
THE PLACE AND NEXUS OF CUSTOMARY CRIMINAL LAW IN INTERNATIONAL LAW*

Abstract

There has been heightened scholarly discourse regarding the intersection, interrelationship, and nexus between customary criminal legal norms and international law. This dialogue is intensified by the collision stemming from their varied and heterogeneous legal standing and classification, amorphous and unclassifiable structure, and the muddled and confusing grasp and perception of these concepts by academics and scholars. One profound hurdle can be seen in the way customary criminal law is viewed: its fluid and uncodified nature, which can be compared with the clear framework of a statute. A further deep complication arises from the structure, essence, and substance of customary criminal law. Because it relies heavily on historical precedent, its legal authority remains deeply ambiguous. Another associated difficulty is discerning the foundational principles of international law, specifically how they govern sovereign States and their citizens, and whether States are bound by them as a matter of legal obligation. This paper aims to provide a legal philosophical examination of the interplay, nexus, interrelationship, and intersection between customary criminal law and international law. This paper further seeks to present a doctrinal critique and a legal philosophical evaluation of the dynamics of the interplay and intersection between customary criminal legal norms and international law. This paper submits that theoretical assumptions as well as legal doctrines regarding the philosophical validity, normative nature, and regulatory enforceability of customary criminal law and international law sometimes lead to a profoundly convoluted and ambiguous comprehension of these legal frameworks.

Keywords: International Law, Interplay, Customary Criminal Law, and Criminal Legal Norms

1. Introduction

Scholarly discourse persists without any decrease in intensity and potency regarding whether legal philosophy should be sidelined or discounted when determining the purview, applicability, scope, and binding obligations of customary criminal law and international law.¹ This interpretation is partially informed by the premise that, given its uncodified, murky, and evolutionary character, customary criminal law lacks the authority to bind state and non-state actors. In other words, customary criminal law rules, due to their non-statutory origins, cannot mandate legal compliance. The practical application of customary criminal law reflects the balance a jurisdiction strikes between indigenous legal traditions and international legal obligations. This implies that customary criminal law depends on how legal frameworks prioritize community-based norms over broader international law. This underscores the inextricable and organic nexus between international law and customary criminal law.²

This study explores the assertion that a local enforcement mechanism is mandatory for uncodified customary criminal law to attain binding legal efficacy in its general application. Put another way, it asks whether local punishment is required for traditional customary criminal law to be legally valid and effective in everyday use. This viewpoint rests on the idea that customary criminal laws are valid and legitimate only because they vary from place to place and are usually applied only when the local community authorizes them. This enquiry underscores the prescriptive authority of law and exemplifies the normative force of legal obligations. Historically, the courts' power to shape the law has been checked by constitutional limits and thresholds. This perspective triggers judicial scrutiny of statutory law. This interpretation creates complications, including its tendency to obscure the legitimate status of customary criminal law. In other words, such an understanding presents difficulties, as it leads to muddled conclusions about the actual role of customary criminal law.³ Put differently, legislative enactments resonate positivize customary law, effectively precluding the courts from establishing competing common-law norms. Within legal philosophy, the doctrine of positive law articulates a foundational premise regarding law in general, maintaining its validity so long as positive law remains the organizing principle of the legal order.

It is uncontested that positive law resonates with and reflects the premise that directives must satisfy certain threshold conditions to be recognized as valid legal norms. In other words, legal experts agree that the existing legal framework affirms the jurisprudential axiom that a rule must satisfy specific baseline requirements to attain legal status. This does not detract and diminish the position held by some legal experts that positive law is equally capable of regulating legal norms. Such a perspective directly opposes natural law theory, which anchors legality in moral reasoning even if that framework fails to reflect the empirical reality of global legal systems.

*By **Richard Suofade OGBE, LLM (London), PhD**, Senior Lecturer and HoD, Faculty of Law, Niger Delta University, Bayelsa State, Email: drogbe@ndu.edu.ng

¹ Larissa van den Herik, 'The Decline of Customary International Law as a Source of International Criminal Law' (2015) 13 *Journal of International Criminal Justice* 119

² Omri Sender and Michael Wood, 'The Emergence of Customary International Law: Between Theory and Practice' (2015) 11 *International Organizations Law Review* 133

³ Omri Sender and Michael Wood, 'The Emergence of Customary International Law: Between Theory and Practice' (2015) 11 *International Organizations Law Review* 133

Consequently, positive law remains central to shaping legal frameworks. This reflects, suggests, and resonates with a distinct shift from the dictates and caprices of natural law, which defines and explicates legality through morality and its associated dogmas, regardless of whether that philosophical deposition aligns with and reflects actual legal practice. Why this distinction matters is because legal structures and associated mechanisms diverge and criss carpets diverse jurisdictions, and their specific provisions remain viable only where constitutional governance effectively upholds legislative authority.

