

THE INTERNATIONAL MONETARY FUND'S IMPERILED PRIORITY

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“[T]he I.M.F.’s status as a preferred creditor—meaning its loans get paid back before those of any other lender—is perhaps global finance’s most sacred writ.”¹

INTRODUCTION

In March 2012, Greece executed the largest sovereign debt restructuring in history.² The restructuring asked holders of government bonds to take a significant haircut, and because a supermajority of creditors agreed, all creditors were bound under the bonds’ collective action clause. That is, all creditors except for Official Sector institutions, such as the European Central Bank and the European Investment Bank. These institutions claimed priority for their holdings of Greek bonds over the private sector’s holdings of the same types of bonds.³ This claim to priority by Official Sector institutions was not new; because the role of Official Sector institutions as lenders in crisis situations has evolved into something akin to a lender of last resort, such de facto priority had become commonplace.⁴

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1. Landon Thomas, Jr., *IMF Shifts Its Approach to Bailouts*, N.Y. TIMES, Nov. 26, 2013, <http://www.nytimes.com/2013/11/27/business/international/imf-plan-for-next-crisis-would-split-the-bill.html?pagewanted=all>.

2. For details, see generally Jeromin Zettelmeyer et al., *The Greek Debt Restructuring: An Autopsy*, 28 ECON. POL’Y 513 (2013).

3. See Felix Salmon, *Greece’s Default Gets Messier*, REUTERS (Feb. 28, 2012), <http://blogs.reuters.com/felix-salmon/2012/02/28/greeces-default-gets-messier/> (discussing claims of priority over holdings of Greek bonds).

4. For discussions of the IMF’s role as a lender of last resort, see, e.g., Michael Mussa, *Reflections on the Function and Facilities of IMF Lending*, in REFORMING THE IMF FOR THE 21ST CENTURY 413, 422–23 (Edwin M. Truman ed., 2006); Charles W. Calomiris, *The IMF’s*

Fast-forward to late October 2012. Up on appeal at the Second Circuit Court of Appeals in New York was the case of *NML Capital, Ltd. v. Republic of Argentina*.⁵ The case pitted a U.S. hedge fund holding defaulted Argentine debt from a decade prior against the Republic. At issue was the meaning of a standard provision in the defaulted debt instruments, something called the *pari passu* clause (*pari passu* means “in equal step” in Latin). The hedge fund, NML Capital (NML), was arguing that the presence of that clause meant that Argentina could not preferentially pay some creditors while ignoring the claims of others.⁶ Further, NML wanted the court to threaten to impose sanctions on any and all who might assist in violation of the clause.⁷ The Second Circuit, for the most part, was persuaded. It fully agreed with NML on the interpretation of the clause and it mostly agreed with them about the enforcement mechanism.⁸ Because the United States Supreme Court declined to hear the case in June 2014, the Second Circuit’s decision will stand for the foreseeable future.⁹

The 800-pound gorilla in the corner throughout the litigation was the implications for Official Sector lending, particularly with the International Monetary Fund (IMF). A key element of Argentina’s argument was that if the court sided with NML—interpreting *pari passu* to mean that all unsecured creditors had to be paid proportionally—its ruling would be inconsistent with the IMF’s long-accepted *de facto* priority as a lender.¹⁰ Therefore, Argentina

Imprudent Role as Lender of Last Resort, 17 CATO J. 275 (1998); Giancarlo Corsetti, Bernardo Guimarães, & Nouriel Roubini, *International Lending of Last Resort and Moral Hazard: A Model of IMF’s Catalytic Finance*, 53 J. MONETARY ECON. 441 (2006).

5. *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246 (2d Cir. 2012), *cert. denied*, 134 S. Ct. 201 (2013).

6. *Id.* at 253–54.

7. *Id.* at 255.

8. *Id.* at 254–56; *see, e.g.*, Anna Gelpern, *Contract Hope and Sovereign Redemption*, 8 CAP. MKTS. L.J. 132 (2013); Theresa A. Monteleone, *A Vulture’s Gamble: High-Stakes Interpretation of Sovereign Debt Contracts in NML Capital, Ltd. v. Republic of Argentina*, 8 CAP. MKTS. L.J. 149 (2013); W. Mark C. Weidemaier, *Sovereign Debt After NML v. Argentina*, 8 CAP. MKTS. L.J. 123 (2013); *see also* Joseph Cotterill, *Sovereign Pari Passu and the Litigators of the Lost Cause*, 9 CAP. MKTS. L.J. 10 (2014).

9. *See* Adam Liptak, *Argentina’s Debt Appeal Is Rejected by Supreme Court*, N.Y. TIMES, June 16, 2014, http://dealbook.nytimes.com/2014/06/16/supreme-court-denies-appeal-by-argentina/?_php=true&_type=blogs&_r=0.

10. Brief of Defendant-Appellant at 43, *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246 (2012), (No. 12-105-cv(L)), 2012 WL 1077763 at *43 (“Without [preferred creditor status for the Official Sector], these lenders would be unable to safeguard countries on the brink of crisis, which would not only force more countries into default, but also serve to destabilize the international financial system as a whole.”).

contended, that interpretation surely had to be wrong.¹¹ Yet NML was clever enough to recognize that this was going to be a stumbling block for them and stipulated in its brief that, of course, it had no interest in going after IMF funds (which was not a major concession, considering Argentina had paid off all its IMF obligations a long while ago).¹² The Second Circuit took the path afforded to it by NML and punted on the issue, saying that the question of Official Sector priority was not before the court and, in any event, the creditors had made clear that they were not after payments that were due to organizations such as the IMF.¹³

Pandora's Box, however, was now open. As a logical matter, if the IMF or some other multilateral lender such as the World Bank, was an unsecured creditor without any de jure preferred creditor status, payments to it in all future cases were now open to attack under the same theory that NML had used against other creditors.¹⁴ As the *New York Times* has noted, "[i]t is at least possible that the Second Circuit opinion could, in the future, be used to keep the [IMF] from having a preferential standing over the holdouts in any restructuring that did occur."¹⁵ Indeed, maybe even some past payments were vulnerable, assuming that statute-of-limitations and immunity complications could be overcome.

11. Multiple commentators have also made this point with respect to the *pari passu* interpretation being advanced by NML. See, e.g., Lee C. Buchheit & Jeremiah Pam, *The Pari Passu Clause in Sovereign Debt Instruments*, 53 EMORY L.J. 869 (2004).

12. See *infra* note 29 and accompanying text.

13. See *NML Capital*, 699 F.3d at 260 ("We are not called upon to decide whether policies favoring preferential payments to multilateral organizations like the IMF would breach *pari passu* clauses like the one at issue here. Indeed, plaintiffs . . . contend that 'a sovereign's *de jure* or *de facto* policy of subordinating obligations to commercial unsecured creditors beneath obligations to multilateral institutions like the IMF would not violate the Equal Treatment Provision for the simple reason that commercial creditors never were nor could be on equal footing with the multilateral organizations.'") (citations omitted).

14. See ANNA GELPERN, PETERSON INST. FOR INT'L. ECON, POLICY BRIEF: SOVEREIGN DAMAGE CONTROL 10 (2013) (noting that *NML Capital Ltd. v. Republic of Argentina* has put the IMF's "super priority" over other lenders at risk), available at <http://www.iie.com/publications/pb/pb13-12.pdf>; LEE C. BUCHHEIT ET AL., THE BROOKINGS INST., REVISITING SOVEREIGN BANKRUPTCY (2013), available at <http://www.brookings.edu/research/reports/2013/10/sovereign-debt>; ALLEN & OVERY, LLP, THE *PARI PASSU* CLAUSE AND THE ARGENTINE CASE 10 (2012), available at <http://www.allenoverly.com/SiteCollectionDocuments/The%20pari%20passu%20clause%20and%20the%20Argentine%20case.pdf>.

