Grotian Moments and Peremptory Norms of General International Law: Friendly Facilitators or Fatal Foes?

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1. Introduction

The concept "Grotian Moments" has an uneasy relationship with the notion of peremptory norms of general international law. On the one hand, it can easily be said that the entrenchment of the idea of peremptory norms in the mainstream of international law resulted from a Grotian Moment, i.e. the Vienna Convention and related processes. On the other hand, peremptory norms have been seen, at least by some, as immutable (or at least not easily modified). Doctrines advancing change, especially rapid change, such as Grotian Moments, probably do not sit so comfortably with peremptory norms if modification is difficult (or even impossible).

I myself am rather sceptical of the concept of "Grotian Moment" as part of the fabric of international law. The concept of Grotian Moments has been described by one of its greatest proponents, Michael Scharf, as a "paradigm shifting development in which new rules and doctrines of [customary] international law emerge with unusual rapidity and acceptance."[1] On the basis of Scharf's definition, Sterio, defines a Grotian Moment as "an instance in which fundamental change in the existing international system happens, thereby provoking the emergence of a new principle of customary international law with outstanding speed."[2] From these definitions, the concept of Grotian Moments can mean one of two things. One possible reading is that by Grotian Moment it is meant a critical moment when a fundamental change in international law occurs in accordance with the normal methodology of international law. In this understanding, the new concept, principle or rule that emerges can, from a legal perspective, be explained with the reference to the ordinary methodological rules of international law: there is widespread and general practice accepted as law for customary international law or there is a widespread ratification of a major treaty. If this is what is meant by Grotian moment, then the concept is *merely* an empirical concept, without legal consequence. It is possible, however, for the concept to be understood as more than an empirical one, but rather a doctrinal concept implying a fundamental shift of international law *without adherence to the methodological rules for evolution and development*. If this is what is meant, then I remain a non-believer. Of course, the proponents of the concept never

[1] See Michael P Scharf "Seizing the 'Grotian Moment': Accelerated Formation of Customary International Law in Times of Fundamental Change" (2010) 43 *Cornell International Law Journal* 439, at 440. See also Michael P Scharf "The 'Grotian Moment' Concept" (2011) 19 *ILSA Quarterly* 16.

[2] Milena Sterio "A Grotian Moment: Changes in the Legal Theory of Statehood" (2011) 39 *Denver Journal of International Law and Policy* 209, at 210.

explicitly describe it in these terms but this is certainly a potential implication of "unusual rapidity and acceptance" and "outstanding" speed.

Certainly, the reference to the concept by the then Secretary-General of the United Nations Boutros Boutros-Ghali,[3] has helped to legitimise the concept.[4] Yet a careful reading of the Boutros-Ghali comment reveals that he adopts the less ambitious understanding of the concept, i.e. the empirical fact of a critical moment in the evolution of international law. The developments he refers to in substantiating his understanding of "Grotian Moment", while certainly reflecting critical moments in the development of international law, do not evidence the non-application of the methodological rules of international law. The comment essentially describes the contributions of the United Nations in the formation of new rules and the shaping of a new international system, but all within the general understanding of law-making in international law.[5] Examples put forward include the record number of cases before the International Court of Justice,[6] the establishment of the International Criminal Tribunals for the former Yugoslavia and Rwanda,[7] the adoption by the UN International Law Commission of the Statute of the International Criminal Court, and the establishment and evolution of peacekeeping mandates.[8] These are critical developments in international law but each of them emerge through the normal application of the rules of international law for law-making. These examples exemplify Grotian Moments as an empirical concept without any legal significance.

As stated earlier, while the proponents of the concept "Grotian Moment" never expressly say so, some examples used to explain the concept *seem* to imply the former (big) idea of a shift in international law without adherence to the normal rules of modification of rules of international law. Examples that have been given for Grotian Moments include the 1999 use of force of force by NATO in Serbia to prevent a genocide against Kosovar Albanians,[9] the terrorist attacks in the United States on 11 September 2001,[10] the (humanitarian) intervention in Syria in response to atrocities committed against the population.[11] Scharf's

[3] Boutros Boutros-Ghali "A Grotian Moment" (1995) 18 *Fordham International Law Journal* 1609

[4] See Scharf "Seizing the 'Grotian Moment' (above note 1), at 444.

[5] Boutros-Ghali (above note 3), at 1609.

[6] *Id.,* at 1610. While certainly impressive, this was particularly non-challenging for the rules of international law since all these cases appeared on the docket of the Court through the normal application of the Court's jurisdictional rules.

[7] *Id.,* 1612, where the adoption of the Statute is described as "strikingly innovative." Yet, while it is true that it was strikingly innovative, the adoption was fully consistent with processes for the adoption of binding obligations by the Council under Chapter VII of the UN Charter.

[8] *Id.,* at 1614 *et seq,.*

[9] Sterio (above note 2), at 213.

[10] See for discussion Michael P Scharf "How the War against ISIS Changed International Law" (2016) 48 *Case Western Reserve Journal of International Law* 15, at 50-53, describing the 9/11 related events as one step away from a Grotian Moment. Sterio (above note 2), at 214.

[11] Milena Sterio "Humanitarian Intervention Post-Syria: A Grotian Momement?" (2014) 20 *ILSA Journal of International and Comparative Law* 343.

use of Nuremberg as a Grotian Moment in his contribution to this volume is an apposite example of what I mean. Scharf never states explicitly that he understands Grotian Moments as permitting the shift in international law without the adherence to the normal methodological rules. Yet, the argument he puts forward that within a year of the formation of the Tribunal, the Nuremberg principles had immediately ripened into customary international law notwithstanding, as he himself acknowledges, the "quite limited amount" of State practice, may imply the non-application or at least the relaxation of the rules for the formation of customary international law. The paper refers to the ILC enumeration of the Nuremberg Principles, yet it should be recalled that the ILC itself was quick to point out that its enumeration of these principles was not an indication of its own view as to their status.[12] These examples *may be read to mean* suggest that "Grotian Moments" provide an avenue, albeit exceptionally, for a change in international law without adherence to the traditional rules of international law-making. If this is what Grotian Moment means, or can mean, then the concept is misguided, without a basis in international law and possibly dangerous.

