Case Western Reserve Journal of International Law

Volume 56
Issue 1 *Issues 1 & 2*

Article 4

2024

Will Climate Change Be the Next Grotian Moment?

Michael P. Scharf

Will Climate Change Be the Next Grotian Moment?

Michael P. Scharf †

Abstract

Under the classic paradigm of international environmental law articulated in the 1941 Trail Smelter arbitration decision, States are responsible for downstream or downwind harm that crosses from their territory into another State. But climate change threatens not just neighboring States but the entire global commons. This Article explores whether the conditions are ripe for a "Grotian Moment"—a paradigm shifting development leading to accelerated formation of customary international law related to the human right to a healthy environment.

I. Introduction

Rising sea levels caused by climate change threaten to inundate low-lying island States, raising serious concerns about the status of climate migrants, the sovereignty and membership in international organizations of submerged States, and the liability of States and corporations for the greenhouse gasses that are significantly altering the earth's climate.[1] But international politics have prevented the negotiation of an effective climate treaty that addresses these

† Michael Scharf is the Dean of the Law School and the Joseph C. Hostetler—BakerHostetler Professor of Law at Case Western Reserve University. He served previously as Attorney-Adviser for U.N. Affairs at the U.S. Department of State and is the Co-founder of the Public International Law & Policy Group, a Nobel Peace Prize-nominated NGO that provides legal assistance to peace negotiations and international criminal prosecutions. In 2020, he was elected President of the American Branch of the International Law Association.

1. *See generally* William J. Ripple et. al., *The 2023 State of the Climate Report: Entering Uncharted Territory*, 73 BioScience 841 (2023).

problems.[2] Are the conditions ripe for a "Grotian Moment"—a paradigm shifting[3] development leading to accelerated formation of customary international law?[4]

Professor Myers McDougal famously described the customary international law formation process as one of continuous claim and response.[5] Out of this process of claim and response, and third-party State support, acquiescence, or repudiation, rules emerge or are superseded. 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."[6] Like the slow creation of a pearl, this process of customary international law formation usually takes many decades.[7]

2. *See* Meinhard Dolle, The Paris Climate Agreement—Assessment of Strengths and Weaknesses, in THE PARIS AGREEMENT ON CLIMATE CHANGE: ANALYSIS AND COMMENTARY 375, 375 (Daniel Klein et. al., 2017).

3. As defined by Thomas Kuhn in his influential book, *The Structure of Scientific Revolutions*, 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* THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 150–51 (2nd ed. 1970).

4. *See generally* MICHAEL P. SCHARF, CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE: RECOGNIZING GROTIAN MOMENTS 1 (2013) (developing the Grotian Moment concept); *see* MICHAEL P. SCHARF ET AL., THE SYRIAN CONFLICT'S IMPACT ON INTERNATIONAL LAW 179 (2020) (applying the Grotian Moment to use of force against non-state actors and humanitarian intervention against chemical weapons facilities); *see also* Michael P. Scharf, *Hugo Grotius and the Concept of Grotian Moments in International Law*, 54 CASE W. RES. J. INT'L L. 17 (2022) [hereinafter *Concept of Grotian Moments*]; *see also* Michael P. Scharf, *Grotian Moments: The Concept*, 42 GROTIANA 193 (2021); *see also* Michael P. Scharf, *Striking a Grotian Moment: How the 2018 Airstrikes on Syria Have Changed International Law Related to Humanitarian Intervention*, 19.2 CHI. J. INT'L L. 586 (2019); Michael P. Scharf, *How the War Against ISIS Changed International Law*, 48 CASE W. RES. J. INT'L L. 1, 5 (2016). The text of Sections I–IV of this article draws upon and reproduces parts of these earlier works as the foundation for the discussion in Section V of whether international environmental law constitutes the next Grotian Moment.

5. *See* Myles S. McDougal & Norbert A. Schlei, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security*, 64 YALE L.J. 648, 655–56 (1955).

6. Maurice H. Mendelson, *The Formation of Customary International Law*, *in* 272 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 165, 190 (1998).

7. *See, e.g.,* Vincy Fon & Franscesco Parisi, *The Formation of Customary Law* 5 (Geo. Mason Univ. Sch. L., Working Paper No. 02–24, 2000); G.I. Tunkin, *Remarks on the Judicial Nature of Customary Norms in*

Under the traditional view, the formation of customary rules is so gradual that it is often described as "crystallization."[8] But sometimes world events are such that customary international law develops quite rapidly.[9] Those instances have come to be known as "Grotian Moments."[10]

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 divine whether an emergent rule has attained customary international law status.[11] 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. Often these Grotian Moments are accompanied by a U.N. resolution or international court decision that affirms or confirms the existence of the new legal rule.[12]

To understand why some scholars use the term "Grotian Moments" to describe this phenomenon, one must know something about Hugo Grotius (1583–1645).[13] The brilliant Dutch scholar and diplomat has been dubbed the "father" of modern international law as well as the law of nations, and has been lauded for having "recorded the creation

---

International Law, 49 Cal. L. Rev. 419, 420 (1961); Manley O. Hudson, *Article 24 of the Statute of the Int'l Law Comm'n*, [1950] 2 Y.B. Int'l L. Comm'n 26, U.N. Doc. A/CN.4/16.

