Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments by MICHAEL P SCHARF [Cambridge University Press, Cambridge, 2013, xi + 228 pp, ISBN 978-1-107-61032-3 £21.99 (p/bk)]

Michael P Scharf's latest book is about the formation of customary international law. In particular, it examines 'radical developments in which new rules and doctrines of customary international law emerge with usual rapidity and acceptance' (1). Scharf labels these rare instances of accelerated law formation 'Grotian moments' (after the 'father' of the discipline himself).

The core of the book's thesis is that there is a 'third element' to the mechanism for the emergence of customary international law. The first two we all know – state practice and *opinio juris* – but Scharf identifies another: what he calls 'a context of fundamental change' (211). As he notes, the usual state of affairs is that custom develops over a significant period of time through widespread and consistent usage (6-7). However, this book argues that where the third element of fundamental change is present, customary international law can, and occasionally does, form at an extremely accelerated rate.

The first few chapters of *Customary International Law in Times of Fundamental Change* set out this central thesis (including situating it in the historical context of Grotius and his work); while the remainder of the work goes on to test it in relation to six case studies. Scharf concludes that the first four of these – the Nuremberg trials (particularly in relation to the concepts of JCE and universal jurisdiction for the crime of aggression), the Truman proclamation on the continental shelf, the emergence of space law in the 1960s and the *Tadić* decision of the ICTY (specifically with regard to war crimes in the context of non-international armed conflict) – all represent genuine 'paradigm altering' examples of the Grotian moments concept. In contrast, he concludes that the unilateral use of force under the

R2P doctrine and the avowed post-9/11expansion of the *jus ad bellum* to encompass pre-emptive action and self-defence against non-state actors do not qualify (or, at least, do not qualify *yet*). This is on the basis that the context of fundamental change in these instances has not, so far, been sufficient for the purported alterations to the law in question to gain wider traction within the international community.

In broad terms, the thesis at the heart of the book is incontestable. There certainly have been instances of expedited customary international law formation in the UN era, and it is difficult to argue with the view that the four cases illustrating the process here are indeed of this sort. There is no question, for example, the Trauman proclamation was a revolutionary in 1945 but *passé* by 1958. There may admittedly be differing opinions in relation to the assertions that Kosovo and 9/11 fall *outside* of the same concept (i.e., the claim that *despite* instances of fundamental change new customary law has not yet crystallised in these instances). As it happens this reviewer would largely agree with the author on both fronts, but others will not. Leaving aside such specifics of application, though, the validity of the book's core argument is hard to dispute.

One could, however, question whether the 'Grotian moment' concept is quite as revolutionary as it first appears. For example, Scharf makes a point of distinguishing his Grotian moments from the well-known and long-standing (if disputed) concept of 'instant custom'. This is on the basis that all custom requires at least *some* state practice to form, and so the notion of 'instant' custom is necessarily a misnomer (219). This must be correct: truly *instant* custom is indeed impossible. Yet, to an extent, Scharf may simply be adopting new terminology rather than formulating a distinct new concept. After all, the two most commonly cited examples of 'instant custom' in the literature are space law and the Truman proclamation (which are, of course, two of Scharf's four examples).

More generally, the criteria for assessing the 'sufficiency' of state practice in the customary law formation process – duration, generality and consistently – have long been accepted as being both interrelated and context-specific. Scharf rightly notes that, even in normal circumstances (i.e., where there is no moment of fundamental change), 'there exists no agreed-upon general formula for identifying how many states are needed and how much time must transpire to generate a rule of customary international law' (59). When one reflects on this, the conceptualisation of the 'context of fundamental change' as a *third element* of customary law formation becomes problematic.

This reviewer would argue that fundamental change is just one factor relevant to the application of the criteria for assessing the 'sufficiency' of the first element of custom formation – state practice – and not a distinct element in itself. Customary international law is ultimately formed by the acceptance of any given state practice as representing evidence of legal change, based on a combination of the duration, uniformity and generality of that practice. How those criteria are applied and thus what will be 'acceptable' in any particular instance, is related to many things: power, relevant state interest, the importance of the rule in question and – of course – whether the practice has occurred in the context of, or because of, a moment of fundamental (political/military/technological/economic) change. While the notion that fundamental change can lead to expedited custom formation is relatively uncontentious, the framing of this as a separate criterion distinct from any other relevant context-specific factor is therefore rather more debatable.

In any event, this is an excellent book. It is clearly and engagingly written (as anyone familiar with Scharf's previous work would expect). The research underpinning it is similarly faultless. Moreover, it is short and to the point: its arguments are both concisely made and precisely targeted. This book is ultimately an extremely important addition to the literature. Its thesis is at the same time indisputable (in and of itself) and yet highly

contestable both in terms of its framing and application to specific examples. *Customary International Law in Times of Fundamental Change* will undoubtedly spark important debate and further research on the process of expedited custom: a process that is controversial and potentially dangerous, but which – as Scharf ably demonstrates – undeniably occurs.

JAMES A GREEN*

* Associate Professor of Public International Law, University of Reading