The point I am making is not that proponents of Grotian Moments believe that Grotian Moments allow the emergence of international law without adherence to the normal rules for law-making. The point I am making is that some of the ways that the concept is used, may be read that way. The examples enumerated above, *all* seem to suggest a lessened scrutiny in the determination of whether new rules have emerged. The Grotian Moment – borrowing words from Scharf's Nuremberg example – because of an "unprecedented" event in history and the "great need for a timely response", seems to be used to "rationalize" the emergence of new rules without adhering to the rules regarding the formation of law. This is different from the situation where, because of an "unprecedented" event requiring "timely response", States either adopt a treaty or *widespread and general* practice accepted as a law emerges. In the former case, the Grotian Moment is an integral part of the elements of the rule, such that in making the case for the new rule, the Grotian Moment has to be referred to. In the latter case the Grotian Moment has no role in the legal determination of whether the rule exists or not, and the argument for the new rule can be made without even referring to the Grotian Moment (though it serves the empirical reason for the rule).

Against this background, the article discusses the intersections between peremptory norms and Grotian Moments. It does this by looking at the intersection between the two concepts as well as the intersection between Grotian Moments, on the one hand and, on the other hand, particular *jus cogens* norms. In the next section, the article will look at the intersection between peremptory norms and "Grotian Moments" at a conceptual level. The third section of the article will then address the intersection between "Grotian Moments" and particular norms of *jus cogens*. Some concluding remarks are then offered.

[12] Formulation of the Nuremberg Principles, *Yearbook of the International Law Commission* 1950, Vol II, para 96, where the ILC concluded that its function "was not to express any appreciation of these principles as principles of international law but merely to formulate them".

2. The Intersection between Grotian Moments and Peremptory Norms

2.1 The 1966 Draft Articles as a Grotian Moment

There are crucial moments in history that have led to the establishment of new doctrines and rules which have fundamentally changed the face of international law. Some of these might be described as Grotian Moments that have been inherently connected to *jus cogens.* The horrors of the Second World War provided obvious impetus for the prioritisation of norms such as the prohibition of genocide and the prohibition on the use of force.[13] The establishment of the United Nations and the wave of decolonisation in the aftermath of the establishment would have also been important for the elevation of self-determination as a higher order set of norms.[14] There are, of course, other norms that are generally accepted as *jus cogens* that are not in an obvious way linked with Grotian Moments. Examples of such generally accepted *jus cogens* whose emergence is connected with what one might call a Grotian Moment includes the prohibition of torture and war crimes. In some sense, this illustrates the limits, as a legal tool, of the concept of Grotian Moments.

At a more elementary level the very adoption of the Vienna Convention, in particular Article 53, could be described as a Grotian Moment (in the less ambitious way that I have described).[15] If one were inclined to rely on the views of members of the International Law Commission (ILC) and States leading up to the adoption to the 1966 ILC Draft Articles on the Law of Treaties and the views of States leading to the adoption of the Vienna Convention, one would easily dismiss the adoption of Article 53 as a Grotian Moment.[16] From those accounts, one would easily conclude that there is nothing spectacular about the adoption of Article 53 and that it amounted to stating the obvious.

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[13] See Nico Schrijver "The Ban on the Use of Force in the Charter" in Marc Weller (ed) *The Oxford Handbook of the Use of Force in International Law* (Oxford, 2015), at 469; Gerhard Werle and Florian Jessberger *Principles of International Criminal Law* (Third, Edition, Oxford, 2014), at 289. See Paul B Stephan "The Political Economy of *Jus Cogens"* (2011) 44 *Vanderbijlt Journal of Transnational Law* 1073, at 1081. There is of course debates on the scope of the jus cogens prohibition. The most recent ILC draft conclusions refer to "aggression", while for some it is the prohibition on the use of force as a whole that is cogens. See for a detailed discussion of the debate Olivier Corten and Vaios Koutroulis "The *Jus Cogens* Status of the Prohibition on the Use of Force: What is its Scope and Why Does it Matter?" in Dire Tladi (ed) *Peremptory Norms of General International Law: Disquisitions and Dispositions* (Brill, 2021). See also Dire Tladi "The Extraterritorial Use of Force against non-State Actors" (2021) 418 *Collected Courses of the Hague Academy of International Law* 223.

[14] See generally Julia Sebutinde "Is the Right to Self-Determination Jus Cogens: Reflections on the Chagos *Advisory Opinion*" in Dire Tladi (ed) *Peremptory Norms of General International Law: Disquisitions and Dispositions* (Brill, 2021). See also Malcolm N Shaw "Self-Determination, Human Rights, and the Attribution of Territory" in Ulrich Fastenrath, Rudolph Geiger, Daniel-Erasmus Khan, Andreas Paulus, Sabine von Schorlemer and Christoph Vedder (eds) *From Bilateralism to Community Interests: Essays in Honour of Judge Bruno Simma* (Oxford, 2011), at 597-598.

