THE COMPLEMENTARY JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT, THE PRINCIPLE OF COMMAND RESPONSIBILITY IN INTERNATIONAL LAW AND THE NIGERIA CRIMINAL LIABILITY REGIME[1]*

Abstract
This essay set out to study The Complementary Jurisdiction of the International Criminal Court, the Principle of Command Responsibility in International Law and the Nigeria Criminal Liability Regime. It adopted the doctrinal methods of legal research with heavy recourse, as it were, to books, journal articles, international law documents and the like for its execution. It was discovered that the manifest absence of the international principle of command responsibility in Nigerian municipal law could be exploited by war criminals to escape liability for offences which they would otherwise have been convicted and punished for, were the trials to be conducted before the ICC. It recommended that the Rome Statute should be amended so that it confers primary jurisdiction on the ICC in cases where municipal investigation, trial and law are likely to conflict with the principle of command responsibility or any principle of international law that could substantially alter the finding of municipal courts in a manner that form bases for the escape of international criminals.

Keywords: Jurisdiction, Command Responsibility, International Law, International Humanitarian Law and Criminal Liability

1. Introduction

Overtime the principle of humanity has come to recognise that the essence of war is not to annihilate the adversary, but to weaken his military capability and bring him to the negotiation table. This is because conflict is an inherent part of human society wherever it may be found. Over the centuries, international law has evolved which prohibits the commission of certain crimes in the conduct of hostilities against adversaries and apportions liability based on the chain of command in some instances, giving rise to the principle of command responsibility as a customary rule of international law. But there was a problem of sanction and enforcement since there is no universal police to give tooth to international law. After World War II, the world witnessed the devastating effects of war and the need to curtail the unbridled aggression that was often unleashed during armed conflict. The situation was indeed horrific that it could best be described in the words of J. F. Kennedy who said 'if mankind does not put an end to war, war will put an end to mankind.' Consequently, mechanisms for the trial of war criminals became a priority for the international community. The actualisation of this priority began on an ad hoc basis necessitating a case by case consideration. This led to the formation of such tribunals as the International Military Tribunal of Nuremberg, the ICTY, the ICTET and more recently the ICTR, to try and punish war criminals for international crimes during the WWII, and other subsequent armed conflicts. However, the first proposal for an international tribunal of the kinds enumerated was made during the Paris Peace Conference of 1919 after WWI and became an even more pressing necessity after WWII. But this desire came to fruition with the generation of the Rome Statute in 1998 establishing the International Criminal Court which subsequently came into effect on 1st July, 2002.

Article 18 of the Rome Statute creates the complementary jurisdiction of the International Criminal Court, which is to the effect that the primary jurisdiction of trying war criminals resides with states, and the jurisdiction of the court is actuated only where states are unwilling or unable to prosecute the offender. However, where states opt to undertake prosecution under municipal law, there is likely to be a problem in the application of the principles of international law because some international law principles are square pegs round holes with municipal law principles. One such international law principle that is incongruent with municipal law and as such is most likely to be inane in municipal criminal trials is the principle of command responsibility which establishes liability through a claim of command and holds commanders responsible for the acts of their subordinates under certain circumstances, in what is akin in some sort to vicarious liability. Under Nigerian municipal law, the law

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is quite settled that there is no vicarious liability in the realm of criminal law. This breaks the potency of the principle of command responsibility, and is likely to lead to the exoneration of war criminals in municipal trials that would otherwise have been convicted and punished under international law. This essay is a focus on this challenge.

2. Conceptual Analysis

It was Aristotle who said, 'Every intelligible argument must always begin with a definition of terms'[2]. In obedience to this immortal truth, key concepts are defined hereunder. Jurisdiction is a common concept in legal parlance. In fact, the importance of jurisdiction is so much that there is hardly a legal occasion that the term does not come up. According to the Free Dictionary, Jurisdiction generally describes any authority over a certain area or certain persons. In the law, jurisdiction sometimes refers to a particular geographic area containing a defined legal authority. In short, jurisdiction is the geographic area over which authority extends; legal authority; the authority to hear and determine causes of action.[3] Owing to the prominence of this term and the hinge it forms in linking the terms of international and municipal laws especially as regards the complementary nature of same as espoused in the Rome Statute, it is needless to state why the definition is a necessity. This preliminary remark having been made; for the purpose of this study, jurisdiction shall for all intents and purposes refer to the powers of the International Criminal Court and corresponding municipal courts to hear and effectively determine a matter brought before them with finality, of course subject to appeals.

Command responsibility is a customary rule of international law, fully christened 'Command Responsibility for Failure to Prevent, Repress or Report War Crimes'. Command responsibility has its root in the IHL principle of responsible command, under which commanders have a duty to ensure that their subordinates respect IHL. Failure on the part of a commander to prevent or punish the commission of offences by his subordinates gives rise to criminal liability under command responsibility.