Most times, interpretive conundrums and cataclysms arise over how tribunals and the various assemblies apply and reflect codified statutes versus inherent rights. These frictions are ultimately resolved by the court of last resort or remedied through constitutional revision by the proper assembly. Working with these parameters of analysis, the charter appears to reign supreme, assigning ultimate interpretive authority as well as mandate to the high bench. Under stare decisis, the supreme tribunal's decrees are binding on all inferior judicatories, requiring a precise mapping of judicial remits. This seeming superstructure is subservient to the high court, yet the attendant and concomitant systemic courtesy never overshadows the adjudicative sovereignty of individual benches, which reflects a dual safeguard of natural and enacted law. Consequently, this inter-court reciprocity stands as a universal legal convention across both civilian and common law heritages. This permissive and fluid legal analysis resonates with the palpable and structured principle of mutual judicial comity, which operates not merely as a procedural courtesy but as a foundational constitutional dictate and construct. Since it is embedded in the supreme law, this doctrine fundamentally restricts and confines legislative power. This means lawmakers do not possess absolute independence, sovereignty, and power, as their statutory output remains subordinate and subservient to the constitutional mandate and authority that courts review and regulate state laws. What is in vogue is that various State constitutions serve as the gatekeepers of legitimacy, prescribing the precise conditions under which the judiciary may validly interpret and apply these enactments.

A fundamental jurisprudential paradox and conundrum emerge here, however: it remains deeply ambiguous whether state constitutions genuinely intend to delegate proactive lawmaking power to the judiciary, or whether courts have simply assumed this role over time. Explicitly, foundational constitutional texts rarely address this systemic reality; the original framers routinely omit any mention of judicial legislation from early drafts. As a result of this development, rather than relying on structural textualism, jurists must infer and assume this authority through alternative methods of constitutional interpretation and judicial activism. A key way to escape this systemic ambiguity and subvert dangerous misinterpretations of the separation of powers, modern constitutional revisions should explicitly codify this lawmaking authority. The implication of this is that such a power must be transparently and without any ambiguity be vested in a clearly designated supreme court, formally recognized as the nation's ultimate judicial body and final arbiter of law.

Unfortunately, most of the time, legal experts and advocates who argue for an expansive or autonomous derivation of state judicial lawmaking powers rest on a fundamental misconception of the constitutional architecture governing state polities. Such assertions rely on an inaccurate historical analysis that mischaracterizes how the legal mandates of state judiciaries are derived and sustained. For instance, a cursory look at the American common law tradition reveals that the authority of their state courts of last resort is not inherently and intrinsically plenary; rather, it is strictly tethered to and circumscribed by the text of state constitutions. By treating judicial interpretation as a parallel mechanism for lawmaking, contemporary revisionist scholarship misreads the historical evolution of separation-of-powers doctrines. The concomitant implication is that it builds a distorted and fluid historical perspective that elevates the court from an arbiter of law into a de facto secondary legislative body, which then ignores the distinct institutional boundaries established during early state constitutional conventions. This kind of expected conceptual conundrum poses a serious structural hurdle and difficulty for legal scholars and political scientists who may be seeking to systematically classify, rank, and evaluate jurisdictions that depart from the traditional unitary model. What this means is that states with a bifurcated judiciary, such as Texas and Oklahoma, which maintain completely separate courts of last resort for civil and criminal appeals, defy conventional metrics for judicial ranking. Taxonomizing these split systems poses a major analytical hurdle for institutional research. Historically speaking, specialists in constitutional drafting, framers, and theorists assumed that judicial systems must strictly conform to a rigid, linear, and cohesive hierarchy. The classical model of a single, apex supreme court is designed to anchor the rule of law through structural uniformity, ensuring vertical and horizontal predictability across all lower tribunals.

Each time jurisdictions do not follow this unified structural model, the systemic friction between competing judicial hierarchies will become readily obvious. This is because these dual courts of last resort operate on parallel planes without a single superior tribunal to resolve internal jurisdictional disputes; their competing structures frequently produce irreconcilable legal doctrines and conflicting state laws. This jurisprudential disjointedness and atomization only throw the broader state legal system into disarray, leaving lower courts, practicing attorneys, and citizens without a clear, uniform standard of conduct. The resulting schisms in case law undermine the

predictability that a well-ordered legal system is designed to ensure, creating a state of perpetual legal uncertainty in which civil liability and criminal culpability may rest on conflicting interpretations of the same constitutional provision. It must be noted that the traditional constitutional obligation and function of the judiciary must remain strictly confined to statutory construction, textual interpretation, and case-by-case adjudication. When tribunals overstep these boundaries to craft policy from the bench, they disrupt the constitutional parity, balance, and equilibrium. This violates the foundational principle that the creation of law belongs to the politically accountable branches, while the courts remain tethered to the neutral exposition of existing law.

