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How to prove a role of Customary International Criminal Law: Re-imaging a Definition of CIL

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Cape Town

2006

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the degree of Master of Laws in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of Master of Laws dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

How to Prove a Rule of Customary International Criminal Law: Re-imagining a Definition of CIL

‘I agree with what you say, Socrates, but I wish you would consider what we ought to do.’¹

INTRODUCTION

The creation of the International Criminal Court (ICC)² has been heralded as an indication that the international community has begun to take the punishment of international crime seriously.³ There has been little in the way of prosecution for international crime since Nuremburg.⁴ However, the last decade has seen a flurry of judicial activity on the international plane.⁵ This increasing jurisprudence necessitates an examination of the role of customary international criminal law.

¹ Plato, *Crito*. Edited by Emlyn-Jones (Bristol Classical: London, 1999)

² International Criminal Court was created by the: ‘Rome Statute of the International Criminal Court’, UN. Doc. A/CONF.183/9 (17th July 1998), adopted on the 17th July 1998 at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.

³ Powell & Pillay, ‘Revisiting Pinochet: The Development of Customary International Criminal Law’ 17 *SAJHR* (2001) 477 at 478. For the question of whether a duty to prosecute under international criminal law see: Bassiouni, ‘Searching for Peace and Achieving Justice: The Need for Accountability’ 59 *Law and Contemporary Problems* (1996) 9; Orentlicher, ‘Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime’ 100 *Yale Law Journal* (1991) 2537.

⁴ Tomuschat, ‘International Criminal Prosecution: The Precedent of Nuremberg Confirmed’ 5 *Criminal Law Forum* (1994) 237 at 238. The exception to this assertion is the *Eichmann* case. *A.G Israel –v- Eichmann*, (1968) 36 ILR 5 (District Court, Jerusalem); *A.G Israel –v- Eichmann*, (1968) 36 ILR 277 (Israel Supreme Court).

⁵ See Charney, ‘Progress in International Criminal Law?’ 93 *AJIL* (1999) 452. This judicial activity was first marked by the creation of the *ad hoc* Tribunals: The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The ICTY was established in 1993 by the Security Council in Res 827 (May 25th, 1993), *reprinted* in 32 ILM 1203 (1993). The ICTR was established by Security Council Res 955 (Nov 8th 1994), *reprinted* in 33 ILM 1602 (1994). For a discussion of the work of the *ad hoc* Tribunals see: Akhavan, ‘Contributions of the International Criminal Tribunals for the Former Yugoslavia and Rwanda to the Development of Definitions of Crimes against Humanity and Genocide’ 94 *Am. Soc’y Int’l L. Proc.* (2000) 279; Cisse, ‘Symposium: Prosecuting International Crimes: An Inside View, The International Tribunals for the Former Yugoslavia and Rwanda: Some Elements of Comparison’ 7 *Transnational Law and Contemporary Problems* (1997) 107; Kolb, ‘The Jurisprudence of the Yugoslav and Rwandan Tribunals on their Jurisdiction and on International Crimes’ 71 *BYIL* (2000) 259; Meron, ‘War Crimes in Yugoslavia and the Development of International Law’ 88 *AJIL* (1994) 78

It is certainly true to say that international criminal law constitutes a distinct species of international law.⁶ Criminal law, by its very nature, is constraining and descending law.⁷ International law, under an orthodox positivist conception, is centred upon notions of state sovereignty and is ascending law.⁸ Within the realm of international criminal law, these two divergent conceptions of law are quite crudely juxtaposed and, thus, a degree of tension is inherent within international criminal law.⁹ Consequently, customary international criminal law norms tend to be stated without any form of empirical enquiry.¹⁰ Would re-imagining the definition of customary international law (CIL) ease this apparent tension?¹¹

CIL, as articulated in Article 38(1) (b) of the ICJ Statute, is plagued by definitional uncertainties. Article 38(1) (b) details custom as ‘evidence of a general practice accepted as law’ and has been described as ‘axiomatic’ by the International Court of Justice (ICJ).¹² Most theorists maintain that there are two constituent elements of CIL: state practice and *opinio juris* (sense of legal obligation).¹³ However,

⁶ Cassese, ‘International Criminal Law’ (Oxford University Press: Oxford, 2003) at 16.

⁷ Koskenniemi, *From Apology to Utopia: the Structure of International Legal Argument* (Lakimiesliiton Kustannus: Helsinki, 1989) at 40; Powell & Pillay, *supra* note 3 at 489. I borrow the terms - ‘descending’, ‘constraining’ and ‘ascending’ from Powell & Pillay, *ibid*. I use the term ‘descending’ law to refer to rules that are vertically applicable in nature. In effect, norms that move from the rule downwards and restrict behaviour. ‘Constraining’ refers to the fact that rules of criminal law are proscriptive in nature. ‘Ascending’ law, on the other hand, refers to norms that moves upwards and bind states in a horizontal manner.

⁸ See Carty, ‘Critical International Law: Recent Trends in the Theory of International Law’ 2 *EJIL* (1990) 210; Koskenniemi, *ibid* at 362; Powell & Pillay, *ibid* at 490.

⁹ Charlesworth, ‘The Unbearable Lightness of Customary International Law’ 92 *Am. Soc’y Int’ L. Proc.* (1998) 44; Powell & Pillay *ibid*. Charlesworth discusses this tension without specific reference to international criminal law. However, I would maintain, as do Powell & Pillay, that the tension is even more apparent within the realm of international criminal law.

¹⁰ Charney, ‘Universal International Law’ 87 *AJIL* (1993) 529 at 537; D’Amato, ‘Trashing Customary International Law’ 81 *AJIL* (1987) 101; Koskenniemi, ‘The Politics of International Law’ 1 *EJIL* (1990) 4 at 27; Powell & Pillay, *supra* note 3 at 497.

¹¹ I use the term ‘re-imagine’ to indicate that I intend to form a completely new picture of a definition of CIL beyond the strictures of the present understanding of the concept and furthermore, to speculate on the possible application of such a novel definition. I use the term to indicate that I intend to *do* more than simply re-define or re-interpret the traditional definition.

¹² *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)* ICJ Reports 1985, pg 13 at pg 20 para 27. It is noteworthy, that Article 38 is identical to a provision in the Statute of the Permanent Court of International Justice (PCIJ). The Statute of the PCIJ was drafted in 1920 by an Advisory Committee of Jurists selected by the League of Nations. See, Charlesworth, ‘Customary International Law and the Nicaragua Case’ 11 *Aust. YBIL* (1984-1987) 1 at 2.

¹³ *North Sea Continental Shelf Case (Denmark/Federal Republic of Germany)*, ICJ Reports 1969, pg 3 at pg 29 para 37. See, Bernhardt, ‘Customary International Law’ *EPIL* 898 at 899; Byers, ‘Power, Obligation

disagreement exists between ‘traditional’ conceptions of CIL – which assert the importance of state practice – and ‘modern’ approaches to CIL, which advocate the supremacy of *opinio juris*.¹⁴ Straddling these divergent doctrines is the contention that in reality there is no distinction between the ‘traditional’ and ‘modern’ approaches.¹⁵

Despite these seemingly distinct doctrines, arguments surrounding the formation of CIL are universally circulatory.¹⁶ Whilst language by its very nature is ambiguous, it is apparent that any definition should be able to ‘exclude official interpretations that are evasions made in bad faith.’¹⁷

CIL serves and can be manipulated by many masters because its elements, state practice and *opinio juris*, have no ascertainable meaning and are routinely ignored.¹⁸

Some theorists have predicted the ultimate demise of CIL on the international plane.¹⁹ Such theorists advocate treaty law, the seemingly more reliable form of norm

and Customary International Law’ 11 *Duke J. Comp. & int’l L* (2001) 81 at 83; Charney, *supra* note 10 at 536; Elias, ‘The Nature of the Subjective Element in Customary International Law’ 44 *ICLQ* (1995) 501; Koskenniemi, *supra* note 7 at 362; Kunz, ‘The Nature of Customary International Law’ 47 *AJIL* (1953) 662 at 665; MacGibbon, ‘Customary International Law and Acquiescence’ 33 *BYIL* (1957) 115 at 117; Paust, ‘Customary International Law: Its Nature, Sources and Status as Law of the United States’ 12 *Mich. J. Int’l L* (1990-1991) 59 at 61; Roberts, ‘Traditional and Modern Approaches to Customary International Law: A Reconciliation’ 95 *American Journal of International Law* (2001) 757. This view of custom is not universal see: Cheng, ‘United Nations Resolutions on Outer Space: ‘Instant’ International Customary Law?’ 5 *Indian J Int L* (1965) 23. Cheng states, at 36: ‘International customary law has in reality only one constitutive element, the *opinio juris*.’

¹⁴ I borrow the terms ‘traditional’ and ‘modern’ from Roberts, *ibid*. For a discussion of ‘traditional’ approaches to CIL see: Charlesworth, *supra* note 12; Thirlway, *International Customary Law and its Codification* (A. W. Sijthoff: Leiden, 1972). For the modern approach to CIL see: Gunning, ‘Modernizing Customary International Law: The Challenge of Human Rights’ 31 *Va. J. Int’l L.* (1990-1991) 211; Kirgis, ‘Custom on a Sliding Scale’ 81 *American Journal of International Law* (1987) 146.

¹⁵ See, Koskenniemi, *supra* note 7.

¹⁶ Kennedy details this circular reasoning as a ‘disciplinary hamster wheel’. See Kennedy, ‘When Renewal Repeats: Thinking Against the Box’ 32 *N.Y.U J. Int’ L. & Pol* (2000) 335 at 407. See, Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge University Press: Cambridge, 1999) at 136; Koskenniemi, *supra* note 7 at 363; Powell & Pillay *supra* note 3 at 495; Roberts, *supra* note 13 at 767.

¹⁷ Cohen, *States of Denial: Knowing About Atrocities and Suffering* (Polity Press: Cambridge, 2001) at 106.

¹⁸ Kelly, ‘The Twilight of Customary International Law’ 40 *Va. J. Int’l L.* (1999-2000) 449 at 459.

¹⁹ See Charlesworth, *supra* note 12; Dunbar, ‘The Myth of Customary International Law’ 1993 *Aust. YB Int’l L* 1; Kelly, *ibid*.

formulation, as the pre-eminent source of international law.²⁰ In fact, Reisman has termed reliance on CIL as a ‘great leap backwards.’²¹ Much of this concern is directly related to the definitional uncertainties beleaguering the formation and application of CIL norms. It is arguable that re-casting the definition of CIL will serve to allay these fears. Can a definition of CIL be exacted to prevent the marginalization of customary international criminal law norms? If so, how does one prove a rule of customary international criminal law?

In Chapter One, I intend to examine the development of CIL and delimit the parameters of the traditional doctrine. In doing so, I hope to highlight the difficulties in its application in the area of international criminal law. In Chapter Two, I will contemplate the modern theories of CIL and illustrate the circular nature of both the modern and traditional doctrines. In Chapter Three, I will re-imagine a definition of CIL that attempts to break this circulatory reasoning. In Chapter Four, I will detail the application of customary international criminal law norms both domestically and internationally. In particular, the jurisprudence of the *ad hoc* Tribunals serves as an indicator of the possible shortcomings of the definition of CIL and is illustrative of the dangers of defective application of the definition as it currently stands. By way of conclusion, I intend to examine how, under my re-imagined definition of CIL, the international and domestic judiciary *should* prove a rule of customary international criminal law. In doing so, I hope to illustrate that a workable definition of CIL is a real possibility.

²⁰ See Gamble, ‘The Treaty/Custom Dichotomy: An Overview’ 16 *Tex Int’l L.J.* (1989) 305; Gunning, *supra* note 14 at 213.

²¹ Reisman, ‘The Cult of Custom in the Late 20th Century’ 17 *California Western International Law Journal* (1987) 133 at 135.

CHAPTER ONE: The Formation of CIL: The Traditional Conception.

i) Distinguishing Customary International Law

Traditional conceptions of international law - engendering consent-based theories - still have a significant influence and weight on the international plane.²² Whilst traditional definitions of international law are increasingly challenged, this challenge largely emanating from the demands of the human rights movement and an ever increasing number of international actors, the traditional doctrines have maintained their pre-eminent role.²³ It is a necessity to detail the specifics of the traditional doctrine of CIL, in order successfully to evaluate the assessment of the role of state practice and *opinio juris* in the traditional bi-partite doctrine.

Firstly, it is essential to distinguish CIL norms and treaty-based obligations.²⁴ The difference appears to lie in the manner in which and whom these norms bind. Treaty-based obligations bind only those states that have explicitly consented to be bound and thus, their application does not appear to challenge traditional conceptions of sovereignty.²⁵ A lack of explicit consent is not a bar to the formation of CIL norms and once they are established as legal rules, such norms bind states generally.²⁶ However, for CIL to retain its veracity in the more traditional, consensual based, theories of international law, its application is often tempered by the persistent objector rule.²⁷

²² Charlesworth, *supra* note 12 at 3; Weil, 'Towards a Relative Normativity in International Law?' 77 *AJIL* (1983) 413 at 420.

²³ Cassese, *International Law in a Divided World* (Clarendon Press: Oxford, 1986) at 401; Charney, *supra* note 10 at 543.

²⁴ It is noteworthy that jurists have discussed whether Article 38 is designed to create a hierarchy between the sources of international law. This discussion centres upon whether treaty norms or customary norms can be said to be of greater importance than the other. Charlesworth, *supra* note 12 at 2. For a discussion of the hierarchy of sources in international law see, Akehurst, 'Hierarchy of Sources of International Law' 47 *BYIL* (1974-75) 273.

²⁵ D'Amato, 'Trashing Customary International Law' 81 *AJIL* (1987) 101 at 103; Gunning, *supra* note 14 at 213. For a discussion of treaty based obligations see: Aust, *Modern Treaty Law and Practice* (Cambridge University Press: Cambridge, 2000); Klabbers, *The Concept of Treaty in International Law* (Kluwer Law International: The Hague, 1998).

²⁶ Akehurst, 'Custom as a Source of International Law' 47 *BYIL* (1974-1975) 1 at 23; Charlesworth, *supra* note 12 at 3, Charney, *supra* note 10 at 536; Gunning, *ibid*; Koskenniemi, *supra* note 7 at 343.

²⁷ For a discussion of the persistent objector rule see: Charney, 'The Persistent Objector Rule and the Development of Customary International Law' 56 *BYIL* (1986) 1; Charney, *supra* note 10; Colson, 'How

CIL is seen as a means of compensating for the apparent inflexibility of treaty-based obligations and as a method of legal regulation of legislative lacunae.²⁸ However, some theorists are scathing of the rationale behind favouring the application of CIL norms over that of treaty-based obligations.²⁹ Reisman terms CIL a ‘slogan’³⁰ and further states that: ‘No one, I submit, seriously believes that custom is replacing deliberate international legislation.’³¹ It is possible, I would maintain, for CIL and treaty-based obligations to co-exist in the international arena, without CIL norms becoming a merely epiphenomenal phenomenon.³² A re-casting of the definition of CIL will serve to facilitate a harmonious co-existence between treaty-based obligations and customary norms.

Despite misgivings regarding the value of CIL as a source of international law, its role in norm-creation appears to be cemented.³³ As previously asserted, Article 38

Persistent Must the Persistent Objector Be?’ 61 *Wash. L. Rev* (1986) 957; Stein, ‘The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law’ 26 *Harvard International Law Journal* (1985) 481. The persistent objector rule provides that if a State has objected to the establishment of a customary norm, whilst in its formative stage, the State is not bound by the emerging customary rule. However, the rule is rarely invoked in practice and its validity is doubted by legal theorists. Moreover, it is thought that a state cannot persistently object to a *jus cogens* norm. See Charney, *supra* note 10 at 538. The ICJ has referred to the persistent objector rule (but only in *dicta*) in: *Anglo-Norwegian Fisheries* cases (UK –v- Norway) ICJ Reports 1951 at 116, at 19 – ‘In any event the 10-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast.’ and the *Asylum* case (Columbia –v- Peru) ICJ Reports 1950 at 266, at pg 15 – ‘But even if it could be supposed that such a custom existed between certain Latin American States only, it could not be invoked against Peru which, far from having by its attitude adhered to it, has, on the contrary, repudiated it.’ Moreover, the application of the persistent objector rule is far from simple. First and foremost, it is difficult, if not impossible, to pinpoint the exact date that CIL norms become binding law. The principle also seems conflict with the principle that ‘new’ states, upon entering the international legal arena, are bound by CIL norms regardless of their opposition. See, Akehurst, *supra* note 24 at 27; Charney, *supra* note 10 at 538; Kelly, *supra* note 18 at 499. It is noteworthy, that the persistent objector will have no role in my re-imagined definition of CIL.

²⁸ Charlesworth, *supra* note 9 at 44.

²⁹ See Dunbar, *supra* note 19; Kelly, *supra* note 18; Reisman, *supra* note 21.

³⁰ Reisman, *ibid* at 142.

³¹ *Ibid* at 135

³² This seems to be endorsed by the ICJ in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua –v- USA) (Merits)* case ICJ Reports 1986, at pg 84 para 177. See Gamble, *supra* note 20 at 307.

³³ Some jurists argue this role is cemented due to the need for customary international law norms to regulate human rights obligations. See, Lillich, ‘The Growing Importance of Customary International Human Rights Law’ 25 *Ga. J. Int’l & Comp. L* (1995-1996) 1; Meron, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon Press: Oxford, 1989) at 80.

constitutes the starting point for any discussion of the delimitation of CIL norms.³⁴ Within the traditional bi-partite doctrine, *opinio juris* serves to distinguish CIL norms from mere behavioural patterns.³⁵ Despite this extra subjective requirement, all non-written norms tend to be cast as norms of CIL.³⁶ As a response to the use of such incorrect terminology, Sir Robert Jennings has noted ‘much of what we perversely persist in calling customary international law is not only *not* customary law: it does not even faintly resemble a customary law.’³⁷ It is arguable that such unsound classification of CIL norms may be as a direct result of the uncertainties beleaguering the traditional bi-partite definition. Such definitional difficulties must be reduced in order that CIL can constitute a workable legal framework for norm-creation.

Much of the reliance on the more traditional explanations of CIL is inextricably linked with the preservation of state sovereignty.³⁸ The traditional doctrine, with its emphasis on state practice, can be termed as ‘positivist and individualistic’.³⁹ In a positivist view of CIL, such as that of Prosper Weil, the normative force of CIL exists only in its consensual nature.⁴⁰ Therefore, by Weil’s reasoning, a re-imagined definition of CIL, one moving away from a seemingly state orientated approach, would result in CIL losing its legitimacy on the international plane. Moreover, this impacts upon the seeming legitimacy of international law generally. Under a positivistic conception of international legal relations, states constitute the sole foundation of law formation.⁴¹

There has been a vast increase in both the number of states and the number of non-state entities on the international plane and thus, the traditional positivistic account

³⁴ Moreover, section 102 of the American Law Institute’s *Restatement (Third) of Foreign Relations Law of the United States*, some what more unambiguously states that: ‘customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.’ Meron, *ibid* at 3.

³⁵ Byers, *supra* note 16 at 130; Roberts, *supra* note 13 at 758.

³⁶ Koskenniemi, ‘The Pull of the Mainstream’ 88 *Michigan Law Review* (1990) 1946 at 1948.

³⁷ Jennings, ‘The Identification of International Law’, in Cheng *International Law, Teaching and Practice* Stevens & Sons, 1982) cited in Roberts, *supra* note 13 at 759.

³⁸ Charlesworth, *supra* note 12 at 2; Roberts, *supra* note 13 at 758.

³⁹ Charlesworth, *ibid*.

⁴⁰ Charlesworth, *supra* note 9 at 44. See, Weil, *supra* note 22.

⁴¹ For a positivistic account of international legal relations see, Weil, *ibid*.

of international law has been susceptible to challenge.⁴² The traditional views of CIL, and international law generally, are challenged by a theory of international law based on the interests of the global community of states.⁴³ In effect, international law binds due to an international social consciousness that is designed to protect the global community of states.⁴⁴ It is clear that the advent of a larger and moreover, multi-faceted international community may result in the limited utility of principles purely based upon sovereign equality.⁴⁵ This relatively contemporary change in the international legal reality will filter into my re-imagination of CIL.

ii) The Role of State Practice

It has been stated that fully detailing what counts as state practice is practically impossible.⁴⁶ However, for sake of clarity of definition, it is essential that the parameters of state practice are delimited.⁴⁷ The majority of jurists seem to believe that cognisant acts – meaning acts are carried out with the knowledge of the state - resulting in direct or physical consequences are tantamount to state practice.⁴⁸ Moreover, it is universally accepted that all organs of the state can contribute to state practice and thus, the formation of a CIL norm.⁴⁹ D’Amato asserts that only those acts that have physical consequences can be deemed to count as state practice.⁵⁰ This view has gained a certain degree of currency within opinions of the ICJ.⁵¹ A dissenting opinion by Judge Read in the *Anglo-Norwegian Fisheries* case exemplifies such reasoning:

⁴² Charney, *supra* note 10 at 543; Roberts, *supra* note 13 at 759.

⁴³ Charlesworth, *supra* note 12 at 2.