15. Floyd Norris, *Ruling on Argentina Gives Investors an Upper Hand*, N.Y. TIMES, June 19, 2014, <http://www.nytimes.com/2014/06/20/business/economy/ruling-on-argentina-gives-investors-an-upper-hand.html>.

In short, the de facto priority status of Official Sector institutions is no longer secure. This brings front and center the question of whether, if attacked, a multilateral financing organization like the IMF could defend itself by saying that its longstanding de facto priority status has, as a matter of customary international law (CIL), evolved to de jure status.

I. THE EVOLUTION OF INTERNATIONAL NORMS INTO CUSTOMARY LAW

The threshold question is: When and how does a norm evolve into law? Over the years, courts have established numerous norms that have evolved into international law.¹⁶ Given this jurisprudence, one might imagine that the answer to the threshold “when and how” question would be clear. This is not the case.¹⁷

A. *The Textbook Definition*

The textbooks set forth a two-part test to be applied to historical evidence to determine whether CIL can be said to have emerged. CIL exists when there is evidence of: “(1) a relatively uniform and consistent state practice regarding a particular matter; and (2) a belief among states that such practice is legally compelled.”¹⁸ Or, to use a different phrasing, CIL “results from a general and consistent practice of states followed by them from a sense of legal obligation.”¹⁹ This sense of legal obligation is also referred to as *opinio juris*.

There are significant practical difficulties in implementing this textbook definition. First, while the authorities seem to agree that there needs to be lots of state practice to satisfy Step One of the

16. *See infra* Part IV.

17. For a historical treatment that shows that this murkiness has existed for a long while, see Ernest Young & Emily Kadens, *How Customary is Customary International Law?*, 54 WM & MARY L. REV. 885 (2013).

18. SEAN D. MURPHY, *PRINCIPLES OF INTERNATIONAL LAW* 92–93 (2d ed. 2012) (“[S]tates through their practice, and international lawyers through writings and judicial decisions, have agreed that customary international law exists whenever two key requirements are met: (1) a relatively uniform and consistent state practice regarding a particular matter; and (2) a belief among states that such practice is legally compelled.”).

19. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102(2) (1987). Much quoted in the literature are pieces of language from a set of classic International Court of Justice (ICJ) cases. Those include the ICJ’s North Sea Continental Shelf Cases (Ger./Den.; Ger./Neth.), 1969 I.C.J. 3, ¶ 77, stating that for a practice to amount to CIL, the practice must be “settled” and ICJ’s Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 246, ¶ 111, stating that the presence of *opinio juris* can be tested based on the analysis of a “sufficiently extensive and convincing practice.”

definition, the terms they use to describe the quantum of state practice required are all rather vague. These are terms such as “uniform and consistent,” “settled,” “extensive,” or “virtually uniform.” As best we can tell, there is no authoritative source that translates what those terms mean regarding how much practice there must be, either with respect to the number of states engaged in the practice or for how long they needed to have been engaging in it.²⁰

Even more perplexing to international law scholars is the *opinio juris* conundrum. The second step of the textbook definition requires evidence that the states *actually believe* that the particular practice identified in step one is legally compelled. As a threshold matter, there is the question of how one *ever* determines what a state—a legal fiction—believes. But assuming one clears that hurdle, step two poses a chronological puzzle. For a practice to become law, states have to engage in it thinking that it is already law. But how can states think that it is law if it is not already law?²¹

The scenario is impossible unless one believes that a large fraction of states are systematically mistaken about the law over long periods of time.²² Further, that state of misbelief is directly at odds with the requirement in step one that the norm in question be well-established and widely followed—after all, the norms that are most likely to be well-established and widely followed are the ones that everyone is clear on, not the ones that key actors are mistaken about. Finally, it is not clear why the international system would want to elevate to binding status only those norms that international actors are mistaken about.

20. *E.g.*, CURTIS F.J. DOEBBLER, INTRODUCTION TO INTERNATIONAL HUMAN RIGHTS LAW 33 (2006) (“Just how large a number of states are necessary to create a rule of customary international law is not settled”). For a wonderfully vague attempt to translate the definition of CIL into the quantum of evidence required, see Herman Meijers, *How Is International Law Made?*, 9 NETH. Y.B. INT’L L. 3, 5 (1978).

21. For discussions of the chronological paradox, see, e.g., Curtis A. Bradley, *The Chronological Paradox, State Preferences and Opinio Juris* (June 1, 2013) (unpublished manuscript), available at http://law.duke.edu/cicl/pdf/opiniojuris/panel_1-bradley-the_chronological_paradox_state_preferences_and_opinio_juris.pdf; Olufemi Elias, *The Nature of the Subjective Element in Customary International Law*, 44 INT’L & COMP. L.Q. 501, 504 (1995); Raphael M. Walden, *The Subjective Element in the Formation of Customary International Law*, 12 ISR. L. REV. 344, 363 (1977).

22. See Michael J. Glennon, *How International Rules Die*, 93 GEO. L.J. 939, 957 (2005) (“[C]ustomary international law is thought to be altered by acts that initially constitute violations of old rules; that is how it changes.”).

As Curtis Bradley has asked: Would states really want the law governing their practices to arise solely out of the mistaken beliefs of their brethren? Is the evolution of law to be decided by those states least knowledgeable about the law and, therefore, most likely to make systematic mistakes over the long term?²³ The answer to Bradley's question surely must be no. At bottom, we have a situation where it is neither clear how one would go about finding evidence of the mythical *opinio juris*, nor is it clear that the international system should want to.²⁴

B. *The Textbook Definition in Practice*

Perhaps the easiest way to illustrate the internal inconsistencies of the textbook definition of CIL is to provide an example. For purposes of the discussion that follows, we will focus on the IMF since it is the primary provider of emergency assistance in the international financial system today. The initial question concerns the IMF's position as a *de facto* preferred creditor when it lends to sovereigns in distress. How well-established is this norm?

Our canvassing of the extensive literature on the IMF suggests that this norm of *de facto* priority for IMF lending is as well-established as just about any international norm can possibly be. There is extensive discussion of how the norm is widely accepted by the international community and has been so since roughly the 1970s, if not longer.²⁵ For example, in 2010 when the European Stabilization Mechanism specified that its lending to distressed euro-area sovereigns would be on a priority basis, care was taken to specify that that priority would be secondary to the priority due to the IMF.²⁶

23. See Bradley, *supra* note 21.

24. Cf. J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 475 (2000) (“[T]here is no methodology that has the capacity to determine whether states have, in fact, accepted a norm as law.”).

25. E.g., LEONIE F. GUDER, *THE ADMINISTRATION OF DEBT RELIEF BY INTERNATIONAL FINANCIAL INSTITUTIONS: A LEGAL RECONSTRUCTION OF THE HIPIC INITIATIVE* 50 (2008); Bessma Momami, *Internal or External Norm Champions: The IMF and Multilateral Debt Relief*, in *OWNING DEVELOPMENT: CREATING POLICY NORMS IN THE IMF AND THE WORLD BANK* 34 (Susan Park & Antje Vetterlein eds. 2010); LEX REIFFEL, *RESTRUCTURING SOVEREIGN DEBT: THE CASE FOR AD HOC MACHINERY* 66 (2003); Ashoka Mody, *A New Greek Test for Europe*, PROJECT SYNDICATE (Sep. 16, 2013), <http://www.project-syndicate.org/commentary/the-ongoing-consequences-of-the-greek-crisis-by-ashoka-mody> (noting the IMF's “implicit status as a ‘senior’ creditor”).