8. Scharf, Customary International Law in Times of Fundamental Change, *supra* note 4, at 211.

9. *Draft Conclusions on Identification of Customary International Law, with Commentaries*, [2018] 2(2) Y.B. Int'l L. Comm'n 3, U.N. Doc. A/73/10 ("Provided that the practice is general, no particular duration is required."); North Sea Continental Shelf (Ger. v. Den., Ger. v. Neth.), Merits, 1969 I.C.J. 3, ¶¶ 71–74 (Feb. 20).

10. *See, generally* Scharf, Customary International Law in Times of Fundamental Change, *supra* note 4, at 1; *see also* Scharf et al. The Syrian Conflict's Impact on International Law, *supra* note 4. 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, 1206–07 (2007) (describing Nuremberg as an "international constitutional moment"); *see also* Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 Harv. Int'l L.J. 1, 2–3 (2002) (describing 9/11 as an "international constitutional moment.").

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

12. *Concept of Grotian Moments, supra* note 4, at 48.

13. *See generally* Charles S. Edwards, Hugo Grotius, The Miracle of Holland: A Study in Political and Legal Thought (1981).

of order out of chaos in the great sphere of international relations."[14] In the mid-1600s, at the time that the nation-state was formally recognized as having emerged into the fundamental political unit of Europe, Grotius "offered a new concept of international law designed to reflect that new reality."[15]

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

14. *See* Hugo Grotius, The Rights of War and Peace 10 (A.C. Campbell trans., 1901); *see also* Edwards, *supra* note 13.

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

16. Benedict Kingsbury, *A Grotian Tradition of Theory and Practice? Grotius, Law, and Moral Skepticism in the Thought of Hedley Bull*, 17 Quinnipac L. Rev. 3, 9–10 (1997).

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

18. The Peace of Westphalia was composed of two separate agreements: (1) the Treaty of Osnabruck concluded between the Protestant Queen of Sweden and her allies on the one side, and the Holy Roman Habsburg Emperor and the German Princes on the other; and (2) the Treaty of Munster concluded between the Catholic King of France and his allies on the one side, and the Holly Roman Habsburg Emperor and the German Princes on the other. The Conventional view of the Peace of Westphalia is that by recognizing the German Princes as sovereign, these treaties signaled the beginning of a new era. But in fact, the power to conclude alliances formally recognized at Westphalia was not unqualified and was in fact a power that the German Princes had already possessed for almost half a century. Furthermore, although the treaties eroded some of the authority of the Habsburg Emperor, the Empire remained a key actor according to the terms of the treaties. For example, the Imperial Diet retained the powers of legislation, warfare, and taxation, and it was through Imperial bodies, such as the Diet and the Courts, that religious safeguards mandated by the Treaty were imposed on the German Princes.

The term "Grotian Moment," on the other hand, is a relatively recent creation, coined by Princeton Professor Richard Falk in 1985.[19] Since then, scholars and even the U.N. Secretary-General have employed the term in a variety of ways,[20] but ever 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.[21] Usually this happens during "a period in world history that seems analogous at least to the end of European feudalism . . . when new norms, procedures, and institutions had to be devised to cope with the then decline of the Church and the emergence of the secular state."[22]

Grotian Moments that have been the catalyst for rapid formation of customary international law include the creation and judgment of the Nuremberg Tribunal after World War II,[23] the technological access to the continental shelf and outer space in the 1950s and 60s,[24] the leap in international humanitarian law brought about by the creation of the Yugoslavia Tribunal and its first Appeals Chamber decision in 1995,[25] and the international community's response to the ISIS terrorist

---

Michael P. Scharf, *Earned Sovereignty: Juridical Underpinnings,* 31 Denv. J. Int'l L. 373, 375–76 n.20 (2003).

19. The Grotian Moment in International Law: A Contemporary Perspective 7 (Richard Falk, et al. eds., 1985), as reprinted in Burns H. Weston et al., International Law and World Order 1087–92 (Thomson/West 2d ed. 1990); *see* International Law and World Order 1265–86 (Burns H. Weston et. al. eds., Thomson/West 4th ed. 2006); *see also* Richard A. Falk, *The Interplay of Westphalia and Charter Conceptions of International Legal Order*, *in* 1 The Future of the International Legal Order 39, 42 (Richard Falk & Cyrile Black eds., 1969) (displaying the early seeds of the Grotian Moment concept of a changing paradigm in Falk's work).

20. Boutros Boutros-Ghali, *A Grotian Moment*, 18 Fordham Int'l L.J. 1609, 1613 (1995) (referring to the establishment of the International Tribunal for the former Yugoslavia as part of the process of building a new international system for the 21st century).

21. Saul Mendlovitz & Marev Datan, *Judge Weeramantry's Grotian Quest*, 7 Transnat'l L. & Contemp. Probs. 401, 415 (defining the term "Grotian moment"); *see* Milena Sterio, *Humanitarian Intervention Post–Syria: A Grotian Moment*, 20 ILSA J. Int'l & Compar. L. 343, 345 (2014).

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

23. Tom Sparks & Mark Somos, *Grotian Moments: An Introduction*, 42 Grotiana 179, 180 (2021).

24. *Id.*

25. Prosecutor v. Tadic, 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).

organization attacks in 2014–2015.[26] After reviewing what these historic cases have in common, this Article explores whether the rapid change in the world's climate occurring in the 21st century is likely to produce history's next great Grotian Moment.