⁴⁴ Charlesworth, *ibid.* It is noteworthy, that Charney terms such a view of the binding nature of CIL as ‘societal context’, Charney, *supra* note 27 at 18.

⁴⁵ Byers, *supra* note 13 at 82.

⁴⁶ Bernhardt, *supra* note 13 at 900. I will detail what role state practice plays and moreover, what counts as state practice in my re-imagination of the CIL definition see Chapter Three.

⁴⁷ Byers, *supra* note 16 at 133.

⁴⁸ Charlesworth, *supra* note 12 at 5.

⁴⁹ Bernhardt, *supra* note 13 at 900.

⁵⁰ D’Amato, *The Concept of Custom in International Law* (Cornell University Press: Ithaca, 1971) at pg 191. See, Byers, *supra* note 16 at 134; Charlesworth, *supra* note 12 at 5; Roberts, *supra* note 13 at 757;

⁵¹ Gunning, *supra* note 14 at 214. However, it is noteworthy that the ICJ has seeming also implicitly recognised that state practice is not limited to actual acts. See, the *North Sea Continental Shelf Cases (Federal Republic of Germany –v-Denmark; Federal Republic of Germany –v- Netherlands)* ICJ. Reports 1969, pg 3 at pg 20, para 14; *Asylum* case, *supra* note 26 at pg 15. See, Akehurst, ‘Custom as a Source of International Law 47 *BYIL* (1974-1975) 1 at 2; Byers, *supra* note 16 at 134.

Customary international law is the generalisation of the practice of States. This cannot be established by citing cases where coastal states have made extensive claims, but have not maintained their claims by the actual assertion of sovereignty over trespassing foreign ships. Such claims may be important as starting points...The only convincing evidence of State practice is to be found in seizures, where the coastal state asserts its sovereignty over the waters in question.⁵²

D'Amato's assertion that only acts constitute state practice, as I will go on to discuss, may simply entrench divisions of power on the international plane.⁵³ Moreover, the ICJ has implicitly accepted that other forms of state behaviour count as state practice.⁵⁴ Akehurst deems the distinction that D'Amato carves between actions and other forms of state behaviour as 'artificial'.⁵⁵ D'Amato's contention would seem to suggest that in order for a change in CIL to occur, the existing law must be violated.⁵⁶ This is quite clearly problematic and the quandary would seem to be even more acute in the realm of international criminal law. It would be far from ideal to suggest that for a norm of international criminal law to evolve, considering the constraining and descending nature of the law, that the existing law be violated – in effect, requiring the commission of an international crime.

As previously asserted, the view that only acts are tantamount to state practice is not universal.⁵⁷ In fact, it is widely believed that entry into binding agreements may constitute state practice.⁵⁸ Within the text of the judgment of the *North Sea Continental Shelf Cases*, entry into the Geneva Convention on the Continental Shelf of 1958 and the conclusion of other delimitation agreements was seen to count as state practice.⁵⁹ Moreover, some writers have argued for a far broader understanding of state practice,

⁵² *Anglo-Norwegian Fisheries case*, *supra* note 27 at 191. It is noteworthy that Akehurst stated that it appears to be unclear whether or not the ICJ agreed with the Opinion of Judge Read and in any event, such an Opinion is held by the minority. Akehurst, *ibid*.

⁵³ Byers, *supra* note 13 at 84.

⁵⁴ See note 51. See, Akehurst, *supra* note 51; Byers, *supra* note 16 at 134.

⁵⁵ Akehurst, *ibid* at 3.

⁵⁶ Byers, *supra* note 16 at 134.

⁵⁷ Brownlie, *Principles of Public International Law* (Oxford University Press: Oxford, 2003) at 6;

Charlesworth, *supra* note 12 at 6; Greig, *International Law* (Butterworths: London, 1976) at 18.

⁵⁸ Charlesworth, *supra* note 12 at 5.

⁵⁹ *North Sea Continental Shelf Cases*, *supra* note 51; Charlesworth, *ibid*.

asserting that state behaviour of any kind may be equivalent to state practice.⁶⁰ Such behaviour may include treaty ratifications, voting patterns at the UN General Assembly and perhaps most pertinently, omissions.⁶¹

It would seem entirely inappropriate, particularly in the context of international criminal law, for the emphasis upon norm-creation to be seen simply as physical acts.⁶² It is apparent that the traditional doctrine allows little room for the existence of *opinio juris*. Within the traditional conception of CIL, the doctrinal prominence of state action can have a detrimental impact upon smaller states and their participation in the international order.⁶³ Currently, the practice of the powerful and prominent is considered for purposes of state practice and smaller states are simply left to languish in the wake of norm-creation.⁶⁴ Despite the reality of power play on the international plane, some authors are unashamedly sanguine about the professed equality of traditional notions of CIL.

Indeed customary law, resting as it does upon the authority and practice of all, is undaunting in its force, uncircumscribed by a minority of elites.⁶⁵

It is noteworthy that there is no detailed guidance on how wide a specific practice must be.⁶⁶ Moreover, most jurists maintain that there is an inverse relationship between duration and consistency of practice.⁶⁷ The shorter the duration of the practice, the more consistent the practice must be and vice versa. In effect, a rule of CIL can be formed in a

⁶⁰ Byers, *supra* note 16 at 134.

⁶¹ Akehurst, *supra* note 51 at 10; Byers, *ibid*. Byers points to the findings of the International Law Commission. As regards divergent forms of state practice the law commission included: domestic judicial decision, domestic legislation, treaties and diplomatic correspondence. Byers, *ibid* at 135. It is noteworthy that other scholars have explicitly excluded the act of voting on UN GA Resolutions from the realm of state practice. See, Gunning, *supra* note 14 at 215; Schwebel, 'The Effect of Resolutions of the UN General Assembly on Customary International Law' 73 *Am. Soc'y Int'l Proc.* (1979) 302. Whilst, other jurists have maintained that GA Resolutions are evidence of *opinio juris* and do not, therefore, count as state practice. See, Paust, *supra* note 13 at 73.

⁶² Akehurst, *supra* note 51 at 41; Gunning, *supra* note 14 at 215.

⁶³ Byers, *supra* note 13 at 84

⁶⁴ Charney, *supra* note 10 at 537.

⁶⁵ Paust, *supra* note 13 at 63.

⁶⁶ Charelsworth, *supra* note 12 at 7. It is noteworthy, that the creation of a regional or local custom is also permissible on the international plane. The traditional bi-partite doctrine is still a pre-requisite to the formation of such a rule and regional custom cannot contradict treaty provisions or *jus cogens* norms. See, Bernhardt, *supra* note 13 at 902. The ICJ has recognised this phenomenon in the *Asylum case*, *supra* note 27 and *The Case Concerning Right of Passage Over Indian Territory (Portugal –v- India)* ICJ Reports, 1960.

relatively short time frame.⁶⁸ In fact, Cheng has argued that the formation of ‘instant’ custom is possible on the international plane.⁶⁹ The ICJ in the *North Sea Continental Shelf* cases stated that ‘virtually uniform’ state practice was required if the practice at point had occurred in a short time period.⁷⁰

Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, 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 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.⁷¹

The facts of the case may serve to indicate the reasoning behind ‘extensive and virtually uniform’ practice being required. The case involved the transformation of a treaty-based provision into a customary one, in a relatively short time period.⁷² However, the *North Sea Continental Shelf* cases are not alone in demanding consistency.⁷³ In the *Anglo-Norwegian Fisheries* case ‘substantial uniformity’ was deemed a pre-requisite.⁷⁴ Furthermore, in the *Asylum* case a regional customary law was

⁶⁷ Charlesworth, *ibid* at 7.

⁶⁸ Bernhardt, *supra* note 13 at 901; Charlesworth, *ibid*, Gunning, *supra* note 14 at 214. Cheng has suggested that ‘instant’ custom may be created on the international plane. See Cheng, *supra* note 13.

⁶⁹ See Cheng, *supra* note 13, Langville, ‘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* (2003) 145 at 150.

⁷⁰ *North Sea Continental Shelf Cases*, *supra* note 51 at 43, para 74.

⁷¹ *Ibid*. It is noteworthy, that in Judge Lachs’ dissenting Opinion he seems to point to the concept of ‘instant’ custom. He does so by detailing the customary status of freedom of movement in space and further states: ‘[t]he dimension of time in law, being relative, must be commensurate with the rate of movement of events which require legal regulation. A consequential response is required. And so the short period within which the law on the continental shelf has developed and matured does not constitute an obstacle to recognizing its principles and rules, including the equidistance rule, as part of general law.’ As per, Judge Lachs, *North Sea Continental Shelf Cases* at pg 230. The dissenting opinion of Judge Lachs focuses on the formation of instant custom through state practice and, as such, seems to constitute a rather extreme version of the traditional doctrine’s reliance on state practice. See, Langville, *supra* note 69 at 150. For a discussion of instant custom, see Cheng, *supra* note 13.

⁷² The Convention in question – Geneva Convention on the Continental Shelf – had only entered into force in June 1964, and consequently there was a period of less than three years between the Convention entering into force and the commencement of proceeding before the ICJ. Charlesworth, *supra* note 12 at 7.

⁷³ *Ibid*.

⁷⁴ Charlesworth, *ibid*. In the *Anglo-Norwegian Fisheries Cases*, *supra* note 27, at pg 131, the judgement stated:

considered not to have been established due to conflicting practice.⁷⁵ Despite the foregoing difficulties in ascertaining its exact meaning, state practice constitutes the cornerstone of the traditional doctrine of CIL formation and thus, it appears that there is little room for *opinio juris*.

iii) The Role of *Opinio Juris*

In traditional conceptions of CIL the role of *opinio juris* could be detailed as merely epiphenomenal to that of state practice. Some jurists attribute this to the ‘elusive’ nature of the subjective element of CIL.⁷⁶ Byers states that ‘since subjective feelings are difficult to identify, the analysis of customary rules has almost always focused on state practice.’⁷⁷ As I will go on to discuss, I remain unconvinced that delimiting *opinio juris* is any more of a hardship than determining the content of state practice. It is most certainly arguable that detailing what states actually believe constitutes a legal norm can be determined with a greater degree of ease than delimiting what states actually do. In the context of international criminal law, as I will go on to discuss, such an assertion would seem to be even more pertinent.

An examination of historical underpinnings of *opinio juris* is most instructive. The role of *opinio juris* in CIL norm-creation was first acknowledged, at least academically, at the beginning of the nineteenth century.⁷⁸ Puchta and Savigny stated that custom was ‘merely the immediate and spontaneous revelation of the common popular sentiment.’⁷⁹ Previously, the articulation of a subjective, or psychological,

‘...[T]he court deems it necessary to point out that although the ten-mile rule has been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law.’

⁷⁵ *Asylum case*, *supra* note 27 at pg 277; Charlesworth *ibid* at 8.

⁷⁶ Charlesworth, *ibid*. For a discussion of the professed intangible nature of *opinio juris* see, Byers, *supra* note 13 at 83; Slama, ‘Opinio Juris in International Law’ 15 *Okla City U. L. Rev* (1990) 603 at 615; Stern, ‘Custom at the Heart of International Law’ 11 *Duke J. Comp. & Int’l L* (2001) 89 at 95.

⁷⁷ Byers, *ibid*.

⁷⁸ Slama, *supra* note 76 at 613.

⁷⁹ Puchta & Savigny, cited in Slama, *ibid* at 613.

component in CIL was noticeable only by its absence.⁸⁰ It is, however, important to note that Puchta and Savigny seemed to suggest all that was required for the formation of a norm of CIL, was the presence of this subjective element.⁸¹ In 1899 a theory - more in keeping with the contemporary understanding of CIL - was advanced by Géný.⁸² In combining material and subjective elements and applying them to the formation of CIL, Géný articulated a theory of formulation indistinguishable from the traditional bi-partite doctrine.⁸³ Géný's inclusion of a subjective element within the concept of CIL was to enable distinction between legal norms and non-legal norms.⁸⁴

It is evident that *opinio juris* is not a novel concept. However, despite this historical backdrop, no agreement exists on the exact content of *opinio juris* or on how one determines its existence.⁸⁵ In fact, the discussion of *opinio juris* is often relegated to the realm of legal theory and as a concept it is given little practical consideration.⁸⁶ D'Amato attempts comprehensively to recapitulate the divergent theories of *opinio juris* and establishes four distinct schools of thought.⁸⁷ First, he details what he terms the 'traditional' conception of CIL – a belief by states that their acts are in conformity with, and perhaps even required by, existing legal norms.⁸⁸ The second theory that D'Amato details equates *opinio juris* with consent.⁸⁹ Thirdly, D'Amato depicts a theory of *opinio juris* that concerns state behaviour in multi-lateral convention or treaty conclusion.⁹⁰ The final theory of *opinio juris* espoused by D'Amato is one that entails the opinion of the community of states; a theory of psychological consensus of the global community.⁹¹

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² Géný termed the subjective element of custom – *opinio necessitatis*. See, Elias, *supra* note 13 at 504; Slama, *ibid.*

⁸³ *Ibid.*

⁸⁴ Elias, *ibid.*; Slama, *supra* note 76 at 613.

⁸⁵ Slama, *ibid.* at 619

⁸⁶ Byers, *supra* note 13 at 86.

⁸⁷ D'Amato, *supra* note 50 at 66; Slama, *supra* note 76 at 620.

⁸⁸ D'Amato, *ibid.*; Slama, *ibid.*

⁸⁹ D'Amato, *ibid.* at 68; Slama, *ibid.* See, Lobo de Souza, 'The Role of State Consent in the Customary Process' 44 *ICLQ* (1995) 521.

⁹⁰ D'Amato, *ibid.* at 70; Slama, *ibid.*

⁹¹ D'Amato, *ibid.* at 72; Slama, *ibid.*

After detailing these divergent theories D'Amato states: 'it is hard to find anything concrete, analytical, or useful in any of these hypotheses of *opinio juris*.'⁹²

I submit that the nature of *opinio juris* is entirely dependent upon which theory of international law is preferred.⁹³ For the purposes of the traditional conceptions of international law, couched in positivistic and individualistic terms, the role *opinio juris* appears epiphenomenal to state practice.⁹⁴ In fact, some jurists have questioned the utility of *opinio juris* at all.⁹⁵ D'Amato reduces the importance of *opinio juris* to a mere articulation of legal intent.⁹⁶ To this end he details *opinio juris* as 'an objective claim of international legality articulated in advance of, or concurrently with, the act which will constitute the quantitative elements of custom.'⁹⁷ It seems that D'Amato's reasoning is somewhat tautological and ventures no closer to elucidating the parameters of the CIL definition.⁹⁸

The disagreement regarding the content of the subjective element of CIL begs the question: are states truly ever motivated by *opinio juris*? Goldsmith and Posner pose this very question and propose that states are not in fact motivated by *opinio juris*.⁹⁹ They argue that the reality of international legal relations is that states are induced to act by coercion or self-interest.¹⁰⁰ Despite inconsistencies regarding the exact content of *opinio juris*, there still appears to be the innate feeling that *opinio juris* is a necessary component in customary norm formulation.¹⁰¹ However, *opinio juris* plays second fiddle to state practice in traditional models of CIL. On the rare occasion that attempts are made to detail the exact parameters of *opinio juris*, the subjective element is often found in the

⁹² D'Amato, *ibid* at 68.

⁹³ See, Elias, *supra* note 13 at 501.

⁹⁴ Byers, *supra* note 13 at 83.

⁹⁵ Kelsen asserts that *opinio juris* is a fiction simply created in order to give the judiciary creative law making powers. Brownlie, *supra* note 57 at 8. See, Bernhardt, *supra* note 13 at 899.

⁹⁶ D'Amato, *supra* note 50 at 74. See, Charlesworth, *supra* note 12 at 11; Byers, *supra* note 13 at 86; Slama, *supra* note 76 at 623.

⁹⁷ D'Amato, *ibid*.

⁹⁸ Slama, *supra* note 76 at 623.

⁹⁹ Goldsmith & Posner, 'A Theory of Customary International Law' 66 *U. CHI. L. Rev.* (1999) 1113

¹⁰⁰ *Ibid*; Norman & Trachtman, 'The Customary International Law Game' 99 *AJIL* (2005) 541 at 544.

¹⁰¹ Brownlie, *supra* note 57 at 8.

realm of state practice and such reasoning is without doubt circular in nature.¹⁰² The role and content of *opinio juris* is somewhat more exact in the modern theories of CIL formation. Within the text of Chapter Three I hope to explicate a definition of *opinio juris* that enables the subjective element of CIL to constitute the paramount force in norm-creation.

iv) Shortcomings of the Traditional Model

In critiquing the traditional model of CIL, the work of Koskenniemi is instructive.¹⁰³ Koskenniemi details the inherent tension between apology and utopia in international law.¹⁰⁴ In effect, if international law - for these purposes CIL - is simply to be an expression of what states do, with no normative element to speak of, the resultant effect is that the law would simply constitute international relations under a different guise.¹⁰⁵ CIL norms could not be termed legal norms at all. However, modern theories of CIL do not escape Koskenniemi's criticism. If CIL norms are merely descriptions of how states *should act*, without any connection with the reality of how states do act, they could be deemed, under Koskenniemi's reasoning, as utopian.¹⁰⁶

For present purposes, the crux of Koskenniemi's critique relates to the circular nature of definition of CIL.¹⁰⁷ As previously averred, this circularity is most certainly present in the traditional model of CIL norm formulation - *opinio juris* is generally found within the sphere of state practice.¹⁰⁸ Under the traditional conception of CIL, the two elements, in the traditional bi-partite doctrine, cannot be said to exist independently of

¹⁰² Koskenniemi, *supra* note 7 at 40.

¹⁰³ See, *ibid*; Koskenniemi, *supra* note 36; Koskenniemi, *supra* note 10.

¹⁰⁴ Charlesworth, *supra* note 9 at 44; Koskenniemi, *supra* note 7 at 363.

¹⁰⁵ Koskenniemi, *ibid*; Powell & Pillay, *supra* note 3 at 495; Roberts, *supra* note 13 at 767.

¹⁰⁶ Koskenniemi, *ibid*; Powell & Pillay, *ibid* at 498; Roberts, *ibid*.

¹⁰⁷ Charlesworth, *supra* note 12 at 10; Kennedy, *supra* note 16 at 407; Koskenniemi *ibid* at 40; Powell & Pillay, *ibid* at 494; Roberts, *ibid* at 766.

¹⁰⁸ Charlesworth, *supra* note 12 at 10. Here, Charlesworth utilizes the dissenting opinion of Judge Tanaka in the *North Sea Continental Shelf* cases, *supra* note 51 at pg 176, as an illustration of the judiciary finding *opinio juris* within the realm of state practice.

one another.¹⁰⁹ The resultant effect is that the traditional doctrine does not allow there to be a coherent method of delimiting customary international norms.¹¹⁰

The traditional conception of CIL norm creation creates what Byers terms as a ‘chronological paradox’.¹¹¹ This ‘chronological paradox’ concerns how rules of CIL are actually created. In effect, in order for a new rule of CIL to emerge, states must believe that the rule already exists.¹¹² It has been suggested that states could erroneously believe that they are bound and thus, the paradox is solved.¹¹³ However, the suggestion that an entire legal process is based upon a falsehood seems at the least tenuous.

The traditional CIL doctrine is often charged with endorsing current patterns of state power.¹¹⁴ If the emphasis is purely upon what states do, then the most powerful players in the international arena, those states that inevitably *act* the most, are completely instrumental in shaping CIL norms.

If state practice is treated as the primary element of customary international law, it becomes difficult to regard disparities of wealth and military power as irrelevant in the formation of customary rules. In terms of their ability to engage in practice across a wide range of issues, and thereby influence the development of customary rules, the tiny island country of Tuvalu (population 10,600) and the United States are patently unequal.¹¹⁵

The tendency in CIL formation, to rely on the practice of larger states serves to fuel the assumption that the smaller, less powerful states have acquiesced to the emerging

¹⁰⁹ Powell & Pillay, *supra* note 3 at 495.

¹¹⁰ *Ibid.*

¹¹¹ Byers, *supra* note 16 at 130.

¹¹² Byers *ibid* at 131; Koskeniemi, *supra* note 7 at 361. It is noteworthy, that this criticism was one that was levelled by D’Amato at, what he termed, ‘traditional’ conceptions of *opinio juris*. See note 87. Byers suggests that D’Amato may have ‘circumvented’ the chronological paradox through envisaging *opinio juris* as an ‘articulation’. Byers, *supra* note 16 at 132. However, I remain unconvinced of the utility of the ‘articulation’. To all intents and purposes it appears no different to traditional understandings of *opinio juris* - D’Amato’s construct still centres upon a legal belief and is simply accompanied by articulation of such a belief and he fails to suggest where such articulation is to be found.

¹¹³ Byers, *ibid* at 131; Slama, *supra* note 76 at 622.

¹¹⁴ Byers, *supra* note 13 at 84.

¹¹⁵ *Ibid.*

norm.¹¹⁶ Often, the reality is simply that the smaller states are utterly unaware of the impending formation of new CIL norm by which they will ultimately be bound.¹¹⁷

The discrepancy between what states profess to do and what they actually do is quite pronounced.¹¹⁸ This is a fact that seems to be overlooked by the traditional CIL doctrine. Here, an analogy with the prohibition upon torture is instructive.¹¹⁹ Whilst, states denounce torture, almost universally, and wax lyrical about the illegality of such practice, the reality is quite different.¹²⁰ One only needs to briefly examine the recent alleged activity of the CIA in Eastern Europe as a stark example of this point.¹²¹ If the creation of CIL norms were to be based entirely upon state practice, I would maintain that many of the international community's dearly held human rights norms would be rendered non-applicable. Perhaps, what states profess to do in the process of norm creation is more important than actual state practice.