26. Rodrigo Olivares-Caminal, *The EU Architecture to Avert a Sovereign Debt Crisis*, 2011 OECD J., no. 2, at 1, 14, available at <http://www.oecd.org/finance/financial-markets/49191980.pdf> (“It is worth stressing that the IMF priority is not established anywhere and acts *de facto*, the Treaty is the first formal official document where it has been acknowledged.”),

More importantly, there is no disagreement, even from critics of the IMF and its claims to preferred creditor status, that such a norm exists and is widely accepted among nations.²⁷ Further, there is the reality that the IMF has, over scores of sovereign crises over the past several decades, always gotten paid back on a preferred basis.²⁸ Even NML, the hedge fund fighting for its equal payment rights from Argentina, acknowledged—and, in fact, assumed—the official sector's superior status. In its brief to the Second Circuit NML commented, "Multilateral organizations' preferred status among creditors follows from the unique role those organizations play in sovereign finance as lenders of last resort The Equal Treatment Provision requires equal treatment of similar commercial creditors; it does not require that creditors with differing priority be treated equally."²⁹ At bottom then, there is extensive evidence that the IMF's preferred creditor status has been widely accepted over a long period of time as an international norm and there is no evidence pushing in the other direction.

Were that evidence not persuasive enough, there is the fact that the institution itself is a subset of the international community. There are roughly 200 states in the world of which more than 90 percent are members of the IMF. When the IMF demands or receives preferred creditor status (which it always does), it is effectively acting on behalf of its member-shareholders. That means that we can safely say that over 90 percent of the nations in the world regularly cooperate in following the norm of granting the IMF preferred-creditor status. All in all, the evidence is such that it should easily satisfy the first prong of the two-part test for CIL evolution, regardless of how narrowly the

27. Kunibert Raffer, Preferred or Not Preferred: Thoughts on Priority Structures of Creditors 2 (October 16, 2009) (unpublished manuscript), available at <http://homepage.univie.ac.at/kunibert.raffer/ila-wash.pdf>, (noting that "all other creditors are supposed to take haircuts first. Only if this would still be considered insufficient by the Bretton Woods Institutions (BWIs), their own and other IFIs' claims can be touched"). Recently, Raffer further defended his view by taking the "Yes" position in a written debate with Cleary Gottlieb Steen & Hamilton partner Andrew Shutter concerning whether official sector debt should be subordinate to that of the private sector. *Head to Head: In the Case of Sovereigns, Should Official Sector Debt be Subordinated to Private Sector Debt?*, INT'L FIN. L. REV. (July 10, 2013), <http://www.iflr.com/Article/3228952/Head-to-head-In-the-case-of-sovereigns-should-official-sector-debt-be-subordinated-to-private-sector.html>. In that debate, Raffer again conceded that the IMF has traditionally enjoyed de facto priority status. *See id.* ("[P]reference has been an unfortunate routine for decades. The IMF and other multilateral lenders have been able to secure *de facto* creditor treatment . . .").

28. *See* Mussa, *supra* note 4, at 421.

29. Corrected Joint Response Brief of Plaintiffs-Appellees at 39–40, *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246 (2012), (No. 12-105(L)), 2012 WL 1494918 at *39–40.

definition is read.

Yet even with step one of the CIL definition established to a near-certainty, step two poses problems for the IMF. It is widely accepted that the preferred priority of the IMF is agreed in practice but not legally compelled.³⁰ This is precisely the opposite of what step two of the textbook definition requires. Further, Official Sector institutions themselves discount their “legal” status as preferred creditors. In other words, they accurately recognize the reality that their preferred creditor status is a function of long standing norms and not any formal legal dictate. For example, the International Finance Corporation (IFC) has a webpage dedicated to explaining the institution’s preferred creditor status and noting its value to distressed sovereigns. It begins with a clear statement of its status: “As a multilateral development institution, IFC enjoys a *de facto* Preferred Creditor Status.”³¹ Yet, the IFC then goes on to comment that the nature of its priority is found only in custom; just a few lines after it boldly declares its *de facto* priority the IFC notes, “As is the case for the World Bank and other multilateral development institutions, Preferred Creditor Status is *not a legal status*, but is embodied in practice, and is granted by the shareholders of IFC (over 180 member governments).”³² It would be difficult to craft a clearer statement disclaiming *opinio juris* and thus concede step two of the traditional test for CIL.

Because Official Sector institutions fail to meet the traditional test for CIL, it is tempting to conclude at this point that no court could possibly find that the IMF has *de jure* preferred creditor status. The problem with reaching that conclusion, though, is that surely this same state of affairs—the near impossibility of finding evidence of *opinio juris*—has existed with every prior norm that a court ever decided had evolved into CIL. Put differently, even though the traditional CIL

30. Susan Schadler, *The IMF’s preferred creditor status: Questions after the Eurozone crisis*, VOX (Apr. 28, 2014), <http://www.voxeu.org/article/imf-preferred-creditor-status-and-eurozone-crisis>.

31. *Preferred Creditor Status*, INT’L FIN. CORP., http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Syndications/Overview_Benefits_Structure/Syndications/Preferred+Creditor+Status (last visited May 30, 2014).

32. *Id.* (emphasis added). See also REBECCA M. NELSON ET AL., CONG. RES. SERV., R41239, FREQUENTLY ASKED QUESTIONS ABOUT IMF INVOLVEMENT IN THE EUROZONE DEBT CRISIS 4 (2010) (“The IMF, like the other international financial institutions, enjoys a *de facto* preferred creditor status; member governments grant priority to repayment of their obligations to the IMF over other creditors.”).

doctrine seems to raise insurmountable barriers to those seeking to transform custom into law, courts still manage to discover CIL. How?

C. *A Different Understanding of CIL*

We are not the first to recognize the difficulties in confronting the circularity of the textbook definition of CIL—far from it. We have guidance from a subset of international law scholars who have wrestled with the same *opinio juris* conundrum. These scholars suggest that if *opinio juris* is understood as capturing a sense of what states would find, in a hypothetical bargain sense, as a normatively attractive rule that improves the common interest of the international collective, then the two-part definition can work. In other words, under this view, the “sense of legal obligation” in *opinio juris* is what states believe the law should be rather than what they believe it is.³³ Courts determining CIL under this conception would, in effect, be engaging in a form of common law adjudication.

The commentators who suggest this possibility do not, for the most part, make empirical claims regarding what courts actually do.³⁴ Their points are generally more normative—about what courts should be doing. Below, we attempt to determine what courts actually do when they confront evolving international norms. By deconstructing court analyses, we hope to uncover a more sensible understanding of the CIL doctrine.

II. HOW DO COURTS FIND CIL?

Our question is simple: how do courts apply the dictates regarding the requirements for finding that a norm has evolved into CIL? What we know from the commentary and plain logic is that courts do often look at the past practices of states to determine the first prong of the

33. Bradley, *supra* note 21 (articulating this “state preferences” view); *see also* BRIAN D. LEPARD, *CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS* 97–98 (2010) (arguing that “*opinio juris* be interpreted as a requirement that states generally believe that it is desirable now or in the near future to have an authoritative legal principle or rule prescribing, permitting, or prohibiting certain state conduct”); Raphael M. Walden, *Customary International Law: A Jurisprudential Analysis*, 13 *ISR. L. REV.* 86, 97 (1978) (noting that “what is involved may be, not a belief that the practice is *already* legally binding, but a claim that it *ought* to be legally binding”).

34. There is language in some ICJ cases that might be seen as supporting this perspective, but these bits and pieces of language do not add up to a consistent theme. *See, e.g.*, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 *I.C.J.* 36, ¶ 70 (July 8) (suggesting that the normative character of a rule helps determine whether it satisfies the conditions for being *opinio juris*).

traditional definition of CIL—evidence of past practices. But, given that prong one is easily satisfied, it is the second prong that concerns us: the *opinio juris* bit of the equation. In theory, then, the best approach would be to code the various court decisions for the evidence that courts examine on the second prong alone. Unfortunately, we realized when we began our coding that the court decisions were not going to cooperate. Courts in this area, it turns out, do not neatly separate out the evidence that they look at in terms of saying X piece of evidence helped persuade them on prong one and Y piece of evidence helped persuade them on prong two. Instead, they tend to bundle all the evidence into a single discussion and then assert whether the two-prong test is satisfied (and sometimes they do not even mention the two-prong test). Given that reality, our inquiry reports on the evidence that courts look to when confronting CIL, then tries to back out the question of what pieces are likely to have impacted the *opinio juris* determinations.