II. Nuremberg as a Prototypical Grotian Moment

While the post–World War II Nuremberg war crimes trials were not without criticism, there can be no question that Nuremberg represented a paradigm-shifting development in international law. The International Law Commission (ILC) has recognized that the Nuremberg Charter and Judgment gave birth to the entire international paradigm of individual criminal responsibility.[27] 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.[28] 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."[29] 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."[30]

Importantly, on December 11, 1946, in one of the first actions of the newly formed U.N., the General Assembly unanimously affirmed the principles from the Nuremberg Charter and judgments in Resolution 95(I).[31] This General Assembly Resolution had all the

26. Scharf, *How the War Against ISIS Changed International Law*, *supra* note 4, at 16.

27. Michael P. Scharf, *Seizing the Grotian Moment: Accelerated Formation of Customary International Law During Times of Fundamental Change* 43 Cornell Int'l L.J. 439, 454 (2010).

28. *Id.*

29. Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 Harv. Int'l L.J. 1, 13 (2002).

30. *Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May – 26 July 1996, Official Records of the General Assembly, Fifty-first Session, Supplement No.10* [1996], 2 Y.B. Int'l L. Comm'n 19, U.N. Doc. A/51/10.

31. G.A. Res. 95(I), Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal (Dec. 11, 1946) [hereinafter G.A. Nuremberg Principles]. The Resolution states in whole:

> The General Assembly,
>
> Recognizes the obligation laid upon it by Article 13, paragraph 1, sub-paragraph a, of the Charter, to initiate studies and make

attributes of a resolution entitled to great weight as a declaration of customary international law:[32] 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 view that it was merely a political statement.[33]

Despite the fact that Nuremberg and its Control Council Law #10 progeny consisted of only a dozen separate cases tried by a handful of courts over a period of just three years, the International Court of Justice (ICJ),[34] the International Criminal Tribunal for the Former

> recommendations for the purpose of encouraging the progressive development of international law and its codification;
>
> Takes note of the Agreement for the establishment of an International Military Tribunal for the prosecution and punishment of the major war criminals of the European Axis signed in London on 8 August 1945, and of the Charter annexed thereto, and of the fact that similar principles have been adopted in the Charter of the International Military Tribunal for the trial of the major war criminals in the Far East, proclaimed at Tokyo on 19 January 1946;
>
> Therefore,
>
> Affirms the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal; Directs the Committee on the codification of international law established by the resolution of the General Assembly of 11 December 1946, to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offenses against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal."

32. 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, ¶ 70 (Jul. 8) [hereinafter Legality of Nuclear Weapons]; *see* Scharf, Customary International Law in Times of Fundamental Change, *supra* note 4, at 56–57 (discussing authorities related to the importance of wording, vote outcome, and explanation of votes in this regard).

33. G.A. Nuremberg Principles, *supra* note 31; *Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal*, Audiovisual Libr. of Int'l L., https://legal.un.org/avl/ha/ga_95-I/ga_95-I.html [perma.cc/D6Q7-ZQQ9].

34. Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 89 (Jul. 9) [hereinafter Legal Consequences]; Henry T. King Jr. *The Legacy of Nuremburg*, 34 Case W. Res. J. Int'l L. 335, 342 (2002).

Yugoslavia,[35] the European Court of Human Rights,[36] and several domestic courts[37] have cited the General 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.[38] 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.[39] Moreover, the time period from the end of the war to the General Assembly's endorsement of the Nuremberg Principles was a mere year, a drop in the bucket compared to the amount of time it ordinarily takes

35. Prosecutor v. Tadic, 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. Tadic, 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).

36. The European Court of Human Rights recognized the "universal validity" of the Nuremberg principles in *Kolk and 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 and Kislyiy v. Estonia, App. No. 23052/04, 24018/04, at 8–9, https://hudoc.echr.coe.int/eng?i=002-3508 [https://perma.cc/TSQ2-ZKKK].

37. 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 (Can.); *see also* Prosecutor v. Ivica Vrdoljak, Case No. X-KR-08/488 July 10, 2008 *(*Bosnia & Herzegovina); *see generally* 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, 316–51 (1994) (summarizing the *Touvier* and *Barbie* cases in French courts).

38. *See* U.S. Holocaust Mem'l Museum, *International Military Tribunal at Nuremberg*, U.S. Holocaust Mem'l Museum: Holocaust Encyc. (Nov.17, 2020), https://encyclopedia.ushmm.org/content/en/article/international-military-tribunal-at-nuremberg [https://perma.cc/LPL4-PKCM].

39. *See* U.N. Secretary-General, The Charter and Judgment of the Nürnberg Tribunal—History and Analysis, U.N. Doc. A/CN.4/5, at 1–15 (1949).

to crystallize customary international law.[40] 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.[41]

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. 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.[42] 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.[43] 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.

III. Examples of Grotian Moments Since World War II

As the *Max Planck Encyclopedia of Public International Law* has observed, "recent developments show that customary rules may come into existence rapidly."[44] 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

40. The end of WWII is commonly considered to be V-J Day (Victory over Japan Day) when Japan surrendered on August 14, 1945. The United Nations General Assembly affirmed the Nuremberg Principles only 484 days later on December 11, 1946. *See Victory Over Japan Day: End of WWII*, U.S. Dep't of Defense, https://www.defense.gov/Multimedia/Experience/VJ-Day/ [https://perma.cc/CZF2-CJQ5]; s*ee* G.A. Nuremberg Principles, *supra* note 31.

41. *See* G.A. Nuremberg Principles, *supra* note 31; *see* Legality of Nuclear Weapons, *supra* note 32, ¶ 80; *see* Legal Consequences, *supra* note 34, ¶ 89.