International Law, though lacks a univocal definition amongst scholars, is an amalgam of two words – international which means between nation states and law which is simply seen as a body of principles that have evolved to guide the conduct of human action in a society. However, scholars have made their professional input in the definition of the term. According to Beth Simmons[4] 'International law is a body of principles, customs, and rules recognised on effectively binding obligations by sovereign states in their mutual relations'. This definition is distinguishable from law as it applies in the municipal parlance and suffices for the purpose of avoiding the philosophical convolution associated with most definitions which is not the thrust of the instant study.

The International Committee of the Red Cross defines the concept from the point of view of the object of international humanitarian law thus:

> International humanitarian law applicable in armed conflict means international rules, established by treaty or custom, which are specifically intended to solve humanitarian problems that arise directly from international or non-international armed conflicts. For humanitarian reasons, these rules protect persons and property that are, or may be affected by armed conflict by limiting conflicting parties' rights to choose their means and methods of warfare. The expression 'International humanitarian law' is often abbreviated to international humanitarian law or humanitarian law.[5]

[2]This is rendered in Latin as *initio definitio est disputanti nominis*

[3] Legal Free Dictionary available at *https://legal-dictionary, thefreedictionary.com.* and accessed on the 17/4/2020 at 10.40pm.

[4]B. Simmons "International Law" in Handbook of International Relations P. 353 available at https://scholar.harvard.edu May 3, 2012 accessed on 17/4/2020 at 11.12pm.

[5] Definition elaborated by the International Committee of the Red Cross and Generally accepted. Source: Commentary on the Additional Protocols of 8th June, 1977, ICRL, Geneva, 1987, P. xxvii.

3. The International Criminal Court (ICC)

The International Criminal Court is a product of deliberations of the international community that lasted almost century. In fact, the first proposal for an international tribunal to prosecute and try political leaders accused of committing international crimes was made during the Paris Peace Conference in 1919 after WWI. The desire was manifested for the first time in the establishment of the Nuremberg International Military Tribunal.[6] Similar tribunals followed this model in the International Criminal Tribunal of the East Timor ICTET,[7] the International Criminal Tribunal of Yugoslavia ICTY[8] and finally the International Criminal Tribunal for Rwanda ICTR[9] in 1994 established to try the major proponents of the Rwandan genocide. Following the successes recorded by these ad hoc tribunals, the United Nations General Assembly tasked the International Law Commission (ILC) to commence drafting the statute for the establishment of a permanent court. In 1994, this draft was presented to the General Assembly which convened a conference in Rome four years later in June 1998[10] wherein the Treaty was fine-tuned. On 17th July, 1998 the Rome Statute was adopted by a vote of 120 to 7 with 21 countries abstaining from the vote, establishing the International Criminal Court. However, it did not come into force until the conditionality for its coming to effect was met with the ratification of the Statute by 60 countries bringing the Rome Statute into force on 1st July, 2002. The court delivered its first judgment in 2012 wherein it found the Congolese Rebel Leader, Thomas Lubanga Dyilo guilty of war crimes relating to the procurement, conscription and use of child soldiers.[11]

The Rome Statute is divided into 13 parts and 128 articles which clearly define the individual crimes, clarify the court's jurisdiction, establishment provision and the structure of the court, its financing, general principles of criminal law, sentences, procedures, the execution of sentences and cooperation in criminal law. Besides the Rome Statute, there were also other ancillary documents meant to aid the effectuation of the statute as well as its proper administration. Among these are the Rules of Procedure and Evidence, the Elements of Crime, the Relationship and Agreement between the court and the United Nations, the Financial Regulations, the Agreement on the Privileges and Immunities of the Court, the Rules of Procedure of the Assembly of State Parties, the budget for the first financial period, basic principles governing a Headquarter agreement between the court and the government of the Netherlands[12], as well as procedure for the nomination and election of Judges, Prosecutor and Deputy Prosecutor.[13] For the general, but more especially for the purpose of this paper, the most important of the ancillary documents enumerated above are the Rules of Procedure and Evidence and the elements of crimes, which clearly set the parameters for the functioning of the court and defines the specific aspects of each crime listed in the statute respectively. Furthermore, the statute is a comprehensive international treat wherein international criminal law has been successfully and uniformly codified, developed with special cognisance of the different criminal law systems of the United Nations Member States, their different traditions and jurisprudence. The court therefore symbolizes jurisdiction exercised

[6]See Charter of the International Military Tribunal at Nuremberg establishing by agreement the tribunal for the prosecution and punishment of major war criminals of the European Axis especially German Leaders 8/8/1945.stat. 1544, 82 Units 279.