A. Which Courts?

Historically, the most important court in terms of determinations of customary international law has been the International Court of Justice (ICJ). This is the court whose determinations are cited to most often by scholars and other courts as the key authority in terms of what CIL is and how it should be determined. We, therefore, collected all of the cases ever decided by the ICJ that could arguably be said to have made determinations of CIL. We supplemented those cases with determinations of the ICJ's predecessor court, the Permanent Court of International Justice (PCIJ). In addition, we examined a subset of decisions from the numerous other international tribunals, such as the International Tribunal on the Law of the Sea (ITLOS). We did not have the resources to collect the decisions of every one of these secondary international tribunals. Therefore, we tried to limit ourselves to the most important decisions. We did that by looking to all cases from these tribunals that were cited in the 2013 report of the International Law Commission's (ILC) study group on CIL.³⁵

35. The ILC is a United Nations appointed committee that is perhaps the most influential body of experts on international law. For details, see *Origin and Background of the Development and Codification of International Law*, INT'L L. COMM'N, <http://legal.un.org/ilc/intro.htm> (last visited Jan. 11, 2015).

To obtain our observations, we searched each database of cases for all of the judicial opinions that discussed any one of the following terms: “custom,” “international law,” “customary international law,” “*opinio juris*,” “practice,” or “law of nations.” As noted, we supplemented the list of cases here with the cases mentioned in the 2013 draft of the ILC’s report on CIL. Once cases had been identified, we examined the portions of the opinions discussing CIL and coded each determination of CIL for the types of evidence that were discussed as either rising to the level of CIL or not. Within a single case that might have multiple CIL issues in it, we coded each issue separately. If there were dissenting or concurring opinions that were doing independent analyses of the CIL question, we coded those separately as well. The goal was to examine a wide array of judicial determinations so as to try and understand how judges and courts got around the intractability problem in the traditional definition of CIL.

We encountered a few threshold issues. The first was whether to code only opinions that concluded that there was CIL or also those that concluded that CIL was not present. The argument in favor of limiting the data to cases affirmatively finding CIL is that since we are interested in examining the type and amount of evidence courts think is adequate to find CIL, we should limit our analysis to those instances where CIL was found. The counterargument is that the types of disputes that end up in court—particularly at the appeals level or at the level at which states are willing to go to an international tribunal—will necessarily be those in which the legal question is a close one. Otherwise, as the research on the economics of litigation teaches us, the cases would have settled. This approach is also relevant if one believes that—consistent with a large body of literature on judicial behavior—factors other than simply the quantum of evidence can make a difference as to the outcome in close cases.³⁶

The second threshold issue was whether to code only cases from one type of court (the ICJ, for example) or include a variety of types of courts. On the matter of including multiple courts, including domestic courts, the argument in favor of limiting the analysis to international tribunals such as the ICJ is that domestic courts are often going to be biased towards domestic interests and that,

36. Cf. Eric A. Posner & Miguel F.P. Figueiredo, *Is the International Court of Justice Biased?*, 34 J. LEGAL STUD. 599 (2005).

therefore, an examination of their analyses is less valuable.³⁷ For us, it would have been interesting to be able to examine a wide range of domestic tribunals, but resource constraints again kept us focused on the international tribunals.

B. Which Variables?

In choosing the variables to code for, we began with the standard rule (extensive practice plus *opinio juris*) and set forth the types of evidence that the definition likely contemplated. Next, we did an initial round of coding of roughly a dozen ICJ cases to look at what types of evidence they were citing as support for their inquiries. The combination of those two steps gave us twelve evidentiary variables to code for. By looking at the kinds of evidence that courts use in applying the standard CIL rule of evolution, we hope to draw inferences about how they are tackling the problems posed by the rule.

The variables fit roughly into four categories. The first category includes the variables that capture the use of direct evidence supporting the standard CIL definition. Second are the variables that capture the degree of delegation of the task of collecting and analyzing the evidence to third parties, such as treatise writers or academics. Third are the variables capturing something that is not at all traditional CIL, but what we will call “aspirational” CIL. Finally, fourth are the variables that capture what one might call the procedural elements in the CIL calculus.

1. Direct Evidence Supporting the Standard Definition

State Acts: Part one of the standard definition of CIL tells us to look for widespread and settled evidence of state practice. The first variable we coded for, therefore, was evidence of actions by states. Specifically, assertions along the lines of, “On X date, State Y took Z action.”

Statements by State Officials: Under the traditional definition of CIL, states not only have to act, but they also have to believe that their actions are consistent with international law. That is, *opinio juris*. Courts might cite to evidence of statements by state officials indicating their understanding of certain legal obligations. There

37. Along these lines, see Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Law: An Analysis of the Attitudes of National Courts*, 4 EUR. J. INT'L L. 159 (1993).

might also be evidence of what other states believe at the time.

2. Evidence of Delegation to Intermediaries

Treatises: Our expectation was that academic treatises would play an important role in assisting courts with their determinations of CIL. Assuming that treatise writers seek the fame that comes with being cited by courts as authoritative, there is an incentive for these writers to build reputations for credibly reporting and analyzing the historical evidence that points to or away from a certain set of practices having evolved towards CIL status.

Academic Articles: The rationale for academic articles constituting evidence of CIL is the same as with treatises.

Reports of International Committees: Interest groups often have distinct perspectives on how law should evolve. They, therefore, have an incentive to try and influence the way in which CIL evolves by putting together groups of eminent lawyers and scholars to do the kind of background research work that courts are unable to do. Examples of the types of bodies that we code for under this variable include the International Law Association, expert committees put together by the Red Cross, and various bar association committees. We code both citations to committee reports and conference reports under this variable.

Note, though, that we are making substantial assumptions regarding the content of some of these types of materials. There will certainly be academic articles and committee reports that are largely normative, which would perhaps better fit under the next category of evidence.

3. Evidence of Aspirational CIL

Treaties: The problem with looking solely at the statements of state officials as evidence of their understanding of the law is that those officials might be acting strategically in making those statements. In this context, treaties might provide more credible evidence of state beliefs. After all, a state that enters into a treaty is subjecting itself to legal liability. Here, however, we encounter an issue under the traditional definition of CIL: treaties are good evidence of what states want the law to be, but they are not necessarily good evidence of what the law is. After all, the need for a treaty is likely to arise primarily in the absence of law, not when it is widespread and well established.

United Nations (UN) Resolutions: UN resolutions are relevant to CIL determinations in the same manner that treaties are: they are indications of what states consider important issues for the international community. However, like treaties, they are also problematic as a source of evidence of CIL since it is unlikely that there would be a need for a UN resolution on topics where there was already longstanding and widespread agreement on a certain principle of international law. Along those lines, the presence of a UN resolution is arguably evidence against the presence of CIL.

UN Conference and Committee Reports: The different organs of the UN are constantly producing a vast amount of material on issues of international concern, such as the proliferation of nuclear weapons, labor rights, human trafficking, environmental standards, and odious debts. The level of support from the various nations for these UN studies or conference reports can range from none at all to widespread support. At most, this type of evidence suggests that there are issues of concern. Individual states may support or even fund UN conferences and reports, but that does not tell us whether the state supports CIL on the matter. The state may simply be interested in studying the matter or seeking to placate some minority domestic constituency.