42. *Establishment of an International Criminal Court—Overview*, U.N., https://legal.un.org/icc/general/overview.htm [https://perma.cc/GY4T-HNF3].

43. *Id.*; Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

44. Tullio Treves, Customary International Law, Max Plank Encyclopedia of Public International Law ¶ 24 (2006); Int'l L. Ass'n, Statements of Principles Applicable to the Formation of General Customary International Law 20 (2000).

> 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.[45]

These are not the only examples of Grotian Moments since World War II, but each follow the pattern of Nuremberg. Each of these examples should be examined in turn, beginning with the rapid formation of the law of the continental shelf. In 1945, U.S. President Harry Truman issued a proclamation that the resources on the continental shelf off the coast of the United States belonged to the United States.[46] 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.[47] The 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.[48] Though the United States recognized that it was acting as a custom pioneer,[49] 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;[50] rather, within five years, half of the world's coastal States had made similar claims to the resources of their continental shelves,[51] leading commentators to declare that the continental shelf concept had become virtually instant customary international law.[52] By 1969, the ICJ had confirmed that the Truman Proclamation quickly generated customary international law binding on States that had not ratified the 1958 Law of the Sea Convention.[53]

The second example is the formation of outer space law, which rapidly emerged from the great leaps in rocket technology in the 1960s,

45. Int'l L. Ass'n, *supra* note 44, at 20.

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

47. Barry Buzan, Seabed Politics 8 (1976); U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, art. 3.

48. James B. Morell, The Law of the Sea: An Historical Analysis of the 1982 Treaty and Its Rejection by the United States 4 (McFarland & Co., 1992); Buzan, *supra* note 47, at 7.

49. *See* Ann L. Hollick, U.S. Foreign Policy and the Law of the Sea 30 (Princeton Univ. Press, 1981).

50. Buzan, *supra* note 47, at 8.

51. Morell, *supra* note 48, at 2.

52. H. Lauterpacht, *Sovereignty over Submarine Areas*, 27 Brit. Y.B. Int'l. 376, 376–77 (1950).

53. North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), Merits, 1969, I.C.J Rep. 3, ¶ 47 (Feb. 1969).

led by the Soviet Union and the United States, inaugurating the era of space flight.[54] 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.[55] 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.[56]

The third example is the customary international humanitarian law that rapidly emerged from the Yugoslavia Tribunal in the 1990s.[57] 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, Russia's assumption of the Soviet seat in the Security Council, and the return of genocide to Europe for the first time since Nazi Germany.[58] 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.[59] This decision closed a gaping hole in the coverage of international humanitarian law and was soon thereafter affirmed by the Rwanda Tribunal[60] and Special Court for Sierra Leone.[61]

54. Scharf et al., The Syrian Conflict's Impact on International Law, *supra* note 4, at 27.

55. G.A. Res. 1962, Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space (Dec. 13, 1963).

56. Manfred Lachs, The Law of Outer Space: An Experience in Contemporary Lawmaking 137–139 (1972).

57. Scharf et al., The Syrian Conflict's Impact on International Law, *supra* note 4, at 27.

58. *Id.*

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

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

61. Statute of the Special Court for Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S 137, art 3.

It was codified in the 1998 Statute of the International Criminal Court, which has been ratified by 124 States.[62]

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.[63]

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

Had the *Max Plank Encyclopedia* been written today, it would no doubt 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 calling itself ISIS rapidly took over more than thirty percent of the territory of Syria and Iraq.[64] In the process, it captured billions of U.S. dollars' worth of oil fields and refineries, bank assets and antiquities, tanks and armaments, and became one of the greatest threats to peace and security in the Middle East. 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.[65] While

62. Rome Statute, *supra* note 43 (distinguishing between "international armed conflict" in paragraph 2(b) and "armed conflict not of an international character" in paragraphs 2(c)–(f)). *The States Parties to the Rome Statute*, ICC, https://asp.icc-cpi.int/states-parties [https://perma.cc/U7BK-KAEP].

63. Scharf, *How the War Against ISIS Changed International Law*, *supra* note 4, at 34.

64. *Id.* at 16.

65. Claire Mills, ISIS/Daesh: The Military Response in Iraq and Syria 4–7 Briefing Paper No. 06995, (2015); *DOD Statement on Escalating Actions in Iraq, Syria, and Turkey,* U.S. Dep't of Defense (Nov. 23, 2023), https://www.defense.gov/News/Releases/Release/Article/3227725/dod-statement-on-escalating-actions-in-iraq-syria-and-turkey/ [https://perma.cc/V3N2-EXH6].

the Iraqi government had consented to foreign military action against ISIS within Iraq, the Syrian government did not.[66] Rather, Syria protested that the air strikes in Syrian territory were an unjustifiable violation of international law.[67]

The United States claimed that the airstrikes in Syria were lawful acts of collective self-defense on behalf of the government of Iraq.[68] 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,[69] but the United States argued that since the infamous 9/11 attacks by Al Qaeda, 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.[70]

At first, the United States was isolated in its position.[71] Its allies pointed out that the ICJ 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.[72] Reaffirming its previous precedent, in its 2005 *Armed Activities in 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.[73] The post–9/11 case signaled the ICJ's

66. 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. BEN SMITH, SIS AND THE SECTARIAN CONFLICT IN THE MIDDLE EAST BRIEFING REPORT 15/16 54 (2015); *Chemical Weapons Attack in Syria*, THE WHITE HOUSE, https://obamawhitehouse.archives.gov/issues/foreign-policy/syria [https://perma.cc/2345-2HP2].