[15] Article 53 of the 1969 Vienna Convention on the Law of Treaties provides: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

[16] See generally First Report of the Special Rapporteur on *Jus Cogens* (Dire Tladi) (A/CN.4/693) (2016), at para 28 *et seq.*

The idea of a hierarchy in international law in the form of some rules having the power to invalidate other rules was first introduced into the work of the International Law Commission by Sir Hersch Lauterpacht.[17] In his first report (the fourth overall report on the topic of the law of treaties), Lauterpacht proposed Draft Article 15 which provided that "[a] treaty, or any of its provisions, is void if its performance involves an act which is illegal under international law .."[18] In the proposed commentary, Lauterpach explained that "international law" in Article 15 referred to "such overriding principles of international law which may be regarded as constituting principles of international public policy (*ordre international public*)."[19] The phrase "*jus cogens*" was introduced into the lexicon of the ILC Articles by Sir Gerald Fitzmaurice in his third report (the eighth report overall).[20] In this report, Fitzmaurice proposed two provisions concerning *jus cogens*. Draft Article 16(2) built on Lauterpacht's proposal and provided that, for a treaty to be valid, it should be "in conformity with or not contravene … those principles and rules of international law which are in the nature of *jus cogens*." Draft Article 17 proposed by Fitzmaurice, distinguishes between *jus cogens* and *jus dispositivum* by providing that "it is only if the treaty involves a departure from or conflict with absolute and imperative rules … of international law in the nature of *jus cogens* that a cause of invalidity can arise." Sir Humphrey Waldock, in his second report (the twelfth overall report on the topic), also proposed that "[a] treaty is contrary to international law and void if" it "involves the infringement of a general rule or principle of international law having the character of *jus cogens.*"[21]

In the context of international law *as it stood at the time,* these were awe-inspiring proposals. Yet, members of the Commission accepted the correctness of the principle implied in these proposals, with many extolling its importance.[22] While there were differences of opinion concerning the drafting and even the theoretical basis, members did not question the basic proposition contained in these proposals.[23] The spirit of the Commission was captured by Mr Yasseen who stated that "the concept of *jus cogens* in international law was unchallengeable", supporting this statement by noting that "[n]o specialist in international law could contest the proposition that no two States could come to an agreement to institute

[17] Report by the Special Rapporteur on the Law of Treaties (Mr. Hersch Lauterpacht) (A/CN.4/63) (1953).
[18] *Id.,* Draft Article 15.
[19] *Id.,* at para 4 of the commentary.
[20] See Third Report of the Special Rapporteur on the Law of Treaties (Gerald Fitzmaurice) (A/CN.4/115 and Corr.1) (1958).
[21] Art 13(1) of the Second Report of the Special Rapporteur on the Law of Treaties (Sir Humphrey Waldock) (A/CN.4/156 and Add.1-3) (1963).
[22] See, e.g. Mr Rosene (A/CN.4/SR.682), stating that the principle was, from a political and moral standpoint "of capital importance." See also Mr Yaseen (A/CN.4/SR.683) stating that the principle "was as important as it was sensitive"; Mr. Tabibi (A/CN.4/SR.683) who sated that no "State could ignore certain rules of international law"; Mr. Pal (A/CN.4/SR.683) stating that "there could be no doubt that an international public order existed now and that certain principles of international law had the character of jus cogens"; Mr. Lachs (A/CN.4/SR.684) observed that the concept of *jus cogens* "was a vital one for contemporary international law".
[23] Mr. Briggs (A/CN.4/SR. 683), who while questioning the use of the term, proposed the following redrafting: "A treaty is void if its object is in conflict with a peremptory norm of general
international law from which no derogation is permitted except by a subsequently accepted norm
of general international law".

slavery or to permit piracy, or that any formal agreement for either purpose was other than void". [24] There was also support from States for the proposal from the Commission. Issues that were raised by States concerned not the principle itself but rather the need for a dispute settlement mechanism to ensure proper implementation.[25] The only State that opposed the notion of *jus cogens* on *a substantive basis* was Luxembourg, noting that it interprets the provision as an attempt to "introduce as a cause of nullity criteria of morality and 'public policy' such as are used in internal law" and it questioned "whether such concepts are suitable for transfer to international relations which are characterized by the lack of any authority, political or judicial, capable of imposing on all States standards of international justice and morality".[26]

Yet, there was, at the time, virtually no evidence of the application of *jus cogens* in practice. *Jus cogens*, at the time, was truly a doctrine "without pedigree", to borrow from d'Aspremont.[27] There was, of course, much literature supporting the concept.[28] There had also been examples of practice supporting the idea of invalidity of treaty law on account of conflict with higher rules. However, these examples could not be seen as classical application of the *jus cogens* doctrine. For example, Article 20 of the Covenant of the League of Nations, while prohibiting the conclusion of treaties contrary to its provisions was, itself, a treaty rule and not a norm of *jus cogens*. The individual opinion of Judge Schüking in the *Oscar Chinn* case before the Permanent Court of International Justice is yet another example that may be advanced as an approximation of *jus cogens* prior to the adoption of Draft Article 50 of the ILC Draft Articles on the Law of Treaties. Yet even that opinion was based on the agreement applicable between the parties, i.e. the Act of Berlin.[29]

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[24] A/CN.4/SR.828. Similar support was also expressed in the course of the Vienna Conference. See, e.g. Mr. Khlestov (Soviet Union), *Official Records of the United Nations Conference on the Law of Treaties, First Session,* Vienna, 26 March – 24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole (A/CONF.39/11), Fifty-second Meeting, 4 May 1968, para 3.

[25] See for discussion Michael Wood "The Unilateral Invocation of Jus Cogens Norms" in Tladi (above note 14).

[26] See Fifth Report of the Special Rapporteur (Humphrey Waldock) on the Law of Treaties (A/CN.4/183), *Yearbook of the International Law Commission* 1966, Vol 2, at 21.

