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]

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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.

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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

By positing that there is a third factor (a context of fundamental change) that can be as important to the creation of new rules of customary international law as the traditional ingredients of state practice and *opinio juris*, the Grotian Moment concept illuminates how and why customary international law can sometimes develop with surprising rapidity and limited state practice. The concept reflects the reality that in periods of fundamental change, whether by technological advances, the commission of new forms of crimes against humanity, or the development of new means of warfare or terrorism, rapidly developing customary international law may be necessary to keep up with the pace of developments.

While the Grotian Moment concept may account for accelerated formation of customary international law, it should be contrasted with the view that there can be such a thing as "instant customary international law," as suggested, for example, in an oft-cited 1965 article by University College London professor Bin Cheng.[29] Professor Cheng opined that not only was it unnecessary that state practice should be prolonged, but there need be no state practice at all provided that the *opinio juris* of the states concerned can be clearly established by, for example, their votes on UN General Assembly resolutions.[30] Legal scholars have been largely

the provision invoked; – and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.

Id. at para. 74. While recognizing that some norms can quickly become customary international law, the ICJ held that the equidistance principle contained in Article 6 of the 1958 Convention on the Continental Shelf had not done so as of 1969 because so few states recognized and applied the principle. At the same time, the Court did find that Articles 1 and 3 of the convention (concerning the regime of the continental shelf) did have the status of established customary law. *Id*. at pp. 24–7, paras. 25–33.

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

[30] *Id*. at 36. Other scholars and commentators who have asserted the possibility of "instant customary international law" include Peter Malanczuk, Akehurst's Modern Introduction to International Law 45–46 (7th ed. 1997); Jeremy Levitt, *Humanitarian Intervention by Regional Actors in Internal Conflicts: The*

critical of Cheng's "instant custom" theory, at least to the extent that it does away with the need to demonstrate any state practice other than a country's vote in the UN General Assembly.[31]

The Grotian Moment concept, in contrast, requires a foundation of state practice, but it also recognizes that in times of fundamental change UN General Assembly Resolutions can take on heightened significance in terms of declaring existing customary law or crystallizing emerging customary law, despite a relatively small amount and short duration of state practice.[32]

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Little has previously been written about the Grotian Moment concept. Indeed, an exhaustive search of law review databases revealed only sixty-one previous references to the term "Grotian Moment," and few that use the term in the way it is being employed here. This book develops and explores the concept of "Grotian Moment" in international law. This book does not, however, constitute uncritical advocacy of a new paradigm that supports assertions of speedy formation of customary international law that are not backed up by state practice. Rather, it seeks to present a balanced exploration, including an examination of cases in which commentators and NGOs have been too quick to claim the existence of a new rule of customary international law.

To set the stage, Chapter 2 provides a discussion of the historic underpinnings of the Grotian Moment concept, focusing on the impact of Hugo Grotius's scholarship during the advent of the modern international system. Chapter 3, in turn, provides a theoretical framework for

Cases of ECOWAS in Liberia and Sierra Leone, 12 Temp. Int'l & Comp. L. J. 333, 351 (1998); 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 & Comp. L. Rev. 145 (2003).

[31] *See* G. J. H. Van Hoof, Rethinking the Sources of International Law 86 (1983).

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

investigating and testing the existence and application of the Grotian Moment concept. The remaining chapters examine six case studies of potential Grotian Moments. ICJ judge Christopher Greenwood helped me identify these Grotian Moment candidates during a memorable birthday lunch at the Peace Palace in April 2012. Chapter 4 examines whether the Nuremberg precedent fits within the profile of a legitimate Grotian Moment, and the consequences of such a conclusion for modern war crimes trials. Moving along in chronological order, Chapter 5 examines how the post–World War II need for oil and technological advances in deep sea drilling brought about a rapid change in the law of the sea marked by the extension of sovereignty over the continental shelf. Chapter 6 then explores whether the advent of space rocket technology in the 1960s constituted a Grotian Moment, marked by rapid development of customary international rules concerning space flight. Chapter 7 examines how the return of genocide to Europe for the first time since the Second World War and the creation of the first international criminal tribunal since Nuremberg sowed the seeds for rapid recognition of individual criminal responsibility for war crimes in the context of internal armed conflict. Chapter 8 scrutinizes the development of the Responsibility to Protect Doctrine in the aftermath of the 1999 NATO Kosovo intervention as a possible Grotian Moment. Finally, Chapter 9 examines the rapid changes in customary international law that have arisen out of the international community's response to the attacks of September 11, 2001. The concluding chapter summarizes the findings of the previous chapters and examines the practical applications and potential consequences of recognition of the Grotian Moment concept.

While exploring the usefulness of the Grotian Moment concept through the lens of these six case studies, the author recognizes that "it is always easy, at times of great international turmoil, to spot a turning point that is not there."[33] With this admonition in mind, the book takes

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

a hard and balanced look at each scenario, focusing on three lines of inquiry: First, was the particular change in question of a sufficiently fundamental nature? Second, to qualify as a legitimate Grotian Moment, the case must be one in which the extent and duration of State practice are much less than is traditionally required for customary international law. Third, there must nevertheless be recognition that the rule did in fact acquire customary law status despite the dearth and short period of State practice. Together, these factors provide a prism for assessing whether the case studies examined in the book and other situations constitute legitimate Grotian Moments in international law. It is hoped that this approach will help scholars, courts, and government officials recognize and utilize Grotian Moments as they occur in the future.