Statutes—Domestic: Domestic statutes may indicate individual state preferences as to the future of international law. Or, even if those preferences vis-à-vis international law have not formed, perhaps courts could read an aspiration in that direction into them. The link is not necessarily obvious though. The fact that a state has local legislation on an issue affecting its citizens does not mean that it takes the same view regarding the rights or obligations of citizens of other countries. Both contemporary and historical practice are rife with examples of how states, particularly the rich ones, have very different conceptions of what their own citizens are entitled to and what outsiders to their nations are entitled to. Would one infer, for example, from the domestic statutes in northern European nations that there is CIL mandating that a basic level of social support be provided in all nations and that all other nations are responsible for? Probably not. Objections aside, we code for the number of statutes cited because statutes do seem to be cited as support of CIL.

Statutes—International: Because there is no global legislature making international law, there can be no international statutes. There are, however, international treaties that have wide agreement among states and that are sometimes referred to as “statutes.” We code these separately.³⁸

4. Evidence on Procedural or Other Background Matters

Case Law—International Tribunal Cases: Prior cases are not, in and of themselves, evidence of either state behavior or *opinio juris*. That is, unless the argument is made that courts are state actors. And that argument, given that courts in many jurisdictions are avowedly not seeking to reflect either the views of the executive or those of the general public, is a problematic one. Prior court decisions might get cited, however, because they set precedent in terms of how CIL cases are to be decided or what kinds of evidence had been considered relevant in a prior dispute.

Case Law—Domestic Cases: The rationale for using municipal court decisions as evidence is the same as that for international tribunal cases.

We recognize that others might disagree with our categorizations of the variables. For that reason, we report the results on all the variables individually.

In addition to the foregoing variables, we also coded for agreements among the parties regarding what the applicable CIL was. We had not expected this to be a relevant form of evidence, but came across it in a handful of cases.

In terms of coding the variables, we coded the number of unique items that were cited in each judicial determination (what we call observations). If the treaty creating the IMF was cited, we counted that as one in the treaty column. If, in addition, the treaty implementing the European Stabilization Mechanism was also cited, our number of treaties cited tally went up to two. We did not count the number of times some piece of material was cited, tallying only whether it was cited.

38. *E.g.* INT’L CRIMINAL COURT, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (2011), available at <http://www.icc-cpi.int/iccdocs/PIDS/publications/RomeStatutEng.pdf>.

The final two variables we coded for were case-level controls to help us determine whether different categories of cases apply CIL differently.

5. Case-Level Controls

Subject Area: Some scholars have suggested that there are two different categories of CIL, roughly speaking: traditional CIL and modern CIL.³⁹ The former emphasizes step one of the textbook definition—state practice—while the latter emphasizes step two—opinio juris. Traditional CIL is made up of the rules that have long governed interstate relationships, such as the rules governing diplomatic immunities, the conduct of war, and the regulation of ships in international waters. Here, traditional practices are arguably more relevant in determining CIL. Then there is modern CIL, which governs matters that fit more into the category of individual rights, such as prohibitions on states committing genocide. In these individual-rights cases, the argument is sometimes made that evidence of opinio juris is more important than state practice—largely because longstanding state practices are often inconsistent with the rights being sought.

For purposes of this inquiry, we have divided cases into those involving collective interests—more traditional CIL—versus individual rights—modern CIL. This is to examine whether we see something different going on in terms of the type of evidence that is relevant in the different categories of case.

Explicit Use of the Two-Part, Textbook Definition: We have coded the cases using a generous definition of when the courts might be determining a CIL rule. It might be argued, therefore, that some of these determinations that we have coded are no more than exercises in clarification of the CIL rule and do not call for the courts to analyze evidence. It strikes us that this is not a particularly meaningful distinction, since clarification of the CIL rule is essentially a form of determining whether there is CIL. Still, perhaps cases in which the judge explicitly says that she is applying the two-part definition are ones that the judge is more serious about illustrating how the definition applies. We therefore code the cases for whether they are ones in which the two-part definition is explicitly invoked.

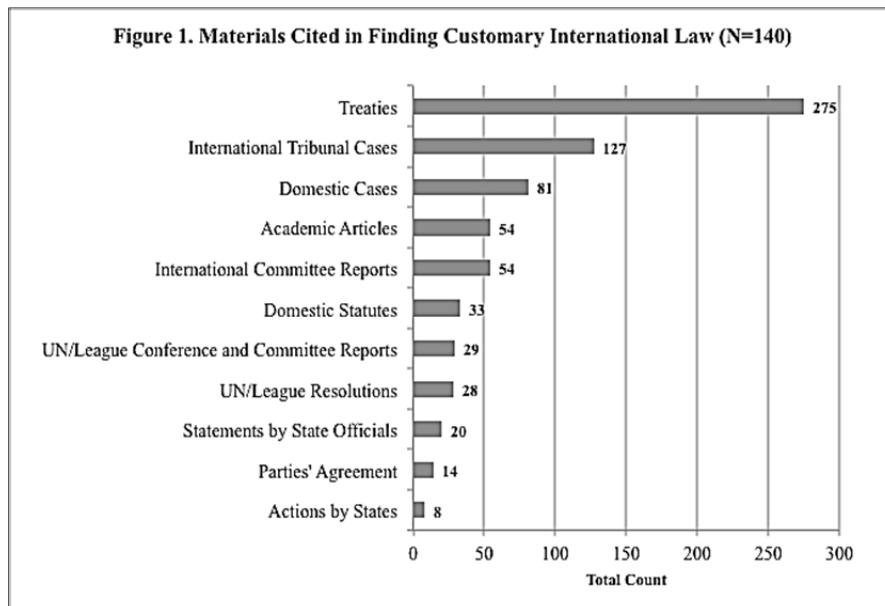
39. See, e.g., Anthea E. Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757 (2001).

III. ANALYSIS

A. *The Total Counts*

Figure 1 provides a breakdown of the full dataset, in terms of the pieces of evidence described above. For simplicity, we have combined some of them. This project began with the inquiry of how much and what kind of evidence was enough to satisfy the traditional CIL definition. For example, how many statements from state officials were being discussed as relevant in each judicial determination with respect to CIL?

We have numbers on 140 different CIL determinations by international tribunals. When we began this project to inquire into how courts determined *opinio juris*, we expected to primarily find courts citing to evidence of various government officials making statements as to what they believed CIL in a particular case to be. This, after all, would be classic *opinio juris*, if one could somehow solve the problem of determining whether the statements were genuine or strategic. What we see in the data, however, is that there are only twenty citations to statements by government officials in all 140 determinations. Basically, that means that statements of state officials are almost never examined.



Instead, the type of evidence that looks to be the most important for determinations of CIL is the international treaty. In the 140 CIL determinations, there were 275 citations to treaties, telling us that treaties are by far the most important type of evidence in CIL determinations. After citations to treaties come citations to prior cases, both domestic and international—what we expect are largely citations for procedural reasons. As noted earlier, the fact that treaties are cited at all as evidence of CIL is puzzling if one expects to see the traditional definition being followed. Treaties, after all, typically are entered into because there is no existing law and nations need some law. In other words, they are an indicator of the absence of law, rather than the presence of it, that is the opposite of *opinio juris*. Yet here, we find that not only are treaties cited, but they are the dominant type of material cited in CIL determinations.

Although most treaties are forward-looking, and the traditional definition of CIL asks for backward-looking evidence, there are exceptions to the objection to treaties as evidence for CIL. In the case of some treaties, for example, the drafters of the treaty might purport to be doing nothing more than codifying established and consistent state practice. In those cases, however, one would expect the court in question to specify that it was citing a treaty because that treaty represented a codification of past state practice and *opinio juris*.⁴⁰ And this does happen. But it happens rarely. To examine this question, we took a random subset of fifty of our coded CIL determinations and examined the question of whether there was any indication on the part of the judge that the treaty being cited was meant to codify existing practice. We found such indications in fewer than 20 percent of the determinations. If one plausibly assumes that the remainder of the treaties were cited as evidence of what states wanted their laws to be, then we must conclude that the dominant form of evidence being cited is forward-looking or aspirational.⁴¹

40. For example, take the following language from a United States domestic case applying CIL: “Moreover, other courts, international bodies, and scholars have recognized that the principles set out in the London Charter and applied by the International Military Tribunal are significant not only because they have garnered broad acceptance, but also because they were viewed as reflecting and crystallizing preexisting customary international law.” *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 271 (2d Cir. 2007).