[27] See Jean d'Aspremont "*Jus Cogens* as a Social Construct without Pedigree" (2015) 46 *Netherlands Yearbook of International Law* 85.

[28] Alfred Verdross "*Jus Dispositivum* and *Jus Cogens* in International Law" (1966) 60 *American Journal of International Law* 55; Georg Jellinek *Die Rechtiliche Natur der Staatenverträge: Ein Beitrag Zur Juristichen Construction des Volkerrechts* (Wien, 1880), at 59-60; Antoine Pillet ''Le Droit International Public, Ses Éléments Constitutifs, Son Domaine, Son Object'' (1894) 1 *Revue Générale de Droit International Public* 1, at 20, who invokes a ''droit absolu et impérieux'' (''an absolute and compelling law''), which is the ''le droit commun de l'humanité'' (''the common law of humanity'').

[29] Separate opinion of Judge Schücking in *The Oscar Chinn case,* Judgment of 12 December 1934, Permanent Court of International Justice, Ser. A/B No. 63, p. 65, at 148. See also *Pablo Najera (France) v United Mexican States*, Decision No. 30-A of 19 October 1928, Vol V UNRIAA 466, at 470 where the French-Mexican Claims Commission explicitly referred to "*jus cogens"* character of Article 18 of the Covenant of the League of Nations ("le caractère d'une règle de droit à laquelle il n'est pas libre aux Etats, membres de la Société des Nations, de déroger par des stipulations particulières, entre eux (*jus cogens*).") Yet, even here, the Commission makes plain that, as a treaty rule, Article 18, applies only between the members of the League (*entre eux*).

Given the scarcity of practice at the adoption of the Draft Articles (and subsequently, the Vienna Convention), the view that the ILC's introduction of *jus cogens* from the periphery to the mainstream of international law represented a Grotian Moment is a compelling one. It was a Grotian Moment in the sense that prior to Commission's text, the term *jus cogens* was used either in a narrow technical sense of non-derogation clauses in treaties, or (in its fuller sense) was the subject of scholarly musings but not much more. The work of the Commission, and the subsequent adoption of the Vienna Convention, appears to have galvanised actual practice of States to the point where currently, the idea of *jus cogens* as part of the fabric of international law is *virtually* unopposed. There is, of course a common misconception that France opposed the concept of *jus cogens*. This false narrative no doubt arose (and became entrenched) because of France's vote against both Article 53 and the Vienna Convention as a whole. Yet, the records indicate France, both in response to the ILC's work on the topic and during the Vienna Conference, expressly supported the concept but was concerned about the lack of adequate of safeguards against abuse and the potential for destabilisation of treaty relations.[30] France declared for example, that "the substance of *jus cogens* was what represented the undeniable expression of the universal conscience, the common denominator of what men of all nationalities regarded as sacrosanct, namely, respect for and protection of the rights of the human person",[31] and that it "could hardly formulate an objection to such" a concept.[32] There were of course, a few States, such as Australia and Turkey that did, in fact, question the concept of *jus cogens* as such,[33] but this was rather exceptional.

2.2 Peremptory Norms and Grotian Moments: Facilitator or Foe

The issue addressed in this sub-section is whether *jus cogens,* at a conceptual level, facilitates or obstructs Grotian Moments. Whether one accepts the natural law or positive law conception of *jus cogens*, it is hard to argue with the generally accepted view that *jus cogens* has its origins in the natural law thinking.[34] The relationship between the two concepts permeates scholarly writings.[35] The similarities between *jus cogens* as a concept and a natural

[30] For a full discussion see First Report of the Special Rapporteur (Dire Tladi) on Jus Cogens, A/CN.4/693 (2016), at para 36.

[31] *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March – 24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11), Fifty Fourth Meeting, at para 32.

[32] *Id.,* at para 27.

[33] See Tladi First Report (above note 30), at para 37.

[34] See, e.g. Gennady Danilenko "International *Jus Cogens*: Issues of Law-Making" (1991) 2 *European Journal of international Law* 42, at 44 ("It is well known that the doctrine of international jus cogens was developed under a strong influence of natural law concepts."); Levan Alexidze "The Legal Nature of Ius Cogens in Contemporary International Law" (1981-III) 172 *Recueil de Cours de l'Académie de droit international de La Haye* 229, at 228 who states that ''the fathers of the bourgeois science of international law – Francisco de Vitoria, Francisco Suarez, Ayala Balthazar, Alberico Gentili, Hugo Grotius – stressed the peremptory character of rules of natural law, placing it above positive law". See also Mary Hansel "'Magic' or Smoke and Mirrors? The Gendered Illusion of *Jus Cogens*?" Tladi (above note 14), at 471 *et seq.*

[35] Mark Janis "The Nature of Jus Cogens" (1987) 3 *Connecticut Journal of International Law* 359, at 361 ("[t]he distinctive character essence of jus cogens is such, I submit, as to blend the concept into traditional notions of

law approach are undeniable. The basic tenet of natural law thinking is that beyond positive, state-made law, is natural law, which is a higher set of norms against which the validity of consent-based rules of international law must be judged. All you need to do to explain the (basic) theory of *jus cogens* is to replace the words "natural law" with "*jus cogens*".[36] Yet, a dominant strand of natural law thinking – certainly not the only for there are a multiplicity of natural law approaches – is one that characterises this natural law as immutable. Groot himself, known in part for his adherence to the natural law approach, described the immutability of natural law.[37]