It would seem that the traditional conception of CIL is far from a determinate means of delimiting custom. Due to the uncertain nature of the content of CIL, those that unwittingly apply CIL norms are often accused of using CIL as a tool, however ill-fitting, as a means of serving a previously determined end.

CIL is often, the first, last and only refuge –the virtual conversation-stopper – for international lawyers trying to get out of an analytical jam.¹²²

¹¹⁶ Byers, *supra* note 13 at 84

¹¹⁷ Charney, *supra* note 10 at 536.

¹¹⁸ Byres, *supra* note 16 at 135

¹¹⁹ The prohibition on the torture is found in: *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984. Entry into force 26 June 1987, in accordance with article 27 (1). There are currently 74 signatories to the Convention and 141 parties. Last updates 26th January 2006. Available at <http://www.ohchr.org/english/countries/ratification/9.htm> , last viewed 20th February 2006.

¹²⁰ Byers, *supra* note 16 at 135; Roberts, *supra* note 13 at 769.

¹²¹ See Dworkin, 'New Light on the CIA's Secret Detention Programme', available at: <http://www.crimesofwar.org/onnews/news-cia3.html>, last viewed 20th February 2006.

¹²² Estreicher, 'Rethinking the Binding Effect of Customary International Law' 44 *Va. J. Int'l L* (2003-2004) 5.

Will the modern conception of custom provide a more workable definition? Perhaps, it is possible to exact a definition of custom that does not fall foul of criticism of circularity. I hope to deconstruct CIL as a concept and re-imagine a definition of CIL that is theoretically sound and moreover, workable as regards delimiting norms of international criminal law. In order to achieve such ends it is a necessity to examine the modern theories of custom and look beyond the constraints of Article 38.

CHAPTER TWO: The Formation of CIL: The Modern Conceptions under the Microscope

i) The Rise of *Opinio Juris*

As previously averred, the modern doctrine of CIL is largely concerned with *opinio juris*.¹²³ Roberts states that the modern constructions of CIL reflect ‘substantive normativity.’¹²⁴ In juxtaposing the traditional with the modern, Roberts reveals that traditional formations of CIL can be equated with ‘description.’¹²⁵ In effect, the norms of modern CIL are to be found in abstract normative standards – *opinio juris*. On the other hand, traditional CIL norms originate from what states do and thus can be labelled ‘descriptive’. The modern doctrine’s reliance upon normative statements results in the creation of CIL norms in somewhat of a more expedient fashion.¹²⁶ Jurists appear to have a propensity to resort to treaties and declarations to prove the existence, or otherwise, of *opinio juris*.¹²⁷ As such, the doctrines of modern CIL can be portrayed as more democratic than traditional conceptions of custom.¹²⁸

Most states can participate in the negotiation and ratification of treaties and declarations of international fora, such as the United Nations General Assembly.¹²⁹

¹²³ Charlesworth, *supra* note 12 at 22; Roberts, *supra* note 13 at 764.

¹²⁴ Roberts, *ibid*.

¹²⁵ *Ibid* at 763.

¹²⁶ *Ibid* at 768. It is a reliance on *opinio juris* that results in Cheng’s proposal of the existence of ‘instant’ custom. See Cheng, *supra* note 13.

¹²⁷ Roberts, *Ibid*. In the *Nicaragua case*, *supra* note 32, the Court utilised UN GA Resolutions and other declarations to illustrate the existence of *opinio juris*. See, Charlesworth, *supra* note 12 at 23; Kirgis, *supra* note 14 at 147; Morrison, ‘Legal Issues in the *Nicaragua* Opinion’ 81 *AJIL* (1987) 160 at 161.

¹²⁸ The view that the modern doctrine of CIL is more democratic is not universal. Some theorists maintain that the realities of power play pervade CIL generally, regardless of whether one prefers a traditional or a modern construction of CIL. See, Byres, *supra* note 13 at 84; Stern, *supra* note 76.

¹²⁹ Roberts, *supra* note 13 at 768.

The starting point for any discussion of the formation of modern custom is the *Nicaragua* case.¹³⁰ CIL norms constituted the basis of the ICJ's decision in *Nicaragua*.¹³¹ This was a result of an US reservation restricting the acceptance of compulsory jurisdiction under Article 36(2).¹³² The 'Vandenberg' reservation stated that ICJ's compulsory jurisdiction would not apply to the US vis-à-vis disputes regarding multi-lateral treaty obligations, unless all parties affected by Court's decision were party to treaty in question, or the US explicitly agreed to such jurisdiction.¹³³ The Nicaraguan application to the ICJ relied upon four multi-lateral treaties, all of which the US and Nicaragua were party to.¹³⁴ However, the US successfully argued that Honduras, Costa Rica and El Salvador would be affected by any decision of the Court and thus, the reservation was applicable.¹³⁵ The majority of the court accepted the US reasoning,¹³⁶

¹³⁰See, *Nicaragua*, *supra* note 31. It is noteworthy, that upon discovering the initiation of the proceedings, the United States indicated to the Court that it had suspended its acceptance of the Court's jurisdiction *a propos* disputes with any Central American State. The Court concluded that it still had jurisdiction and proceeded to the merits of the case. Further to this, the US indicated that the situation in question was one that was intrinsically political in character and on those grounds withdrew its participation in the case. The US then terminated the Courts compulsory jurisdiction under Article 36(2) of the ICJ Statute. However, the Court proceeded without US participation and still came to a decision on the merits of the case. Maier, 'Appraisals of the ICJ'S Decision: Nicaragua –v- United States (merits) 81 *AJIL* (1987) 77

¹³¹ For reasoning as to why CIL norms constitute the backbone of the judgment see: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua –v- United States) Jurisdiction and Admissibility*, 1984 ICJ Reports 392; Charlesworth, *supra* note 12.

¹³² See Franck, 'Some Observations on the ICJ's Procedural and Substantive Innovations' 81 *AJIL* (1987) 116 at 118. Article 36(2) of the ICJ Statute states: 'The States parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

- a) the interpretation of a treaty;
- b) any question of international law;
- c) the existence of any fact, which, if established, would constitute a breach of an international obligation
- d) the nature or the extent of the reparation to be made for breach of an international obligation.

For a further discussion of the Court's compulsory jurisdiction see: Kelly, 'The International Court of Justice: Crisis & Reformation' 12 *Yale Int Law J* (1987) 342; Merrills, 'The Optional Clause Today' 50 *BYIL* (1979) 87; Waldock, 'Decline of the Optional Clause' 32 *BYIL* (1955-56) 244.

¹³³ Briggs, 'The International Court of Justice Lives up to its Name' 81 *AJIL* (1987) 78 at 80;

¹³⁴ The relevant multi-lateral treaties were: Charter of the United Nations, the Charter of the Organisation of American States, the Montevideo Convention on the Rights and duties of States of 26th December 1933 and the Convention on the Rights and Duties of States in the Event of Civil Strife of 20th February 1928. See, *Nicaragua*, *supra* note 131 at 422 para 68.

¹³⁵ *Nicaragua*, *supra* note 131 at para 68. See, Charlesworth, *supra* note 12 at 17

¹³⁶ *Nicaragua*, *ibid* at para 69; Charlesworth, *ibid*.

however, Nicaragua had also applied to the Court under CIL norms and the Court decided the case on that basis.¹³⁷

The case concerned a Nicaraguan claim that the US had violated CIL through the use of armed force and unlawfully intervening in its domestic affairs.¹³⁸ In the judgement, the Court seemingly endorsed the application of the traditional bi-partite doctrine.¹³⁹

[T]he Court has to next consider what are the rules of customary international law applicable to the present dispute. For this purpose, it has to direct its attention to the practice and *opinio juris* of States.¹⁴⁰

Despite detailing the bi-partite doctrine, the Court did not employ it, at least not in the traditional sense, in its judgement. There was no empirical enquiry into state practice.¹⁴¹ The relevant norms of CIL were identified despite a distinct lack of state practice in support of the norms.¹⁴² As I will go on to discuss, such a lack of empirical enquiry appears to be endemic in legal reasoning. The Court, in finding that the US had in fact breached CIL,¹⁴³ averred that inconsistencies in state practice did not act as an indicator of the absence of a norm as long as such inconsistencies were treated as breaches of the rule in question.¹⁴⁴

¹³⁷ Charlesworth, *ibid*; Morrison, *supra* note 127 at 161. As regards the application of CIL, the court stated: ‘There are a number of reasons for considering that, even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty –law and on that of customary international law, these norms retain a separate existence. *Nicaragua* case, *supra* note 31 at 95 para 177.’

¹³⁸ Maier, *supra* note 130 at 77.

¹³⁹ Charlesworth, *supra* note 12 at 17.

¹⁴⁰ *Nicaragua* case, *supra* note 31 at 97, para 183. Here, the Court drew attention the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case, *supra* note 12, whereby the Court described the traditional bi-partite model ‘axiomatic’.

¹⁴¹ Charlesworth, *supra* note 12 at 20.

¹⁴² D’Amato, ‘Trashing Customary International Law’ 81 *AJIL* (1987) 101 at 102.

¹⁴³ The Court stated: ‘*Decides* that the United States of America, by training, arming, equipping, financing and supplying the *contra* forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted, against the Republic of Nicaragua, in breach of its obligations under customary international law not to intervene in the affairs of another state.’ See *Nicaragua*, *supra* note 31 at 146.

¹⁴⁴ Roberts, *supra* note 13 at 759.

The Court relied almost exclusively on normative standards, which it located in Resolutions of the UN General Assembly and the Friendly Relations Declaration of 1970.¹⁴⁵ Here, the Court appeared to suggest that *opinio juris* can be found within Resolutions and multi-lateral treaties. I would maintain that the act of voting at the UN GA in of itself cannot constitute individual *opinio juris*.¹⁴⁶ It is essential that the psychological factor of CIL be re-iterated.¹⁴⁷ GA Resolutions may constitute *evidence* of *opinio juris* but not *opinio juris* itself. These aforementioned Resolutions and declarations were seen as *confirmation* of the existence of a CIL norm.¹⁴⁸ The Court, in hingeing its decision upon these normative standards, identified CIL norms prohibiting the use of force, despite a lack of state practice supporting the asserted normative standards.¹⁴⁹

In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of the states should, in general, be consistent with such rules, and instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a state acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than weaken the rule.¹⁵⁰

The reasoning in the *Nicaragua* judgement has been criticised by several jurists. In fact, D'Amato termed the judgement a 'failure of legal scholarship'.¹⁵¹ He further states that the judgement contained no independent evidence of the theory that the Court employed.¹⁵² If one employs Koskenniemi's reasoning the judgment may be criticised as

¹⁴⁵ UN Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations GA Res 2625, UN GOAR Supp. (No.28) at 121, UN Doc.A/8028 (1970) See, Kirgis, *supra* note 14 at 147; Koskenniemi, *supra* note 7 at 371. See, *Nicaragua case*, *supra* note 31 at pg 106, para 202.

¹⁴⁶ D'Amato, *supra* note 50 at 102.

¹⁴⁷ *Ibid.*

¹⁴⁸ Koskenniemi, *supra* note 7 at 371.

¹⁴⁹ Charlesworth, *supra* note 9 at 45; Kirgis, *supra* note 14 at 147.

¹⁵⁰ *Nicaragua case*, *supra* note 31 at 98, para 186.

¹⁵¹ D'Amato, *supra* note 50 at 105. It is noteworthy, that the *Nicaragua* case has not been universally criticised see: Briggs, *supra* note 133.

¹⁵² *Ibid.*

hopelessly utopian.¹⁵³ This is due to what Charlesworth terms the separation of ‘compliance and custom.’¹⁵⁴ In effect, the judgement, asserting that a prohibitive norm of CIL exists, has no correlation with international reality. However, as I shall go on to discuss, I do not believe that it is essential that international law reflect the reality of state behaviour and this seems particularly pertinent in the realm of international criminal law. Perhaps, the reality is simply that states breach international legal norms.

The modern doctrine, in its elevation of *opinio juris*, does not escape criticism of circularity.¹⁵⁵ More often than not, *opinio juris* is proven by resort to state practice and the requisite psychological element is all but forgotten. It seems that neither element of the traditional doctrine can exist independently of one another. I submit that it possible to re-imagine a definition of CIL that breaks this endemic circularity. However, such a definition must be re-imagined out with the constraints of Article 38. The traditional bipartite definition must be abandoned in its entirety, in order to facilitate a workable and practicable definition.

ii) Kirgis and the sliding scale

Kirgis attempts to reconcile traditional and modern approaches to custom through what he terms the ‘sliding scale’.¹⁵⁶ In doing so, he does not stray from the confines of Article 38. He avers that the divergent CIL doctrines can be reconciled if they are not viewed as ‘mutually exclusive’.¹⁵⁷ Instead, he maintains, they must be viewed as ‘interchangeable along a sliding scale.’¹⁵⁸ In effect, the stronger the evidence of *opinio juris* the less evidence of state practice required to prove the existence of a CIL norm and vice versa.

¹⁵³ See Koskenniemi, *supra* note 7 at 363; Powell & Pillay, *supra* note 3 at 495; Roberts, *supra* note 13 at 762.

¹⁵⁴ Charlesworth, *supra* note 9 at 45.

¹⁵⁵ See, Koskenniemi, *supra* note 7 at 40.

¹⁵⁶ Kirgis, *supra* note 14; Roberts, *supra* note 13 at 760.

¹⁵⁷ Kirgis, *ibid* at 149.

¹⁵⁸ *Ibid*; Roberts, *supra* note 13 at 760.

On the sliding scale, very frequent, consistent state practice establishes a customary rule without much (or any) affirmative showing of *opinio juris*, so long as it is not negated by evidence of a non-normative intent. As the frequency and the consistency of the practice decline in any series of cases, a stronger showing of *opinio juris* is required. At the other end of the scale, a clearly demonstrated *opinio juris* establishes a customary rule without much (or any) affirmative showing that governments are consistently behaving in accordance with the asserted rule.¹⁵⁹

The element preferred in employing the sliding scale, whether that is *opinio juris* or state practice, is entirely dependent upon the seeming significance, or otherwise, of the CIL norm in point.¹⁶⁰ In effect, the application of the sliding scale is inextricably linked to whether given situations are seen as issues of high or low politics. If the CIL norm in question is not seen an issue of high politics, such as the delimitation of the continental shelf, the international judiciary will require that both elements of the traditional bipartite doctrine are fulfilled.¹⁶¹ However, if the CIL norm in question concerns the prohibition of on the use of force, or a similarly *important* CIL norm, the international judiciary will forgo one of the elements in order that a rational result ensues.¹⁶²

The more destabilizing or morally distasteful the activity – for example, the offensive use of force or the deprivation of fundamental human rights – the more readily international decision makers will substitute one element for the other, provided the asserted restricted rule seems reasonable.¹⁶³

It is most certainly arguable that international criminal law is a matter of high politics. By Kirgis' reasoning, this could relegate state practice to an entirely peripheral role in the delimitation of customary international criminal norms. If one employs Kirgis' sliding scale, in the realm of international criminal law, it is wholly plausible that state practice is rendered at the most a secondary concern.

¹⁵⁹ Kirgis, *ibid.*

¹⁶⁰ *Ibid.*; Roberts, *supra* note 13 at 772.

¹⁶¹ Roberts, *ibid.*

¹⁶² *Ibid.*

¹⁶³ Kirgis, *supra* note 14 at 149.

Simma and Alston assert that there is somewhat of an ‘irresistible’ temptation to develop doctrines of CIL that re-interpret custom to provide the ‘right’ answers.¹⁶⁴ This criticism is most certainly pertinent as regards Kirgis.¹⁶⁵ The sliding scale seems to lack consistency and coherence. Moreover, it seems to allow the international judiciary too much creative space. Any workable doctrine of CIL should be precise and enable the international judiciary concisely and consistently to apply principles of international law and not enable the judiciary actually to create the principles in question. In the realm of international criminal law, this consistency is absolutely essential in order to facilitate the application of principles that constitute constraining and descending law.¹⁶⁶ However, Kirgis paints a rather pessimistic picture of international legal relations if the sliding scale were not to be employed.

The alternative would be an international legal order containing ominous silences – where treaty commitments cannot be found – concerning the ways in which state impose their wills on other states or individuals.¹⁶⁷

Kirgis seems to draw on natural law principles and, I would maintain, the sub-text of sliding scale is directly correlated to morality. The international judiciary is left with the rather unenviable task of discerning what constitutes a ‘morally distasteful’ activity and moreover, what the reasonable result should be. Clearly, as regards CIL norms, all form of norm delimitation involves an inevitable amount of law creation.¹⁶⁸ However, Kirgis’ sliding scale seems to locate an inordinate amount of law making power with the international judiciary. Such legislative power should vests in states and not the international judiciary.¹⁶⁹

¹⁶⁴ Simma & Alston, *The Sources of Human Rights Law: Custom, Jus Cogens and General Principles* 12 *Australian Yearbook of International Law* (1988 – 1989) 82 at 83; Roberts, *supra* note 13 at 760.

¹⁶⁵ Roberts, *ibid.*

¹⁶⁶ Koskenniemi, *supra* note 7 at 40; Powell & Pillay, *supra* note 3 at 489.

¹⁶⁷ Kirgis, *supra* note 14 at 148.

¹⁶⁸ Georgiev states: ‘The ‘existence’ of law does not necessarily imply its ‘completeness’ – that there is a ready-made set of rules ‘out there’ that can be applied to any situation and that may provide the solution to any social problem.’ Georgiev, ‘Politics or Rule of Law: Deconstruction and Legitimacy in International Law’ 4 *EJIL* (1993) 1 at 7.

¹⁶⁹ See Dixon, *International Law* (Oxford University Press: Oxford, 2005) at 8. In discussing the roles of the ICJ Dixon states: ‘the ICJ is primarily concerned with the enforcement of international rights and duties.’

Moreover, Kirgis does not escape the criticism of circularity.¹⁷⁰ Yet again the two elements of the bi-partite doctrine are not independent of one another and the ‘hamster wheel’ of CIL discourse continues to roll on unabated.¹⁷¹ Byers states that the only possible method of avoiding criticism of circularity, in the given context, is using D’Amato’s distinction between state practice and ‘articulation’.¹⁷² Regardless of whether or not one applies the distinction propounded by D’Amato, Kirgis’ sliding scale seems inappropriate for the demands of international criminal law and CIL generally. It is not a coherent form of norm creation and, whilst attempting to reconcile traditional and modern approaches to CIL within the confines of Article 38, the sliding scale firmly places much of the powers of norm creation within the hands of the international judiciary. It is once again apparent that it is necessary, in order that a workable definition of CIL is advanced, to look beyond the constraints of Article 38.

iii) Non-state Actors and the formation of CIL

Gunning is at the fore of the debate calling for the inclusion of non-state actors in CIL norm creation.¹⁷³ This appears to be a theory of CIL norm creation that looks outside the confines of Article 38. However, in reality most jurists attempt to reconcile their theory with the traditional bi-partite doctrine. Gunning avers that the inclusion of non-state actors is an absolute necessity in order that contemporary demands of the human rights movement are met.¹⁷⁴ Before detailing how the inclusion of non-state actors within custom formation may be facilitated, it is essential to distinguish state-based international organisations and independent organisations. For present purposes, a state-based organisation can be understood as one that is instituted by states, or by an organisation of states and cannot be classed as entirely independent from state influence. A non-state based organisation is one that may be classified as an independent entity. State parties are not instrumental in their inception and membership of such an organisation is not composed of state parties.

¹⁷⁰ Byers, *supra* note 16 at 137.

¹⁷¹ Kennedy, *supra* note 16.

¹⁷² Byers, *supra* note 16 at 137.

¹⁷³ See Gunning, *supra* note 14; Powell & Pillay, *supra* note 3 at 497; Roberts, *supra* note 13 at 775.

In general, the discussion of the involvement of non-state actors centres upon the UN GA.¹⁷⁵ It is argued that the actions of international organisations, particularly those whose members are state parties – such as the UN GA - should constitute state practice for the purposes of the creation of CIL norms.¹⁷⁶ Moreover, Gunning controversially argues for a much wider conception of international organisations and calls for NGOs to have a role in the creation of CIL norms.¹⁷⁷ Whilst, making a distinction between state-based and non-state based organisations, Gunning argues that both types of organisation be included in custom formation.

It would seem, however, that the practice of international organisations can also create rules of customary law.¹⁷⁸

Theorists argue that voting at the GA, whether those votes be positive or negative, may constitute state practice or *opinio juris* and thus, the GA could hold a key role in CIL norm-creation.¹⁷⁹ It is noteworthy that jurists are often unclear whether the actions of non-state actors should constitute state practice or *opinio juris*.¹⁸⁰ However, whichever element of the bi-partite doctrine is favoured, such an assertion seems to stand in stark contradiction to the UN Charter.¹⁸¹ The Charter clearly articulates that GA Resolutions

¹⁷⁴ Gunning, *ibid* at 212

¹⁷⁵ Gunning, *ibid* at 222.

