



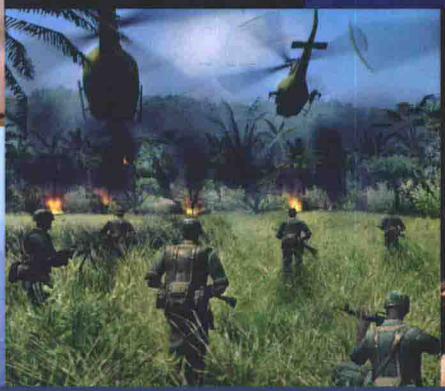
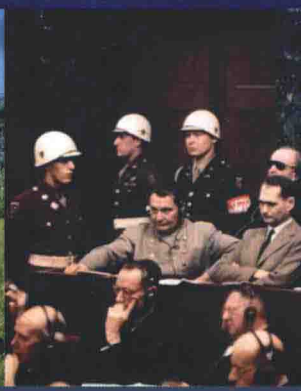

Customary International Law in Times of Fundamental Change

Recognizing Grotian Moments

Michael P. Scharf

CAMBRIDGE

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RECOGNIZING GROTIAN MOMENTS

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Case Western Reserve University School of Law

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CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE

This is the first book to explore the concept of "Grotian Moments." Named for Hugo Grotius, whose masterpiece *De Jure Belli ac Pacis* helped marshal in the modern system of international law, Grotian Moments are transformative developments that generate the unique conditions for accelerated formation of customary international law. In periods of fundamental change, whether by technological advances, the commission of new forms of crimes against humanity, or the development of new means of warfare or terrorism, customary international law may form much more rapidly and with less state practice than is normally the case to keep up with the pace of developments. The book examines the historic underpinnings of the Grotian Moment concept, provides a theoretical framework for testing its existence and application, and analyzes six case studies of potential Grotian Moments: Nuremberg, the continental shelf, space law, the Yugoslavia Tribunal's *Tadic* decision, the 1999 NATO intervention in Serbia, and the 9/11 terrorist attacks.

Michael P. Scharf is the John Deaver Drinko-Baker & Hostetler Professor of Law and Associate Dean for Global Legal Studies at Case Western Reserve University School of Law.

Other Books by Michael P. Scharf

International Criminal Justice: Legitimacy and Coherence (Edward Elgar, 2012) (with G. Boas and W. Schabas)

Henry T. King, Jr.: A Life Dedicated to International Justice (Carolina Academic Press, 2011) (editor)

Shaping Foreign Policy in Times of Crisis: The Role of International Law and the State Department Legal Adviser (Cambridge University Press, 2010) (with P. Williams)

Criminal Jurisdiction 100 Years After the 1907 Hague Peace Conference (T.M.C. Asser Press/Cambridge University Press, 2009) (with W. M. van Genugten)

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The Law of International Organizations: Problems and Materials (Carolina Academic Press, 2001; 2nd ed. 2007, 3rd ed. 2013)

The International Criminal Tribunal for Rwanda (Transnational Publishers, 1998) (2 vols.) (with Virginia Morris)

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Balkan Justice: The Story behind the First International War Crimes Trial since Nuremberg (Carolina Academic Press, 1997)

International Criminal Law: Cases and Materials (Carolina Academic Press, 1996; 2nd ed. 2000, 3rd ed. 2007, 4th ed. 2013) (with Jordan Paust et al.)

An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia (Transnational Publishers, 1995) (2 vols.) (with Virginia Morris)

For Trina, on our 25th Anniversary

Author's Biography

Michael P. Scharf is the John Deaver Drinko-Baker & Hostetler Professor of Law and Associate Dean for Global Legal Studies at Case Western Reserve University School of Law. Scharf is the author of fifteen books, including BALKAN JUSTICE, which was nominated for a Pulitzer Prize in Letters in 1997; THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, which was awarded the American Society of International Law's Certificate of Merit for outstanding book in 1999; PEACE WITH JUSTICE and ENEMY OF THE STATE, which won the International Association of Penal Law's Book of the Year awards for 2003 and 2009, respectively; and SHAPING FOREIGN POLICY IN TIMES OF CRISIS, which was published by Cambridge University Press in 2010.

