

A few observations on customary international law in Latvian court practice

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Abstract

Customary law is one of two principal sources of international law, side-by-side international treaties. Mainstream academic studies of customary law often look at the case law of international courts and tribunals, or at least the application of customary law by national courts of larger countries. The purpose of this article is to take a different angle. The author analyses publicly available practice of Latvian courts to see how national courts face the challenge of applying customary law. A source of international law that is intrinsically linked to the challenge of determining its scope. The article shows that for national courts in Latvia, scrupulous application of customary law is not an easy task, and courts do not perform an in-depth analysis of state practice. Instead, national courts prefer different shortcuts, e.g., analysis provided in academic writings or works of the International Law Commission.

Keywords

Customary law • state practice • *opinio juris* • Latvian judiciary

INTRODUCTION

Most standard textbooks on international law usually regard customary law as a source of comparable standing to international treaties. The importance and development of customary law is often illustrated by examples from international courts and tribunals and examples of state practice that have affected the conduct of the entire international community. To a lesser extent, such texts refer to national court practice, and when they do, it is the practice of the larger countries. Against this backdrop, the purpose of the article is to see to what degree national courts actually perform the analysis of state practice and *opinio juris* of states when faced with the challenge of applying customary law. Taking into account that national courts, particularly in small countries, would often lack the expertise in international law and resources that characterise often colossal litigation before international courts.

This is a contained empirical and inductive study that looks at the practice of application of customary law rules within a single legal system—Latvian courts. The study then

generalises the conclusions drawn from the analysis of the relevant cases. An important caveat is that the author only looks at general courts. These are general courts (in a technical sense) that hear criminal and civil cases, economic courts, and administrative courts. This study examined all three instances. This study did not use the practice of the Latvian Constitutional Court (LCC). In Latvia, the LCC is a separate judicial body that does not resolve actual disputes between parties. Its function is to determine the validity of legal acts, in particular, due to their possible non-conformity with the Latvian Constitution. However, while the stark difference between the LCC and other courts could justify its absence from the study, practical considerations were more relevant. LCC practice is not represented in the public database of decisions used to prepare this study.

This brings us to the description of the database and its uses. In 2013, Latvia implemented the so-called ‘tiesas nolēmumu anonimizētā datubāze’ (anonymised database of court rulings) that is available at: <https://manas.tiesas.lv/eTiesasMvc/nolemumi>. In 2025, the database was merged with a judicial platform called “E-Lieta” (“E-Case”) and new rulings were no more added to the database as of 20

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March 2025. New decisions are added to the new “E-Case” platform. Thus, in this study, the author used only rulings that were added to the anonymized database from September 2013 until March 2025.

The database contains rulings from all courts mentioned above (except for the LCC) and all instances. Importantly, the database mostly contains rulings that resolve substantive disputes, while procedural decisions are published sporadically. The author used a simple search term ‘paražu tiesības’ (that is ‘customary law’) to search the ruling. The author used an option to search it using inflections of the term (‘meklēt frāzi locījumos’). It is important to underline that the database usually contains decisions in the same case from multiple instances if the initial and appellate decisions were appealed. The search also does not discriminate between the use of the phrase ‘paražu tiesības’ in the part of the ruling where the courts restate the arguments of the parties, the ruling of the lower instance court, or actually mention it in the reasoning. In fact, Latvian court have a prevalent tendency to recite in detail and often verbatim arguments of the parties and arguments of lower courts.

The search was performed on 28 July 2025. Later, the collected cases were manually sorted, identifying those that did not actually refer to customary law in the understanding of international law. The few cases that referred to customary law were manually analysed. The following chapters offer an introduction into the complexity of customary law and then present the research results.

RESEARCH RESULTS AND DISCUSSION

The intrinsic complexity of customary law

Before moving on to our empirical study, it is useful to provide a brief introduction to the nature and scope of international customary law. It has been stated that ‘[f]or most of human history, the rules governing relations between states remained unwritten’ (Yoo and Stradner, 2018: 315). This implies that the majority of such rules are customary rules listed in Art. 38(1)(b) of the International Court of Justice (ICJ) Statute. Their customary law is listed just below the treaties, and it is customary law that is referred to as ‘general international law’ (Roberts and Sivakumaran, 2024: 96).