It is speculated that certain framers of the Constitution argued that the judiciary shapes and constructs principles and rules to foster a dynamic legal equilibrium. This reasoning is rooted in the framers' proclivity and predilection towards legal realism rather than positivism. It is hereby submitted that endorsing the Supreme Court as the highest law of the land does not empower the judiciary to enact state legislation. Although specific constitutional clauses may authorize the Supreme Court to legislate. In other words, scholars widely acknowledge that certain constitutional framers operate under the premise that judiciaries delineate rules intended to foster a dialectical legal equilibrium. This conceptual framework is rooted in the reality that these drafters subscribe to legal realism rather than legal positivism. It must be noted that championing and upholding the establishment of a Supreme Court as the ultimate arbiter of constitutional supremacy does not denote or imply a mandate for judicial legislation. Even though it is accepted that some specific constitutional provisions may explicitly confer quasi-legislative authority upon a Supreme Court, interpreting or executing these clauses requires no extraordinary doctrinal manipulation.

2. Legal Philosophy of theoretical perspectives on Customary Criminal Law

This part of the paper examines the jurisprudential theories underlying customary criminal law within the framework of international law.⁴ The central focus of this paper is to rigorously scrutinize the prescriptive value and standard significance of customary penal jurisprudence within the global legal order and determine whether its structural hegemony and institutional supremacy yield any tangible, practical significance in current adjudicative practices and present-day dispute resolution. An underlying axiom of this discourse is that overarching legal philosophies do not merely observe but actively shape and modulate the operational mechanics of customary legal systems. This causal nexus arises on account of the fact that customary criminal law is not a historical accident. It is rather an organic construct that stems from and is nurtured by evolving philosophies of jurisprudence and state practice. Admittedly, the precise magnitude of this anticipated philosophical impact remains unquantified, conceptually elusive, and largely unspecified in existing literature. For instance, staunch advocates of legal positivism maintain that positivist doctrine exerts profound, exclusionary control over the recognition and enforcement of customary criminal law, a contested assertion that remains highly polarized among international law scholars who debate the necessity of state consent versus systemic state behavior.

Despite the conflicting opinions, it is clear that the subject's foundational legal philosophy regarding these underlying principles is deeply entrenched and conceptually well-established. For the time being, the discipline lacks a standardized, universally accepted framework or methodology to adequately measure the empirical scale of this philosophical influence on customary norm generation. Nevertheless, it remains empirically defensible to suggest that a meaningful degree of qualitative and quantitative evaluation is achievable by tracking judicial citations and state behavior. Undoubtedly, adherents of this structuralist doctrine maintain that specific jurisprudential principles provide clear evidence of an ongoing, concerted effort to strictly circumscribe the judiciary's authority, thereby preventing courts from engaging in judicial activism or establishing rule-based, quasi-legislative mandates through the back door of customary interpretation. On the other hand, dissenting legal scholars frequently view this restrictive interpretation as a fundamental misconstruction and an opportunistic misuse of these jurisprudential concepts, even while acknowledging the inherent logical benefits and predictability that this conservative line of reasoning offers to sovereign states. Fundamentally, while certain adherents of natural law theory and naturalistic legal thinking may emphatically resent this positivist orientation, their ideological objections do not attenuate the systemic validity of this ongoing jurisprudential analysis and canonical debate.

A passing mention regarding the anticipated detrimental effect for customary criminal law is needed here, though any conclusion remains heavily contingent on the interviewer's underlying dogmatic and philosophical foundations. Natural and positive law theorists inevitably disagree in their analytical outcomes. In the same vein, empirical legal scholars, alongside interdisciplinary legal researchers, introduce distinct critical perspectives. The fundamental problem is that these disparate thinkers are foundationally shaped by incompatible legal ideologies that yield contradictory outcomes. As a case in point, modern legal philosophy repeatedly questions or continually assesses John Austin's notion and formulation of law as the command of an absolute sovereign who exacts routine acquiescence or systemic conformity

⁴ Pierre-Hugues Verdier and Erik Voeten, 'Precedent, Compliance, and Change in Customary International Law' (2014) 108 *American Journal of International Law* 389.

while remaining legally inexplicable. Nonetheless, contemporary dialogue or present-day discussion frequently perverts and skews Austin's foundational premise and central proposition regarding this absolute and unchecked sovereignty.