During the elder Bush and the Clinton administrations, Scharf served in the Office of the Legal Adviser of the U.S. Department of State, where he held the positions of Attorney-Adviser for Law Enforcement and Intelligence, Attorney-Adviser for United Nations Affairs, and delegate to the United Nations Human Rights Commission. In February 2005, Scharf and the Public International Law and Policy Group, a nongovernmental organization he cofounded and directs, were nominated for the Nobel Peace Prize by six governments and the prosecutor of an international criminal tribunal for the work they have done to help in the prosecution of major war criminals, such as Slobodan Milosevic, Charles Taylor, and Saddam Hussein. During a sabbatical in 2008, Scharf served as Special Assistant to the Chief Prosecutor of the Cambodia Genocide Tribunal.

A graduate of Duke University School of Law (Order of the Coif and High Honors) and judicial clerk to Judge Gerald Bard Tjoflat on the Eleventh Circuit Federal Court of Appeals, Scharf is an internationally recognized expert who has testified before the Senate Foreign Relations Committee and the House Armed Services Committee and hosts the radio program *Talking Foreign Policy* on WCPN 90.3 FM ideastream (law.case.edu/TalkingForeignPolicy).

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Several people and entities deserve special recognition for their invaluable contributions to this book. In particular, my thanks go to John Berger and his team at Cambridge University Press for encouraging me to write this book and helping me refine the text. I am also grateful to my old friend Chris Greenwood of the International Court of Justice, who helped me come up with the case studies of potential Grotian Moments that are the subject of this text. I also thank the editors of the Harvard and Cornell International Law Journals, noting that portions of this work were originally published in Michael P. Scharf, *Universal Jurisdiction and the Crime of Aggression*, 53 HARVARD INTERNATIONAL LAW JOURNAL 358–389 (2012), and Michael P. Scharf, *Seizing the "Grotian Moment": Accelerated Formation of Customary International Law in Times of Fundamental Change*, 43 CORNELL INTERNATIONAL LAW JOURNAL 440–469 (2010). My appreciation also goes to Dean Lawrence Mitchell of Case Western Reserve University School of Law, who provided me a generous grant to support this project, to Cindy Hill-Graham who helped prepare the index, and to the following law students who assisted with the research: Matthew Carlton, Rachel Heckelman, Malea Hetrick, Richard Hilbrich, Allison Mahan, Roxana Malene, Pooja Patel, Jennifer Spencer, and Danyella Tonelli. Finally, I express my utmost gratitude to my wife, Trina, and son, Garrett, who support my writing and fieldwork even when they complicate their lives in immeasurable ways.

Contents

1 Introduction

THIS BOOK EXAMINES THE CONCEPT OF "GROTIAN Moments," a term that denotes radical developments in which new rules and doctrines of customary international law emerge with unusual rapidity and acceptance. Though I am an academician, my interest in this concept did not begin as purely academic. During a sabbatical in the fall of 2008, I had the unique experience of serving as Special Assistant to the International Prosecutor of the Extraordinary Chambers in the Courts of Cambodia (ECCC), the tribunal created by the United Nations and government of Cambodia to prosecute the former leaders of the Khmer Rouge for the atrocities committed during their reign of terror (1975–9).[1] While in Phnom Penh, my most important assignment was to draft the Prosecutor's brief[2] in reply to the Defense Motion to Exclude "Joint Criminal Enterprise" (JCE)

[1] For background on the creation of the ECCC, see Michael P. Scharf, *Tainted Provenance: When, If Ever, Should Torture Evidence Be Admissible?* 65 WASHINGTON & LEE LAW REVIEW 129 (2008).