Of course, it is well acknowledged that ‘[t]reaties are the most important source of obligation in international law’ (Crawford, 2019: 28; see also: Jennings and Watts, 1996: 31). However, ‘[c]ustom is the oldest and the original source of international law as well as of law in general’ (Jennings and Watts, 1996: 31). Judging by the number of monographs devoted to customary law, it is clear that, for academia, it remains a crucial

source of international law (e.g., Dupuy, 2021; Lepard, 2017; Mayali and Mousseron, 2018; Sender and Wood, 2024). The extensive reliance on customary law in the recent rulings and opinions of the ICJ confirms that customary law preserves its importance in the practice of international courts.

This state of affairs should not surprise us. Numerous core principles of international law are, in reality, customary rules. Most importantly, the principle of sovereignty among states informs all other rights and duties linked to statehood. In the words of Viñuales, ‘the main actionable legal concepts expressing the idea of sovereignty (i.e., police powers, immunities, the necessity defence, the interpretation rules applicable to limitations of sovereignty, etc.) are both ‘general’ and ‘customary’ in nature’ (Viñuales, 2014: 318). Besides sovereignty, customary law pervades state responsibility, diplomatic protection, state immunity, the rights of states to possess nuclear weapons, and international environmental law. Interestingly, the very rules on creation and application of customary law are customary, and so are the rules concerning international treaties concluded in verbal form (Schmalenbach, 2018: 57), and, of course, numerous gaps in the international treaty regime.

However, the application of customary law presents several specific and significant obstacles. First, due to its unwritten form, it may be very difficult to establish the content of customary rules (Boyle and Chinkin, 2007: 163). But that is not all. Second, additional problem occurs—‘because of its nature as custom, dispute arises not just over its content, but over the process by which a norm assumes the status of law’ (Yoo and Stradner, 2018: 316). Thus, the uncertainty might be related not only to primary rules of international law but also to secondary rules, i.e., ‘the rules that are applied to determine the existence and content of the primary rules’ (Roberts and Sivakumaran, 2024: 93). This is in contrast to domestic law, where there is little dispute on the existence of the rule, but most disputes focus on its application to a specific fact pattern (Roberts and Sivakumaran, 2024: 94).

Usually, it presented that for a customary rule to be created, there must ‘general and consistent practice by States [...]’ (Roberts and Sivakumaran, 2024: 96; see also: Lowe, 2007: 37). Yet scope of practice differs. While general customary rules require broad practice, customary rules created among two or a few states require the observance of the customary by those states only (Virally, 1968: 132–133). The consistency of practice, occasionally, has also been disposable, for instance, ‘the principle of non-sovereignty over the space route followed by artificial satellites came into being soon after the launching of the first sputniks’ (Shaw, 2021: 506). In other words, a customary rule was created rapidly through practice of two states - the United States of America and the Soviet Union. It could be argued that only they possessed the ‘their special relationship with the subject-matter of the practice’

(Shaw, 2021: 508), hence their practice was sufficient. However, we should not forget that concerning the use of near space affected sovereignty of all states.

However, practice is not the most difficult part of creating a customary rule. The more controversial aspect is *opinio juris*. Even basic explanations of the concept are often contradictory. As one textbook defines it as: 'belief that a state activity is legally obligatory [...]' (Shaw, 2021: 513). This might sound correct if a state's practice restricts its existing rights. For instance, one can conceptualise the practice of a state that allows satellites to fly over its territory as being accompanied by a belief that it is legally obliged to abstain from obstructing the satellite. But even then, states might well understand that the traditional concept of sovereignty could very well allow them to act, but instead felt that the self-imposed restriction on their sovereignty was 'reasonable and just' (Lowe, 2007: 40). Moreover, in all cases concerning such entities as states, we cannot talk of any belief whatsoever, but only about statements, actions, and inactions that indicate that states consider something as reasonable and just or unreasonable and unjust (Cf. Roberts and Sivakumaran, 2024: 101).

However, once we look from the point of view of the state that violates international law, we cannot talk about any acceptance of a legally binding obligation. For instance, in 1945, the Proclamation by the US President Truman signified that 'the USA asserted for the first time that coastal States had a right to utilise natural resources in the subsoil and seabed of the continental shelf that was contiguous to their coastlines' (Roberts and Sivakumaran, 2024: 100). In this case, the USA hardly demonstrated that it was obliged or had a right to extend its powers over the sea, but as stated above, it considered such an extension to be reasonable and just.