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid* at 213.

¹⁷⁸ Akehurst, *supra* note 26 at 11.

¹⁷⁹ *Ibid*; Gunning, *supra* note 14 at 222

¹⁸⁰ Gunning notes that: ‘While logically compelling [the inclusion of non-state actors in custom formation], this premise has not been fully analyzed.’ See Gunning, *ibid*.

¹⁸¹ Article 10 of the UN Charter states: ‘The General Assembly may discuss any questions or matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the members of the UN or to the Security Council or to both on any such questions or matters.’

Gunning, *supra* note 14 at 222; Sloan, ‘The Binding Force of a ‘Recommendation’ of the General Assembly of the United Nations’ 25 *BYIL* (1948) 1. Sloan, at 6, notes that the records of United Nations Conference on International Organization at San Francisco provide no clarity as regards the meaning of ‘recommendation’. However, he goes on to state that: ‘There is one question, however, that was clearly decided and that was that the General Assembly should not be given the function of international legislation.’ For a further discussion on the legal effect, or otherwise, of UN GA Resolutions see: Asamoah, ‘The Legal Effect of Resolutions of the General Assembly’ 3 *Colum. J. Transnat’l L.* (1963-1964) 210; Garibaldi, ‘The Legal Status of General Assembly Resolutions: Some Conceptual Observations’ 73 *Am Soc’y Int’l L. Proc.* (1979) 324; Joyner, ‘UN General Assembly Resolutions and International Law:

are only ‘recommendations’ and thus the arguments as to their binding nature may appear slightly strained. Furthermore, it seems apparent that state voting patterns in the GA are not intended, particularly by the states themselves, to generate legal norms.¹⁸² Despite the international legal grounding of the UN GA and the status afforded to its Resolutions, Gunning terms the exclusion of GA Resolutions from CIL norm creation ‘unreasonable’.¹⁸³

If the acts or practices of nations as individual nations are considered legitimate, to dismiss the acts or practices of those same nations when they act in concert is unreasonable, especially in a community oriented toward the peaceful discussion and resolution of disputes.¹⁸⁴

I would submit that whilst GA Resolutions cannot in of themselves constitute binding legal norms, the Charter makes this much quite clear, they may, however, be evidence of the existence of a binding norm within the realm of CIL. This begs the question: how can the inclusion of non-state organisations be reconciled with state sovereignty on the international plane? It is arguable that their inclusion would drastically undermine positivistic conceptions of international legal relations.¹⁸⁵ It seems apparent that their inclusion would emasculate the traditional bi-partite doctrine.

Allowing non-state actors a role in the generation of customary international law would undermine the traditional requirements of state practice and *opinio juris*.¹⁸⁶

The traditional bi-partite doctrine bases CIL norm-formation entirely upon the actions (state practice) and beliefs (*opinio juris*) of states. The inclusion of non-state actors, within the constraints of Article 38, serves to disrupt the traditional definition. However, perhaps the weakening of the traditional doctrine is a necessity in order that a workable definition, one that fits contemporary concerns, can be advanced. In discussing the inclusion of non-state actors in the creation of CIL, Charlesworth points to Franck’s

Rethinking the Contemporary Dynamics of Norm-Creation’ 11 *California Western International Law Journal* (1981) 445.

¹⁸² Roberts, *supra* note 13 at 769.

¹⁸³ Gunning, *supra* note 14 at 222.

¹⁸⁴ *Ibid.*

¹⁸⁵ Charlesworth, *supra* note 9 at 45.

‘linkage of fairness and compliance’.¹⁸⁷ Here, she suggests that the inclusion of non-state actors in CIL norm creation would potentially increase the perceived levels of fairness *a propos* the process itself and the resultant norms.¹⁸⁸

Gunning argues that the contemporary process of CIL formation is rooted in an erroneous presumption.¹⁸⁹ She avers that the supposition that states are supreme no longer reflects the reality of international legal relations.¹⁹⁰ Franck, in asserting that the international legal community has expanded, seemingly endorses Gunning’s standpoint.

Only a few decades ago, international law applied exclusively to states. Today, it is an intricate network of laws governing a myriad of rights and duties that stretch across and beyond national boundaries, piercing the statist veil even while it sometimes pretends nothing has changed.¹⁹¹

It is apparent that, to a certain degree, state behaviour is influenced and manipulated by factors outside the traditional statist view of international legal relations.¹⁹² Perhaps this paradigm shift necessitates the inclusion of non-state actors within the realm of custom creation. However, I remain unconvinced that this can be achieved within the constraints of Article 38. It is increasingly apparent that an entirely new definition of CIL is needed in order that norms may be discerned in a coherent fashion.

Somewhat controversially, Gunning includes NGOs, as non-state actors, in the process of custom formation.¹⁹³ Her reasoning behind the inclusion of NGOs mirrors her reasoning for the inclusion of non-state actors generally – state sovereignty is not absolute.¹⁹⁴ Whilst international organisations, such as the UN, are state-based creations,

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*

¹⁸⁹ Gunning, *supra* note 14 at 221.

¹⁹⁰ *Ibid.* For a discussion of the traditional conceptions of sovereignty on the international plane see: Biersteker & Weber, ‘The Social Construction of State Sovereignty’, in Biersteker & Weber (eds.), *State Sovereignty as a Social Construct* (Cambridge University Press: Cambridge, 1996); Loughlin, ‘Ten Tenets of Sovereignty’, in Walker (ed.), *Sovereignty in Transition* (Hart Publishing: Oregon, 2003) at 55.

¹⁹¹ Franck, *Fairness in International Law and Institutions* (Oxford University Press: Oxford, 1995) at 5.

¹⁹² Gunning, *supra* note 14 at 221.

¹⁹³ Charlesworth, *supra* note 9 at 44; *ibid* at 227.

¹⁹⁴ Gunning, *supra* note 14 at 221.

NGOs act independently of states.¹⁹⁵ Gunning seems to view the independence of NGOs as a positive factor in the process of norm-creation.¹⁹⁶ By the inclusion of NGOs within the ambit of non-state actor, Gunning disconnects entirely from notions of state sovereignty. Under the theory propounded by Gunning, non-state actors, that are not even created by state parties and moreover, in which state parties have no material involvement, can have a central role in international norm-creation. I would maintain that such a theory has insurmountable theoretical problems.

Gunning asserts that non-state actors generally be included ‘as equal participants in international organization.’¹⁹⁷ However, how does one include non-state actors in CIL norm creation? Gunning details two divergent methods for inclusion.¹⁹⁸ Firstly, she suggests increasing the role of international organisations, so their acts are deemed to constitute collective state practice.¹⁹⁹ Secondly, she suggests, that the international community recognise that NGOs have a ‘distinct, measurable impact on international affairs.’²⁰⁰ However, Gunning fails to indicate quite how this can be achieved. Whilst stating that NGOs should have a role in CIL formation, the identification of the exact parameters of that role is noticeable only by its absence.

It is noteworthy that Charlesworth maintains that employment of non-state actors in CIL formation is most effective within the domestic sphere.²⁰¹ This assertion could be

¹⁹⁵ Gunning, *supra* note 13 at 230. For a discussion of the role of NGOs on the international plane see: Chadwick, ‘The Emerging Roles of the NGOs in the UN System: From Article 71 to a People’s Millennium Assembly’ 8 *Global Governance* (2002) 93; Martens, ‘NGOs in the UN System: Examining Formal & Informal Mechanisms of Interaction’ 2 *Int’l J. Civ. Soc’y L* (2004) 11; Martens, ‘Examining the (Non-) Status of NGOs in International Law’ 10 *Ind. J. Global Legal Stud* (2002-2003) 1; Posner & Whittome, ‘The Status of Human Rights NGOs’ 25 *Colum. Hum. Rts. L. Rev.* (1993-1994) 269

¹⁹⁶ It is noteworthy, that NGOs have a consultative status as regards the UN, see Gunning, *ibid.* Article 71 of the UN Charter states: ‘The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.’

¹⁹⁷ Gunning, *supra* note 14 at 230.

¹⁹⁸ Gunning, *ibid* at 221.

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*

²⁰¹ Charlesworth, *supra* note 9 at 46; Koh, ‘Review Essay: Why Do Nations Obey the Law?’ 106 *Yale L.J.* (1997) 2599 at 2658. Here, Koh suggests that international organizations are of the most use in ‘internalizing’ CIL norms.

particularly relevant in discerning a suitable role for NGOs in custom formation. If NGOs were to partake in CIL formation, determining which NGOs are to have such a role could be problematic²⁰² By including NGOs, organizations with largely no material connection to the state, Gunning not only alters CIL but the shape of the international community entirely. I find no international legal support for Gunning's assertion. Gunning seems to simply appeal to morality and the reality of the international legal order and consequently, conclude that states and NGOs share an equal status.

Gunning indicates that the inclusion of non-state actors in norm creation may create paradoxes in traditional conceptions of custom.²⁰³ However, Gunning's understanding of such a paradox is quite unclear. Gunning may have been suggesting that if non-state actors form part of CIL creation, there may be a situation whereby divergent patterns of behaviour exist between the relevant states and the non-state actors.²⁰⁴ Here, an examination of *S –v- Petane* is useful in elucidating Gunning's meaning.²⁰⁵ The case concerned the customary status of Additional Protocol 1 to the Geneva Conventions.²⁰⁶ If the Additional Protocol were held to be part of CIL, it would have been automatically incorporated into South African law.²⁰⁷ In asserting that Additional Protocol I constituted CIL, the defendant referred to GA Resolutions.²⁰⁸ Conradie J asserted that GA Resolutions do not constitute state practice for the purposes of CIL formation and further stated that: 'Customary international law is founded on practice, not on preaching.'²⁰⁹ Ultimately, the Court held that the Additional Protocol had not become part of CIL.²¹⁰ Such reasoning may be illustrative of Gunning's 'paradox' – the behaviour of a state may be entirely distinct from the behaviour of a non-state actor.

²⁰² Gunning, *supra* note 14 at 230.

²⁰³ *Ibid* at 223.

²⁰⁴ *Ibid*.

²⁰⁵ *State –v- Petane* 1988 (3) SA 51(C)

²⁰⁶ *Ibid* at pg 52. See, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1). Adopted on 8 June 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts

²⁰⁷ *S –v- Petane*, *supra* note 205 at 56.

²⁰⁸ *Ibid* at 58.

²⁰⁹ *Ibid* at 59.

However, if the behaviour of a state instituted non-state actor is at point, I see no real difference between a paradox in the given situation and within the traditional conception of CIL. Under the traditional conception of custom, excluding the actions of non-state actors, a state may not have the requisite *opinio juris* or state practice and will still be bound by a general rule of custom.²¹¹ Within the context of *S –v- Petane*, South Africa’s behaviour was not distinct nationally and internationally – regardless of the action of states in concert. South Africa, in this case, had not acceded to the Convention in question and its practice domestically did not appear to stray from this. So, in effect, no paradox actually existed.

However, Gunning may be suggesting a quite different understanding of ‘paradox.’ In effect, she may be proposing that a state may have a belief domestically and hold an entirely different belief *in concert* with the international community.²¹² For example, State X signs and ratifies the Torture Convention and continues to use torture as a method of interrogation domestically.²¹³ It is arguable that the problem of paradoxical behaviour could be drastically reduced if *opinio juris* is to be favoured in delimiting CIL norms. Whilst impossible to prove, it seems more likely that a state may *act* differently in the global community of states and domestically. If the activities, of state instituted non-state actors are seen to impact upon *opinio juris*, it seems unlikely that a state could have an individual *opinio juris* that differs greatly from a belief that it holds in concert with other states.²¹⁴ Or at least, such a divergence would be extremely difficult to prove.

It is arguable that states may be less willing to participate in international organisations, if such organisations were seen as legally binding.

²¹⁰ *Ibid* at 67.

²¹¹ Some theorists argue that this is tempered by the persistent objector rule. See note, 27.

²¹² See Gunning, *supra* note 14 at 223.

²¹³ See note 118.

²¹⁴ It is noteworthy that Paust, *supra* note 13 at 73, discusses the concept of GA Resolutions constituting *opinio juris*.

One criticism of this approach could be that nations would be reluctant to participate in international organizations or their agencies if the organizations acts were legally binding.²¹⁵

However, Gunning suggests that states cannot ‘afford’ to be excluded from international organisations through non-participation.²¹⁶ Perhaps this is true of states with less power on the international plane. The most powerful states *can* and *do* ‘afford’ not to participate in transnational organisations. Gunning even points to the US withdrawal from UN Educational, Scientific and Cultural Organization (UNESCO).²¹⁷ However, she merely states that this illustrates that ‘isolationism is the exception, not the rule.’²¹⁸ State participation, or rather non-participation, in the International Criminal Court (ICC), is another pertinent example of the ability of powerful states to freely choose which international organisations they can ‘afford’ to be part of.²¹⁹ The US, whilst largely shaping the structure of the Statute and the accompanying negotiations, ultimately did not become party to the treaty establishing the Court and can very much ‘afford’ to remain as such.²²⁰

I would maintain that there is a role in CIL formation for organisations – such as the UN GA – whose representatives are made up of nation states. I remain unconvinced that NGOs *should* or *could* have a role in CIL norm creation. Moreover, in order that non-state actors, for my purposes state-based international actors, have a role in CIL creation, it is essential that one looks outside the constraints of Article 38. The current definition, whether understood in traditional or modern terms, does not allow for the inclusion of non-state actors without stretching the boundaries of interpretation.

iv) Shortcomings of the modern approaches to custom: beyond Article 38?

²¹⁵ Gunning, *supra* note 14 at 226.

²¹⁶ *Ibid.*

²¹⁷ *Ibid.*

²¹⁸ *Ibid.*

²¹⁹ See note 2.

²²⁰ For a discussion of US non-participation in the ICC see: Du Plessi, ‘Seeking an International Criminal Court – Some Reflections on the US Opposition to the ICC’ 15 *S. Af. J. Crim Just* (2002) 301; Khan, ‘Why the United States is so Opposed’ available at http://www.crimesofwar.org/icc_magazine/icc-khan.html, last viewed 20th February 2006; Kirsch, ‘The International Criminal Court: Current Issues and Perspectives’ 64 *Law & Contemporary Problems* (2001) 3.

It is noteworthy that the criticisms of modern custom are often directly correlated to the advantages of the traditional doctrine and vice versa.²²¹ In exacting a definition of CIL that attempts to re-interpret Article 38, it is almost impossible to dissect the two divergent approaches. The modern and traditional approaches to custom are inextricably linked and this is best explained through Koskenniemi's theory of circularity.²²² If custom relies upon the normative element, *opinio juris*, it may be accused, under Koskenniemi's reasoning, with being utopian.²²³ In effect, it bears no relation to the reality of what states actually do. Roberts details modern custom as 'descriptively inaccurate'.²²⁴ However, as I shall go on to discuss, why should CIL relate to what states do?

Cassese avers that the traditional and modern doctrines of international law co-exist on the international plane.²²⁵ He states that the modern conceptions of international law have not quite succeeded in replacing the more traditional rhetoric.²²⁶ This, he claims, is largely due to the structure of the international plane and the enduring emphasis upon individualistic and state sovereignty orientated approaches.²²⁷ As I will go on to discuss, it is apparent that whilst contemporary academic thought favours the modern approach to CIL formulation, this is not echoed within the realm of judicial decision making.²²⁸ Is it possible to present a theory of international law that still respects state sovereignty, whilst challenging the traditional, somewhat outdated, conceptions of the reality of the international legal plane?

It seems that proving the existence *opinio juris* is not a simple task. Whilst disagreement persists in defining the exact parameters of *opinio juris*, proving its existence is an unenviable task.²²⁹ The normative element of CIL is often located within

²²¹ Roberts, *supra* note 13 at 770.

²²² Byers, *supra* note 16 at 136; Kennedy, *supra* note 16 at 407; Koskenniemi, *supra* note 7 at 363; Powell & Pillay, *supra* note 3 at 495; Roberts, *supra* note 13 at 767.

²²³ Koskenniemi, *ibid*; Powell & Pillay, *ibid*.

²²⁴ Roberts, *supra* note 13 at 769.

²²⁵ Cassese, *supra* note 23.

²²⁶ *Ibid*.

²²⁷ *Ibid*.

²²⁸ This is largely the case, the only exception is the *Nicaragua case*, *supra* note 31.

²²⁹ Roberts, *supra* note 13 at 768.

the material element of state practice. Any workable definition of CIL must carefully define the parameters of the normative element. To this end, it is essential to look out with the traditional bi-partite doctrine. However, can a definition of CIL exacted out with the parameters of Article 38 be reconciled with international legal theory?

In order not to make custom seem like a natural morality, it will have to justify its norms ultimately by reference to concrete State practice and *opinio juris*.²³⁰

Despite Koskenniemi's criticism, as I will go to discuss, I believe it is possible to discern a definition of CIL, that is not within the confines of Article 38, that is reconcilable with notions of state sovereignty and does not simply reflect 'natural morality.'²³¹

An examination of international criminal law serves to indicate that the modern approaches to CIL are somewhat more appropriate for the realm of constraining and descending law.²³² However, the circularity of modern CIL is criticised and moreover, proving a rule of CIL is still an almost impossible task. Charlesworth states that modern CIL can only be rationalised if the 'traditional rhetoric' of custom is cast aside.²³³ It is often stated that traditional conceptions of custom allow powerful states to shape the law.²³⁴ However, Stern argues that articulation of *opinio juris* is also directly effected by power.²³⁵ In effect, inequality pervades the entire formation of CIL. Is it possible to exact a definition of CIL that is coherent, democratic and avoids criticism of circularity? It is increasingly apparent, that it is necessary to dispense with Article 38 and look beyond both traditional and modern approaches to CIL.

²³⁰ Koskenniemi, *supra* note 7 at 348.

²³¹ *Ibid.*

²³² See note 7.

²³³ See Charlesworth, *supra* note 12; Roberts, *supra* note 13 at 760.

²³⁴ Byers, *supra* note 13 at 84 ; Stern, *supra* note 76

²³⁵ See, Byers, *supra* note 13 at 87; Stern, *ibid.*

**CHAPTER THREE: CIL in the Wake of International Criminal Law: Re-
Imagining a Definition**

i) International Criminal Law and CIL

The apparent theoretical and practical frailties of both the ‘traditional’ and ‘modern’ doctrines of CIL serve to indicate the need for an entirely new approach to customary international norm delimitation. It is essential to set apart international criminal law, as a distinct species of international law, in order to credibly re-cast notions of CIL for application in the international criminal justice system and discern how the specifics of international criminal law may impact upon CIL norm employment.

The traditional theoretical conceptions of international law are increasingly challenged on the international plane, however, modern theories have not succeeded in dethroning the traditional rhetoric of state sovereignty and individualism.²³⁶ As such, two strong opposing theoretical forces exist within international criminal law – ascending law and descending law - that at times can appear diametrically opposed.²³⁷ International law offers what can be termed a ‘horizontal framework’²³⁸ based, at least in the traditional sense, on the sovereign equality of states.²³⁹ Criminal law is quite distinct and

²³⁶ See Cassese, *supra* note 23 at 401. For a discussion of the more traditional theoretical approaches to international law see: Carty, *supra* note 7 at 210; Koskenniemi, *supra* note 7 at 363; Powell & Pillay, *supra* note 3 at 495.

²³⁷ ‘Developments – International Criminal Law’ 114 *Harvard Law Review* (2001) 1943 at 1949; Charlesworth, *supra* note 9 at 44; Powell & Pillay, *ibid* at 490.

²³⁸ Tallgren, ‘The Sensibility and Sense of International Criminal Law’ 13 *EJIL* (2002) 561 at 562.

²³⁹ The *Lotus* case affirmed the fundamental nature of the principle of sovereign equality on the international plane and the horizontal nature of international legal relations: ‘International law governs

concerns law that could be termed as constraining and descending law; a horizontal framework does not exist.²⁴⁰

Criminal law as a tool of international lawyers faces an enormous challenge...it is supposed to be, by definition, positivistic discipline of the law, based on the fundamental importance of legality, the principle of *nullem crimen sine lege*, *nulla poena sine lege*.²⁴¹

This so-called ‘challenge’ is even more pertinent in the realm of customary international criminal law. If there is no coherent method of norm delimitation, it would seem unlikely that the tension in international criminal law – between ascending and descending law – can be reconciled. I will endeavour to advance a theory that will go some way towards reconciling this tension.

International criminal law has expanded more in the last fifty years than in the last five hundred.²⁴²

Recent decades have seen a veritable ‘explosion’ of international criminal law enforcement.²⁴³ The establishment of the *ad hoc* Tribunals indicated the international community’s intention to enforce substantive international criminal law.²⁴⁴ Sunga called the creation of the ICTY the first ‘tangible’ measure undertaken by the international community as regards international criminal law enforcement.²⁴⁵ Such a flurry of judicial activity is not only present on the international plane; domestic prosecutions for international crime have also seen a sharp increase.²⁴⁶ Perhaps, the most important of

relations between independent States. The rules binding upon states therefore emanate from their own free will.’ *The Lotus Case (France –v- Turkey)* 1927 P.C.I.J Reports, Series A. No. 10 at 18, See Tallgren, *ibid*.