[2] Co-Prosecutors' Supplementary Observations on Joint Criminal Enterprise, Case of Ieng Sary, No. 002/19–09–2007-ECCC/OCIJ, 31 December 2009. A year later, the Co-Investigating Judges ruled in favor of the Prosecution that the ECCC could employ JCE liability for the international crimes within its jurisdiction. See Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, December 8, 2009, Case No. 002/19–09–2007-ECCC-OCIJ, December 8, 2009.

liability as a mode of liability from the trial of the five surviving leaders of the Khmer Rouge.[3]

JCE is a form of liability somewhat similar to the Anglo-American "felony murder rule,"[4] in which a person who willingly participates in a criminal enterprise can be held criminally responsible for the reasonably foreseeable acts of other members of the criminal enterprise even if those acts were not part of the plan. Although few countries around the world apply principles of coperpetration similar to the felony murder rule or JCE, since the decision of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the 1998 *Tadic* case,[5] 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, the Special Panels for the Trial of Serious Crimes in East Timor, and the Special Tribunal for Lebanon have recognized and applied JCE liability during the last ten years.

These modern precedents, however, were not directly relevant to the Cambodia Tribunal because the crimes under its jurisdiction had occurred some twenty years earlier. Under the international law principle of *nulem crimin sine lege* (the equivalent to the U.S. Constitution's *ex post facto* law prohibition), the Cambodia Tribunal could only apply

[3] Pursuant to the Co-Investigating Judges' Order of 16 September 2008, the Co-Prosecutors filed the brief to detail why the extended form of JCE liability, "JCE III," is applicable before the ECCC. The Defense Motion argued in part that JCE III as applied by the *Tadic* decision of the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber is a judicial construct that does not exist in customary international law or, alternatively, did not exist in 1975–9. *Case of Ieng Sary*, Ieng Sary's Motion against the Application at the ECCC of the Form of Responsibility Known as Joint Criminal Enterprise, Case No. 002/19–09–2007-ECCC/OCIJ, July 28, 2008, ERN 00208225–00208240, D97.

[4] For background about, and cases applying, the felony murder rule, see David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 HARVARD JOURNAL OF LAW & PUBLIC POLICY 359 (1985).

[5] *Prosecutor v. Tadic*, Judgment, Case No. IT-94–1-A, ICTY Appeals Chamber, July 15, 1999.

the substantive law and associated modes of liability that existed as part of customary international law in 1975–9. Therefore the question at the heart of the brief that I drafted was whether the Nuremberg Tribunal precedent and the United Nations 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.[6] In response, the Prosecution brief I drafted 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. This was the first time in history that the term was used in a proceeding before an international court. Despite the dearth of State practice, the Cambodia Tribunal ultimately found JCE applicable to its trials on the basis of the Nuremberg precedent and UN General Assembly endorsement of the Nuremberg Principles.[7]

* * *

Dutch scholar and diplomat Hugo Grotius (1583–1645) is widely considered to be the "father" of modern international law as the law of nations and has been recognized for having "recorded the creation of order out of chaos in the great sphere of international relations."[8] In the mid-1600s,

[6] For the definition of customary international law, see *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, Merits, February 20, 1969, ICJ Rep. 3, para. 77.

[7] In Case 002, the ECCC Trial Chamber later confirmed that JCE I and JCE II reflected customary international law as of 1975 but questioned whether JCE III was actually applied at Nuremberg and therefore was not applicable to the ECCC trial. Decision on the Appeals against the Co-Investigative Judges' Order on Joint Criminal Enterprise (JCE), Ieng et al. (002/10–09–2007-ECCC/TC), Trial Chamber, June 17, 2011.

[8] *See* CHARLES S. EDWARDS, HUGO GROTIUS, THE MIRACLE OF HOLLAND (1981).

at the time that the nation-state was crystallizing into the fundamental political unit of Europe, Grotius "offered a new concept of international law designed to reflect that new reality."[9] In his masterpiece, *De Jure Belli ac Pacis* (The Law of War and Peace), Grotius addresses questions bearing on international legal personality, interstate legal obligations, when resorting to war is lawful, and when the conduct of war becomes a crime.[10]