For the concept of Grotian, the close relationship between jus cogens and natural law – or at least its more dominant strand – should be obvious. A conception of *jus cogens* based on natural, and in particular that strand of natural law based on immutability of the higher norms would conceptually be a fatal foe to the effect of Grotian Moments on *jus cogens* norms since Grotian Moments are about change (drastic change no less). Yet the conception of jus cogens currently accepted in international law does not reflect this model of natural law centred on the immutability of natural law term. This concept of *jus cogens* is one that refuses to be placed in a philosophical box as either natural law or positivist doctrine.[38] That it retains its natural law flavour is best exemplified in the basic hierarchical superiority resulting in the invalidation of positive law rules that are in conflict with it.[39] The interaction between

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natural law"); Louis Sohn *The New International Law: Protection of the Rights of Individuals Rather than the State* (1981) 32 *American University Law Review* 1, at 14-15, referring to *jus cogens* as "practically immutable" – language reminiscent of natural law doctrine. Dan Dubois "The Authority of Peremptory Norms in International Law: State Consent or Natural Law?" (2009) 78 *Nordic Journal of International Law* 133, at 134 ("..the conclusion reached is that, in any coherent theory of peremptory norms, one must inevitably have recourse to some conception of natural law"). See also Mary-Ellen O'Connell "*Jus Cogens*: International Law's Higher Ethical Norms" in Donald Childress (ed.) *The Role of Ethics in International Law* (New York, 2012), especially at 97. O'Connell explains, however, that modification in the form of expansion is possible. See Mary Ellen O'Connell "Self-Defence, Pernicious Doctrines, Peremptory Norms" in Mary Ellen O'Connell, Christian Tams and Dire Tladi *Max Planck Trialogues on the Law of Peace and War (Vol I): Self-Defence against Non-State Actors* (series editors, Anne Peters and Christian Marxsen) (Cambridge, 2019), 244.

[36] There are of course, even prior to the twentieth century, authors that put forward positivist conceptions of the central idee underlying jus cogens, the limits to the contractual freedom of States, but these are rather atypical. Georg Jellinek *Die Rechtiliche Natur der Staatenverträge: Ein Beitrag Zur Juristichen Construction des Volkerrechts* (Wien, 1880), at 59-60 and Ottfried Nippold *Der Völkerrechtliche Vertrag – seine Stellung im Rechtssystem und seine Bedeutung fur das international recht* (1894). I have considered these, and other authors that adopt a more positivists approach to this central idea in my first report on jus cogens as Special Rapporteur. See Tladi First Report (above note 30), at paras 22.

[37] See for some description of the extracts from *De Jure Belli Ac Pacis,* Tladi First Report (above note 30), at para 21.

[38] See generally for discussion Jean d'Aspremont "*Jus Cogens* as a Social Construct without Pedigree" (2015) 46 *Netherlands Yearbook of International Law* 85.

[39] This is the rule reflected in Articles 53 and 64 of the Vienna Convention on the Law of Treaties. In the ILC's latest Draft Conclusions on the subject, this rule is made applicable also to other rules of international law. See Draft Conclusions on Peremptory Norms of General International Law (*Jus Cogens*), adopted on first reading, *Report of the International Law Commission,* Seventy-First Session, General Assembly Official Records (A/74/10), Draft Conclusions 14, 15, 16. Other indicators that *jus cogens* retains its natural law flavour is the general characteristics identified by the ILC in draft conclusion 3 of the draft conclusions, which describe *jus cogens* as reflecting and protecting fundamental values, of being hierarchical superior and being universally applicably.

positivism and natural law in the current conceptualisation of international law is famously described by Koskenniemi who posits that while, at first glance, *jus cogens* appears to be non-consensualist source of law (natural law), without the recognition and acceptance of States (positive law), it remains nothing more than morality.[40] This modern conception of *jus cogens* does permit modification.[41] Article 53 of the Vienna Convention itself makes it plain that modification of peremptory norm is possible.[42] Similarly, Article 64 speaks of the emergence of a norm of *jus cogens* subsequent to the adoption of a treaty. The Commission's Draft Conclusions on Peremptory Norms, adopted on first reading, similarly adopted the same posture.[43]

The conception of *jus cogens,* as it is understood in present-day international law, as reflected in the ILC's Draft Conclusions, is thus not a fatal foe to the potential for Grotian Moments to influence particular norms of *jus cogens* since it permits and foresees modification. Yet, for modification of *jus cogens* norms, the modifying norm must in itself meet the requirements for peremptoriness.[44] In connection with Grotian Moments, this means that any norm emerging from a Grotian Moment must be accepted and recognised by the international community of States as a whole as one from which no derogation is permitted – an exceedingly onerous threshold. This then reflects the first perspective of the relationship between Grotian Moments and *jus cogens*: Because *jus cogens* norms are not immutable, it does not represent a fatal foe to Grotian Moments. Yet, because of the significantly high threshold for the modification of *jus cogens* norms and the establishment of new norms of *jus cogens*, *jus cogens* does represent somewhat of a foe for Grotian Moments as catalysts for new norms.

The idea that doctrine of *jus cogens* is a foe, even if not fatal, to the ability Grotian Moments to influence the emergence, modification or abrogation of such peremptory norms is only one side of the story. The other side of the story is that the relationship between *jus cogens* and Grotian Moments can be said in a more positive way. After all, the recognition of norms as having *jus cogens* status often has, as underlying propellers, moments in history that may

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[40] Martti Koskenniemi *From Apology to Utopia: The Structure of Legal Argument (Reissue with new Epilogue)* (Cambridge, 2006), at 307 *et seq.*

[41] See, generally Mehrdad Payandeh "Modification of Peremptory Norms of General International Law" in Tladi (above note 14).

[42] Article 53 provides that norms of *jus cogens* can only be modified "by a subsequent norm of general international law having the same character".