67. *See* SMITH, *supra* note 66, at 55.

68. Letter from Samantha J. Power, Representative of the United States of America to the United Nations, to Ban Ki-moon, Secretary-General of the United Nations (September 23, 2014).

69. *See* Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 195, (June 27); *see also* Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161, ¶ 71–72 (Nov. 6); The Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2003 I.C.J. 136 ¶ 139 (July 9); *see also* Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶ 178 (Dec.19).

70. *See* Ashley S. Deeks, *Unwilling or Unable: Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT'L L. 483, 497 (2012).

71. *See* Oona A. Hathaway, *How the Expansion of "Self-Defense" Has Undermined Constraints on the Use of Force*, JUST SEC. (Sept. 18, 2023), https://www.justsecurity.org/88346/the-expansion-of-self-defense/ [https://perma.cc/LVV8-XU7W].

72. *Id.*

73. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, 169–70 (Dec. 19) (holding that Uganda could not rely on self-defense to justify its military operation in

"determination to counter a more permissive reading of Article 51" brought on by the international community's reaction to 9/11.[74]

Scholars[75] and certain members of the ICJ 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.[76] Writing separately in the *Congo case*, Judge Koojimans noted that in the era of Al Qaeda, it is "unreasonable to deny the attacked State the right to self-defense merely because there is no attacker State."[77] Judge Simma similarly concluded in his separate opinion in the *Congo* case that "Security Council resolutions 1368 (2001) and 1373 (2001) cannot but be read as affirmations of the view that large-scale attacks by non-State actors can qualify as 'armed attacks' within the meaning of Article 51."[78]

Yet, it was not until ISIS bombed a Russian jetliner over the Sinai desert on October 31, 2015, and attacked a Paris stadium and concert hall on November 13, 2015, that the situation was ripe for a Grotian Moment.[79] 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.[80]

The October 31 and November 13 ISIS attacks were a game changer, killing and injuring over 824 nationals of Russia, France, and

---

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).

74. Theresa Reinold, *State Weakness, Irregular Warfare, and the Right to Self-Defense Post–9/11*, 105 Am. J. Int'l L. 244, 261 (Apr. 2011).

75. *See generally* R.Y. Jennings, *The Caroline and McLeod Cases*, 32 Am. J. Int'l L. 82 (1938) (*quoting* 61 Parliamentary Papers (1843)).

76. *See generally* Terry D. Gill & Kinga Tibori-Szabo, *Twelve Key Questions on Self-Defense Against Non-State Actors*, 95 Int'l L. Stud. 467 (2019).

77. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Opinion of Judge Koojimans, 2005 I.C.J. 306, ¶ 30 (Dec. 19).

78. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Opinion of Judge Simma, 45 I.C.J. 334, ¶ 11 (Dec. 19).

79. Barbara Starr & Catherine E. Shoichet, *Russian Plane Crash: U.S. Intel. Suggests ISIS Bomb Brought Down Jet*, CNN (Nov. 4, 2015, 8:37 PM), https://www.cnn.com/2015/11/04/africa/russian-plane-crash-egypt-sinai/index.html [https://perma.cc/5WD8-6XBY]; *Paris Attacks: What Happened on the Night*, BBC (Dec. 9, 2015), https://www.bbc.com/news/world-europe-34818994 [https://perma.cc/VF83-AACL].

80. S.C. Res. 2249, at 1–2 (Nov. 20, 2015).

a number of other countries.[81] They showed that ISIS —the richest and most technologically advanced terrorist organization in the world[82] — 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.[83] 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.[84] 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 is the Article and Chapter under which the Security Council can permit States to use force as an exception to Article 2(4) of the U.N. Charter.[85] Nor does the Resolution use the word "authorizes" or even "decides" in relation to use of force. These textual differences led Professor Mark Weller to conclude that "this language suggests that the resolution does not grant any fresh authority for states seeking to take action."[86]

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.[87] Importantly, the French Security Council Representative, who had sponsored Resolution 2249, stated in his explanation of the vote on the resolution that "collective action could now be based on Article 51 [self-defense] of the United Nations Charter."[88] 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

81. Starr & Shoichet, *supra* note 79; *Paris Attacks: What Happened on the Night*, *supra* note 79.

82. Robert Windrem, *ISIS Is the World's Richest Terror Group, But Spending Money Fast*, NBC, https://www.nbcnews.com/storyline/isis-uncovered/isis-richest-terror-group-world-n326781 [https://perma.cc/RT9Y-K53L] (March 20, 2015, 12:09 PM).

83. *Beyond Iraq and Syria: ISIS's Global Reach Before the Sen. Comm. on Foreign Relations*, 115th Cong. (2017) (statement of Lorenzo Vidino, Ph.D, Director, Program on Extremism, George Washington University).

84. Arabella Lang, Legal Basis for UK Military Action in Syria, House of Commons Library Briefing Paper No. 7404 8 (2015).

85. *See* S.C. Res. 2249, *supra* note 80.

86. Lang, *supra* note 84, at 7.

87. *See* S.C. Res. 2249, *supra* note 80, ¶ 5.