41. Even if the drafters of the treaty did assert that they were codifying past state practice and *opinio juris*, it is not clear that a court, if it were following the traditional definition of CIL, should be able to assume that what was said by states during the codification process was true. Among the other complications involved in using treaties as evidence of widespread and settled state practices is that most treaties have only a subset of states that agree to them, as other

And it is not just treaties that receive a high degree of attention from courts in their CIL determinations. Treaties dominate, but three other forms of evidence that are largely aspirational in character also play a big role in CIL determinations. Those are UN Resolutions, other UN Material such as committee reports and conference reports, and domestic statutes. Added together, these materials constitute another significant portion of the material cited to in CIL determinations. These are also among the more cited materials in CIL determinations. Treaties by themselves, as Figure 1 shows, have 275 citations in the 140 CIL determinations. Add in the UN materials, UN committee reports, and state statutes and we have over 350 citations to this aspirational or forward-looking material. By contrast, there are fewer than fifty or so citations to material that might directly support the traditional CIL definition, and here we are talking about not only *opinio juris*, but also state practice.

Despite the numbers reported above, one might nevertheless wonder whether courts, while they are not looking to direct evidence supporting the traditional definition, are delegating the job of collecting the evidence and analyzing it to academic scholars. After all, the role that academic scholars played for a long time—and still do in some jurisdictions—was to collect evidence and synthesize law. From the citation count data in Figure 1, we do see that there are roughly fifty citations to academic articles and treatises. But that is still only a little more than one cite to an article or treatise every third CIL determination; not enough to support arguments about widespread *opinio juris*.

To recap, based on Figure 1, it looks like courts are neither pursuing direct evidence fitting the traditional definition nor are they delegating that task to academics and treatise writers. The vast majority of the action in CIL cases is occurring on the aspirational or forward-looking front; little is occurring on the traditional or backward-looking front. To borrow from Bradley's article on the chronological paradox in *opinio juris*, it looks as if courts are engaged in a type of common law adjudication—forward-looking adjudication focused on solving global problems as opposed to some kind of backward-looking historical aggregation of evidence (something that courts probably would not have the expertise to do, even if they

states may not have even been invited to participate. For a discussion of some of these complications, see Gary L. Scott & Craig L. Carr, *Multilateral Treaties and the Formation of Customary International Law*, 25 DENV. J. INT'L L. & POL'Y 71 (1996).

wanted to).⁴²

B. Dealing with Outliers

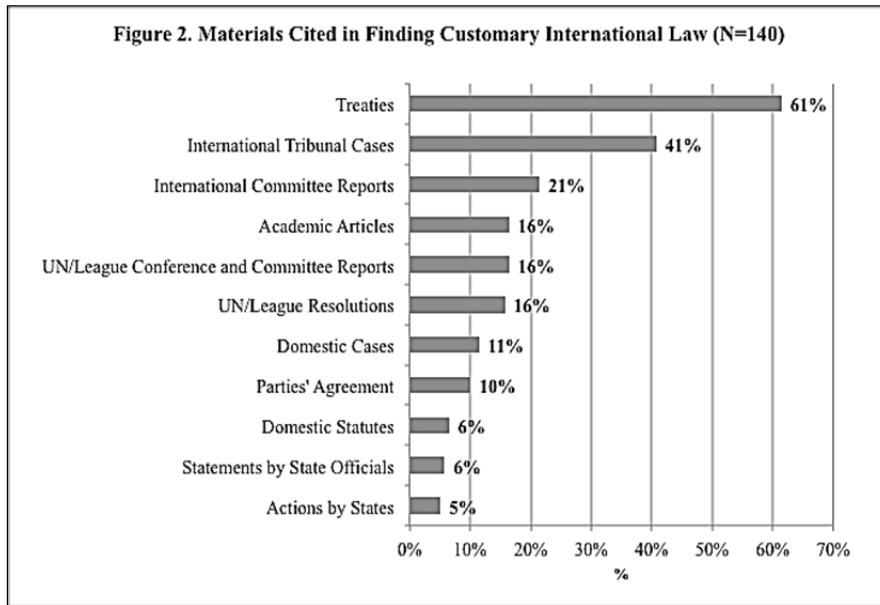
Most of the determinations that we examined cited to only a handful of materials. This creates a potential issue with outliers if there is a subset of cases where the judges cite a lot of materials, while the vast majority of cases have very few citations. For example, imagine that there is one opinion that cites to seventy-five treaties and every other determination only cites to one or two treaties. With a limited dataset, such as the one we use, that single opinion with the seventy-five treaties would skew our results.

To correct the problem, we estimate counts of materials being cited, in individual determinations, by giving a maximum score of 1 if a particular type of material is cited. So, if judicial determination A cites to five different treaties, we code that as a 1 as opposed to a 5. What we get with this coding is the fraction of CIL determinations that use treaties or direct evidence of state acts and so forth. We end up undercounting the influence of individual variables here, but we correct for the problem of outliers. Figure 2 reports these modified results.

The primary result remains: treaties constitute the dominant form of evidence used in CIL determinations. Sixty-one percent of the determinations use at least one treaty as support for their analysis—and we know from Figure 1 that they probably use more than one. By contrast, statements of state officials are used in only a small fraction, 6 percent, of determinations. The other forms of aspirational evidence, as Figure 2 demonstrates, also show up in relatively high fractions of cases as compared to statements of state officials. UN or League of Nations Conference Reports and Committee Reports show up in 16 percent of the determinations. UN or League of Nations Resolutions also show up in 16 percent of the determinations, and other International Committee Materials show up in 20 percent of the determinations. The point that emerges from Figure 2, therefore, is essentially the same as in Figure 1: it is the forward-looking or

42. See Bradley, *supra* note 21. The type of backward looking analysis that the CIL definition calls for, if taken seriously, would require courts to be experts in history, economics, political science, and anthropology, in addition to the expertise in law that we assume they have. One need only read a few of these CIL opinions to realize that these courts are not demonstrating those types of expertise or borrowing it from the arguments of the parties. Rather, they are doing what pragmatic courts do.

aspirational types of evidence that dominate the determination of CIL. Judges do look, to some extent, to evidence of past practices. But for the most part, the inference we draw from the data is that judges seem to be trying to figure out not what legal norms among states were in the past and whether they believed they were law, but rather what states generally believe should be law for their collective.



C. Parsing the Subsets

1. Explicit Mention of the Two-Part Textbook Test

In constructing our dataset of CIL determinations, we painted with a broad brush. We collected all of the determinations where it was even arguable that CIL was being determined. One objection to our analysis, therefore, could be that we are not in fact reporting on the set of cases where CIL is determined via the classic two-part test. That subset, it might be argued, is made up solely of the determinations where the two-part test is explicitly invoked.

To answer this objection, we coded each of our determinations for whether the two-part test was explicitly invoked. Table 1 shows the comparison of the types of evidence used in the subset of cases invoking the two-part test and the types used in the remainder of cases. Here we report the percentage of times a type of evidence shows up at least once in a determination, not the raw numbers of

times the type of evidence shows up.⁴³ In terms of our key variable, the use of treaties is higher in the determinations invoking the two-part test, 78 percent of the determinations, than in the other determinations, 58 percent. In other words, although the difference is not statistically significant, the primary result regarding the dominance of aspirational evidence of CIL, and particularly treaties, holds.