[43] See Draft Conclusions on Peremptory Norms of General International Law (*Jus Cogens*), adopted on first reading, *Report of the International Law Commission,* Seventy-First Session, General Assembly Official Records (A/74/10), especially Draft Conclusion 14(1) which, having stated that the a rule of customary international law will not emerge if it conflicts with a norm of jus cogens, and proceeds to clarify that this "is without prejudice to the possible modification of a peremptory norms". See also Dire Tladi "The International Law Commission's Draft Conclusions on Peremptory Norms of General International Law (jus cogens): Making Wine from Water or More Water than Wine" (2020) 89 *Nordic Journal of International Law* 244, at 256.

[44] See para 5 of the Commentary to Draft Conclusion 14 of the Draft Conclusion on Peremptory Norms (above note 43).

result in, or contribute, to a normative policy shift leading to a shift in the law. The examples alluded to in the introduction to this section – the horrors of World War II laying the foundations for the *jus cogens* character of the prohibition of genocide as well as the wave of decolonisation serving as an impetus for the peremptory character of self-determination – are illustrative of the fact that a positive relationship – what may be called facilitative friendship – *can* exist between *jus cogens* norms and Grotian Moments.

Applied to the relationship between *jus cogens* and Grotian Moments, there may be norms of international law (or for that matter, norms of morality that are yet to acquire the status of law at all), whose character and content meet the substance and normative requirements of *jus cogens* but which are yet to be recognised and accepted by the international community of States as a whole as having peremptory character. It may be an historical event – a Grotian Moment – that galvanises the international community of States to bestow on that norm the acceptance and recognition of peremptoriness. A hypothetical is warranted. Whatever one's views on the use of nuclear weapons, it would probably be a stretch to suggest that the prohibition on the use of nuclear weapons is *jus cogens*. Yet, it is not inconceivable that a stand-off between two nuclear weapons States, similar to the Cuban Missile Crisis, could propel "the international community of States as a whole" to recognise the peremptory character of the prohibition of nuclear weapons. This stand-off would be a Grotian Moment leading to the emergence of a new peremptory norm of general international law. The entry into force in January 2021 of the Nuclear Ban Treaty *could* also result in a massive rate of ratification of the treaty, accompanied by overwhelming expressions of acceptance and recognition of the peremptory character of the main obligation of the treaty. This too *could hypothetically* be a Grotian Moment leading to the emergence of a new *jus cogens* norm prohibiting the use of nuclear weapons. What is important in these hypotheticals is that the Grotian Moments do not replace the rules of international law for law-making.

3. Particular "Grotian Moments" and Particular Jus Cogens

There are two examples that have been put forward in many scholarly works as Grotian Moments which have caught my eye. The first example is the airstrikes by NATO in the Socialist Federal Republic of Yugoslavia in response to the genocide against Kosovar Albanians. The second is the attacks of 11 September 2001 in the United States and the subsequent response by the United States and the United Nations Security Council. The former is said to be a Grotian Moment for humanitarian intervention, while the latter is said to be a Grotian Moment for an expanded right to the use of force against non-State actors in self-defence. Both events would be followed much later by comparable events which could also lay claims to the title Grotian Moments. For the former, the US-led attacks in Syria in response to allegations of chemical weapons by the Assad government provided a historical parallel. For the latter, the US-led attacks in Syria against ISIS provided the parallel. Both examples of Grotian Moments have been said to affect international law on the use of force by making it more permissive. Of course, the prohibition on the use of force is a *jus cogens*

norm. As such the claims that these Grotian Moments had an effect on the law on the use of force falls to be assessed in terms the relationship described in section 2.

First, is it possible for these Grotian Moments to modify peremptory norms of international law on the use of force, or is the peremptory status of the prohibition on the use of force a fatal foe for the potential impact of Grotian Moments? As discussed in the second section of the article, it is possible for Grotian Moments to have an effect on jus cogens, but the threshold for this is high. This is certainly the case also for the law on the use of force.[45] Thus these moments in history could potentially have had the effect of expanding the law on the use of force to permit humanitarian intervention and extraterritorial self-defence against non-State actors. More than that, given the historical significance and the underlying purpose, any evolution of the law pursuant to these moments would be in congruence with the positive relationship between *jus cogens* and Grotian Moments (the facilitative friendship). Whether these moments had the effect of modifying international law (or contributing to its modification), however, ought to be determined by the rules of international law on its modification. It is not enough to simply identify these events as Grotian Moments.

I have elsewhere provided detailed reasons why, both so-called "Grotian Moments" have not affected the current state of international law and I will not repeat that detailed description.[46] To affect the content of the rule prohibiting force, it would need to be shown either that there was a general and widespread practice accompanied by the requisite *opinio juris* reflecting the evolved norm. Alternatively, it could be shown that there was subsequent practice establishing the agreement of the Parties to the UN Charter as to a new interpretation of the Charter rules. Moreover, in both instances, given the *jus cogens* character of the rule in question, it would need to be shown that the general norm of international law so produced was accepted and recognised by the international community of States as a whole as one from which no derogation was permitted. I will point out that in both instances, the test falls at the first hurdle, i.e. the establishment of the general norm (or more accurately, the modified understanding of the existing general norm of international law), such that it has become unnecessary to assess whether there is evidence of the recognition and acceptance of the peremptory character of the norm.

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[45] See Payandeh (above note 41). See also Olivier Corten and Vaios Koutroulis "The *Jus Cogens* Status of the Prohibition on the Use of Force: What is its Scope and Why Does it Matter?" in Tladi (above note 14). For the present author's view on the effect of *jus cogens* on the modification of the rules on the use of force see Dire Tladi "The Use of Force on Self-Defence against Non-State Actors, Decline of Collective Security and the Rise of Unilateralism: Whither International Law?" in O'Connell, Tams and Tladi (above note 35), at 26 *et seq.* These views are expanded upon and clarified in the Dire Tladi "The Extraterritorial Use of Force against Non-State Actors" 2021 *Collected Courses of the Hague Academy of International Law* (forthcoming).