Although scholars such as New York University professor Benedict Kingsbury have argued that Grotius's actual contribution has been distorted through the ages, the prevailing view today is that his treatise had an extraordinary impact as the first formulation of a comprehensive legal order of interstate relations based on mutual respect and equality of sovereign states.[11] In "semiotic" terms,[12] the "Grotian tradition" has come to symbolize the advent of the modern international legal regime, characterized by a community of states operating under binding rules, which arose from the 1648 Peace of Westphalia.[13]

The term "Grotian Moment," on the other hand, is a relatively recent creation, coined by Princeton professor Richard Falk in 1985.[14] Since

[9] John W. Head, *Throwing Eggs at Windows: Legal and Institutional Globalization in the 21st Century Economy*, 50 KAN. L. REV. 731, 771 (2002).

[10] HUGO GROTIUS, DE JURE BELLI AC PACIS (n.p. 1625). *See also* HUGO GROTIUS: ON THE LAW OF WAR AND PEACE (Stephen C. Neft., ed., Cambridge University Press, 2012).

[11] Benedict Kingsbury, *A Grotian Tradition of Theory and Practice? Grotius, Law, and Moral Skepticism in the Thought of Hedley Bull*, 17 QUINNIPIAC L. REV. 3, 10 (1997).

[12] Semiotics is the study of how meaning of signs, symbols, and language is constructed and understood. Michael P. Scharf, *International Law in Crisis: A Qualitative Empirical Contribution to the Compliance Debate*, 31 CARDOZO L. REV. 45, 50 (2009) (citing CHARLES SANDERS PEIRCE, COLLECTED PAPERS OF CHARLES SANDERS PIERCE: PRAGMATISM AND PRAGMATICISM [Charles Hartshorne and Paul Weiss, eds., 1935]).

[13] Michael P. Scharf, *Earned Sovereignty: Juridical Underpinnings*, 31 DENVER J. INT'L L. 373, 373 n. 20.

[14] THE GROTIAN MOMENT IN INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE 7 (Richard Falk et al., eds., 1985), excerpt reprinted in BURNS H. WESTON ET AL, INTERNATIONAL LAW AND WORLD ORDER 1087–92 (Thomson/West, 2d ed., 1990).

then, scholars and even the UN secretary-general have employed the term in a variety of ways,[15] but here the author is using it to denote a transformative development in which new rules and doctrines of customary international law emerge with unusual rapidity and acceptance.[16] Usually this happens during a period of great change in world history, analogous in magnitude to the end of European feudalism in Grotius's times, "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."[17]

Drawing from the writings of Professor Bruce Ackerman, who used the phrase "constitutional moment" to describe the New Deal transformation in American constitutional law,[18] some international law scholars have used the phrase "international constitutional moment" to convey the "Grotian Moment" concept. Stanford Law professor Jenny Martinez, for example, has written that the drafting of the UN Charter was a "Constitutional moment" in the history of international law.[19] Washington University Law professor Leila Sadat has similarly

See also INTERNATIONAL LAW AND WORLD ORDER 1265–86 (Burns H. Weston, Richard A. Falk, Hilary Charlesworth & Andrew K. Strauss, eds., Thomson/West 4th ed. 2006). For the early seeds of this concept of a changing paradigm in Falk's work, see Richard A. Falk, *The Interplay of Westphalia and Charter Conceptions of International Legal Order*, in 1 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 32 (R. Falk & C. Black, eds. 1969).

[15] Boutros Boutros-Ghali, *The Role of International Law in the Twenty-First Century: A Grotian Moment*, 18 FORDHAM INT'L L. J. 1609, 1613 (1995) (referring to the establishment of the International Tribunal for the Former Yugoslavia as part of the process of building a new international system for the twenty-first century).

[16] Saul Mendlovitz & Marv Datan, *Judge Weeramantry's Grotian Quest*, 7 TRANSNATIONAL L. & CONTEMPORARY PROBLEMS 401, 402 (defining the term "Grotian moment").

[17] BURNS H. WESTON, INTERNATIONAL LAW AND WORLD ORDER, 1369 (3d ed., 1997); 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).

[18] BRUCE ACKERMAN, RECONSTRUCTING AMERICAN LAW (1984).