This very short overview of the two principal elements making up secondary rules of international law, even without any further study of nuances and contradictory precedents, is evidence of the complexity intrinsic to customary law. There are a handful of textbook cases in which the ICJ (and its predecessor, the Permanent Court of International Justice) delved into the analysis of the existence of customary law. The usual suspects are the *Lotus*, *Asylum*, *North Sea Continental Shelf*, *Nicaragua*, *Right of Passage over Indian Territory* cases and a few others. Yet, while *opinio juris* seems a crux of creation of customary law, even the ICJ 'will often infer the existence of *opinio juris* from a general practice, from scholarly consensus, or from its own or other tribunals' previous determinations' (Crawford, 2019: 24). Thus, either simply presuming that it exists or outsourcing its determination to others be it scholars or other tribunals.

Now that we have laid down the general outlook of customary law, we can look at the practice of Latvian courts to see whether we can formulate any hypotheses concerning the interaction between customary law and Latvian national courts.

Findings of the study

The initial study allowed the author to identify 62 decisions that contained the term 'customary law' and its inflections in the title. However, after manual analysis of these cases, 41 were found to be irrelevant. In these 41 decisions, parties and occasionally courts mentioned customary law in various unrelated contexts. For instance, customary laws regarding hunting, paying tips and granting surnames. These were excluded from the case pool.

The remaining 21 decisions were analysed further. However, many of them still hardly shed light on customary law. The first sub-section will look at such cases that only marginally or *en passant* mention customary law. The second sub-section will focus on those that apply or comment on customary law.

Cases marginally referring to customary law

Firstly, it is necessary to mention four decisions (Judgment No. A420495911, 2013; Judgment No. A420591712, 2014; Judgment No. A420602312, 2015; Judgment No. A42808309, 2011) where administrative courts seemed to use a certain template for cases concerning alleged violations of the European Human Rights Convention. The courts include in their reasoning the reference to Art. 1(5) of the Administrative Procedure Law that states: 'An external legal act is the Constitution (*Satversme*), laws, Cabinet regulations and binding regulations of local government, and also international agreements and original Treaties of the European Union and legal acts issued on the basis thereof'. After this reference was included, the courts analysed the alleged violations of the Convention, without ever actually dealing with customary law. These were similarly irrelevant to our study.

Marginal references to customary law are likewise found in three decisions dealing with the same customs dispute. In the first instance decision, the question posed by the court was whether a vessel running under the Latvian flag was to be treated as Latvian territory for purposes of the law of customs. The court stressed that this was the case under Art. 91 (1) of the UN Convention on the Law of the Sea. However, the applicant argued that the state authority could not apply the UN Convention because it was not yet in force when the goods were delivered to the vessel running under the Latvian flag. The court, without a factual analysis but by reference to Latvian scholars, decided that Latvia has complied with and applied the UN Convention as customary law (Judgment No. A42312805, 2007).

The appellate court upheld the decision in principle and no longer focused on customary law aspects (Judgment No. A42312805, 2008). The Supreme Court squashed the appellate decision and returned the case to the appellate court. The second review by the appellate court found that the Customs Code of Latvia was not to be interpreted extensively, and customs were not applicable to vessels operating under

the Latvian flag (Judgment No. A42312805, 2009). What was relevant was whether the goods were delivered to be circulated in the Latvian market. Moreover, the vessels in question were not located in Latvian territorial waters. At the end of the day, the entire string of decisions concerning this dispute was not much devoted to the application of customary law but rather the Customs Code of Law. It is important to stress that in Latvian, 'customary law' and customs do not sound alike and do not share any linguistic origins.

One decision, where the term 'customary law' appeared, dealt with the removal of citizenship (Judgment No. A420139818, 2019). The applicant, opposing the removal, referred to Art. 1 of the Convention on Certain Questions Relating to the Conflict of Nationality Law (hereinafter, the Nationality Convention), stating: 'It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality'. The court never caught up with the argument and did not refer to anything related to the customary law.

Comparable is a decision (Judgment No. A420256518, 2020) where the court relied in Art. 23(3)(2) of the Latvian Immigration Law stipulating a temporary residence permit shall be issued if it complies with the norms of international law or is related to reasons of a humanitarian nature. Here, the appellate court simply observed that the norms of international law also embrace customary law, with no further consequences for the given case (Judgment No. A420256518, 2020).

