

Book Review



Michael P. Scharf, Milena Sterio and Paul R. Williams, *The Syrian Conflict's Impact on International Law* (Cambridge University Press 2020), 221 pp.

The Syrian Conflict's Impact on International Law is a book-length collection of seven essays on seven distinct topics. The common thread of the essays is the Syrian conflict which started in 2011. The thesis of the monograph is that the Syrian conflict has been a fundamentally transformative event (more accurately, as reflected in the book, a collection of events) of such significant and universal effect that it (they) constitute a so-called 'Grotian Moment' in public international law.

Before reviewing the book, it might be of assistance to consider the notion of the Grotian Moment. The term is an informal reference point to the idea that events related to the subjects of international law (being States and, to a limited extent in certain contexts, international organisations) can occur, in the modern era, in such a way that customary international law is developed or created in significantly (in relative terms) shorter duration than is usually required. It is neither a rule nor a maxim of international law. Thus, whilst the development or creation of customary international law norms usually requires many decades of comprehensive adherence to the norm by an overwhelming number of States, those who subscribe to the notion of the Grotian Moment point to modern examples of the (relatively) rapid development of certain customary norms that have occurred within a matter of a few decades only and without near-universal State practice.

The first and most celebrated example of a Grotian Moment is said to be the development of customary norms of sovereign rights over the seabed beyond three nautical miles from the coast. This is said to have begun with the Truman Proclamation of 1945 (driven by rapid technological developments for offshore hydrocarbon extraction) and to have crystallised with the *North Sea Continental Shelf* case Judgment of the International Court of Justice in 1969. This period of a mere quarter century is considered unusually expedited for the development

of customary international law. Another example of a Grotian Moment might be the aftermath of the Second World War, which appeared to have generated a number of developments in international humanitarian law and international human rights. However, as most of these possible new customary norms were rapidly incorporated into conventional international law, the example is not entirely apposite.

The authors of *The Syrian Conflict's Impact on International Law* postulate that the events of that conflict constitute a single Grotian Moment. Indeed, they propose that those events were so momentous in combination that the Grotian Moment stimulated the rapid development of norms across a wide spectrum of customary international law themes, as set out below. However, the authors fail to establish that the Syrian conflict was so universal and momentous an event as to constitute a single Grotian Moment in and of itself that transformed a broad spectrum of customary international law. Rather, each of the substantive chapters of the book focuses on one or more specific events that the authors postulate developed certain specific customary norms. In this respect, although it is not expressed as such, it seems that the central thesis of the book is that the Syrian war was the catalyst for a number of events which, each on its own, constituted a Grotian Moment that facilitated the development or creation of a particular customary norm.

This reformulation or precision of the analysis in the book is borne out by the structure of the book itself. It is divided into nine chapters. The first and last of these are the introduction and conclusion. The second chapter provides a usefully concise but comprehensive review of the chronology and salient facts of this highly complex conflict. The third chapter discusses the accelerated formation of customary international law. Each of the remaining chapters address what the authors consider to be five discrete sub-systems of customary international law norms which have been transformed by virtue of the Grotian Moment(s) represented by the Syrian conflict:

1. Use of force in self-defence against non-state actors (chapter 4);
2. Humanitarian intervention in response to use of chemical weapons (chapter 5);
3. Transformation of accountability paradigms (chapter 6);
4. Refugee and asylum law (chapter 7); and
5. Conflict and post-conflict peace processes (chapter 8).

Thus, there is one central legal thesis and one central factual thesis presented in the book. The one central legal thesis is that customary international law can and sometimes does develop rapidly, pivoting around fundamentally transformative events of universal effect (so-called 'Grotian Moments'). It is safe to say that, although the details of how and when this occurs remain

the subject of debate, in its broadest conception, the idea of the potential for the rapid development of customary norms is widely accepted now as being orthodox public international law for the modern era.