88. Press Release, Security Council, Security Council "Unequivocally" Condemns ISIL Terrorist Attacks, U.N. Press Release SC/12132 (Nov. 25, 2015).

as "helping to midwife the development of new norms of customary international law."[89]

Resolution 2249 had an immediate effect in changing government attitudes about the legality of use of force against autonomous non-state actors. Within two weeks of its adoption, the U.K. 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 members of Parliment that such action could not be legally justified.[90] Immediately thereafter, the United Kingdom joined the United States and several other States in bombing ISIS targets throughout Syria.[91]

The changing law governing use of force against non-state actors follows the pattern of history's other Grotian Moments. 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.[92] To respond to the fundamental change presented by these uber-terrorist groups, the United States argued that it is now lawful to attack such nonstate actors when they are present in States that are unable or unwilling to curb them.[93] While States and the ICJ were initially reluctant to embrace this new view of self-defense, in the aftermath of the attacks against the Russian airliner and Paris disco 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.[94] 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."[95] Resolution

89. David Koplow, *International Legal Standards and the Weaponization of Outer Space*, *in* Security in Space: The Next Generation 159, 162 (2008).

90. 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://perma.cc/N4722RB6].

91. *Id.*

92. *See generally* Robin Wright et al., The Jihadi Threat: ISIS, al-Qaeda, and Beyond (2017).

93. Adil Ahmad Haque, *Self-Defense Against Non-State Actors: All over the Map*, Just Sec. (Mar. 24, 2021), https://www.justsecurity.org/75487/self-defense-against-non-state-actors-all-over-the-map/ [https://perma.cc/MP8R-VDGS].

94. S.C. Res. 2249, *supra* note 80, at 5.

95. Int'l L. Ass'n, *supra* note 44, at 64, n. 177.

2249 capped a Grotian Moment, and reaffirmed the importance of this concept in international law.

V. Is Climate Change the Next Grotian Moment?

The classic paradigm of international environmental law was articulated in the 1941 *Trail Smelter* arbitration decision.[96] There, the arbitral tribunal held that a State has the customary duty to prevent transboundary harm that originates in its territory, and a State that causes such harm to another State must pay compensation for the injury.[97] The case is widely recognized as the *fons et origo* (foundational source) of the core principle of international environmental law: States are responsible for downstream or downwind harm that crosses from their territory into another State.[98] For nearly eighty years, *Trail Smelter* has provided the foundation upon which international environmental law operated.[99] This foundation, however, started to crack as environmental harm began to threaten not just neighboring States but the entire global commons as well.[100]

Today, greenhouse gas emissions are affecting the global commons in ways beyond the *Trail Smelter* paradigm's ability to respond. Rising sea levels caused by melting sea ice and warming oceans are beginning to alter coastlines around the world at an accelerating rate.[101] In the case of low-lying island States, climate change threatens their very

96. The Smelter in Trail Canada sent its toxic sulfur dioxide and nitrous oxide emissions downwind across the border into Washington State. *See Trail Smelter Arbitration Decision*, 33 Am. J. Int'l L. 182, 183–84 (1939); s*ee also Trail Smelter Arbitration Decision*, 35 Am. J. Int'l L. 684, 693 (1941).

97. *Trail Smelter Arbitration Decision*, 35 Am. J. Int'l L. 684, 716–17 (1941).

98. Alfred P. Rubin, *Pollution by Analogy: The Trail Smelter Arbitration*, *in* Transboundary Harm in International Law 259 (Rebecca M. Bratspies & Russell A. Miller eds., 2006).

99. In later years, international law supplemented Trail Smelter with "the precautionary principle," which provides that if there is a risk of cross boundary severe damage to humans or the environment, the absence of incontrovertible, conclusive, or definite scientific proof is not a reason for inaction. Meinhard Schröder, *Precautionary Approach/Principle*, *in* Max Plank Ency. Pub. Int'l L., 1 (2014); *see* Catherine Prunella, *An International Environmental Law Case Study: The Trail Smelter Arbitration*, Int'l Pollution Issues (Dec. 2014), https://intlpollution.commons.gc.cuny.edu/an-international-environmental-law-case-study-the-trail-smelter-arbitration/ [https://perma.cc/UKJ6-SN7W].

100. *See* Neil Craik et al., Liability for Environmental Harm to the Global Commons 54 (2023).

101. Rebecca Lindsey, *Climate Change: Global Sea Level*, Climate.gov (Apr. 19, 2022), https://www.climate.gov/news-features/understanding-climate/climate-change-global-sea-level [https://perma.cc/NXP8-YG8D].

existence.[102] Climate change has thus engendered considerable concern about the fate of climate refugees,[103] the continued sovereignty and membership in international organizations of submerged island-states,[104] and the liability of States and corporations for climate-altering greenhouse gases.[105]

Despite repeated efforts over the past thirty years, the international community has been unable to conclude an effective international convention to halt climate change and address its effects.[106] Watered down to garner an international consensus, the most recent attempt, the 2015 Paris Climate Agreement, is based on voluntary "nationally determined contributions" by governments"[107] and "is essentially void of clearly actionable commitments."[108]

With the crisis approaching more quickly than anticipated, and the international community unable to effectively address it via the treaty route, the time seems ripe for a Grotian Moment. The U.N. General Assembly laid the groundwork on July 28, 2022, by adopting a groundbreaking resolution (Resolution 76/300), declaring a healthy environment to be a universal human right.[109]

Resolution 76/300 was adopted with no opposing votes.[110] It was particularly noteworthy that among the supporters was the United States, which had long resisted U.N. recognition of "new" human rights and had opposed a similarly worded resolution at the Human Rights Council just a few months earlier.[111] The successful negotiation of

102. *See, e.g.*, Ripple et al., *supra* note 1, at 846.