[46] In respect of the Kosovo example, see Aniel Caro de Beer and Dire Tladi "The Use of Force against Syria in Response to Alleged Use of Chemical Weapons by Syria: A Return to Humanitarian?" (2019) 79 *Zeitschrift für Ausländisches Öffentliches Recht und Volkerrecht* 205, at 218 *et seq.*. In respect of the 9/11 example, amongst many others, see Tladi "The Use of Force on Self-Defence against Non-State Actors, Decline of Collective Security and the Rise of Unilateralism" (above note 45), at 66 *et seq.*

To begin with the NATO intervention in Yugoslavia, it is clear that while many States were sympathetic with the intervention and accepted it politically, States did not generally accept the lawfulness of the intervention nor did they believe that it should serve as precedent for future similar circumstances. It is noteworthy, that in the Security Council debate following the intervention, only one State made the claim that the intervention was legal.[47] Other States, including some States that led the intervention, while justifying the political necessity of the action, did not suggest or seek to make the case that the intervention was legal.[48] The failure of the proponents, with the exception of the United Kingdom, to claim that the intervention was lawful is particularly interesting because other States claimed that the intervention was unlawful.[49] There remains a large group of States that reject humanitarian intervention as an exception to the prohibition on the use of force.[50] As noted by Franchini and Tzanakopoulos, it is mainly authors and commentators, and not States, that consider that NATO intervention was a law-transforming moment.[51] The NATO intervention in Yugoslavia can therefore not be regarded as "Grotian Moment" resulting in a shift in the rules of international law.

The case for 9/11 as a law transforming "Grotian Moment" is not much more convincing. Many proponents for the right to use force extraterritorially against non-State actors have advanced 9/11 as the defining moment. In this respect, Judge Kooijmans in the *Armed Activities in the Territory of the Congo* case noted that the narrow interpretation of the right

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[47] See statement by Sir Jeremy Greenstock (United Kingdom) (S/PV.3988) ("The action being taken is legal. It is justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe. Under present circumstances in Kosovo, there is convincing evidence that such a catastrophe is imminent.")

[48] See statements at the meeting, S/PV.3988*.,* especially the statements by Mr. Burleigh (United States of America), Mr. Fowler (Canada), Mr. van Walsum (Netherlands), Mr. Dejammet (France).

[49] See, e.g. statement by Mr. Hasmy (Malaysia) ("As a matter of principle, my delegation is not in favour of the use or threat of use of force to resolve any conflict situation, regardless of where it occurs. If the use of force is at all necessary, it should be a recourse of last resort, to be sanctioned by the Security Council, which has been vested with primary responsibility for the maintenance of international peace and security"); Mr. Lavrov (Russian Federation) ("Attempts to justify the NATO strikes with arguments about preventing a humanitarian catastrophe in Kosovo are completely untenable. Not only are these attempts in no way based on the Charter or other generally recognized rules of international law, but the unilateral use of force will lead precisely to a situation with truly devastating humanitarian consequences."); Mr. Qin Huasun (China) ("This act amounts to a blatant violation of the United Nations Charter and of the accepted norms of international law. The Chinese Government strongly opposes this act…. It has always been our position that under the Charter it is the Security Council that bears primary responsibility for the maintenance of international peace and security. And it is only the Security Council that can determine whether a given situation threatens international peace and security and can take appropriate action. We are firmly opposed to any act that violates this principle and that challenges the authority of the Security Council.")

[50] In 2016, many years after the NATO intervention, the Non-Aligned Movement, a group of 120 States (plus twenty seven observers), re-affirmed their long standing position against humanitarian intervention. See 17th Summit of Heads of State and Government of the Non-Aligned Movement (2016) ("*reaffirmed* the Movement's commitment to enhance international cooperation to provide humanitarian assistance in full compliance with the UN Charter and mindful of the relevant UN resolutions, where applicable …they reiterated the rejection by the Movement of the so-called 'right' of humanitarian intervention, which has no basis either in the UN Charter or in international law.")

[51] Daniel Franchini and Antonios Tzanakopoulos "The Kosovo Crisis – 1999" Tom Ruys and Olivier Corten (eds) *The Use of Force in International Law: A Case-Based Approach* (Oxford, 2018), at 618

to self-defence is "no longer" correct due to, *inter alia*, "resolutions 1368 (2001) and 1373 (2001)" which recognise "the inherent right of individual or collective self-defence without making any reference to an armed attack by a State."[52] In the same vein, and in the same case, Judge Simma made the following observations:

> Such a restrictive reading of Article 51 might well have reflected the state, or rather the prevailing interpretation, of the international law on self-defence for a long time. However, in the light of more recent developments not only in State practice but also with regard to accompanying *opinio juris*, it ought urgently to be reconsidered, also by the Court. As is well known, these developments were triggered by the terrorist attacks of September 11, in the wake of which claims that Article 51 also covers defensive measures against terrorist groups have been received far more favourably by the international community than other extensive re-readings of the relevant Charter … 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.[53]

The reliance on Security Council resolutions 1368 and 1373 for the proposition that there is now, under international law, a right of States to use force against non-State actors in self-defence, is problematic for a number of reasons. In the forthcoming Hague Academy Lectures on extraterritorial use of force against non-state actors, after a detailed analysis of the resolutions,[54] I outlined the following problem with the reliance on these resolutions:

(i) on their face, those resolutions do not, even implicitly, provide for a right of self-defence against non-State actors. They merely recall the existence of the right in general terms;

(ii) the language relied on is preambular language;

(iii) UN Security Council resolutions are, as a rule, directed at a specific situations and are, save for some recent exceptions, intended to establish general rules of customary international law.