²⁴⁰ Koskenniemi, *supra* note 7 at 40; Powell & Pillay, *supra* note 3 at 495.

²⁴¹ Tallgren, *supra* note 238 at 564.

²⁴² Sunga, *The Emerging System of International Criminal Law: Developments in Codification and Implementation* (Kluwer Law International: The Hague, 1997) at 2.

²⁴³ ‘Developments – International Criminal Law’, *supra* note 237 at 1948.

²⁴⁴ See note 5; *ibid* at 1952.

²⁴⁵ Sunga, *supra* note 242 at 5.

²⁴⁶ Charney, ‘International Criminal Law and the Role of Domestic Courts’ 95 *AJIL* (2001) 120 at 121; ‘Developments – International Criminal Law’, *supra* note 237 at 1947.

these domestic cases has been the United Kingdom House of Lords decision in the *Pinochet* cases.²⁴⁷

However, the development of the enforcement mechanisms of international criminal law is an entirely modern phenomenon.²⁴⁸ It is certainly true to say that international criminal law is a relatively new branch of the law.²⁴⁹ Before World War II, prosecutions for international crime were noticeable only by their absence.²⁵⁰ Towards the end of the nineteenth century, several European states codified certain crimes of war, however, little followed in the way of prosecution.²⁵¹ At the end of World War I, calls for the prosecution of Kaiser Wilhelm II and the perpetrators of the Armenian genocide were left unanswered.²⁵² The unimaginable horrors visited upon Europe by the Nazi final solution provided the impetus, for what could be described as the first international criminal tribunal – Nuremberg.²⁵³ However, after Nuremberg there was a significant lull

²⁴⁷ See, *R –v- Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* [2001] 1 AC 147, (hereinafter, *Pinochet No 3*) It is noteworthy, that I will examine Pinochet as regards CIL norms in Chapter IV. For a discussion of the Pinochet precedent see: Murphy, ‘The Pinochet Judgment: New Accountability for Old Dictators’ 32 *Victoria U. Wellington L. Rev* (2001) 463; Powell & Pillay, *supra* note 3; Wedgwood, ‘International Criminal Law and Augusto Pinochet’ 40 *Va J. Int’l L.* (1999-2000) 829; White, ‘Pinochet, Universal Jurisdiction, and Impunity’ 7 *Sw.J.L & Trade Am* (2000) 209.

²⁴⁸ Cassese, *supra* note 6 at 16.

²⁴⁹ *Ibid.*

²⁵⁰ Goldstone, ‘Future of International Criminal Justice: Thirteenth Annual Frank.M. Coffin Lecture on Law and Public Service’ 57 *Me. L. Rev.* (2005) 554

²⁵¹ See ‘Developments – International Criminal Law’, *supra* note 237 at 1950. The relevant law here is ‘Hague Law’ and ‘Geneva Law’. ‘Hague Law’ governed the conduct of war. The Hague Peace Conferences produced the 1899 Hague Conventions I – III and the 1907 Hague Convention 1-XIII. ‘Hague Law’ and ‘Geneva Law’ are treaty-based law, however, their enactment did not inhibit the evolution of CIL, as indicated by the Martens clause within the Hague Convention IV:

‘Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience.’ See ‘Developments – International Criminal Law’ *ibid.*

‘Geneva Law’ concerned the treatment of the sick and the wounded. The relevant Conventions are: the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Convention I); the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Convention II); Geneva Convention relative to the Treatment of Prisoners of War (Convention III) and the Geneva Convention Relative the Protection of Civilian Persons in Time of War (Convention IV). For a discussion of ‘Geneva Law’ see: Schlögel, ‘Geneva Red Cross Conventions and Protocols’ *Encyclopedia of Public International Law* 531.

²⁵² ‘Developments – International Criminal Law’ *ibid.*

²⁵³ *Ibid* at 1951; Goldstone, *supra* note 250. For a discussion of the formation of the International Military Tribunals at Nuremberg and Tokyo see: Cassese, *supra* note 6 at 376.

in enforcement of international criminal law, both internationally and domestically.²⁵⁴ The establishment of the *ad hoc* Tribunals marked the renewed sense of vigour in the enforcement of international criminal norms.

The slow development of international criminal law may be attributed to the inherent tensions between ascending law, in the shape of state sovereignty, and descending law, characterised by prohibitive criminal norms.²⁵⁵ However, the application of customary international criminal law norms presents more than mere theoretical problems. I previously identified the complexities in ascertaining what state practice *actually* is.²⁵⁶ The practical difficulties of applying the bi-partite doctrine seem even more pronounced in the case of international criminal law.

In the sphere of international criminal law, much of the regulated conduct concerns the actions of the military. Military activity is purposely kept from public scrutiny, for professed reasons of national security and state interest.²⁵⁷ Thus, discerning when a breach of international criminal law has occurred is not a simple task. Furthermore, the only possible means of delimiting state practice is through examining how states respond to the individuals who have allegedly breached international criminal law. The crucial question here is: do states prosecute those alleged to have committed an international crime? However, if in the first instance the breaches in question are kept from public scrutiny, it would seem extremely difficult to actually ascertain any form of state response. In effect, it is not practically feasible to discern the actual content of state practice. It is arguable that establishing the existence of the subjective element in the realm of international criminal law is a far more attractive prospect, both in terms of theory and practice.

²⁵⁴ The exception to this, at least domestically, is the *Eichmann* case. See: *AG Israel – v – Eichmann* (1968) 36 ILR 5 (District Court, Jerusalem); *AG – v – Eichmann* (1968) 36 ILR 277 (Israel Supreme Court).

²⁵⁵ Kittichaisaree, *International Criminal Law* (Oxford University Press: Oxford, 2001) at 4.

²⁵⁶ See Bernhardt, *supra* note 13 at 900.

²⁵⁷ Once again recent American activity in Eastern Europe is indicative of this very point. See: Dworkin, *supra* note 121.

The ‘explosion’ of the enforcement of international criminal law has resulted in a plethora of unanswered questions in the application of customary international criminal law. It is clear that the current definition is utterly unsuitable, in terms of theory and in terms of the practicality of its application. I hope to re-imagine a definition of CIL in which state practice becomes an entirely epiphenomenal concern. However, in order to advance such a definition, it is necessary carefully to delimit *opinio juris*. Is it possible to exact a definition of CIL that enables the international judiciary coherently to apply norms of customary international criminal law?

ii) Re-imagining Customary International Law

Before endeavouring to re-cast the definition of CIL, an in depth enquiry into Koskenniemi’s criticism of the CIL doctrine is instructive.²⁵⁸ Koskenniemi characterizes the inherent tension prevalent in the formation of CIL.²⁵⁹ He details a dichotomy of theoretical frailty in CIL norm creation between the concepts of apology and utopia:

A law which would lack distance from state behaviour, will or interest would amount to a non-normative apology, a mere sociological description. A law which would base itself on principles which are unrelated to state behaviour, will or interest would seem utopian, incapable of demonstrating its own content in any reliable way.²⁶⁰

In effect, doctrines of CIL can be termed apologetic if they constitute a mere *description* of what states do.²⁶¹ The absence of a normative standard seems to indicate a process of norm-creation more akin to a sociological enquiry than a method of delimiting coherent legal norms.²⁶² As previously asserted, it is often thought that the traditional models of CIL delimitation – relying principally upon the practice of states – are steeped in apologetic leanings.²⁶³

²⁵⁸ Koskenniemi, *supra* note 7;

²⁵⁹ *Ibid* at 362; Charlesworth, *supra* note 9 at 44; Powell & Pillay, *supra* note 3 at 490

²⁶⁰ Koskenniemi, *supra* note 7 at 2.

²⁶¹ Koskenniemi, *supra* note 7 at 363; Powell & Pillay, *supra* note 3 at 495; Roberts, *supra* note 14 at 767.

²⁶² Koskenniemi, *ibid*; Powell & Pillay, *ibid*; Roberts, *ibid*.

²⁶³ Roberts, *ibid*.

On the other hand, a doctrine of norm-creation may be cast as utopian if it fails to relate to the reality of international legal relations.²⁶⁴ A methodology of CIL concerned solely with normative standards – what the practice *ought* to be – may be termed utopian as it bears no relation to the practice of states in question.²⁶⁵ Description and normativity, under Koskenniemi’s reasoning, appear to be inversely related to one another.

This is starkly illustrated by the fact that the criticisms of the divergent approaches – apologetic and utopian – correspond inversely.²⁶⁶ The modern approach, cast as utopian, cannot be described as apologist – it is not a mere reflection of what states do. Whereas the traditional approach, cast as apologist, is not utopian – it cannot be said to be distinct from the reality of international legal relations. In effect, the key criticism of each of the doctrines (utopian or apologist) constitutes the value upheld in the opposing doctrine.²⁶⁷ Modern theories of custom are not apologist and are, consequently, utopian. Traditional theories of CIL formation are not utopian and are, consequently, apologist. In this sense, the divergent criticism the doctrines attract cannot exist independently and thus, neither can the opposing approaches to CIL formation – they are inversely related.²⁶⁸

Because indeterminate, customary law doctrine can only produce solutions which remain vulnerable to the criticisms compelled by itself. Any proposed solution – that is, any attempt to cease the shifting of perspectives at some point – will have to appear either apologist (because it prefers psychology to behaviour) or utopian (as it privileges behaviour over psychology).²⁶⁹

In their attempt to exist independently of one another, description (a reliance upon state practice) and normativity (a reliance upon *opinio juris*) resemble different ends of a tightly stretched elastic band. The more description and normativity struggle to become

²⁶⁴ Koskenniemi, *supra* note 7 at 363; Powell & Pillay, *supra* note 3 at 498; Roberts, *ibid.*

²⁶⁵ Koskenniemi, *ibid.*; Powell & Pillay, *ibid.*

²⁶⁶ Roberts, *supra* note 14 at 270.

²⁶⁷ *Ibid.*

²⁶⁸ *Ibid.*

utterly independent of one another, the more likely they are to collapse back into one another. They thus form not the intended dichotomy along a straight line, or in Kirgis' terms a sliding scale, but an entirely circular doctrine. Instead of labouring under the pretence that Article 38, whether examined through a modern approach (representing utopia) or a traditional approach (representing apology), is a workable legal definition, I intend to entirely re-construct the definition of CIL outside of the bounds of Article 38. As a formula, I would express my conception as follows:

OPINIO JURIS + LEGITIMATE EXPECTATION OF THE COMMUNITY OF STATES

= A NORM OF CUSTOMARY INTERNATIONAL LAW

First and foremost, I intend to collapse description (state practice) into normativity (*opinio juris*), allowing the aforementioned elastic band to recoil and thus, abruptly ending the failing attempts to reason along a straight line. In effect, I am surrendering to the reality of circular reasoning; *opinio juris* and state practice cannot and should not exist independently of one another. In re-imagining the definition of CIL, the first constituent element of CIL is *opinio juris*; the material element (state practice) becomes a merely epiphenomenal phenomenon. Its largely diminished role, as I will go on to discuss, will simply be as one of the many sources used to evidence the existence, or otherwise, of *opinio juris*.

Koskenniemi would be utterly correct in asserting that this is an entirely utopian approach.²⁷⁰ However, I make no apology for the fact that CIL norms, under the re-imagined definition, are utopian and do not reflect what states *do*. Moreover, the second element in the re-imagined definition of CIL – legitimate expectation of the global community of states – prevents the definition being cast as utterly utopian. Legitimate expectation of the global community of states is a new addition to the delimitation of

²⁶⁹ Koskenniemi, *supra* note 7 at 388.

²⁷⁰ Koskenniemi, *ibid* at 363.

CIL.²⁷¹ For present purposes, legitimate expectation constitutes a normative belief, held in common by the global community of states that a certain pattern of behaviour is legally required.²⁷² Subsequently, a normative reliance is formed upon the basis of this communal belief.

To all intents and purposes legitimate expectation of the global community of states can be seen as a form of communal *opinio juris*.²⁷³ It is, thus, imperative to distinguish the first and second elements of the re-imagined definition. Whilst legitimate expectation is a form of communal *opinio juris*, it is entirely distinct from the first element. This is largely due to the fact they exist on different planes. *Opinio juris*, as understood in the first element, is realised individually. Whilst *opinio juris*, as understood within the context of the global community of states, is held by states in common. Moreover, it is the subsequent effect of the existence of the communal *opinio juris* that is fundamental – the resultant normative reliance.

An instructive analogy may be drawn here between domestic criminal law and international criminal law. A note of caution is essential here: such an analogy ignores the relationship between individuals in international criminal law and moreover, it must be asserted that domestic criminal law and international criminal law are distinct.²⁷⁴ Bearing this in mind, domestically, if the law were to constitute a mirror image of how the subjects of the domestic legal sphere behaved, criminal law could no longer be termed as constraining and descending law.²⁷⁵ Furthermore, criminal law would ultimately fail in its professed purpose.²⁷⁶ In order that such an unfavourable outcome be avoided, the principles and prohibitions in the criminal law should reflect a common set

²⁷¹ It is noteworthy that Byers discusses the concept of legitimate expectation in CIL in customary international law and comments upon how important he believes it is within the terms of CIL. However, he discusses the concept in a far more general fashion and does not suggest for its inclusion within the definition of CIL as a distinct element of norm-formation. See Byers, *supra* note 16 at 106.

²⁷² Koskenniemi, *supra* note 7 at 365. In discussing legitimate expectation Koskenniemi refers to the legitimate expectation of other states and not the legitimate expectation of states as a collective.

²⁷³ See Cheng, *supra* note 43.

²⁷⁴ Tallgren, *supra* note 238 at 566.

²⁷⁵ Koskenniemi, *supra* note 7 at 40; Powell & Pillay, *supra* note 3 at 489.

of shared standards.²⁷⁷ International customary criminal law, by its very nature, ought to be utopian. It should reflect what the law *ought* to be. I would maintain that this does not serve to disconnect law from reality. The resultant reality is that states break the law. International customary law should reflect what individual states and the global community of states perceive the law to be, *not* how they act.

a) The Role of *Opinio Juris* in the Re-imagined Definition of CIL

In order that *opinio juris* constitute the core of the re-imagined definition of CIL, both in theoretical terms and in order that the doctrine can be applied practically, it is absolutely essential to detail the parameters of *opinio juris*. What *exactly* is *opinio juris* and how does one prove its existence or otherwise? For present purposes, *opinio juris* is a sense of legal obligation.²⁷⁸ In effect, it is the belief of a state that a certain norm, omission, prohibition or action is legal in character.

But it is sometimes enough to believe in love for it to exist. Why can the belief in the existence of a norm on the part of a state, which is simultaneously the subject and creator of international law, not be at the origin of the emergence of such a norm?²⁷⁹

It is essential to re-iterate that *opinio juris* is *not* the will that something become the law²⁸⁰ or a mistaken belief that a certain norm is prescribed by the law.²⁸¹ It solely constitutes a belief that the law necessitates the state behaviour, or state action, at point. It is, therefore, crucial to delimit how such a belief is evidenced. Perhaps *opinio juris* is not as 'elusive' as some theorists maintain.²⁸²

²⁷⁶ The purpose of criminal law is largely seen as a method of controlling the types of behaviour that society finds to be acceptable and protect citizens of the state from undue harm. See, Williams, *Criminology* (Blackstone Press Ltd: London, 1991)

²⁷⁷ It is noteworthy that I do not use the term morality. I would maintain that acceptable standards of behaviour internationally and morality are distinct. For a discussion of universality and international law see: Carlston, 'Universality of International Law Today: Challenge & Response' 8 *Harvard L.J.* (1962) 79; Charney, *supra* note 10; Green, 'Is there a Universal International Law Today?' 23 *Canadian Yearbook of International Law* (1985) 3; Kurt, 'International Law and Global Ideological Conflict: Reflections on the Universality of International Law' 45 *AJIL* (1951) 648.

²⁷⁸ See, my discussion of the role of *opinio juris* at pg 12.

²⁷⁹ Stern, *supra* note 76 at 97.

²⁸⁰ Koskenniemi, *supra* note 7 at 369.

²⁸¹ Byers, *supra* note 13 at 86.

²⁸² Charelsworth, *supra* note 12 at 8

I would aver that the resultant effect of collapsing description (state practice) into normativity (*opinio juris*) is that *opinio juris* is more a lucid and coherent element in CIL norm-creation. A coherent doctrine would enable the judiciary, both domestically and internationally, to undertake empirical enquiries when determining the existence and applicability of CIL norms. As such, domestic legislation, national judicial decisions, statements, involvement in – or indeed abstention from – international conventions, voting patterns at the GA, may all constitute evidence of *opinio juris*. It is noteworthy, that *opinio juris* cannot be expressed as actually subsisting in any of the aforementioned phenomena. For example, *opinio juris* could not be said to actually be located within the realm of state behaviour. Such state behaviour could, and should, only constitute evidence of the existence *opinio juris*. In the same way that a bloodstained knife cannot be said to constitute the crime of murder, it could merely be detailed as evidence of the existence the crime; the same principle would apply when one wishes to prove the existence of *opinio juris*.

The re-imagined definition may also be criticised for being apologetic as ultimately CIL is created by what states perceive the law *ought* to be. As such, the re-imagined definition may be accused of enabling the formation of ‘bad’ law. In effect, if the law is constructed largely around what states believe the law *is* there can be no accountability mechanism vis-à-vis the creation of law that may be deemed morally irreprehensible.²⁸³ It may be argued that, under the re-imagination of CIL, it is possible for a CIL norm to emerge permitting behaviour contrary to accepted standards. The pertinent examples here are Nazi Germany and Rwanda.

However, I would submit that in carrying out morally irreprehensible acts more often than not states ignore the law entirely.²⁸⁴ Justifications for state behaviour are couched in terms of necessity, security or morality. In the context of Rwanda, which saw the

²⁸³ I use the term moral only in relation to a set of shared standards held by the international community.

²⁸⁴ It is noteworthy that in the case of Nazi Germany discriminatory race laws were enacted, however, the German Criminal Code remained in tact. Brundto states: ‘By executive action those in power merely

slaughter of some 800,000 Tutsi and moderate Hutus in three months, the law remained unchanged.²⁸⁵ I would maintain that it is extremely unlikely that a state actor, or an individual, would truly believe that the law permitted the commission of a genocidal act or war crime. As such, the foundation for the creation of a norm of CIL, *opinio juris*, could not be said to exist. The far more likely scenario is that whilst ‘acting’ states, or individuals, appeal to seeming moral or sociological justifications for their actions ignoring the law entirely.²⁸⁶ Whilst these factors may impact upon law creation, or constitute the reasoning behind the creation of a particular law, they cannot be said to be tantamount to law itself. The other possibility is that states, in attempting to justify their actions, may erroneously apply CIL.

Furthermore, even if this assertion proved incorrect in a specific instance - a state or an individual in carrying out, for example, a genocidal act truly had the requisite *opinio juris*, the second element in the reformulation of CIL – the global legitimate expectation - would act as a safety net barring the creation of such a norm. In effect, the legal reality of these given situations would be that states or individuals concerned were acting contrary to international customary criminal norms and consequently, the appropriate criminal enforcement mechanisms should be employed. The reality, once again, does not serve to invalidate the existence of a legal norm but simply illustrate that customary international criminal law norms are broken. Perhaps, here, the weak link in the functioning of customary criminal law norms would simply be the criminal enforcement mechanisms and not the method of norm-creation itself.

The overt reliance on *opinio juris* may have other theoretical frailties. Can we really aver that a state can hold a psychological belief?²⁸⁷ It is perhaps a flawed presumption that a nation state, as a social construct, can hold a common sense of legal belief.

exonerated the perpetration of acts committed in pursuit of policy.’ Brundo, ‘The Nuremberg Experience’ 19 *Texas Journal of International Law* (1984) 633 at 641.

²⁸⁵ Pottier, *Re-Imagining Rwanda: Conflict, Survival and Disinformation in the Late Twentieth Century* (Cambridge University Press: Cambridge, 2002) at 9.

²⁸⁶ Once again the recent alleged activity of United States operatives in Eastern Europe concisely illustrate this very point. See Dworkin, *supra* note 121.

Such an argument, however, is not really a psychological one at all... [it] is based on the naturalistic assumption that a nation has an intelligible essence.²⁸⁸

I submit that it is possible for a state, in the abstract, to hold a subjective belief. It is noteworthy, that in delimiting the novel parameters of CIL I purposely avoid using the term ‘morality’ and do not refer to natural law principles. This is largely because I would maintain that a nation state cannot be said to have a common morality. However, a state *can* be said to hold a set of shared legal principles and acceptable standards of behaviour. Such beliefs can be classed as subjective and thus, a state is indeed capable of psychological belief in the delimitation of customary legal norms.

(b) The Role of Legitimate Expectation in the Re-imagined Definition of CIL

As previously asserted, the second element I propound, in re-casting the CIL definition, is one that is absent from the definition as exacted in Article 38.²⁸⁹ Despite its absence from the traditional bi-partite doctrine, some theorists argue that legitimate expectation is fundamental to custom formation.²⁹⁰ In fact, Byers states that legitimate expectation is at the ‘heart of all customary and treaty rules.’²⁹¹ Byers does not appear to couch legitimate expectation in terms of a form of communal *opinio juris* and seems to suggest that it already has a defined role on the international plane.