Similarly, in another decision, (Judgment No. AA43-0407-23/17, 2023) a person was arguing being qualified for the status of a stateless person. However, there was an obstacle: he was a Cuban national. Therefore, during the appeal against the decision of the first-instance court, he argued that Latvia had to ignore his nationality as Cuba, in violation of international law, prohibited him from revoking it. In this context, he referred to Art. 1 of the Nationality Convention. The appellate court simply found that this line of reasoning was irrelevant, as the issue was the granting of the status of a stateless person, which was impossible for a national of another country. In another decision dealing with the removal of citizenship, the court itself refers to Art. 1 of the Nationality Convention, but thereafter never dealt with customary law, instead focusing on the Convention on Citizenship by the European Council (Judgment No. A42-01398-18/20, 2018).

Finally, one decision almost had an opportunity to apply the Article on State Responsibility (ASR). In this peculiar case, an individual considered that her human rights had been violated by another individual who had submitted a submission to state institutions, allegedly amounting to libel (Judgment No. C30406715, 2016). Without focusing on the private law dispute between parties, it is worth noting that the alleged

victim claimed before the appellate court that the first instance should have applied Art. 8 ASR to determine whether the author of the submission had acted on behalf of the Latvian state. This argument was rejected by the Appellate Court, emphasising that the claimant had failed to prove that the defendant's conduct led to defamation, and as a result, any references to the ASR were irrelevant by definition.

Cases where customary law was of relevance

The immunity case

In one case, the Latvian Supreme Court applied a rule of customary law that dealt with state immunity. The case itself is not remarkable, but it should be stressed that Latvian courts had surprisingly subtle experience with state immunity.

In 2004, a first-instance court in case No. C27150904 rejected a claim arising from the employment law of a security guard who had worked at the US embassy and considered that the embassy had violated his rights as an employee (Paparinskis, 2005). The court rejected the claim based on the embassy's immunity. The decision itself was not groundbreaking, but it sparked an extensive 2005 commentary by M. Paparinskis (current president of the International Law Commission (ILC)). This article had a remarkable effect in 2007, when the Supreme Court had to assess a somewhat similar fact pattern (Judgment No. SCK-237, 2007, facts of the judgment and the reasoning are cited from Paparinskis, 2005). An individual filed a claim for compensation for losses against the Russian embassy. The claim was based on a lease contract between the embassy and the individual in question. The embassy acted as a tenant and its diplomat, residing in the apartment, allegedly caused damage to the apartment.

The Supreme Court made it clear that since the rent contract was concluded with the embassy, the immunity of diplomatic agents was irrelevant (Paparinskis, 2008). The relevant immunity was that of a state, and the Supreme Court made a seminal finding that in Latvia, state immunity should not be absolute and should not extend to actions that can be characterised as *jure gestionis*. Hence, a dispute over a rent contract was clearly characterised as *jure gestionis* and was not covered by immunity.

The 2007 ruling of the Supreme Court demonstrates surprising depth and sophistication when making statements about international customary law. At the same time, the ruling itself does not delve into scrupulous analysis of state practice. This paradox can be easily explained as follows. The Supreme Court drew extensively on Paparinskis' article from 2005, and as a result, generated perhaps one of the most (if not the most) sophisticated Supreme Court decisions on public international law in the history of Latvian statehood. Yet, the reliance on the publication, implies 'outsourcing' of actual analysis of state practice. This task was exquisitely performed by M. Paparinskis.

Owing to their age, these two rulings did not appear in our database search. Simultaneously, our study uncovered a 2015 decision by the Supreme Court concerning state immunity (Judgment No. SKC-2048-15, 2015). This was a commercial dispute between the parties. A Latvian company advised an American company to lend money to a Belarusian company. In their contract, the Latvian company undertook liability in case the Belarusian company did not perform its obligations and failed to return the loan. As it turned out, the Belarus company did exactly that. As the Belarusian company was owned by the president of the Belarusian administration, the Latvian company wanted to sue the Belarusian state directly for compensation. The case went to the Supreme Court, which denied the claim on the basis of the immunity of the Belarusian state.

The Supreme Court, referring to the Court of Justice of the European Union case *Ahmed Mahamdia* (Judgment C-154/11, 2012), stated that it was a generally recognised principle of international customary law that a state could not be sued before a court of another state. The Supreme Court rejected the claimant's argument that Belarus could be sued based on the UN Convention on Jurisdictional Immunities of States and Their Property (hereinafter: Immunity Convention). The Supreme Court pointed out two justifications: (1) although Latvia had ratified the Immunity Convention, it was not in force yet; (2) it was not ratified by Belarus.