103. Jane McAdam, *Moving Beyond Refugee Law: Putting Principles on Climate Mobility into Practice*, 34 Int'l J. Refugee L. 440, 442 (2022).

104. *See generally* Michael Gerrard, *Statehood and Sea-Level Rise: Scenarios and Options*, 17 Charleston L. Rev. 579 (2023).

105. *See* Marc-Philippe Weller & Mai-Lan Tran, *Climate Litigation Against Companies*, 1 Clim. Action, July 4, 2022, at 14.

106. *Id.* at 9–10.

107. Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, 3156 U.N.T.S 79; Framework Convention on Climate Change, Adoption of the Paris Agreement, ¶ 12, U.N. Doc. FCCC/CP/2015/L.9/Rev.1 (Dec. 12, 2015).

108. Henrik Selin & Adil Najam, *Paris Agreement on Climate Change: The Good, the Bad, and the Ugly*, The Conversation (Dec. 14, 2015, 5:55 AM), https://theconversation.com/paris-agreement-on-climate-change-the-good-the-bad-and-the-ugly-52242 [https://perma.cc/R4RG-9HWG].

109. G.A. Res. 76/300, ¶ 1 (Aug. 1, 2022).

110. UNGA Recognizes Human Right to Clean, Healthy, and Sustainable Environment, IISD (Aug. 3, 2022), https://sdg.iisd.org/news/unga-recognizes-human-right-to-clean-healthy-and-sustainable-environment/ [https://perma.cc/CNN8-YVUR].

111. Jacob Katz Cogan, *Contemporary Practice of the United States Relating to International Law*, 117 Am. J. Int'l L. 128, 129 (2023).

Resolution 76/300 was largely due to the efforts of John Knox, the U.N.'s first Special Rapporteur for Human Rights and the Environment.[112] Like other custom pioneers,[113] Knox couched his recommendations as flowing from previous human rights resolutions and treaties, despite the fact that the resolution was in fact more revolutionary than evolutionary.[114]

In explaining its vote in favor of Resolution 76/300, the United States said the resolution was merely aspirational, emphasizing that it "is not legally binding or a statement of current international law."[115] But as with the U.N. Declaration of the Principles at Nuremberg and the U.N. Declaration on Outer Space discussed above,[116] a widely supported General Assembly resolution like Resolution 76/300 can pave the way for a Grotian Moment if it is followed by State practice, including in the form of international and national judicial decisions. Thus, the U.N. High Commissioner for Human Rights, Michelle Bachelet, said Resolution 76/300 "emphasizes the underpinning of legal obligations to act, rather than simply of discretionary policy."[117]

Citing Resolution 76/300, on March 29, 2023, the U.N. General Assembly adopted by consensus Resolution A/77/L.58, requesting an advisory opinion from the ICJ on the obligations of States with respect to climate change.[118] The principal sponsor of Resolution A/77/L.58,

112. *Id.* at 130–31.

113. *See, e.g.,* Anthony D'Amato, *Human Rights as Part of Customary International Law: A Plea for Change of Paradigms*, 25 Ga. J. Int'l & Compar. L. 47, 82, 95 (1996).

114. John H. Know (Special Rapporteur) *Report on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, ¶14, U.N. Doc. A/HRC/37/59 (Jan. 24, 2018); Rep. of the G.A. ¶ 37, U.N. Doc. A/73/188 (2018).

115. *See Explanation of the Position on the Right to a Clean, Healthy, and Sustainable Environment Resolution,* U.S. Mission to the U.N. (July 28, 2022), https://usun.usmission.gov/explanation-of-position-on-the-right-to-a-clean-healthy-and-sustainable-environment-resolution/ [https://perma.cc/KQQ6-7EMA].

116. *See supra* Sections II–III.

117. *UN General Assembly Declares Access to Clean and Health Environment a Universal Human Right*, UN. (July 28, 2022), https://news.un.org/en/story/2022/07/1123482 [https://perma.cc/F79W-76HS].

118. G.A. Res. A/77/L.58, at 1–4 (Mar. 1, 2023). The Resolution requests the ICJ to decide:

> (a) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations;
>
> (b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:

Vanuatu, is an island State threatened with extinction by rising sea levels.[119] As an indication of how far Resolution 76/300 has shifted the legal terrain, the General Assembly's request for an advisory opinion references international human rights instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.[120]

Meanwhile, the U.N. Human Rights Committee expounded on the effect of climate change on migrants' right to life under the International Covenant on Civil and Political Rights in *Teitiota v. New Zealand*.[121] Whereas climate migrants are not considered refugees entitled to asylum because they are not fleeing from persecution, the Committee opined that climate change nevertheless triggers non-refoulement obligations under human rights law.[122] The Committee's decision concerned a complaint brought by Ioane Teitiota, a Kiribati national who New Zealand wanted to deport to an island State that had allegedly been rendered uninhabitable by climate change.[123] Although the Committee rejected Teitiota's factual allegations, it recognized that generally States have a human rights obligation not to return individuals to States facing sea level rise, salinization, and land degradation due to climate change.[124] It stated "this ruling sets forth new standards that could facilitate the success of future climate change-related asylum claims."[125]

Concurrently, three cases on the human rights obligations of States to reduce and mitigate the effects of climate change are pending before

> (i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?
>
> (ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?.