The one central factual thesis is that the Syrian conflict from 2011 onward constituted a Grotian Moment which provided factual matrices around which five customary international law normative sub-systems either pivoted to create 'instant custom' or crystallised existing trends in the development of the law into custom. In truth, although this thesis is formally presented as a single event (the Syrian conflict), the analysis in the book in fact more properly can be viewed as being that multiple Grotian Moments occurred during this period, the common factor being that the events occurred during the conflict.

In relation to the book's legal thesis, the book reviews the history of the idea that custom can develop and trends can crystallise into norms in an accelerated fashion. This theory has its genesis in the International Court of Justice's 1969 judgment in the *North Sea Continental Shelf* case. Traditionally, customary international law was considered to be a set of legal principles that developed over centuries of consistent practice by an increasing and ultimately near-universal body of States. In the *North Sea* case, the Court held that customary international law norms can develop in an accelerated fashion, in certain circumstances. In that case, the Court was confronted with a dispute between neighbours about the delimitation of their overlapping continental shelves. The idea that States could enjoy sovereign rights over the seabed beyond three nautical miles from their coasts was first asserted by the United States in 1945. The issue was thus brought before the Court some 25 years later. The Court considered that, given recent and rapid developments in seabed extractive technology, as well as the significant increase in States paying attention to the question of ocean resources during that 25-year period, the relevant customary international law norms could legitimately be said to have developed and crystallised between 1945 and 1969. The authors point to a number of other examples of the accelerated development of customary international law norms. In each example, the accelerated development took place over a period of decades.

To this point, the book reflects an orthodox view of the development of customary international law in the modern era. However, the book pushes the limits of orthodoxy somewhat in describing the accelerated nature of customary international law creation. On the one hand, it recognises expressly that the examples of accelerated creation or crystallisation of custom show that it takes place over decades. On the other hand, it

implicitly argues in favour of what some refer to by the oxymoronic term of 'instant custom'. The idea that Grotian Moments can create instantaneous customary international law norms is not widely accepted and is certainly not reflected in State practice.

The reason for the book's support for 'instant custom' appears to be the authors' frustration with what they perceive to be the failure of existing customary international law norms to enable States to act in ways that might achieve outcomes that they (the authors) desire. The book thus ultimately reflects the authors' evangelical attempt to demonstrate that customary international law can be transformed literally in an instant by certain events, one such being the Syrian conflict (more precisely, certain specific events during the conflict).

For example, the authors evidently would like States to be able legally to intervene militarily within another State's jurisdiction, without either that State's agreement or United Nations Security Council authorisation, in circumstances when the authors consider that military intervention could produce an outcome that they would like. Thus, they applaud what they call 'custom pioneers', that is to say, actors that behave in a manner that is not consistent with existing customary international law but is consistent with rules that the authors would wish to become customary international law. Of course, stripped bare of the niceties of evangelic conjecture, the term 'custom pioneers' is an obfuscating label that the authors give to actors that violate customary international law but in a way that the authors approve (and approve because they hope that it will lead to a change in the relevant custom); if and when the custom changes, then retrospectively the rule-breaker can be said to have been a visionary rule-influencer and, presumably, the legal and moral opprobrium of actually having been a rule-violator might be softened. This moniker camouflages a variable and subjective characterisation. It reduces the analysis to a declension akin to: I am a custom pioneer; you operate in a grey area; she violates international law. Such an approach to the rule of law is, or should be, troubling to the reader.

In sum, to the extent that the book takes note of the existing concept of accelerated norm creation in international law, it expresses orthodox views. When it strays from the rule of law and wanders into the subjective world of characterising-what-I-like-as 'instant custom', it seeks to promote a view of norm creation that is beyond the orthodox and not one that is adopted by States. Ultimately, the suggestion that accelerated development of custom can be instant is not supported by the factual matrices arising from the Syrian conflict that are identified in the book because, as the book itself sets out, each of the five normative sub-systems has been in development already for a number of decades.