The ruling is interesting for its scepticism towards arguments based on the Immunity Convention, even though in 2007, the convention (not ratified by Latvia) was used as an *obiter dictum* argument to justify the rejection of absolute immunity (Judgment No. SKC-2048-15, 2015). In fact, the Supreme Court perhaps had no reason to specifically oppose arguments based on the Convention. While Art. 10(1) of the Convention eliminates immunity from jurisdiction in commercial disputes, its application is excluded by Art. 10(3). The latter provision states that if the proceedings are related to a commercial transaction in which a state enterprise or other entity established by a state has an independent legal personality and can participate in civil litigation and own property, state immunity is not affected. In the given case, the dispute clearly involved acts of a separate company, which was, however, closely related to the state. The Supreme Court had space for maneuverer within the text of the Convention to preserve the immunity of Belarus without necessarily ruling on the customary status of the Convention.

A decision on state responsibility

We have already mentioned one case where a court was close to applying the ASR. However, there is another case mentioning the ASR. It cantered on the infamous Saint George's ribbon (Judgment No. C33444821, 2024). A military symbol used by the Russian Federation; the ribbon is often

directly associated with its aggression towards other states. In 2022, a person was not served in a restaurant because he was wearing a ribbon. He claimed compensation from the restaurant. The court of first instance firmly sided with the restaurant owners and rejected the claim. The court used a plethora of arguments, but, *inter alia*, it mentioned that the ribbon was used by the Russian Federation during its aggression in Crimea and other Ukrainian territories—actions that were incompatible with Art. 2 of the UN Statute. Moreover, these actions violated *ius cogens* rules, and based on Art. 41(2) ASR, states were prohibited from recognising such a violation. In this study, the court mentioned that the ASR included rules that were recognised as customary rules.

Decisions related to customary treaty law

A significant number of decisions concerned the Vienna Convention on the Law of Treaties (VCLT). In 2015, (Judgment No. C33257614, 2015) a first instance court heard a case concerning a misdirection of luggage by an airline. The dispute was about the compliance of the claim with the 2-year limitation period espoused in Art. 35 of the Convention for the Unification of Certain Rules for International Carriage by Air (hereinafter: Montreal Convention). Without a clear justification, when assessing compliance with the provision, the court recited Art. 31 VCLT on the interpretation of treaties, *en passant*, remarking that Art. 31 codified customary rules.

In 2016, (Judgment No. SKC-268/2016, 2016) the Supreme Court rendered a decision in a civil dispute concerning the division of an oil transportation company immediately after Latvia regained independence. The division of the company was based on an Act signed by governmental representatives of Latvia, Lithuania, and Belarus. One of the parties in the dispute remarked that the Act ought to be assessed on the basis of the VCLT, because even though Latvia had not yet joined the VCLT when the Act was signed, its rules on the conclusion of treaties had the status of customary law. The Supreme Court did not adopt this line of reasoning.

In 2018, (Judgment No. SKC-1494/2018, 2018) in another litigation related to the same fate of the oil transportation company and its property, the first instance court found that the Act was an international treaty and was governed by the rules contained in the VCLT, because even though Latvia had not joined the VCLT when the Act was signed, its rules represented customary law. In 2020, dealing with the validity of the same Act, the Supreme Court squashed the decisions of the appellate court, expressly stating that the Act had to be assessed by lower courts based on the VCLT that codified customary law rules. The Supreme Court insisted that the appellate court had to assess whether the Act fell within the concept of an international treaty and whether its conclusion was authorised by the Latvian state. In 2021, (Judgment No. CA-0023-21, 2021) following these

instructions, the appellate court once again heard a case dealing with the oil infrastructure and ownership over it. In this study, the appellate court repeated the same statement that the VCLT codified customary law and applied it to the Act to find that it was not concluded in a manner that demonstrated state consent.

In December 2020, (Judgment No. SKA-109/2020, 2020) the Supreme Court faced a different case related to the payment of retirement pension to a US national. The problem was the application of the bilateral pension treaty between the US and Latvia, which the Latvian authorities refused to apply as the person in question had not been granted the status of a pensioner in Latvia. An important issue was that the treaty was concluded via an exchange of diplomatic notes and was never ratified by the parliament. Hence, it was argued that such a treaty could only pre-empt legal acts adopted by the government, but not parliamentary laws with higher legal force. The Supreme Court first established that, at the time the treaty was concluded, Latvia had no unanimous approach as to which documents had to be ratified by the legislative branch. However, in addition, the court stressed that Art. 26 VCLT, establishing the *pacta sunt servanda* principle, was applicable to treaties concluded by Latvia even before Latvia joined the VCLT. The latter was a direct codification of customary rules. Hence, the person in question could rely on the treaty between the USA and Latvia.