This part of the study examines the extent to which sovereign authority remains bound by the mandates of customary international criminal law. A central inquiry concerns state autonomy in contemporary geopolitical interactions. A cornerstone of the international legal order is the absolute legal equality and uniform standing of all nations. Consequently, no sovereign state may authoritatively dominate and justifiably subdue another politically, nor encroach upon a peer state's domestic jurisdiction under any pretext. Conversely, nation-states are deontologically and prescriptively bound to uphold the juridical and Westphalian equality of all members of the international community, which is a sacrosanct obligation expressly codified in the United Nations Charter and other international instruments. Nonetheless, the dominant legal orthodoxy and reigning paradigm hold that customary criminal frameworks lack the faculty and competence to mandate specific actions and enjoin compliance upon independent nations. Legal conventionalists and analytical jurists typify and portray customary international criminal law in this matrix as intellectually and philosophically obsolete. In the strict sense, this conceptual and theoretical orientation does not liquidate and deprive customary criminal rules of their broader normative value. Instead, it underlies the fact that such norms cannot be integrated into positive law because non-compliance fails to trigger formal juridical sanctions.

A community of legal jurists expressed reservation and disapproval about the ambivalent and enigmatic disposition of customary international criminal law, emphasizing its disjointed and atomized structural design. This scholarly doubt stems from a treatise rooted in the inherent lack of mandatory enforceability within customary norms, a limitation dictated by the principle of Westphalian state sovereignty. Nonetheless, this scholarly doubt stems from a treatise rooted to national autonomy among diverse states remains a critical prerequisite for establishing a conducive to enhanced bilateral relations and structural organizational advancement.

A major structural tension stems from the dualistic interpretation and framework governing the interplay of customary international law and municipal legal orders. Even though both models represent equivalent cornerstones of contemporary legal doctrine, unwritten international legal norms do not possess automatic legal effect as well as being not judicially enforceable per se but require explicit constitutional ratification to achieve domestic enforceability. Accordingly, the local enforceability of customary international criminal law fails to hold up against contemporary limitations on state supremacy; instead, its legal enforceability depends entirely on domestic constitutional frameworks.

3. Institutionalization, Codification and Legalization of Cultural Norms

One central dispute in jurisprudence concerns whether the legal system should codify dominant societal norms. In other words, Jurisprudential discourse frequently contests whether official legal frameworks should mirror majoritarian cultural values and standards. The primary doctrinal hurdle is calibrating the implementation of these mandates against deeply entrenched societal mores. One persuasive argument suggests that informal norms should be replaced by formal laws backed by state penalties. This issue has been appraised within the framework of customary international criminal law. This analysis examines the institutional mechanisms that generate hierarchical divergence and intra-state antagonism, effectively positioning state executives and their subordinate administrators into an adversarial operational paradigm. Simultaneously, largely uncoded international law does not have the formal structural mechanism required to formalize and legitimize norms meant to bind independent states. States' practice within this decentralized paradigm frequently yields incomparable and contrary international norms. However, this originates from the assumption that the global legal framework does not intentionally formulate and produce paradoxical mandates. This textual and logical alignment by themselves do not preclude international law from fostering an environment conducive to domestic legal frameworks. Ultimately, international mandates derive their binding authority over states primarily from their conventional, treaty-based foundations. This method of comparison undermines the implied conventions which govern international penal jurisprudence. It falsely implies that internalizing these principles is a prerequisite for local legal validity and authority. However, it remains a well-settled proposition that various tenets of customary international criminal law are fundamentally animated by moral imperatives. Consequently, admission to the international legal order is strictly reserved for universally recognized principles and norms. In the final analysis, the international society of sovereign states constitutes the foundational source of authority underpinning this customary law. In other words, the collective framework of sovereign states remains the primary legitimizing body for this body of customary law.