[19] Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANSNAT'L L. 529 (1998); Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 463 (2003).

described Nuremberg as a "constitutional moment for international law."[20] Dean Anne Marie Slaughter (Princeton's Woodrow Wilson School) and Professor William Burke-White (University of Pennsylvania Law School) have used the term "constitutional moment" in making the case that the September 11 attacks on the United States evidence a change in the nature of the threats confronting the international community, thereby paving the way for rapid development of new rules of customary international law.[21] While the phrase "international constitutional moment" might be quite useful with respect to paradigm-shifting developments[22] within a particular international organization with a constitutive instrument that acts like a constitution, the term "Grotian Moment" makes more sense when speaking of a development in customary international law.

* * *

Normally, customary international law, which is just as binding on states as treaty law,[23] arises out of the slow accretion of widespread state

[20] Leila Nadya Sadat, *Enemy Combatants after Hamdan v. Rumsfeld: Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200, 1206–07 (2007).

[21] Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT'L L. J. 1, 2 (2002). See also Ian Johnstone, *The Plea of "Necessity" in International Legal Discourse: Humanitarian Intervention and Counter-Terrorism*, 43 COLUM. J. TRANSNAT'L L. 337, 370 (2005) (arguing that 9/11 constituted a "constitutional moment" leading to recognition of a newly emergent right to use force in self-defense argued against nonstate actors operating with the support of third states).

[22] As defined by Thomas Kuhn in his influential book THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 150 (1970), 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. One such example is the Keynesian revolution in macroeconomic theory.

[23] While customary international law is binding on states internationally, not all states accord customary international law equal domestic effect. A growing number of states' constitutions automatically incorporate customary law as part of the law of the land and even accord it a ranking higher than domestic statutes. BRUNO

practice evincing a sense of legal obligation (*opinio juris*).[24] Consistent with the traditional approach, the U.S. Supreme Court has recognized that the process of establishing customary international law can take several decades or even centuries.[25] Not so long ago France took the position that thirty years is the minimum amount required, while the United Kingdom has said nothing less than forty years would be sufficient.[26] The International Law Commission, at the beginning of its work, demanded state practice "over a considerable period of time" for a customary norm to emerge.[27] In the 1969 *North Sea Continental Shelf* cases, however, the International Court of Justice observed that customary norms can sometimes ripen quite rapidly, and that a short period is not a bar to finding the existence of a new rule of customary international law, binding on all the countries of the world, save those that persistently objected during its formation.[28]

SIMMA, INTERNATIONAL HUMAN RIGHTS AND GENERAL INTERNATIONAL LAW: A COMPARATIVE ANALYSIS 165, 213 (1995). In the United States, customary international law is deemed incorporated into the federal common law of the United States. Some courts, however, consider it controlling only where there is no contradictory treaty, statute, or executive act. See *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Circ. 1986) (holding that attorney general's decision to detain Mariel Cuban refugees indefinitely without a hearing trumped any contrary rules of customary international law).

[24] For the definition of customary international law, see *North Sea Continental Shelf* (*Federal Republic of Germany v. Denmark*; *Federal Republic of Germany v. Netherlands*), Merits, 20 February 1969, ICJ Rep. 3, para. 77.

[25] *The Paquete Habana*, 175 U.S. 677, 700 (1900).

[26] Franscesco Parisi, *The Formation of Customary Law*, Paper Presented at the 96th Annual Conference of the American Political Science Association, August 31, 2000, at 5.

[27] *See Working Paper by Special Rapporteur Manley O. Hudson on Article 24 of the Statute of the International Law Commission*, [1950] 2 Y.B. International Law Commission 24, 26, U.N. Doc. A/CN.4/16.

[28] *North Sea Continental Shelf* (*Federal Republic of Germany v. Denmark*; *Federal Republic of Germany v. Netherlands*), Merits, 20 February 1969, ICJ Rep. 3, paras. 71, 73, 74. The Court stated: Although the passage of only a short period of time is not necessarily ... a bar to the formation of a new rule of customary international law, ... an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of