Table I: CIL Determinations With Explicit Mention of the Two-Part Test

<i>Variable</i>	<i>Two-Part Test Mentioned (n = 23)</i>	<i>Two-Part Test Not Mentioned (n = 117)</i>
Parties' Agreement	13	9
UN/League Resolutions	43	10***
UN/League Conference and Committee Reports	17	16
Domestic Cases	13	11
Domestic Statutes	9	6
International Tribunal Cases	65	36**
International Committee Reports	22	21
Treaties	78	58
Actions by States	0	6
Statements by State Officials	22	3***
Academic	13	17
*** indicates significance at the .01 level, ** indicates significance at the .05 level and * indicates significance at the .1 level.		

3. Cases that Find CIL.

Another possible objection to the numbers in Figure 1 is that those numbers are from all CIL determinations. Perhaps, as one colleague argued to us, treaties are only being cited in cases where CIL claims are being rejected? If we are interested in what types of evidence are used in determining whether CIL is present, this colleague argued, we should have focused on the cases where the tribunal found CIL, as opposed to looking also at the determinations where CIL was not found.

43. We do this for all three tables. The basic results hold true if one looks at the raw number breakdowns as well. We choose to report the percentage numbers though, so as to be able to also report the significance levels (which would not make sense in the case of the raw numbers).

To answer the objection, we coded all of our determinations for whether CIL was found or not. Table 2 reports the results of comparing the determinations where CIL was found versus those where it was not. A couple of things are worth noting here. First, CIL is found in roughly half the determinations and not found in the other half. That suggests that these cases, when they are brought to an international tribunal, stand in equipoise—where the litigants have roughly equal chances of winning. Importantly for our purposes though, we see that the use of treaties as evidence is greater in the cases where CIL is found—68 percent of determinations use treaty evidence—as compared to where CIL is not found, 55 percent. As with the prior parsing, the differences are not statistically significant on the use of treaties. The relevant point, though, is that the primary result holds even when we limit ourselves to the subset of cases where CIL is found.

Table II: CIL Determinations Broken Down by Whether CIL was Found

<i>Variable</i>	<i>CIL found (n = 64)</i>	<i>CIL not found (n = 76)</i>
Parties' Agreement	19	3**
UN/League Resolutions	23	9*
UN/League Conference and Committee Reports	14	18
Domestic Cases	9	13
Domestic Statutes	5	8
International Tribunal Cases	52	32*
International Committee Reports	23	20
Treaties	69	55
Actions by States	5	5
Statements by State Officials	9	3
Academic	16	17
*** indicates significance at the .01 level, ** indicates significance at the .05 level and * indicates significance at the .1 level.		

3. Subject Area Differentials.

As explained in Part II.B.5, some scholars have suggested that courts apply the two-part test differently, as a function of the type of issue involved. The claim is that courts may look more to historical evidence of state practice and less to *opinio juris* in the case of

traditional types of CIL. By contrast, in disputes involving what scholars describe as modern CIL, courts are likely to look less to historical evidence and more to *opinio juris*. At first cut, it is not clear which box a court would put the IMF priority issue in. On the one hand, it looks like the type of topic that falls in the traditional box—it involves state interactions and does not implicate individual rights—unless one sees creditor rights in that light. On the other hand, financial interactions among states have not traditionally been governed by international law, so one might see this as a modern type of CIL. At this stage of the analysis though, the threshold question is whether there is any indication in the data that courts treat the different types of CIL questions differently. If they do not appear to, then we can put aside the question of whether IMF priority is modern or traditional CIL.

Fortunately, for our purposes, Table 3 shows little evidence of courts looking primarily to different types of evidence in individual rights cases versus those involving intergovernmental interaction issues. We see that treaties are cited significantly more often in rights-type cases, 83 percent, than in those involving intergovernmental relations, 54 percent, but the reality is that treaties are the most important type of evidence cited in either type of case.

Table III: CIL Determinations Broken Down By Subject Type (Collective Interest v. Individual Rights)

<i>Variable</i>	<i>Collective Interest Determinations (n = 105)</i>	<i>Individual Rights Determinations (n = 35)</i>
Parties' Agreement	11	6
UN/League Resolutions	15	17
UN/League Conference and Committee Reports	13	26
Domestic Cases	10	14
Domestic Statutes	4	14*
International Tribunal Cases	37	51
International Committee Reports	17	34*
Treaties	54	83*
Actions by States	7	0
Statements by State Officials	4	11
Academic	13	26
*** indicates significance at the .01 level, ** indicates significance at the .05 level and * indicates significance at the .1 level.		

To summarize, the results are fairly consistent, no matter how we parse them. The dominant form of evidence used in determinations of CIL looks to be forward-looking or aspirational evidence. That is, primarily treaties among states—which are arguably the strongest indicator of what states want—but also other forms of aspirational evidence, such as UN resolutions and international committee reports. These materials tend to generally focus on questions of what types of new rules would serve the world community in the future, rather than analyses of what rules have been utilized in the past. Under this rubric, the question that jumpstarted our inquiry—whether the IMF can be said to have a preferred creditor status under CIL—boils down to whether courts can be persuaded that this would be a good thing for the community of nations.

IV. POTENTIAL OBJECTIONS

There are many strong arguments in favor of the IMF being granted preferred creditor status when it lends to nations in financial distress.⁴⁴ The simplest argument is that this is emergency financing that is given to a nation when it has lost market access. No one else is willing to lend and the IMF, reasonably, demands that if it lends at below-market rates under such conditions, it should be assured that the IMF will be repaid before the other creditors who lent during the good times.

The argument in favor of IMF priority strengthens if one considers the fact that the IMF, by its own rules, can only lend to one of these nations in crisis when either (1) it is confident that the crisis in question is a liquidity one rather than a solvency one, that is, market access has been irrationally withdrawn and will likely return, or (2) when a failure to support this nation presents a high degree of systemic risk or contagion.⁴⁵ The IMF is also not allowed to lend when a nation is not attempting, in good faith, to resolve its arrears with its prior creditors,⁴⁶ the goal here being to protect against the moral hazard problem of countries defaulting on private creditors too readily, in the expectation of receiving IMF support. All in all, IMF

44. See, e.g., Rutsel Silvestre J. Martha, *Preferred Creditor Status under International Law: The Case of the International Monetary Fund*, 39 INT'L & COMP. L.Q. 801 (1990).

45. INT'L MONETARY FUND, SOVEREIGN DEBT RESTRUCTURING—RECENT DEVELOPMENTS AND IMPLICATIONS FOR THE FUND'S LEGAL AND POLICY FRAMEWORK 48 (2013), available at <http://www.imf.org/external/np/pp/eng/2013/042613.pdf>.

46. See *id.* (discussing the good faith criterion).

lending practices are set up with the intent to enhance global welfare.

The objections to the foregoing line of argument are that we have oversimplified and that IMF lending is rarely as benevolent as we have portrayed. Instead, it is politically driven by the interests of the IMF's largest shareholders and that the conditionality and austerity that the IMF almost always demands, particularly from weak nations, has more to do with enabling the expansion of western interests and often ends up worsening the financial crises in question.⁴⁷

For purposes of our analysis, the foregoing normative debate over the degree to which priority for IMF lending is socially beneficial is not particularly relevant. What our analysis says is that the type of evidence courts are most likely to look to is aspirational evidence—what kind of rule would be good for the system—and that the lack of evidence of *opinio juris* is not going to be an absolute bar to a finding of a CIL doctrine on IMF priority. That said, and assuming that our preliminary empirical analysis holds up, there are still a number of objections that critics might raise about our project. Below, we list the three we have heard most frequently and our answers to them.

