Iraq in Context*, 18 EMORY INT'L L. REV. 17, 20, 30 (2004).

228. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 ¶ 18 (July 8) (“[I]n stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend.”).

229. *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 2019 I.C.J. 95, ¶ 160 (Feb. 25).

The third critique asks how the Grotian Moment concept can be differentiated from the much-criticized concept of so-called “instant custom”?<sup>230</sup> Grotian Moments, such as the response to ISIS, represent instances of *rapid*, as opposed to *instantaneous*, formation of customary international law. In addition to non-binding General Assembly or Security Council resolutions, some underpinning of State practice is necessary, whether it precedes the resolution consistent with Professor Myres McDougal’s “claim and response” approach,<sup>231</sup> or follows the resolution as envisioned in Professor Anthony D’Amato’s “articulation and act” approach.<sup>232</sup>

The fourth critique asks whether the Grotian Moment concept unfairly favors the great powers at the expense of less developed States? Grotius, himself, has been accused of being a colonialist in his mindset.<sup>233</sup> And it is true that in the examples of Grotian Moments discussed in this article, the largest, most economically and militarily powerful, and technologically advanced States were the dominant players in developing the new customary rules. But the phenomenon is not unique to accelerated formation of customary international law. Professor Charles De Visscher has drawn an insightful analogy between the formation of ordinary custom and the making of a path through the soil of the forest.<sup>234</sup> While many animals pass by with barely a trace, others, because of their relative size and weight or the frequency of their passage, make deeper footprints.<sup>235</sup> Understood in this light, whether accelerated or at a glacial pace, the process of customary international law formation has never been particularly democratic or fair.

And the final critique suggests that the Grotian Moment concept might be destabilizing. Despite the distinction between instant custom and the phenomenon of Grotian Moments, some States and commentators are understandably apprehensive about a concept that rationalizes rapid formation of customary international law. For them, international law is best created exclusively through treaties, as to

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230. Bin Cheng, *United Nations Resolutions on Outer Space: ‘Instant’ International Customary Law?*, 5 IND. J. INT’L L. 23 (1965), reprinted in STUDIES IN INTERNATIONAL SPACE LAW 133, 136, 147 (1997); Benjamin Lengille, *It’s “Instant Custom”: How the Bush Doctrine Became Law After the Terrorist Attacks of September 11, 2001*, 26 B.C. INT’L & COMPAR. L. REV. 145, 145 (2003).

231. McDougal & Schlei, *supra* note 119, at 648.

232. ANTHONY A. D’AMATO, CONCEPT OF CUSTOM IN INTERNATIONAL LAW 88 (1971).

233. Martine Julia van Ittersum, *The Long Goodbye: Hugo Grotius’ Justification of Dutch Expansion Overseas, 1615–1645*, 36 HIST. EUR. IDEAS 386, 386 (2010).

234. CHARLES DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 155 (Princeton Univ. Press, 1968).

235. *See id.*

which States can opt out by non-action, simply by declining to ratify the instrument. So long as customary norms take many decades to ripen into law, customary international law does not seem threatening. It is another matter if customary law can form within just a few years and is deemed binding on States that have not affirmatively manifested their persistent objection. In such case, they may abhor a concept of law formation that appears more revolutionary than evolutionary.

But such apprehension is unwarranted. The Grotian Moment concept does not represent something new and dangerous, but rather provides doctrinal grounding for, and historic corroboration of, a phenomenon that has existed since at least World War II. The case studies involving the international law changes described in this article demonstrate continuing international recognition that customary international law must have the capacity in unique circumstances to respond to rapidly evolving developments by producing rules in a timely and adequate manner. “Grotian Moment” is an apt label for the phenomenon of rapid formation of customary international law in such times of fundamental change.