More importantly, numerous States objected to the notion that the fight against terrorism permitted the extraterritorial use of force against non-State actors.[55]

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[52] See separate opinion of Judge Kooijmans in *Case Concerning Armed Activities in the Territory of the Congo (Democratic Republic of Congo v Uganda),* Judgment, *ICJ Reports 2*005, p.168, at para 28.

[53] See, *id., s*eparate opinion of Judge Simma. at para 11.

[54] See Tladi "The Extraterritorial Use of Force against Non-State Actors" (above note 45).

[55] During the conference associated with this volume, one participant suggested that the criticism against the use of force in response to terrorism only related to the question of proportionality. This is patently incorrect. While a full response to that position falls beyond the scope of this article, reference can be made to Tladi "The Use of Force against Non-State Actors" (above note 45), at 66-88. Reference can also be made to the following sources: Statement of the Permanent Mission of the Republic of El Salvador on behalf of the Community of Latin American and Caribbean States (CELAC) during the United Nations' Special Committee on the Charter of the United Nations and the Strengthening of the Role of Organisation, New York, 20–28 February 2018, available at https://celac.rree.gob.sv/wp-content/uploads/2018/02/Statement-CELAC-Charter-Committee-Feb-2018.pdf ("CELAC has noted an increase in the number of letters addressed to the President of the Security Council under Article 51 of the Charter regarding military action, in the context of counterterrorism. As it has been noted before

These two events, while certainly prominent and impactful, did not have a major effect on the trajectory of positive law. In both instances, there was insufficient practice in support to transform international law. Moreover, the rules which these events were meant to affect are norms of *jus cogens*. To consummate the "Grotian Moment" in respect of the *jus cogens* prohibition of the use of force, a higher threshold of acceptance and recognition by the international community of States as a whole of no derogation, would need be met.

4. Conclusion

The phrase "Grotian Moments" can be a potentially useful concept for describing events which may have an impact on international law. It can be used, as an empirical concept, to explain why particularly fundamental shifts international law have occurred, Understood in this way, Grotian Moments have no effects on the processes and rules for law-making. In other words, this characterisation of an event as a "Grotian Moment" has not legal significance beyond providing context for shifts in law and is insufficient to transform the rules and doctrines of international law. Describing an historical event as a "Grotian Moment" does not thereby transform that moment into a law-making tool. Yet, this is only way of looking at Grotian Moments is not the only way. Some of the examples that have been advanced in the literature may suggest that Grotian Moments are more than just empirical descriptors of historical events that provide context for shifts in international law. Some of the examples suggest that Grotian Moments may have, beyond its empirical value, a law-making quality, capable to galvanise a shift in law, whether through the non-application of the methodological rules of law-making or through the significant relaxation of those rules. To

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by the Group, this is an issue of concern . . .There are also underlying concerns stemming from attempts to reinterpret the law on self-defence and de facto expand an exception to the general prohibition to the use of force contained in article 2.4 . . ."). See also the statement by the Permanent Mission of the Republic of El Salvador on behalf of the Community of Latin American and Caribbean States (CELAC) during the UN General Assembly Sixth Committee Consideration of the Agenda Item Measures to Eliminate International Terrorism, 2 October 2017 (A/C.6/72/SR.1), at para. 30, and the statement of the Permanent Mission of Brazil during the UN Sixth Committee Consideration of the Agenda Item Measures to Eliminate International Terrorism, 2–4 October 2017 (A/C.6/72/SR.4), at para. 32 ("there are underlying concerns stemming from attempts to reinterpret the law regarding the content and the scope of self-defence, especially on its applicability in relation to non-state actors. However difficult, we should not shy away from discussing critical legal issues involving the use of force. Some interpretations regarding the scope and content of self-defence arising from counter-terrorism scenarios might not be adequate or advisable, as they might set dangerous precedent. Silence regarding these interpretations, such as the so-called 'unwilling or unable doctrine', should not be understood as acquiescence or as proof of *opinio iuris*"). See also UN Doc. S/PV.8175, 6 February 2018, in which Mexico stated that it was concerned by the "continuous references to Article 51 of the Charter of the United Nations by some States to address threats to international peace and security with military action, especially against non-State actors. Mexico is troubled that such a practice, coupled with the ambiguous language of recent Council resolutions, runs the risk of a de facto broadening of exceptions to the general prohibition on the use of force, as set out in Article 2, paragraph 4, of the Charter of the United Nations, in an irregular manner". See also the statement of Brazil at the Security Council Debate on Upholding International Law within the Context of the Maintenance of International Peace and Security of 17 May 2018, UN Doc. S/PV.8262, 44: "Some have been arguing that self-defence could be applied as a response to non-State actors, sometimes adding as a condition the criterion of unwillingness or inability on the part of the territorial State. Brazil does not agree with such interpretations."

the extent that this is meaning accorded to the Grotian Moments, then it is without a basis in international law and dangerous.

The empirical understanding of "Grotian Moments" *can* have a modifying impact, even on peremptory norms. For that to happen, however, the modified norm has to be shown to have the acceptance and recognition of the international community of States as a whole as a norm from which no derogation is permitted. More positively, events in history can serve as impetus for State behaviour and attitude, and, in this way, may constitute "Grotian Moments" for the emergence of new norms of *jus cogens*. Yet, in the final analysis the concept of Grotian Moments, as a legal concept, has little if any value, beyond describing the empirical moments that may, or may not, have an effect on international law.