119. Press Release, Vanuatu ICJ Initiative (Sep. 15, 2022), https://drive.google.com/file/d/17r7docJpKRTfqYtj8yNC9TXSjCi6qXdj/view [https://perma.cc/XC4W-WNQC].

120. G.A. Res. A/77/L.58, at 2 (Mar. 01, 2023).

121. *Historic UN Human Rights Case Opens Door to Climate Change Asylum Claims*, U.N. Hum. Rts. Off. of the High Comm'r (Jan. 21, 2020), https://www.ohchr.org/en/press-releases/2020/01/historic-un-human-rights-case-opens-door-climate-change-asylum-claims [https://perma.cc/4XXX-RBUK].

122. *Id.*

123. Hum. Rts. Comm. on the Optional Protocol, concerning communication No. 2728/2016, ¶ 1.1–2.1, U.N. Doc. CCPR/C/127/D/2728/2016 (2020).

124. *Id.* ¶ 9.11.

125. *Historic UN Human Rights Case Opens Door to Climate Change Asylum Claims*, *supra* note 121.

the European Court of Human Rights.[126] While the opinions of the ICJ, U.N. Human Rights Committee, and European Court of Human Rights are not binding on States worldwide, they carry great persuasive authority, and are often cited by national courts.[127] Thus, these pending international judicial decisions have the potential to reaffirm and clarify the legal obligations under human rights and other international principles of States to prevent and redress the adverse effects of climate change. Such clarification would likely influence a growing number of national courts that view State climate change obligations through the lens of human rights.[128]

As with the other examples of accelerated formation of customary international law discussed above, the paradigm shift initiated by U.N. Special Rapporteur John Knox is poised, through the decisions of international tribunals and national courts in these pending cases, to culminate in a Grotian Moment. As such, States will be held accountable under customary international law, not just for damage done to their downwind and downstream neighbors, but also for their failure to adequately regulate the emissions of businesses under their jurisdiction contributing to climate change regardless of where harms actually occur.

126. *See* Eur. Ct. Hum. Rts., Factsheet—Climate Change 1 (2024) ("Verein Klimaseniorinnen Schweiz and Others v. Switzerland, Carême v. France and Duarte Agostinho and Others v. Portugal and 32 Others.").

127. *Advisory Jurisdiction*, Int'l Ct. Just., https://www.icj-cij.org/advisory-jurisdiction [https://perma.cc/N3NA-L97J]; Nikolaos Sitaropoulos, *States Are Bound to Consider the UN Human Rights Committee's Views in Good Faith*, Oxford Hum. Rts. Hub (Mar. 11, 2015), https://ohrh.law.ox.ac.uk/states-are-bound-to-consider-the-un-human-rights-committees-views-in-good-faith/ [https://perma.cc/7ZJU-8WL4]; Eur. Ct. Hum. Rts., Questions & Answers 5, https://icj-cij.org/advisory-jurisdiction [https://perma.cc/BW5B-ZBE8].

128. *See* Elisa de Wit, *Urgenda Foundation v. Netherlands: Historic Climate Change Decision Upheld*, Norton Rose Fulbright (Dec. 2019), https://www.nortonrosefulbright.com/en-za/knowledge/publications/45dc4f83/urgenda-foundation-v-netherlands-historic-climate-change-decision-upheld [https://perma.cc/9UPM-TBZC]; *see also* Louis J. Kotzé, Neubauer et. al. Versus Germany*: Planetary Climate Litigation for the Anthropocene?*, 22 German L. J. 1423, 1437 (2021); *see also* Maria Antonia Tigre, *Major Developments for Global Climate Litigation: The Human Rights Council Recognizes the Right to a Healthy Environment and the Committee on the Rights of the Child Publishes its Decision in an International Youth Climate Case*, Sabin Ctr. for Climate Change L. (Oct. 12, 2021), https://blogs.law.columbia.edu/climatechange/2021/10/12/major-developments-for-global-climate-litigation-the-human-rights-council-recognizes-the-right-to-a-healthy-environment-and-the-committee-on-the-rights-of-the-child-publishes-its-decision-in-an-inter/ [https://perma.cc/B4BE-NAJE].

VI. Conclusion

Ordinarily, customary international law takes many decades to crystallize. But since World War II, there have been several notable 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, 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 establishment of the Nuremberg Tribunal and the creation of the Yugoslavia Tribunal. And in each case, the new rule was confirmed by an international judicial decision and/or a widely supported resolution of an international organization.

Will the human rights approach to climate change represent the next major Grotian Moment? As a growing consensus of scientists conclude that climate change is accelerating faster than anticipated,[129] and the traditional treaty route has proven unable to effectively address the swiftly approaching environmental crisis, there is a clear need for a new approach under customary international law to quickly fill the void. We will soon see whether General Assembly Resolution 76/300 and the decisions of the ICJ and European Court of Human Rights will, in the words of one noted commentator, "midwife the development of new norms of customary international law."[130]

129. Lois Parshley, *Climate Collage Could Happen Fast: As Temperature and Weather Records Fall, Earth May Be Nearing So-Called Tipping Points*, The Atlantic (July 20, 2023), https://www.theatlantic.com/science/archive/2023/07/climate-change-tipping-points/674778/ [https://perma.cc/FJW4-4R3U].

130. Koplow, *supra* note 89, at 162.