Turning now to the factual thesis, the book presents evidence of events during the Syrian conflict that it argues demonstrate that the conflict represents a Grotian Moment (although perhaps more accurately, Grotian Moments). The book suggests that these events provided factual matrices around which five customary international law normative sub-systems either pivoted into 'instant custom' or crystallised developing norms into custom. The five normative sub-systems are:

1. Use of force in self-defence against non-state actors (chapter 4);
2. Humanitarian intervention in response to use of chemical weapons (chapter 5);
3. Transformation of accountability paradigms (chapter 6);
4. Refugee and asylum law (chapter 7); and
5. Conflict and post-conflict peace processes (chapter 8).

In each of these chapters, the book identifies historic trends in the accelerated development of the relevant norm. It then discusses specific events in the Syrian conflict that it argues either created 'instant custom' or crystallised norm creation. Somewhat undercutting the enthusiasm implicitly contained in the opening chapters for 'instant custom', each of the events identified in the book is cogently presented as the latest stage in an evolving continuum over a period of decades. It therefore seems more tenable to view the legal outcomes of these events in terms of possibly crystallising already developing norms into custom, than the creation of 'instant custom' (even were such a thing possible in the law).

The book most effectively argues for norm crystallisation arising from the Syrian conflict in relation to the first two systems. There, the specific events identified in the Syrian conflict provide cogent evidence of shifting norms being widely tolerated and possibly also accepted. In relation to the use of force against non-State actors, this development reflects a decades-old confrontation by States and thus international law of the reality that globalised armed conflict on a massive scale is most certainly no longer the exclusive domain of States. In relation to armed intervention in response to the use of chemical weapons, it seems tenable to argue that customary international law has evolved to reflect changing views about the use of weapons of mass destruction against civilian populations. The book argues convincingly that the Syrian conflict constituted a Grotian Moment (perhaps Grotian Moments) in relation to these two normative sub-systems around which customary international law pivoted to crystallise developing norms.

The book is not as convincing about the Syrian conflict's Grotian role in relation to the other three sub-systems.

In relation to the transformation of accountability paradigms, the book argues that the novel but constitutionally permitted creation of a fact finding commission by the United Nations General Assembly, in the face of Security Council paralysis, and the increased use of the existing universal jurisdiction norms to prosecute war crimes by Germany reflect new customary international law. However, the constitutionally-permissible creation of a fact finding commission by a UN body is not really a question of law creation. Given that it was constitutionally permissible already, a legal norm was not created. And Germany's increased use of the existing legal norm of universal jurisdiction similarly raises no such issues. The examples provided in the book merely reflect creative or expanded use of existing customary international law.

In relation to what the book calls the Syrian Migration Crisis, the facts presented reflect developments of the domestic legal norms and asylum procedures in certain States. But that does not rise to the level of norm creation at public international law.

Finally, in relation to the peace process, the book focuses on how political procedures used in earlier conflicts were remoulded to the context of the Syrian conflict. Again, this does not raise normative issues of customary international law.

In conclusion, the book is thought-provoking. It starts with a very helpful factual overview and timeline of a highly complex and lengthy armed conflict. The discussion of the idea of the accelerated development of customary international law extends too far, in its implicit promotion of the idea of 'instant custom'. The book makes convincing arguments that the Syrian conflict did provide a Grotian Moment (more properly, a number of Grotian Moments) in relation to both the use of force against non-State actors and armed intervention in response to the use of chemical weapons (and perhaps more broadly weapons of mass destruction) against civilian populations. It does not successfully make the case out for the Syrian conflict having provided a Grotian Moment for the customary international law related to accountability paradigms, refugee and asylum law, or peace processes.

Robert Volterra

Partner, Volterra Fietta law firm and Visiting Professor at the Faculty of Law of University College, London, United Kingdom

robert.volterra@volterrafietta.com