[T]he principle of legitimate expectation means that states are legally justified in relying on each other to behave consistently with previous assurances or patterns of behaviour – if those assurances or that behaviour is of a type, and takes place within a context, such that it is considered legally relevant by most if not all states.²⁹²

The foundations of the principle of legitimate expectation in international law seem to be located in the German historical school of thought represented by Savigny and

²⁸⁷ Koskenniemi, *supra* note 7 at 537

²⁸⁸ *Ibid.*

²⁸⁹ See note 271.

²⁹⁰ Byres, *supra* note 16 at 109.

²⁹¹ *Ibid.*

²⁹² *Ibid* at 107.

Ranke.²⁹³ Koskenniemi avers that a principle similar to legitimate expectation was prevalent among jurists in the middle of the nineteenth century and argues that such a principle reduces CIL to a set of bi-lateral agreements.²⁹⁴ However, it is possible to draw a clear distinction between legitimate expectation as discussed by Koskenniemi and the content of legitimate expectation in the re-imagination of CIL. In the context of the re-imagination of CIL, legitimate expectation is held in community and not, as understood by Koskenniemi, by individual state actors.²⁹⁵ Therefore, no bi-lateralism could be said to exist. How does one prove the existence of such a common belief and, at the same time avoid criticism of relying on principles of morality?

Under the re-imagined definition of CIL, non-state actors would have a crucial role in proving the existence of a legitimate expectation of the community of states. Such a role would only be reserved for non-state actors that are instituted through the membership of nation states.²⁹⁶ The expanding nature of the global community and moreover, the shifting focus of international legal relations, serves to indicate that non-state actors should have a role in CIL formation.²⁹⁷ Any definition of CIL that disregards the role of non-state actors is one that is entirely disconnected from the reality of international legal relations and as such may be criticised as utopian.

Under the re-imagined definition of CIL, legitimate expectation and subsequent actual reliance may be evidenced through the Declarations, statements, Memorandums and Resolutions of non-state actors. For example, a Resolution of the UN GA may constitute evidence of a global legitimate expectation. However, once again it is essential to note that a UN GA Resolution, in and of itself, cannot constitute a legitimate expectation (communal *opinio juris*). It can simply constitute the evidence of the existence of a global legitimate expectation. Koskenniemi argues that, if CIL is to reflect

²⁹³ Byres, *supra* note 16 at 139. Carty attempted to use legitimate expectation in his approach to CIL, however, again it was restricted to individual nation states, see Byers *ibid*.

²⁹⁴ *Ibid*.

²⁹⁵ See Koskenniemi, *supra* note 7 at 365.

²⁹⁶ As previously averred, Gunning suggests that NGOs should have a role in CIL norm creation. See, Charlesworth, *supra* note 9 at 44; Gunning, *supra* note 14 at 227.

²⁹⁷ Gunning, *supra* note 14 at 221.

the will of the global community, it is in danger of being utterly apologist.²⁹⁸ He states that CIL would be subject to the changing ‘whims’ of state belief.²⁹⁹ However, I would maintain that a reliance upon individual *opinio juris* and, the delimited form of communal *opinio juris*, is far less likely to be subject to capricious change than a reliance on state practice, particularly when legitimate expectation and subsequent actual reliance are entrenched within the doctrine.

It is essential to re-iterate in exacting a definition encapsulating a collective legitimate expectation, I do not intend to suggest that there exists a shared morality on the international plane.³⁰⁰ It is impossible to assert that there exists a common, or shared, morality among the global community of states.³⁰¹ In fact, it would seem incredible to assert that a common morality can exist within an individual nation state.³⁰²

It is difficult, therefore, to see how shared consciousnesses could exist in respect of the substantive content of each and every rule of customary international law, especially those rules of a highly technical character.³⁰³

Law and morality must be understood as entirely different concepts. Whilst there can be no common morality, there can be an agreement, held in common, upon a set of shared standards of behaviour – particularly in realm of international criminal law. Such agreement, for these purposes, evidences the existence of a psychological belief on the behalf of states. In propounding a definition of CIL that focuses entirely upon normative standards – individual and collective – I make no apology for international customary law not reflecting what states do. International customary law, particularly international customary criminal law, should reflect what the law *ought* to be. As such, the reality of international customary relations lies in normativity – both individual and communal – in effect, what states believe the law is. Ultimately the reality of international legal relations is that states, and individuals, break the law and for that they should be held accountable.

²⁹⁸ Koskenniemi, *supra* note 7 at 375.

²⁹⁹ *Ibid.*

³⁰⁰ See note 255.

³⁰¹ *Ibid.*

³⁰² See page 47.

³⁰³ Byers, *supra* note 16 at 139.

How is such a definition of CIL to be reconciled with notions of state sovereignty and international legal theory? It seems that any re-imagination of the CIL necessarily involves, even at a subconscious level, an attack on the theoretical foundations of the international legal system.

Indeed, to question its [CIL's] veracity might well be regarded as tantamount to a heretical attack on the fundamental beliefs and dogma of the creed, shaking, if not destroying, the very foundations on which international law is built.³⁰⁴

As I will go on to discuss re-casting the definition of CIL leaves the notion of state sovereignty intact. Such a definition is reconcilable with international legal theory. In effect, if the definition of CIL is not challenged and ultimately re-constructed, CIL will be rendered an ineffectual doctrine; a doctrine left in the wake of multilateral treaty conclusion.

iii) Reconciling a Re-imagined Definition with International Legal Theory

The inherent tension that exists within international criminal law – between constraining law and the traditional rhetoric of state sovereignty – must be reconciled in the realm of legal theory in order that the re-imagined definition of CIL is theoretically practicable. As previously averred, modern approaches to international law have not succeeded in unseating the traditional rhetoric of state centred legal relations.³⁰⁵ It is noteworthy, that within the re-imagined definition of CIL, the state still remains the foundation of norm formation. However, the emphasis upon normative standards, and in particular the reference to collective normative standards, must be reconciled with traditional concepts of state sovereignty. The need to reconcile this inherent tension is even more pronounced within international criminal law.

³⁰⁴ Dunbar, *supra* note 19 at 1.

³⁰⁵ Cassese, *supra* note 23 at 401.

It is apparent the international criminal justice system does not yet seem to have asserted any independent justification for its existence.³⁰⁶ It is essential that justifications for the existence of the international criminal justice system are forged and are entirely independent of the justifications employed in the domestic criminal sphere.³⁰⁷

Rather than remaining a mere substitution for or complementary helping hand of a national system, international criminal law is building a fortress of its own, with its own laws and policy.³⁰⁸

However, until such a theoretical ‘fortress’ is advanced, an examination of the justifications employed in the domestic sphere may be inevitable. However, once again, a note of caution is essential here: such an analogy ignores the relationship between individuals in international criminal law and moreover, it must be stated that domestic criminal law and international criminal law are distinct legal spheres.³⁰⁹

From a purely legal construction, the domestic criminal justice system enables governments to afford protection to their citizens.³¹⁰ Domestic criminal law seeks to control the types of behaviour that society finds to be unacceptable and, to all intents and purposes, protect citizens of the state from harm.³¹¹ Can the emerging global criminal justice system be expected to perform the same function? If the emerging international criminal justice system is to be viewed in such a light an examination of the contractarian theory instructive.

The reasoning behind the application of the contractarian theory in international legal relations is directly related to the existence of a global community. Franck, whilst discussing ‘fairness’ in international law, states that substantive ‘fairness’ may only be achieved through reference to the global international community.³¹²

³⁰⁶ Tallgren, *supra* note 238 at 566.

³⁰⁷ Tallgren, *ibid* at 568.

³⁰⁸ *Ibid* at 581.

³⁰⁹ *Ibid*.

³¹⁰ Hale, Hayward, Wahidin & Wincup (Eds), *Criminology* (Oxford University Press: Oxford, 2005) at 428; Hall, *The Ethical Foundations of Criminal Justice* (CRC Press: Boca Raton, 2000) at 194.

³¹¹ See, Williams, *supra* note 276.

³¹² Franck, *supra* note 191 at 26.

It is only by reference to a community's evolving standards of what constitutes right process that it is possible to assert meaningfully that a law, or an executive order, or a court's judgment, or a citizen's claim on a compatriot, or a government's claim on its citizen, is legitimate.³¹³

I submit that the re-imagined definition of CIL embraces the notion of fairness within the second composite part of the definition – the legitimate expectation of the global community of states. In theoretical terms, the concept of fairness aside, the involvement of the global community of states and the subsequent reference to normative standards within the re-imagined definition of CIL, can be justified by reference to the social contract.³¹⁴ The traditional understanding of contractarian theory is that it is applicable to the creation of a community by persons.³¹⁵ The theory, however, does appear to be equally applicable to the creation of a community by states.³¹⁶

It is self-evident that contractarian theory readily explains the origins, if not the modern nature, of international law and organization.³¹⁷

In the traditional conception of social contract theory, persons, by nature, are born free and equal.³¹⁸ However, the human predicament rests upon the reality of competition – others exist who are in possession of the same rights.³¹⁹ Restrictions on individual freedom are only as a result of agreement to divest some of one's autonomy with a central power.³²⁰ The purpose of such divestment is to ensure the protection of one's vital interests.³²¹ A clear analogy may be drawn here with the international

³¹³ *Ibid* at 26.

³¹⁴ For a discussion of the social contract see: Brooks, *Rousseau and Law* (Ashgate: Aldershot, 2005); Hobbes, *The Leviathan*. Edited by Gaskin (Oxford University Press: Oxford, 1998); Locke, *The Two Treatise of Government*. Edited by Laslett (Cambridge University Press: Cambridge, 1988); Murphy, 'Jurisprudence and the Social Contract' 33 *Am. J. Juris* (1998) 207; Pollock, 'Hobbes and Locke: The Social Contract in English Political Philosophy' 9 *J. Soc. Comp. Legis.n.s* (1908) 107; Rosseau, *Political Writings: Containing the Social Contract, Considerations on the Government of Poland and Part I of the Constitutional Project for Corsica*. Edited by Watkins (Nelson: London, 1953).

³¹⁵ Frank, *supra* note 191 at 27

³¹⁶ *Ibid*.

³¹⁷ *Ibid* at 28.

³¹⁸ *Ibid* at 27.

³¹⁹ Murphy, *supra* note 314 at 209.

³²⁰ Franck, *supra* note 191 at 27; Murphy, *ibid* at 209.

³²¹ Franck, *ibid*.

community.³²² States, by nature, are constructed as free and equal, however, in order to protect their vital interests they enter into the global community of states and as such, divest part of their sovereign power in a central authority – in this case the global community of states. An illustration of such a central authority may be the Security Council. Halberstam suggests that the Security Council functions as a cosset mechanism upholding the principles state sovereignty.³²³

If we understand international legal relations in terms of the social contract, the re-imagined definition of CIL may be reconciled with notions of state sovereignty. States still form the basis of all international legal relations but in order to subsist on the international plane their sovereignty cannot be absolute. In order for CIL to function effectively states are bound by CIL, if one uses contractarian theory, to protect their interests. Peaceful co-existence internationally is dependent upon the social contract and the assertion that sovereignty cannot be an absolute concept.

Whilst international criminal law is cast as descending and constraining law,³²⁴ under the re-imagined definition of CIL, states still shape its creation. It is true to say that non-state actors hold a key role in the re-imagined definition of CIL and moreover, they can shape norm creation. However, as previously asserted such non-state actors are in reality state based organisations. Reliance on normativity does not undermine notions of sovereignty - the re-imagined definition of CIL simply looks to what states believe they *ought* to do, instead of what they actually do.

³²² *Ibid.*

³²³ See Alvarez, 'What's the Security Council For?' 17 *Mich J. Int'l L* (1995-1996) 221 at 222; Halberstam, 'The Right to Self-Defence once the Security Council takes Actions' 17 *Mich J. Int'l L* (1995-1996) 229.

³²⁴ Koskenniemi, *supra* note 7 at 40; Powell & Pillay *supra* note 3 at 489.

CHAPTER IV – The Practical Application of Customary International Criminal Law Norms: The Need for a Novel Definition

An examination of contemporary judicial employment of customary international criminal law is essential, in order to assess the possible impact of the application of the re-imagined definition in prosecuting international crime. To this end, I intend to discuss the application of customary international criminal law norms domestically and internationally. Such an examination serves to indicate the need for a novel definition of CIL and moreover, illustrate that the re-imagined definition of CIL constitutes an entirely appropriate methodology.

Proving the existence of a rule of customary international criminal law under the traditional bi-partite doctrine faces an insurmountable obstacle from the offset – very little state practice exists.³²⁵ Within the re-imagined definition of CIL the emphasis is entirely upon normative standards – state practice is a merely epiphenomenal phenomenon.³²⁶ I submit the re-imagined definition’s emphasis on normativity, within the first constituent element (*opinio juris*) and the second constituent element (legitimate expectation of the global community of states), serves to enable the judiciary – both domestically and international – coherently to delimit norms of customary international criminal law.

³²⁵ Powell & Pillay, *ibid* at 500.

³²⁶ See Chapter III, pg 39.

Within contemporary judicial reasoning, norms of customary international criminal law tend to be simply stated and no form of empirical enquiry is apparent.³²⁷ I would submit that such judicial oversight is directly related to the frailties of the traditional bi-partite definition. In effect, asserting the positive existence of a rule of customary international criminal law is an almost impossible task. Envisaging the application of the re-imagined definition, within the context of the domestic and international spheres, serves to illustrate why the re-imagined definition of CIL is both practically and theoretically sound.

i) Customary International Criminal Law and its Domestic Application

As previously asserted, the so-called ‘explosion’ of international criminal law enforcement is not only present on the international plane; the role of domestic courts as an enforcement mechanism is increasingly important.³²⁸ Thus, it is essential to delimit this role in the application of customary international criminal law norms.³²⁹ The number of domestic prosecutions, involving the application of international criminal law, has risen sharply.³³⁰ Here, the pertinent example is Rwanda; there have been a vast number of domestic prosecutions for genocide over and above the work of the ICTR.³³¹ National courts have been described by some jurists as constituting the ‘front line’ of international criminal enforcement.³³² Moreover, Alvarez submits that domestic courts are the proper fora for prosecution of international crime.³³³

³²⁷ An example of such judicial reasoning, although not in the realm of customary international criminal law, is the *Nicaragua* Judgement, *supra* note 32. See Charlesworth, *supra* note 12 at 20.

³²⁸ See ‘Developments – International Criminal Law’, *supra* note 237.

³²⁹ For a discussion of the role of domestic courts in the application of international law generally, see: Charney, *supra* note 246; Knop, ‘Here and There: International Law in Domestic Courts’ 32 *N.Y.U.J. Int’l L. & Pol.* (1999-2000) 501.

³³⁰ Charney, *ibid* at 120

³³¹ Alvarez, ‘Crimes of States/Crimes of Hate: Lessons from Rwanda’ 24 *Yale Journal of International Law* (1999) 365 need 461; Charney, *ibid* at 121

³³² Burke-White, ‘A Community of Courts: Towards a System of International Criminal Enforcement’ 24 *Mich. J. Int’l L.* (2002 – 2003) 1 at 3.

³³³ Alvarez, *supra* note 331 at 482; See Charney, *supra* note 246 at 120.

The seeming importance of domestic prosecution has been further entrenched by the inception of the ICC.³³⁴ Article 1 of the Rome Statute clearly affirms the role of domestic prosecution: '[the Court] shall be complementary to national criminal jurisdictions.'³³⁵ The principle of complementarity is a key principle in the design of the ICC and is further detailed within Article 17 of the Statute.³³⁶ As such, a case will not be admissible before the ICC if a *bona fide* investigation or prosecution has been undertaken by a state - regardless of whether or not that state is party to the Statute - that has jurisdiction over the crime in question.³³⁷ Charney suggests that the principle of complementarity may result in a very small number of prosecutions before the ICC.³³⁸ If this assertion proves to be correct and ultimately, domestic courts are to constitute the cornerstone of international criminal law enforcement, questions surrounding the definition of customary international criminal law seem even more pertinent. In effect, how will domestic courts undertake the unenviable task of applying norms of customary international criminal law?

'To do so, municipal courts will have to apply the level of legal analysis hitherto used in municipal legal cases to international criminal law.'³³⁹

An examination of the application of international customary criminal law in the domestic sphere is illustrative of the need to re-imagine the definition of CIL. The traditional bi-partite doctrine, floundering in definitional difficulties, is inadequate within

³³⁴ See note 2.

³³⁵ Article 1 of the ICC Statute, *supra* note 2. See, Powell & Pillay, *supra* note 3 at 477.

³³⁶ See Charney, *supra* note 246 at 120. The relevant part of Article 17 of the ICC Statute, see *supra* note 2, reads: '1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

- a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from an unwillingness or inability of the State genuinely to prosecute;
- c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20, paragraph 3;
- d) The case is not of sufficient gravity to justify further action by the Court.

³³⁷ Article 17, *ibid*; Charney, *supra* note 246 at 120; Lee, 'An Assessment of the ICC Statute' 25 *Fordham Int'l L.J* (2001-2002) 750 at 751.

³³⁸ Charney, *ibid* at 123.

³³⁹ Powell & Pillay, *supra* note 3 at 478.

the realm of judicial practice. Here, an examination of the *Pinochet* case is instructive.³⁴⁰ The *Pinochet* Judgement endeavoured, albeit rather unconvincingly, to deal with the application of customary international criminal law.³⁴¹ The case arose as a result of a Spanish attempt to extradite Pinochet from the UK for crimes he allegedly committed whilst Head of State in Chile.³⁴² The crimes allegedly committed ‘in Chile and elsewhere in the world [were]: torture, murder and the unexplained disappearances of individuals, all on a large scale.’³⁴³ The Judgment had two main focal points – the concepts of extradition and state sovereignty.³⁴⁴ However, for present purposes, it is the Court’s discussion of the international crime of torture and the employment of customary international criminal law norms that is crucial. An examination of the somewhat convoluted reasoning employed by the Law Lords in discussing the crime of torture is indicative of the need for a novel definition of CIL.³⁴⁵

Lord Millet recognised that torture was an international crime and consequently, that it attracted universal jurisdiction.³⁴⁶ However, the six other Law Lords seemed to accept that status of torture as an international crime but failed to exercise universal jurisdiction over the crime.³⁴⁷ Thus, the case was largely decided in the realm of domestic law.³⁴⁸ Within the text of the Judgment, when customary international law is mentioned, there is no empirical enquiry into its existence.³⁴⁹ Its existence is simply stated - largely through pointing to norms entrenched within International Conventions.³⁵⁰ The House of Lords, in discussing sovereign immunity and state sovereignty, seemingly relied upon state practice in delimiting the existence of customary

³⁴⁰ The case I am concerned with is *Pinochet No. 3*, see *supra* note 247.

³⁴¹ See Powell & Pillay, *supra* note 3 at 478

³⁴² *Pinochet No. 3*, *supra* note 246 at 97f; Bradley & Goldsmith, ‘Pinochet & International Human Rights Litigation’ 97 *Mich. L. Rev.* (1998 – 1999) 2129 at 2133; Powell & Pillay, *ibid* at 479.

³⁴³ *Pinochet No. 3*, *ibid* as per Lord Browne-Willkinson at 101g-h; Powell & Pillay, *ibid* at 479; Wedgewood, *supra* note 247 at 830.

³⁴⁴ For a discussion of the actual content of the judicial decision see: Barker, ‘The Future of Former Head of State Immunity after *Ex Parte Pinochet*’ 48 *ICLQ* (1999) 937; Denza, ‘*Ex Parte Pinochet*: Lacuna or Leap?’ 48 *ICLQ* (1999) 949; Powell & Pillay, *ibid*.

³⁴⁵ Here, see the Torture Convention, *supra* note 119.

³⁴⁶ *Pinochet No.3*, Lord Millet at 177h-j; Powell & Pillay, *ibid* at 480.

³⁴⁷ Powell & Pillay, *ibid* at 481. For a discussion of the divergent Law Lords approaches to the question of universal jurisdiction see: Bradley & Goldsmith, *supra* note 342 at 2145.

³⁴⁸ See Powell & Pillay, *ibid* at 487.

³⁴⁹ *Ibid* at 491.

international criminal law.³⁵¹ However, at no point in the Judgment are the parameters of state practice discerned.³⁵² Moreover, Powell and Pillay point to the fact that there is ‘little to no state practice’ on the extradition of former Heads of State.³⁵³

The Court did not recognise the distinction between norms of CIL and treaty-based norms.³⁵⁴ In fact, discussion of the divergent concepts tended to be lumped together in somewhat of an incomprehensible fashion.³⁵⁵ Lord Millet and Lord Browne-Wilkinson did look to the distinction between CIL and treaty-based norms.³⁵⁶ However, the drawing of such a distinction did not appear to impress upon their Judgments.³⁵⁷ The Law Lords failed coherently to delimit and apply the principles of customary international criminal law. Perhaps the impracticability of the traditional bi-partite doctrine is to blame.

‘The Law Lord’s neglect of customary international law becomes more understandable if we take cognisance of the complexity and internal contradictions of this body of law.’³⁵⁸

As I discuss below, the re-imagined definition of CIL would ultimately allow domestic courts coherently and concisely to apply principles of customary international criminal law.