A. *The IMF Might Not Want Legal Priority*

A critic could validly point out that if the IMF had wanted legal priority, it could have easily negotiated for it in every one of its contracts. It did not, and perhaps that means the IMF believes that it is best for it and the international system for it to ensure compliance with its priority via informal pressures rather than formal ones.⁴⁸ We concede that the foregoing is a possibility; indeed, it has been the status quo until now. But this is where the *NML v. Argentina* case over the meaning of *pari passu* comes into play. If the IMF does not have formal legal priority over other creditors, then it is *pari passu* with everyone else. And under *NML v. Argentina*, that means that those other creditors, if they do not get paid on par with the IMF, can come after the IMF. We are fairly confident that this is not the state of the

47. See, e.g., Kunnibert Raffer, *Improving Debt Management on the Basis of UNCTAD's Principles*, in *SOVEREIGN FINANCING AND INTERNATIONAL LAW: THE UNCTAD PRINCIPLES ON RESPONSIBLE SOVEREIGN LENDING AND BORROWING* 176 (Carlos Esposito, Yuefen Li & Juan Pablo Bohoslavsky eds., 2013); see also Juan Pablo Bohoslavsky, *Consecuencias jurídicas y económicas del crédito abusivo (Especial referencia al endeudamiento soberano)* (2006) (unpublished Ph.D. thesis, University of Salamanca).

48. As a formal matter, IMF lending does not generally occur through loan documents as they are conventionally understood, but through facilities that it already has in place to handle matters such as balance of payment inequities.

world that the IMF wants. That said, if we are wrong in reading the tea leaves, and the IMF is not concerned about the implications of *NML v. Argentina*, they do not have to assert the CIL argument that we suggest they could. If they do not, their status of having no more than de facto priority will remain, and they will either get out of the business of providing emergency financing to distressed nations or they will get sued a lot.

B. All Those Credit Default Swap Contracts That Will be Triggered

The objection that we have heard most often has to do with the parade of horrors that will follow regarding credit default swap (CDS) contracts.⁴⁹ Most sovereign CDS contracts have as one of the events of default a change in the ranking or priority of the debt. Holders of these CDS contracts have in the past raised the argument that IMF lending to a nation in distress, where the IMF had preferred creditor status, is a change in their ranking, after all, they are now junior to the IMF in terms of priority. The answer to these CDS holders thus far has been that the IMF's preferred creditor status is a de facto one, not a formal legal one, and that their contracts are triggered only by a change in formal legal priority. Should a court state that, as a matter of CIL, the IMF now had formal legal priority for its lending, would that not bring all those past holders of CDS contracts who were denied their claims—or did not make them—in the context of IMF programs for countries like Ireland, Spain, Portugal and Greece, rushing back in?

The point is a fair one, but there is a legally familiar answer. Courts do occasionally reinterpret laws in ways that mean that actors who might not have had a claim some years prior, and therefore did not bring it, now realize that they may have a claim under the new legal interpretation. Such reinterpretations, though, do not necessarily bring a flood of litigation. Statutes of limitations for most contract claims are generally no more than a few years. Thus, in the context of the immediate inquiry, many of the claims will likely have expired. Moreover, given that the IMF has control over when or if it asserts its CIL claim, it can make sure that it does so strategically to avoid the greatest possible amount of litigation. Further, it could be argued that many of the past claims would not be valid because the court would

49. At their core, CDS contracts provide a sort of insurance against certain credit events such as default. For additional detail in the sovereign context, see Anna Gelpern & Mitu Gulati, *CDS Zombies*, 13 EUR. BUS. ORG. L. REV. 347 (2012).

be saying that CIL on IMF priority has evolved, *at this point in time*, from a norm to a law. Past claims arguably were under the old de facto priority regime and not the new de jure priority regime.

C. *No Turning Back*

One of the great virtues of CIL is that it evolves, and when needed, it can evolve quickly. Courts can use it to tackle problems caused by unexpected shocks to the system, such as the decision in *NML Capital v. Argentina*. This is particularly valuable in contexts such as international law, where lawmaking is otherwise extremely difficult even if the majority of nations agree on one particular legal path. A considerable downside of CIL, though, is that once it is deemed to have evolved from norm to law, reversing course is extremely difficult. Hence, if it turns out that the IMF successfully asserts the CIL argument and then realizes, after seeing how it works for some years, that de jure priority status is causing immense problems, there is no easy mechanism to reverse course under the conventional understanding of CIL. Enough nations would basically have to violate the new CIL, such that a court could look to all of those violations to say that new CIL had evolved. To that end, the IMF and its member nations should think hard before they assert that IMF priority should be deemed to have evolved from de facto to de jure priority.⁵⁰

CONCLUSION

The Second Circuit's October 2012 decision in *NML v. Argentina* has caused much consternation in the sovereign debt world. Breathing life into a formerly catatonic boilerplate contract provision, the court held that a sovereign cannot pay some bondholders while neglecting to pay other holders of the same type of bonds—that is, unless clear legal priority separates those bondholders. De facto preferred creditor status, like that traditionally enjoyed by Official Sector institutions such as the IMF, simply no longer cuts it. And without this preferred status, the IMF may be unable to fulfill its lender-of-last-resort role, which in turn could harm the entire system of international finance. Irrespective of one's normative stance regarding

50. Another answer would be to rethink that conventional rule by which CIL, once it arises, is so very difficult to alter; and there is a view in international law scholarship that suggests that this should indeed be the case. See Curtis Bradley & Mitu Gulati, *Withdrawing From International Custom*, 120 YALE L.J. 202 (2010).

the role of the IMF, this uncertainty is concerning.

CIL may provide a solution to this problem. To see how, one has to go beyond the conventional CIL doctrine to an analysis of how courts actually decide CIL matters. We find that courts tend to use forward-looking evidence when confronting questions of CIL—a far cry from the state practice/state belief paradigm that dominates the textbooks. Instead of determining whether the quantum of state practice and *opinio juris* merits a finding of CIL, courts appear to modify the inquiry to whether states would *want* a particular norm to be law. Under this conception of CIL, a court could legitimately find that the traditional and established norm of the IMF having *de facto* preferred creditor status has now evolved into a *de jure* preferred creditor status. As such, the IMF's position as a preferred lender may not be imperiled after all.

Before concluding, we note a handful of caveats to our analysis.

First, our empirical analysis only scratches the surface in terms of sophistication of analysis and the size of the data analyzed. We only report simple counts and graphs and have limited the scope of our inquiry to cases from international tribunals. A critic could point out that the majority of CIL determinations are by domestic tribunals. Further, a dispute over IMF priority is most likely to arise in a case in either English or New York domestic courts rather than the ICJ because most debt contracts are governed by the laws of those jurisdictions and because private investors cannot get to the ICJ unless some state supports their claim. Our hope is that future studies will look at a larger number of cases and use more sophisticated empirical tools.

Second, by focusing on the issue of IMF priority and avoiding the question of whether other Official Sector institutions like the European Central Bank, The World Bank, the European Investment Bank and so on are deserving of similar status, we have arguably ducked the hardest question about Official Sector priority. This is so for at least two reasons. First, the lending of these institutions is not quite so clearly “lender of last resort” lending and, therefore, the argument in favor of priority is not quite as clear. Second, unlike as with IMF priority, the norm of granting priority to these institutions is not as well-established.

Third, our primary finding is that treaties are the primary form of evidence used in determinations of CIL. From there, we extrapolate that what judges must be doing is looking to treaties for evidence of

what the global community considers is best for its collective interest. We think this is the most plausible hypothesis, based on what we know. But it is but a hypothesis, and others are possible. For example, there are those who might take a more realist perspective and argue that judges in all these cases are primarily serving the interests of their individual states and that the two-step CIL test is simply fluff.⁵¹ Again, a matter worthy of further inquiry.

51. *E.g.*, Melissa Morgan, Customary Avoidance (Jan. 1, 2014) (unpublished draft), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2385277.