4. The Validity of Customary Penal International Law

The normative weight and prescriptive authority of customary jurisprudence within modern States are largely anchored on their internal interpretive authority and their standardizing normative character. Because these practices are rooted in centuries of localized heritage, their legal weight is inextricably tied to tradition. Hence, a critical legal dilemma emerges: how should national courts construe and execute customary international criminal law? In other words, a central jurisprudential problem surfaces: by what means are domestic courts of competent jurisdiction to interpret and implement customary criminal law? This judicial determination directly intersects with the core institutional duties embedded within a state's legal system and modifies the statutory application of national legislation. That is why scholars must rigorously examine the intersection and interplay between ancestral heritage and indigenous criminal jurisprudence. In other words, the enduring friction between state legislation and unwritten legal systems. It is equally

vital to evaluate the precise degree to which this consuetudinary law influences, overlaps with, or alters broader national legal frameworks.⁵

Although the doctrinal validity of customary international law is long-settled and requires no further vindication, a distinct structural antinomy persists. Unquestionably, the existence of state tradition and custom is predicated on the contextual authority and standardizing normative character inherent in such practices. These frameworks are globally recognized as anchored in heritage and tradition. Consequently, the central analytical inquiry must pivot to the judicial adjudication of customary criminal law by competent tribunals. Accordingly, examining the nexus between tradition and customary penal systems is imperative, as is assessing the degree to which consuetudinary law influences broader national statutes. Contrary to the foregoing, the doctrinal validity of customary or uncodified international law stands as established and settled jurisprudence. Hence, a more formidable jurisprudential puzzle endures: the precise modalities through which international legal obligations achieve efficacy, absent in the centralized, coercive enforcement apparatus indigenous to municipal legal systems. In other words, the normative authority of customary international law remains axiomatic and self-explanatory.

The domestic legal network and structure resonate with the status of customary criminal jurisprudence within a state, just as the integration of uncodified international norms depends on the overarching global legal order.⁶ Within any jurisdiction, unwritten norms are generated by traditional practices. Ultimately, the societal ethos and collective habits of a population shape their indigenous legal traditions, resulting in significant jurisdictional variance across different legal systems. In other words, the authority and prowess of customary criminal law is premised on a state's prevailing legal order, mirroring how customary international law functions within the broader international sphere. In any legal system, behavioral standards evolve from historical custom. Because a group's cultural worldview defines these indigenous traditions, the application and recognition of customary principles naturally exhibit legal pluralism across different nations.

It is settled law that customary practices cannot override and supersede established rules and norms. Whereas customary criminal law creates and builds legally binding obligations, it is its particular and precise manifestation that dictates its operational scope and nature. That is why a municipal legal system need not formally recognize international criminal custom for an obligation to arise. Furthermore, whether international and domestic regimes are conceptualized as monist or dualist, international law possesses no inherent hierarchical supremacy over national law. Rather, international customary criminal law requires formal incorporation into the domestic framework to achieve legal efficacy, rendering it subject to internal regulation. However, this state-centric paradigm creates significant enforcement gaps when national courts refuse to internalize universally recognized crimes. While this dualist-leaning framework maintains state sovereignty, it simultaneously undermines the uniform application of international justice.

6. Conclusion

This study has argued that theoretical legal permutations fail to adequately explain the foundational principles of customary criminal law.⁷ Scholarly debate and abstract dispositions cannot resolve the inquiries about customary criminal law posed by the judiciary. These convoluted and intricate inquiries, rooted and anchored in conventional legal philosophy, demand rigorous jurisprudential scrutiny over superficial or dogmatic interpretations. In other words, evaluating these issues through the lens of customary legal theory demands rigorous scholarly examination rather than superficial treatment. Customary criminal law derives its authority from the societal norms and traditions that individuals observe in their daily lives.⁸ This means that customary criminal law functions as a living legal framework rooted in the everyday practices and accepted behaviors of the populace.⁹ The foregoing postulation is inherently tied to the nature, framework, and tenets of customary international law and its evolving architecture and interpretation.¹⁰ This connects directly to the essence, system, and principles of international customary norms and their fluid interpretation. The jurisprudential interplay, intersection, and interrelationship between customary criminal law and international law have been further explained, giving credence to how state practice crystallizes into binding international criminal transgressions.¹¹

⁵Jean-Marie Henckaerts, 'Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict' (2005) 87 *International Review of the Red Cross*, 175, 179.

⁶BS Chimni, 'Customary International Law: A Third World Perspective' (2018) 112 *American Journal of International Law*, 12

⁷Gordon R Woodman, 'Ideological Combat and Social Change: The Jurisprudence of Regulating Custom' (1987) 31 *Journal of African Law* 179, 182.

⁸W Bennett, 'The Compatibility of African Customary Law and Human Rights' (1991) 40 *International and Comparative Law Quarterly* 186

⁹TW Bennett, 'The Compatibility of African Customary Law and Human Rights' (1991) 40 *International and Comparative Law Quarterly* 18

¹⁰Chuma Himonga and Craig Bosch, 'The Application of the Bill of Rights to Criminal Procedure in Customary Law' (2000) 117 *South African Law Journal* 306, 311.

¹¹*Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1 (2 October 1995) paras 96–99.