Another instance of a domestic judicial ‘enquiry’ into principles of customary international criminal law is *S –v–Petane*.³⁵⁹ Interestingly, the aforementioned case

³⁵⁰ For an example, see the Opinion of Lord Hope, *Pinochet No.3*, *supra* note 247 at 151h-j.

³⁵¹ Once again the Opinion of Lord Hope is instructive. See, *Pinochet No. 3*, *ibid* at 149e-h. See, Powell & Pillay, *ibid* at 490.

³⁵² Powell & Pillay, *ibid*.

³⁵³ *Ibid*.

³⁵⁴ *Ibid* at 491. I previously asserted that CIL norms and treaty-based norms can co-exist on the international plane. See, Chapter I, pg 6.

³⁵⁵ It is noteworthy, that Lord Millet did recognise the different between treaty-based and CIL norms. See, *Pinochet No. 3* at 172f; Powell & Pillay, *ibid*.

³⁵⁶ See, Lord Browne-Wilkinson, *Pinochet No 3*, *supra* note 247 at 109. Lord Browne-Wilkinson discussed the prohibition on torture as a treaty-based and a CIL norm, however, within the text of the Judgment there was no apparent comparison of the treaty-based and CIL norm. See, Powell & Pillay, *ibid*.

³⁵⁷ Powell & Pillay, *ibid*.

³⁵⁸ *Ibid* at 493.

³⁵⁹ *S –v– Petane*, *supra* note 205.

actually detailed the divergent elements of CIL.³⁶⁰ In doing so, however, the Court merely pointed to the fact that a CIL norm had *not* emerged.³⁶¹ I would submit that frailties of traditional bi-partite definition make such a decision inevitable. Under the traditional bi-partite doctrine, the uncertainties persisting within each divergent elements of the doctrine and moreover, the endemic doubt over which element of the doctrine is to be favoured, make it practically impossible to assert the positive existence of a CIL norm. In effect, when domestic courts wish to assert a rule of CIL they simply state its existence. However, when a domestic court wishes to aver that a rule of CIL does not exist, the impracticality of the current definition facilitates such a conclusion. An examination of domestic judicial decisions simply re-iterates the need for a re-imagined definition of CIL. Such a definition must be both easily discernible and practical in its application.

The methodology, or lack thereof, employed by the Law Lords in *Pinochet No.3* is indicative of the practical advantages in applying the re-imagined definition of CIL.³⁶² How would the Law Lords have positively proven the existence of a norm of customary international criminal law under the re-imagined definition of CIL? By way of illustration, I shall focus upon the delimitation of the international crime of torture. The re-imagined definition of CIL collapses description (state practice) into normativity (*opinio juris*) and as such, the resultant effect is a doctrine that quite clearly favours normative standards.³⁶³ In practical terms, how would the novel bi-partite definition – constituting *opinio juris* and legitimate expectation - be proven?

For present purposes, I will illustrate how the positive existence of torture as an international crime may be proven under the re-imagined definition. First and foremost, it is essential to note the date of the alleged offences. In 1973, Pinochet, then the Commander in Chief of the Chilean Army, lead a military coup snatching power from

³⁶⁰ *Ibid* at pg 57.

³⁶¹ *Ibid* at pg 67.

³⁶² See note 345.

³⁶³ See Chapter III, pg 42.

Salvador Allende.³⁶⁴ He was subsequently appointed president and remained in power until 1990 – it is during his seventeen year long rule that the alleged atrocities, including that of torture, occurred.³⁶⁵ These dates are of significance as the Torture Convention did not enter into force until 1987 and the UK did not ratify the Convention until 1988.³⁶⁶ In essence, there is a significant period of time whereby the conventional norm is inapplicable to the atrocities allegedly committed by Pinochet. However, I submit that employing the novel definition of CIL would serve to indicate that a customary international criminal prohibition on torture may have come into existence at a much earlier date.

The first element of the re-imagined definition is *opinio juris* – a belief by a state that a certain norm or prohibition is legal in character. As previously averred, domestic legislation, national judicial decisions, statements of belief, involvement in – or abstention from – international conventions and voting patterns at the GA may all constitute evidence of the existence of *opinio juris*.³⁶⁷ For present purposes, I will examine whether or not the United Kingdom had the requisite *opinio juris*, from 1972 onwards, for a prohibitive customary international criminal law norm to exist.

In proving the existence of *opinio juris* the Law Lords, using the re-imagined definition, could have examined the case of *Ireland – v- United Kingdom*.³⁶⁸ The case at point involved an Irish application to the European Court of Human Rights (ECHR) to ensure that the UK observed its obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms³⁶⁹ with respect to Northern Ireland. The allegations against the UK concerned its treatment of persons in custody

³⁶⁴ Bradley & Goldsmith, *supra* note 342 at 2133.

³⁶⁵ *Ibid.*

³⁶⁶ *Ibid* at 2134.

³⁶⁷ See Chapter III at pg 45.

³⁶⁸ *Ireland –v- United Kingdom*, ECHR, 1978, available at 17 *ILM* (1978) 680. Although, the case was heard in 1978, it concerned the situation in Northern Ireland and UK policies instituted from 1971. See, *Ireland – v- United Kingdom*, para 35.

³⁶⁹ European Convention for the Protection of Human Rights and Fundamental Freedoms, signed 4th Nov. 1950, entered into force 3rd September 1953, 213 UNTS 221. [hereinafter the European Convention]

and specifically, the methods of interrogation employed.³⁷⁰ The Irish Government alleged that the UK had breached Article 3 of the European Convention.³⁷¹ The ECHR ultimately decided, in reference to the claims brought under Article 3, that the actions of the UK government did not amount to amount to torture.³⁷² However, the behaviour of the British Government could most certainly be held as evidence of the existence of the requisite *opinio juris*. Both the British Prime Minister and the Attorney-General stated that such methods of interrogation would no longer be employed and made specific reference to Article 3 of the European Convention.³⁷³

The Government of the United Kingdom have considered the question of the use of the ‘five techniques’ with very great care and with particular regard to Article 3 of the Convention. They now give this unqualified undertaking, that the ‘five techniques’ will not in any circumstances be reintroduced as an aid to interrogation.³⁷⁴

I would submit that this is simply one example of *evidence* the Law Lords could have employed, under the re-imagined definition of CIL, as an indication of the existence of the requisite *opinio juris* for the creation of a prohibitive norm of CIL.³⁷⁵

As previously asserted, evidence of the existence of the second element in the re-imagined definition –legitimate expectation of the global community of states – may be found in Declarations, statements, Memorandums and Resolutions of state-instituted non-state actors.³⁷⁶ In proving the existence of the second element of the novel definition, the Law Lords could have had recourse to a wealth of international conventions condemning

³⁷⁰ See *Ireland –v- United Kingdom*, *supra* note 368 at para 145. Such interrogation methods included: wall standing, hooding, subjection to noise, sleep deprivation and deprivation of food and drink. See, *ibid* at para 96.

³⁷¹ *Ibid* at para 145. Article 3 of the European Convention states: ‘No one will be subjected to torture or to inhumane or degrading treatment or punishment.’, *supra* note 369.

³⁷² *Ireland –v- UK*, *ibid* at para 246.1(4).

³⁷³ *Ibid* at para 101.

³⁷⁴ *Ibid*, as per Attorney-General at a hearing before the Court on the 8th Feb 1977.

³⁷⁵ Although after the Pinochet Judgment, it is interesting to note that a Dutch decision – *Bouterse*, Court of Appeal of Amsterdam, 20th November 2000 ELRO No. AA8395 – held that torture constituted an international crime under CIL before 1982. The decision was later overturned by the Supreme Court. See, de Wet, ‘The Prohibition of Torture as an International Norm of jus cogens and Its Implication for National and Customary Law’ 15 *EJIL* (2004) 97 at 116-117.

³⁷⁶ See Chapter III pg 48.

torture. For example, Article 5 of the Universal Declaration of Human Rights clearly denounces torture.

No one shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment.³⁷⁷

Other examples of such provisions the Law Lords could have employed are: Article 3 of the ECHR,³⁷⁸ Article 7 of the International Covenant on Civil and Political Rights (ICCPR)³⁷⁹ and Article 5(2) of the American Convention on Human Rights.³⁸⁰

Once again reference to such provisions, could only be said to constitute *evidence* of the existence of a legitimate expectation of the global community of states (communal *opinio juris*). The emphasis, within the re-imagined definition of CIL, upon normative standards would enable the judiciary to undertake the much-needed substantive empirical enquires into the existence of customary international criminal law norms. If the domestic judiciary are to play such a crucial role in international criminal law enforcement, they must be given the apposite tools for norm delimitation. Otherwise instead of strengthening international criminal law enforcement, the domestic judiciary – in their failing attempts to delimit customary international criminal law norms - will be in danger of weakening substantive international criminal law.³⁸¹

ii) Customary International Criminal Law and Nuremberg

On the 8th August 1945 the London Charter was signed leading to the inception of the International Military Tribunal at Nuremberg (IMT) and paving the way for the

³⁷⁷ Article 5, The Universal Declaration of Human Rights. Adopted 10th December 1948, G.A Res 217A (III), UN Doc. A/810, at 71. A(III)

³⁷⁸ See *supra* note 368.

³⁷⁹ Article 7 states: ‘No one shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.’ International Covenant on Civil and Political Rights, adopted 16th December 1966, G.A Res. 2200A (XXI), UN. Doc. A/6316 (1966) 999 UNTS 171, entered into force March 23rd 1976.

³⁸⁰ Article 5(2) states: ‘No one shall be subjected to torture or to cruel, inhumane, or degrading treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.’ American Convention on Human Rights (Pact of San José), signed 22nd Nov 1969, OAS Treaty Series No 36, 1144 UNTS 123, entered into force 18th July 1978.

³⁸¹ Powell & Pillay, *supra* note 3 at 500.

prosecution of the Nazi leadership.³⁸² As previously asserted, the IMT can be described as the first international criminal tribunal.³⁸³ The IMT has been viewed by the majority of jurists as a bastion of justice.³⁸⁴ However, the formation of the Tribunal and its subsequent Judgment, has attracted a degree of criticism.

I have never been comfortable with the moral/legal authority and the legitimacy of the Nuremberg Trials, with its philosophical underpinnings of positive law and legal positivism, its judicial outcomes and that look askance at legal/moral constructs such as vengeance, the unity of legality and morality, right and wrong, good and evil.³⁸⁵

Before examining the Tribunal's somewhat sparse discussion of customary international law, it is necessary to place the Judgment within its historical framework.

Under a contemporary understanding, the global community of states – as delimited within the second constituent element of the re-imagined definition – could really only be described as being in the stage of infancy at the time of the Nuremberg Judgment.³⁸⁶ It is noteworthy, that whilst the date of the Nuremberg Judgment most certainly impacted upon the substantive international criminal law norms, the sources applied in delimiting these norms are no different to those employed in the contemporary judicial setting.³⁸⁷

³⁸² Bassiouni, 'Nuremberg Forty Years After: An Introduction.' 18 *Case W. Res. J, Int'l L* (1986) 261. For a discussion of the formation of the International Military Tribunals at Nuremberg and Tokyo see: Cassese, *supra* note 6 at 376. The International Military Tribunal at Nuremberg (IMT) was instituted as a result of the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8th August, 1945, 82 UNTS 279. The Judgment of the IMT is available at: 'Judicial Decisions' 41 *AJIL* (1947) 172. It is noteworthy, that the British Lord Chancellor, Sir John Simon, was opposed to the creation of the IMT. In fact, he was in favour of summary execution of the Nazi leadership. However, the American view prevailed and subsequently, the IMT was instituted. See, Bass, 'War Crimes and the Limits of Legalism' 97 *Mich. L. Rev* (1999) 2103; Brudo, *supra* note 284 at 635.

³⁸³ 'Developments – International Criminal Law', *supra* note 237 at 1951; Goldstone, *supra* note 250; Scharf, 'Have we Really Learned the Lessons of Nuremberg?' 149 *Mil.L.Rev* (1995) 65.

³⁸⁴ Washington, 'The Nuremberg Trials: The Death of Rule of Law (in International Law)' 49 *Loy. L. Rev* (2003) 471 at 477.

³⁸⁵ *Ibid.* Carrol notes that: 'Nuremberg was not a perfect trial. No man, no law, no nation is perfect.' Carrol, 'Nuremberg: Judgment and Challenge: The Rediscovery of the Law above Statutory' 6 *U.S.A.F Acad. J. Legal Stud.* (1995-1996) 205.

³⁸⁶ For a discussion of the developments leading up to the creation of the IMT see: Steiner & Alston, *International Human Rights in Context* (Oxford University Press: Oxford, 2000) at 56 – 135.

³⁸⁷ As previously asserted, the sources of international law as contained within the Statute of the ICJ, are identical to those within the Statute for the Permanent Court of International Justice (PCIJ). The Statute of

The twenty-one defendants before the Tribunal were charged with crimes against the peace (aggression), war crimes and crimes against humanity.³⁸⁸ The reasoning within the text of the Judgment was largely concerned with delimiting the crimes as detailed within the text of Nuremberg Charter.³⁸⁹ However, a careful reading of the Judgment illustrates that cursory references were made to CIL throughout. An examination of the methodology employed by the Tribunal, in its fleeting discussion of customary international criminal law norms, is indicative of the need for a re-imagination of the definition of CIL.

The first crime detailed within the Nuremberg Statute, over which the Tribunal had jurisdiction, was crimes against the peace.³⁹⁰ In delimiting the parameters of the crime the Tribunal examined the Hague Conventions of 1809 and 1907,³⁹¹ Versailles Treaty³⁹² and the Kellogg-Briand Pact.³⁹³ However, a passing reference was made to CIL within the text of the Judgment:

In the opinion of the Tribunal, those who wage aggressive war are doing that which is equally illegal, and of much greater moment of one of the rules of the Hague Convention.³⁹⁴

the PCIJ was drafted in 1920 by an Advisory Committee of Jurists appointed by the League of Nations. See, note 12.

³⁸⁸ See, Article 6 of the Nuremberg Charter, *supra* note 382; Brundo, *supra* note 284. The indictment of the defendants detailed four divergent counts: Count 1 – conspiring or having a common plan to commit crimes against the peace; Count 2 -committing specific crimes against peace by planning, preparing, initiating, and waging wars of aggression against a number of states; Count 3 - the commission of war crimes and Count 4 -the commission of crimes against humanity. See, Ehard, ‘The Nuremberg Trials Against the Major War Criminals and International Law’ 43 *AJIL* (1949) 223 at 226.

³⁸⁹The Nuremberg Judgment, *supra* note 382 at 172.

³⁹⁰ Article 6(a) of the Nuremberg Charter, *supra* note 376 detailed crimes against the peace as: ‘planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.’

³⁹¹ For a discussion of Hague Law see, note 251

³⁹² Versailles Treaty, 28th June 1919, 13 *AJIL* (sup 15/385) (1919)

³⁹³ The Kellogg Briand Pact of 27th August 1928, 94 INTS 57, proclaimed July 24th 1929. See, the Nuremberg Judgment, *supra* note 382 at pg 212 –221.

³⁹⁴ The Nuremberg Judgment, *ibid* at 219.

Here, the Tribunal seemed to suggest that legal norms, concerning crimes against the peace, existed over and above the law of the Hague. However, no empirical enquiry into the existence of these norms was apparent and moreover, there was no indication of the apparent source of such norms. In fact, it may be rather presumptuous to assume that the Tribunal was referring to norms of customary international criminal law at all. However, whilst still referring to crimes against peace, the Tribunal articulated a somewhat clearer reference to CIL. To all intents and purposes, the Tribunal detailed the formation of custom under the traditional bi-partite doctrine but failed to translate such detail in the delimitation of customary international criminal law norms.

The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts. This law is not static, but by continued adaptation follows the need of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate references the principles of law already existing.³⁹⁵

This passage is indicative of the Tribunals reasoning. Whilst making an empirical enquiry into international treaty-based norms and moreover, questioning their validity, the Tribunal simply clumsily stated the existence of norms of CIL. The Tribunal failed to establish what these norms *actually* were and how they would be applicable in the context of the Judgment. In delimiting crimes of war and crimes against humanity the Tribunal's reasoning follows the same pattern.³⁹⁶ The Tribunal relied, almost exclusively, on the principles enshrined within the Nuremberg Charter itself and Hague law.³⁹⁷ However, whilst examining the applicability of Hague law to the delimitation of war crimes, the Tribunal noted that 'by 1939 these rules laid down in the Convention

³⁹⁵ *Ibid.*

³⁹⁶ War crimes are detailed within Article 6(b) of the Nuremberg Charter, *supra* note 382 as: 'violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.' Crimes against humanity are described within Article 6(c) as: 'murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.'

were recognized by all civilised nations, and were regarded as being declaratory of the laws and customs of war.³⁹⁸ Once again, this constitutes a cursory reference to norms of customary international criminal law, without any clear explanation of which norms the Tribunal are referring to and moreover, how the seeming existence of such norms impacted upon the Judgment. In fact, the Judgment did not seem to recognise that treaty-based norms and customary norms can co-exist on the international plane.

The Tribunal's discussion of customary international criminal law norms was steeped in natural law arguments and the existence of CIL seemed to be inextricably linked to morality.³⁹⁹ The Tribunal appeared to suggest that international law and morality were not distinct and inadvertently collapsed principles of CIL into morality. In discussing the Nuremberg Judgment Finch clearly illustrates this very point.

There could be no more sacred trust than that of upholding the law against primitive and barbarous acts of inhumanity which shock the conscience of all civilised people and are forbidden by divine as well as human command.⁴⁰⁰

I submit that despite the seeming infancy of the global community of states, the Nuremberg Judgment could have employed the re-imagined definition of CIL and as such, the Tribunal could have avoided collapsing law and morality. The novel definition's reliance upon normative standards, how states *ought* to behave, would facilitate a more coherent means of norm delimitation.

State practice in the realm of international criminal law enforcement was practically non-existent at the inception of the Nuremberg Tribunal. In fact, Justice Robert Jackson stated there was 'no treaty, precedent or custom' to determine 'by what

³⁹⁷ The Nuremberg Judgment, *supra* note 382 at 248.

³⁹⁸ *Ibid* at 249.

³⁹⁹ For example: 'the prohibition of aggressive war demanded by the conscience of the world, finds expression in the series of pacts and treaties to which the Tribunal has just referred.' *Ibid* at 220. This is despite the best intentions of Justice Robert Jackson: The refuge of the defendants can only be their hope that international law will lag so far behind the moral sense of mankind that conduct which is a crime in the moral sense must be regarded as innocent in law.' Opening remarks of Justice Robert Jackson, cited in Brudo, *supra* note 284 at 635.

⁴⁰⁰ Finch, 'The Nuremberg Trial and International Law' 41 *AJIL* (1947) 20 at 22.

method justice should be done.’⁴⁰¹ The re-imagined definition’s reliance upon normative standards of behaviour could have facilitated an empirical enquiry into the existence of customary international criminal law norms. Moreover, such an enquiry could have remained distinct from morality. How would the Tribunal have proven the positive existence of a prohibitive norm of customary international criminal law? I would maintain that such prohibitive norms could have been proven with a far greater degree of ease than under the traditional bi-partite doctrine. This is largely due to the fact that under the re-imagined definition of CIL, with the emphasis upon normative standards, it would seem that a prohibitive norm of customary international criminal law could emerge in somewhat more of an expedient fashion than under the traditional bi-partite doctrine.

It is noteworthy that in the context of Nuremberg, any form of empirical enquiry into substantive customary international criminal law would not have the breadth of evidentiary sources that a contemporary enquiry would entail. This is simply as a result of the time period in question. However, such an enquiry could be far more successful than an empirical enquiry under the traditional bi-partite doctrine.

By way of example, I shall examine the concept of war crimes and use the United States as a model. In asserting the existence of a prohibitive norm of customary international criminal law under the re-imagined definition, evidence of the existence of the first element – *opinio juris* - could have been proven by reference to US domestic judicial practice. At the end of the American Civil War a number of important trials were heard by a US Military Commission – the most famous being that of *Henry Wirz*.⁴⁰² The case in question concerned the ill treatment of prisoners of war.⁴⁰³ This could most certainly be said, under the re-imagined definition of CIL, to constitute evidence of the existence of *opinio juris*. In asserting the existence of the second element of the re-imagined definition – legitimate expectation – the Tribunal could have referred to Hague law, which expressly stated that the Conventions constituted a codification of

⁴⁰¹ As per Justice Robert Jackson, cited in Cassese, *supra* note 6 at 376.

⁴⁰² *Ibid* at 39.

⁴⁰³ *Ibid*.

international law.⁴⁰⁴ Moreover, it is perhaps arguable that a legitimate expectation, or at least an emerging legitimate expectation, was demonstrated by the institution of the IMT itself.⁴⁰⁵

I would submit that despite the infancy of the global community states, the re-imagined definition of CIL could have been employed in the context of Nuremberg with a certain degree of success. The traditional bi-partite definition is particularly ineffective in the context of Nuremberg – no substantive state practice could have been held to exist. However, the changing nature of the international global community and the evolution of substantive international criminal law norms, serves to indicate need for a novel definition of CIL. It seems apparent that the traditional bi-partite definition is just as unsuitable today, both in terms of practice and theory, as it was in the context of the Nuremberg Judgment.

iii) Customary International Criminal Law and the *Ad Hoc* Tribunals

The establishment of the *ad hoc* Tribunals has most certainly made a considerable contribution to the development of substantive international criminal law and its practical application.⁴⁰⁶ As previously asserted, the inception of the *ad hoc* Tribunals signified the international community's intention to enforce norms of international criminal law.⁴⁰⁷ Today there exists a vast body of judicial jurisprudence concerning the practical application of international criminal law.⁴⁰⁸ How much, if any, of this jurisprudence relates to the delimitation of customary international criminal law norms?