Finally, in 2023, the Supreme Court rendered another decision concerning the treaty on pensions between the USA and Latvia (Judgment No. SKA-6/2023, 2023). Here, once again, the Court stated that the interpretation rules found in the VCLT reflected customary rules. This time, the Supreme Court substantiated its conclusions by references to the practice of the ICJ in the Pulau Ligitan (Judgment Sovereignty over Pulau Ligitan and Pulau Sipadan, 2002: para. 37) and Arbitral Award case (Judgment Arbitral Award of 31 July 1989, 1991: para. 48).

In all these cases, Latvian courts have not analysed the existence of specific customary rules and their content. Instead, courts have used shortcuts. External authorities are to establish that the rules of the VCLT amount to customary law. Then, the text of the Convention is examined to determine the content of these rules.

CONCLUSIONS

Formally, treaty and customary rules have equal standing in international law. However, we could describe them as 'same same, but different'. Performing the entire exercise of establishing the existence of a customary rule and then

determining its content can be a very complex task that is hardly comparable to the complexity of applying a treaty rule. For international courts and tribunals, the application of both sources might be a realistic feat. Some national courts with exceptional expertise and resources, very significant or costly cases that allow parties to invest money into the preparation of the reasoning or themselves, might be able to handle this complexity. However, for most national courts, it is different.

This study was inductive. The author proposes a generalised hypothesis based on the study of a single country. The hypothesis may be incorrect if comparative studies are conducted; however, there is logic behind it. The hypothesis makes several claims. The first aspect is almost a truism: in modern times, customary international law is not often relevant to national courts. That is not surprising. Courts mostly deal with individuals and companies and not interstate disputes. Traditionally, international law has hardly been applied to these groups. However, treaty law encompassing human rights applies specifically to individuals; thus, courts are much more invested in the application of treaty laws, while customary law, by its inter-state nature, is a rare guest in national court rulings.

The second aspect is that in rare cases where national courts might need to apply international customary law, they lack the expertise and resources to assess the customary rules. Scholars like to engage in a complex dissection of the secondary rules needed to find the existence of a customary rule.

However, this is a more complex exercise in practice. Even the ICJ often skips the in-depth analysis of *opinio juris*, deriving it from the general practice of states. For national courts, an in-depth analysis of the creation and even interpretation (dependent on the practice of states) is an overly complex task, and courts simply use shortcuts. Latvian court practice does not offer any examples where courts would directly study state practice of other states to assess the existence of customary rules and their content. On a few occasions, when more profound assessment was performed, courts used several shortcuts.

Unsurprisingly, in Latvia, the most in-depth analysis of customary law in the judgement of the Supreme Court is built extensively on the analysis offered by scholar M. Pāparinskis, who allowed the court to engage in a profound analysis of modern state immunity law. Likewise, other shortcuts exist, most notably the statements of international courts and the work of the ILC. In fact, the ARS has become a synonym for customary law on state responsibility, almost without a critical approach. Even for the ICJ, the Articles have become customary law. Thus, both international and national courts hardly apply any real customary law, but rather written law

created by the ILC. This confirms that all courts long for a written text rather than second-guessing the meaning of state practice (Virally, 1968: 140). Although this poses a risk that national courts do not actually apply true customary law, but its idealised version (Virally, 1968: 142, observing that any codification of customary law inevitably leads to its supplementation and reformulation). Paradoxically, endlessly confirming the relevance and correctness of the ARS strengthens its customary status.

Ultimately, the result might be a truly frozen set of rules that, unlike real customary law, is not subject to much change, unless the ILC revises them, creating new 'customary' rules. If customary law is seen as valuable as 'it is activated by spontaneous behaviour and thus mirrors the contemporary concerns of society', (Shaw, 2021: 500), then the practice of national (and international) courts heavily relying on shortcuts by the ILC could reduce the living nature of customary law. As the main driver for a change would not be a state practice, but rather revision by the ILC, which, in the absence of practice outside the scope of the ARS, would mean the invention of new rules by the ILC.

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