⁴⁰⁴ See note 398.

⁴⁰⁵ It is noteworthy that I fully recognise that the IMT was instituted by the four Allied powers - see Cassese, *ibid* at 331- and as such, illustrating the existence of a legitimate expectation in the given situation would not be without problems. However, it could be argued that the creation of the IMT constituted an emerging legitimate expectation.

⁴⁰⁶ See, Meron, International Criminalization of Internal Atrocities' 89 *AJIL* (1995) 554

⁴⁰⁷ See, 'Developments – International Criminal Law' *supra* note 237 at 1952. For a discussion of the creation of the *ad hoc* Tribunals see note 5.

⁴⁰⁸ See Charney, *supra* note 246 at 122.

While the statutes do not set out to create new criminal offences but instead purport to reference a set of crimes already prohibited under customary international law.⁴⁰⁹

An examination of the jurisprudence of the *ad hoc* Tribunals is once again indicative of the need for a novel definition of CIL. Within the text of the Judgments there appears to be two different trends in the application of customary international criminal law. Firstly, unlike the foregoing examples, an empirical enquiry into the existence of CIL norms was actually undertaken. This is illustrated through an examination of the *Tadic* Judgement.⁴¹⁰ However, I submit that the reasoning of the Appeals Chambers may be called into question. The second trend apparent in jurisprudence, as illustrated through an examination of *Akayesu*, is that norms of CIL are simply stated to exist and any form of empirical enquiry is noticeable only by its absence.⁴¹¹ The frailties of the traditional definition are starkly illustrated through an examination of the jurisprudence of the *ad hoc* Tribunals and moreover, it is evident that under the traditional conception of custom, CIL may only exist as an incoherent and intangible source of law.

Tadic was indicted with grave breaches of Geneva Conventions, violations of laws and customs of war and crimes against humanity in connection with Articles 2, 3 and 5 of the ICTY Statute.⁴¹² Subsequently, *Tadic* filed a motion challenging the jurisdiction of the Tribunal on three grounds.⁴¹³ For present purposes, it is the third

⁴⁰⁹ Tomuschat, *supra* note 4 at 243.

⁴¹⁰ Here, I am concerned with the Appeal on the Jurisdiction: *Prosecutor –v- Tadic*, Case No. IT-94-1, October 2nd 1995 (Appeal on the Jurisdiction) [hereinafter *Tadic Appeal*] available at <http://www.icty.org>, last viewed 20th February 2006.

⁴¹¹ *Prosecutor –v- Jean-Paul Akayesu*, Case No. ICTR-96-4-T, 2nd September 1998, available at <http://www.ictt.org>, last viewed 20th February 2006. It is noteworthy that *Akayesu* was the first genocide conviction by an international court. See: See Gunawardana, ‘Contributions by the International Criminal Tribunal for Rwanda to the Development of the Definition of Genocide’ 94 *Am. Soc’y Int’l L. Proc.* (2000) 277.

⁴¹² *Prosecutor –v- Tadic* Case No. IT-94-1 (February 10th, 1995) (Indictment) available at <http://www.icty.org>, last viewed 20th February 2006. The indictment alleged that at the Omarska detention facility *Tadic* had raped, murdered and assaulted numerous victims, see para 1; para 4.1; para 5.1 *ibid.* See Corey, ‘The Fine Line Between Policy and Custom: *Prosecutor –v- Tadic* and the Customary International Law of Armed Conflict’ 166 *Mil. L. Rev* (2000) 145 at 147.

⁴¹³ These grounds were: 1) that the Security Council lacked the requisite authority to establish the Tribunal and as such its inception was unlawful. See, *Tadic Appeal*, *supra* note 410 at para 8. 2) The primacy jurisdiction granted to the Tribunal had no foundation in international law. See, *Tadic Appeal*, *supra* note 410 at para 8. 3) The Tribunal lacked the requisite subject matter jurisdiction, as the crimes detailed only

ground that is of concern. Tadic claimed that the Tribunal did not have the requisite subject matter jurisdiction because the crimes in question only related to international armed conflict and the conflict in the Former Yugoslavia was internal in nature.⁴¹⁴ However, the Appeals Chamber asserted that the conflict had ‘both internal and international aspects’.⁴¹⁵ The Appeals Chamber then undertook an extensive discussion of the application of CIL in internal armed conflict.⁴¹⁶ Interestingly, the Appeals Chamber recognised that treaty-based obligations and customary norms could co-exist on the international plane and moreover, be of a differing content.⁴¹⁷ However, this did not appear to impress upon the Judgment. In fact, in delimiting customary international criminal law the Judgment did not fully engage with the traditional bi-partite doctrine.

In determining that CIL norms existed governing internal armed conflict the Appeals Chamber relied primarily on ‘such elements as official pronouncements of states, military manuals and judicial decisions.’⁴¹⁸ The Appeals Chamber seemed to believe that the evidentiary sources it employed related to the practice of states and it did not engage with the subjective element of the traditional bi-partite doctrine.⁴¹⁹ As such, the *Tadic* Judgment seemed to endorse the traditional approach in the delimitation of CIL norms. The lack of the normative element in asserting the existence of CIL norms renders

related to international conflicts and the conflict in the Former Yugoslavia was internal in nature. See, *Tadic Appeal*, *supra* note 410 at para 8. See, Corey, *supra* note 412 at 148.

⁴¹⁴ See, *ibid* at para 65 – 145. It is noteworthy that in the *Tadic* Appeal the Appellant added an alternative claim – that there was no ‘legally cognizable armed conflict, see *ibid* at para 66. The Appeals Chamber stated that the conflict in the Former Yugoslavia did in fact constitute an armed conflict: ‘We find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State’, see, *ibid* at 70...

⁴¹⁵ *Ibid* at para 77.

⁴¹⁶ *Tadic Appeal*, *ibid* at paras 96-127; Corey, *ibid* at 152.

⁴¹⁷ *Ibid* at 98.

⁴¹⁸ *Tadic Appeal*, *ibid* at 99; Corey, *ibid* at 153. Examples of what the Appeals Chamber detailed in evidence are: a statement issued by the DRC during its civil war indicating that Common Article 3 would be respected. See, *Tadic*, *ibid* at para 105. The Appeals Chamber also pointed to two GA Resolutions concerning the respect for human rights in armed conflict. See, *ibid* at para 110.

⁴¹⁹ In fact, the Appeals Chamber actually explicitly mentioned *opinio juris* in connection with the interpretation of Article 2 of the Statute by pointing to an *amicus curiae* brief of the US: ‘the ‘grave breaches’ provisions of Article 2 of the International Tribunal Statute apply to armed conflicts of a non-international character as well as those of an international character.’ The Appeals Chamber stated that this may be indicative of a possible change in *opinio juris*. *Ibid*, para 83. However, this assertion did not appear to impress upon their Judgment and the Appeals Chamber held that Article 2 only applied to

the Judgment susceptible to criticisms of apology.⁴²⁰ In effect, if CIL is to simply reflect the practice of states, the law would simply constitute international relations under a different guise and the norms pronounced in the text of the *Tadic* Judgment could not be termed legal norms at all.⁴²¹

Moreover, Meron suggests that the evidence relied upon by the Tribunal in asserting the existence of state practice was inadequate.⁴²²

One may ask whether the Tribunal could have made a greater effort to identify actual state practice, whether evincing respect for, or violation of, the rules...Without some significant discussion of operational practice, it may be difficult to persuade governments to accept the Tribunal's vision of some aspects of customary law.⁴²³

It is arguable that the evidentiary sources relied upon by the Appeals Chamber could not be classed as state practice at all.⁴²⁴ It is noteworthy that the Appeals Chamber specifically pointed to the difficulties in ascertaining the practice of states in the realm of international criminal law.⁴²⁵ As previously asserted, much of the regulated conduct in the realm of international criminal law concerns the military and as such, the only possible means of delimiting state practice is through an examination of how states respond to individuals who have allegedly breached international criminal norms.⁴²⁶ Therefore, the crucial question for the Tribunal, under the traditional bi-partite doctrine, should have been: do states prosecute those alleged to have committed breaches of international criminal law in internal conflicts?

international armed conflict. *Ibid* para 84. Moreover, in discussing Article 3 of the Statute there is no mention of *opinio juris*.

⁴²⁰ Koskenniemi, *supra* note 7 at 363; Powell & Pillay, *supra* note 3 at 495; Roberts, *supra* note 13 at 767.

⁴²¹ Koskenniemi, *ibid*.

⁴²² Corey, *ibid* at 154, Meron, *supra* note 406 at 240

⁴²³ Meron, *ibid*.

⁴²⁴ Corey, *supra* note 412 at 154.

⁴²⁵ 'When attempting to ascertain state practice with the view to the establishment of a customary rule or a general principle, it is difficult, if not impossible to pinpoint the actual behaviour of troops in the field.' See *Tadic* Appeal, *supra* note 410 at para 99; Corey, *ibid* at 153.

⁴²⁶ See pg 39.

I would submit that the employment of the re-imagined definition of CIL in the *Tadic* Judgment would have resulted in far more coherent and reasoned argument. Perhaps the evidentiary sources referred to by the Tribunal – military manuals, judicial decisions and official pronouncements of states – would sit far more comfortably in the re-imagined definition of CIL. As the re-imagined definition places its emphasis upon normative standards of behaviour, such sources could be determined as *evidence* of the existence of *opinio juris*.⁴²⁷ State practice, being merely an epiphenomenal concern, would be largely insignificant in the text of the Judgment. In fact, I submit that the *Tadic* Judgment contained, in the shape of the evidentiary sources it detailed, the building blocks for positively asserting the existence of a CIL norm. However, it is apparent that the traditional CIL definition can only provide an unsound foundation for proving rules of CIL.

. How could have the Appeals Chamber asserted the existence of the second element of the re-imagined definition of CIL? Much of the evidence the Appeals Chamber *could* have employed as evidence in asserting the existence of a legitimate expectation is actually detailed within the text of the Judgment. The Appeals Chamber detailed relevant GA Resolutions,⁴²⁸ the work of the International Committee of the Red Cross (ICRC)⁴²⁹ and statements of regional organisations.⁴³⁰ However, instead of being cast as constituting evidence of a legitimate expectation, such evidence appears to be held to amount to state practice. Over and above the evidence actually detailed by the Tribunal, I would point to the Declaration on the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-International Armed Conflicts.⁴³¹ Moreover, the inception of the ICTY itself may be construed as quite concrete evidence of the existence of a legitimate expectation.

⁴²⁷ See pg 44.

⁴²⁸ *Tadic Appeal*, *supra* note 410 at 110.

⁴²⁹ *Ibid* at 108.

⁴³⁰ *Ibid* at 113.

⁴³¹ The Declaration on the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-International Armed Conflicts. Created by the International Institute for Humanitarian Law, San Remo, Italy, 1990. See the International Review of the Red Cross September – October 1990 No. 278 at pg 404-408.

It is noteworthy that the reasoning within the text of the *Tadic* Judgment impacted upon the jurisprudence of the *ad hoc* Tribunals generally. This is largely due to the fact that cases tend to cross-reference each other. When asserting that customary rules exist governing internal armed conflict, *Tadic* is often referenced. In the *Prosecutor –v- Jelusic* the Trial Chamber stated:

The charges for murder and cruel treatment are based on Article 3 common to the Geneva Conventions whose customary status has been noted on several occasions by this Tribunal and the Criminal Tribunal for Rwanda.⁴³²

The Trial Chamber then referred to the *Akayesu* Judgment which confirmed the customary status of Common Article 3.⁴³³ However, in doing so, the Trial Chamber in *Akayesu* relied upon the reasoning within *Tadic*.⁴³⁴

The second trend identified within the jurisprudence of the *ad hoc* Tribunals is to simply assert the existence of a customary international criminal prohibition. For present purposes, I shall examine the delimitation of the customary international prohibition upon genocide. The Trial Chamber's Judgment in *Akayesu* is indicative of the lack of empirical enquiry in delimiting CIL norms.⁴³⁵ Within the text of the Judgment the Trial Chamber simply states that '[t]he Genocide Convention is undeniably considered part of CIL.'⁴³⁶ In an attempt to provide some kind of evidence for such a statement, the Trial Chamber pointed to an Advisory Opinion of the ICJ and the Report of the Secretary General on the establishment of the ICTY.⁴³⁷ There was absolutely no engagement with the traditional bi-partite doctrine. Moreover, it is patently unclear which element of the

⁴³² *Prosecutor –v- Jelusic*, Case No. IT-95-10-1, 14th December 1999, available at <http://www.icty.org>. last viewed 20th February 2006 at 34. The Judgment then referenced the *Akayesu* Judgment, *supra* note 411 at para 608.

⁴³³ See, *Akayesu* Judgment, *ibid* at para 608.

⁴³⁴ *Ibid*.

⁴³⁵ *Ibid* at para 495.

⁴³⁶ *Ibid*

⁴³⁷ *Ibid*. See, *Report of the Secretary General Under Security Council Resolution 808*, Doc.S/2504. 3rd May 1993, reprinted in 14 *Hum.Rts.L.J* (1993) 198. The relevant section reads: 'This body of law [humanitarian law] exists in the form of both conventional law and customary law. While there is international customary law which is not laid down in conventions, some of the major conventional humanitarian law has become part of customary international law.'

bi-partite doctrine the Trial Chamber is referring to in advancing its two, rather inadequate, examples.

Exactly the same reasoning is employed in the *Prosecutor –v- Rutaganda*.⁴³⁸ There was no real empirical enquiry into the existence of a customary prohibition; the norm was simply stated to exist.

The Genocide Convention is undeniably part of customary international law, as reflected in the advisory opinion issued in 1951 by the International Court of Justice on reservations to the Genocide Convention, and as noted by the United Nations Secretary General in his Report on the establishment of the International Tribunal for Former Yugoslavia.⁴³⁹

I would submit that the employment of the re-imagined definition of CIL, in the foregoing cases, would have resulted in a clear and concise delimitation of the prohibition upon genocide. There is a veritable wealth of evidentiary sources the Trial Chambers *could* have employed in asserting the existence of a CIL prohibition upon genocide. However, I would maintain that the majority of these possible sources would be classed as normative.⁴⁴⁰ It is noteworthy that the enforcement mechanisms of the Genocide Convention have long been met with disenchantment and moreover, persistently labelled as ineffective.⁴⁴¹ Any form of concrete state practice - the prosecution of genocide - could not truly be said to exist until the establishment of the *ad hoc* Tribunals.⁴⁴² How could the Trial Chambers, under the re-imagined definition of CIL, prove the existence of a customary international prohibition?

⁴³⁸ *Prosecutor –v- Rutaganda* Case No. ICTR-96-3, 6th December 1999 at para 46, available at <http://www.ictj.org>, last viewed 20th February 2006

⁴³⁹ *Ibid.* In the *Prosecutor –v- Kayishema & Ruzindana* Case No. ICTR-95-1-T, 21st May 1999, available at <http://www.ictj.org>, last viewed 20th February, exactly the same reasoning is one again employed. After simply noting the existence of the Nuremberg Tribunal and provisions under the Genocide Convention the Trial Chamber stated: '[f]urthermore, the crime of Genocide is considered part of customary international law and, moreover, a norm of *jus cogens*.' *Ibid* at para 88

⁴⁴⁰ The clear exceptions to this are: The Nuremberg Tribunal, *supra* note 382 and the Eichmann case, *supra* note 257.

⁴⁴¹ Cassese, *supra* note 6 at 97.

⁴⁴² Schabas, 'National Courts Finally Begin to Prosecute Genocide, the 'Crime of Crimes'', 1 *Journal of International Criminal Justice* (2003) 39. Once again, the exceptions here would be: The Nuremberg Tribunal, *supra* note 382 and the Eichmann case, *supra* note 257.

In asserting the existence of the first element of the re-imagined definition – *opinio juris* – the Trial Chambers could have had recourse to domestic legislation,⁴⁴³ national judicial decisions⁴⁴⁴ and voting patterns at the General Assembly.⁴⁴⁵ In affirming the existence of the legitimate expectation of the global community of states, the second element within the re-imagined definition, the Trial Chambers could have had recourse to the 1946 General Assembly Resolution of the United Nations.⁴⁴⁶ The resolution unanimously declared that genocide was an international crime and moreover, requested the drafting of a treaty on genocide.⁴⁴⁷ Furthermore, on the 8th of December 1948 the Convention on the Prevention and Punishment of Genocide was unanimously adopted.⁴⁴⁸ It is, once again, arguable that the Trial Chamber could have referred to the creation of the *ad hoc* Tribunals as a clear indication of the existence of a legitimate expectation.

It is arguable, that in the context of genocide, the apparent lack of empirical enquiry into the existence of customary prohibition is directly related to the nature of the crime itself. Genocide has been described as the ‘the crime of crimes’⁴⁴⁹ and its commission, quite correctly, attracts a ‘terrible stigma’.⁴⁵⁰ Perhaps the existence of a customary prohibition is seen as self-evident by the international judiciary. However, if CIL is to constitute a workable legal source of international law, judicial reasoning, regardless of how morally distasteful an international crime is seen to be, must do more than simply state the existence of a prohibition.

⁴⁴³ An example of such domestic legislation can be found within s 220 of the German Criminal Code. See, *Strafgesetzbuch mit Erläuterungen* (Verlag C.H. Beck: München, 2001) at 831.

⁴⁴⁴ The pertinent examples being *Eichmann*, *supra* note 254. Using the German example once again, the Trial Chambers could have pointed to: *Jorgic*, Judgment of 26th September 1997, in 3 *Strafrecht* 215/98. Here, a German Court found the defendant guilty of genocide and sentenced him to life imprisonment. See, Cassese, *supra* note 6 at 97.

⁴⁴⁵ GA. Res 96(1) GAOR, Ist Sess., 55th meeting. U.N. Doc. A/64/Add. 1. The Resolution was adopted unanimously. See, Shah, ‘The Oversight of the Last Great International Institution of the Twentieth Century: The International Criminal Court’s Definition of Genocide’ 16 *Emory International Law Review* (2002) 351 at 354.

⁴⁴⁶ GA. Res 96(1), *ibid*.

⁴⁴⁷ *Ibid*.

⁴⁴⁸ The Convention on the Prevention and Punishment of the Crime of Genocide, adopted by UN GA on 9th October 1948, (1951) 78 UNTS 277. There are currently 137 parties to the Genocide Convention see <http://www.unhcr.ch/html/menu3/b/treaty1gen.htm> last viewed 20th Feb 2006.

⁴⁴⁹ *Prosecutor –v- Kambanda* Case No. ICTR – 97-23-S, Judgment and Sentence, 4th September 1998, para 16, available at <http://www.ictor.org>, last viewed 20th February 2006.

⁴⁵⁰ Schabas, *supra* note 442 at 9.

Careful delimitation of the parameters of customary international criminal law norms is essential to facilitate their acceptance and most crucially, their enforcement on the international plane. By examining judicial practice, it is apparent that the traditional CIL doctrine is inappropriate for the demands of international criminal enforcement. Any definition of CIL should be clear, concise and most importantly, practicable in its application. Judicial practice serves to indicate that as the wealth of international treaty-based norms increases, CIL is in danger of being left languishing the wake of treaty conclusion.

CONCLUSION

The creation of the ICC has heralded a new era in the enforcement of international crime. Effective international criminal enforcement – both domestically and internationally – seems a real possibility. However, if the patently unsuitable definition of CIL is not re-cast, the role of customary international criminal law will be at best minimal. An examination of the contemporary judicial employment of customary international criminal law serves to indicate the need for a novel definition.

Within contemporary judicial practice there is little engagement with the traditional bi-partite doctrine. Moreover, due to definitional frailties, any engagement that does occur is inadequate. Proving a rule of CIL under the traditional definition is an impossible task. In fact, CIL appears to be envisaged as a free-floating concept, whereby norms are seen to simply exist within a legal vacuum and materialise on a judicial whim. CIL constitutes an ethereal source of law, its existence often forgotten and it is employed, more often than not, as an afterthought. The application of the re-imagined definition would resurrect CIL as a concrete source of norm-creation and enable it to function as workable legal concept – both practically and theoretically.

International customary law, particularly international customary criminal law, should reflect what the law *ought* to be. As such, under the re-imagined definition of CIL, the reality of international legal relations lies in normativity. Customary international law would no longer reflect what states do. This does not serve to disconnect law from reality. The reality of international legal relations would be that states, and individuals, break the law. The re-imagined definition enables CIL to become a tangible source of law in international criminal enforcement. CIL would no longer constitute a mere addendum in judicial reasoning. The judiciary – both domestically and internationally- would be enabled to undertake empirical enquiries into the existence of CIL norms and ultimately, successfully prove the existence of rules of customary international criminal law.

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