[7] The Special Panels for Serious Crimes (also called the East Timor Tribunal) was the hybrid international–East Timorese tribunal that was created in 2000 by the United Nations Transitional Administration in East Timor (UNTAET) to try cases of "serious criminal offences" which took place in East Timor in 1999. The Special Panels sat from 2000 to 2006. The Special Courts were mandated by the Special Representative of the UN Secretary General to try the following categories of crimes: Genocide, War crimes, Crimes against humanity, Murder, Sexual offences, Torture. To be eligible for investigation in front of the Special Panels the alleged crimes had to be committed in Timor-Leste or by/against a citizen of Timor-Leste.

[8]The International Criminal Tribunal for the former Yugoslavia (ICTY) was a United Nations court of law that dealt with war crimes that took place during the conflicts in the Balkans in the 1990s. During its mandate, which lasted from 1993 - 2017, it irreversibly changed the landscape of international humanitarian law, provided victims an opportunity to voice the horrors they witnessed and experienced, and proved that those suspected of bearing the greatest responsibility for atrocities committed during armed conflicts can be called to account.

[9] The International Criminal Tribunal for Rwanda (ICTR) is the first international court of law established to prosecute high-ranking individuals for massive human rights violations in Africa. The purpose of this court is to prosecute those allegedly responsible for the 1994 Rwandan Genocide.

[10] Diplomatic Conference of Plenipotentiaries, Rome 1998

[11] The First Prosecutor was Luis Moreno – Ocampo from Argentina.

[12] The Host Country and the Headquarters is situate at The Hague.

[13] Cf Background on the ICC accessed on the 18/4/2020 at 9.40am.

on behalf of the community of nations.[14] The Court is officially located in The Hague, Netherlands, but its proceedings may take place anywhere. The court moved into it first permanent premises in The Hague, particularly at Oude in December, 2015. It also maintains a liason office in New York, and field offices in Kampala, Kinshasa, Bunia and Bangui. It differs from the International Court of Justice (ICJ or World Court) which is an organ of the United Nations, and unlike the ICJ, the ICC is an independent court from the operations of the United Nations. As a criminal tribunal, it prosecutes individuals, and the ICTY and ICTR are similar to it except for the limited territorial and temporal jurisdictions and the fact that they did not cover the full range of international crimes. Significantly too, is that at the time of writing this article, the first African to head the court is a Nigerian – Professor Ebue Osuji.

4. The Complementary Jurisdiction of the ICC

The Rome Statute confers jurisdiction on the ICC is a secondary manner. In other words, its jurisdiction is complementary to that conferred on states who are the primary harbingers of the prosecutorial mantle of war and international criminals. The complementary principle, for short confers the primary responsibility and duty of prosecution of serious international crimes on states, and only allows the ICC to undertake same as a last resort where states are unwilling or unable to prosecute.[15]The principle is enshrined in Article 18 of the Statute which provides thus:

> When a situation has first been referred to the court, the Prosecutor must notify all states that would normally exercise jurisdiction of the intention to proceed with an investigation. Any state, whether party or non-party to the Treaty, may inform the court that it is dealing with the situation domestically and the Prosecutor will defer to that investigation, unless the Pre-Trial Chamber decides to authorise the investigation. Such deferral being open to review by the Prosecutor after six months or at any time when there has been a significant change in the state's unwillingness or inability genuinely to carry out the investigation.[16]

This forms the crux of the instant study, particularly where it conflicts with the laws within the internal territorial jurisdiction of states.

5. The Principle of Command Responsibility in International Law

Rule 153 of the Customary Rules of IHL provide for command responsibility. It is fully christened 'Command Responsibility for Failure to Prevent, Repress or Report War Crimes.' Rule 153 states that:

> Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.

State practice establishes this rule as a norm of customary international law applicable in both IAC and NIAC. Simply put, it is that customary rule of international law which under certain circumstances holds the superior responsible for the acts of his subordinates, in the conduct of hostilities against adversaries. Similarly, Additional Protocols to the Geneva Conventions enacted in 1977 tows the same path. API provides that the fact that a breach of the [GC or API] was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach,[17] and Commanders must prevent, suppress and report to competent

[14] Report of the Preparatory Commission of the ICC, Addendum: Finalized Draft Text of the Elements of Crimes, UN Doc. PCNICC/2000/INF/3/Add 2 (2000)

[15] D. Kastrup, from Nuremberg to Rome and Beyond: The Fight against Genocide, War Crimes and Crimes against Humanity 23 Fordham Int'l Law Journal Pp. 404, 408 (1999).

[16] J. Bleich, The International Criminal Court: Report of the ILA Working Group on Complementarity, cited in *Demmer Jour, Iritâ C™ L & Pol., P*. 281 (1997).

[17] See Article 86 thereof on the duty of commanders

authorities breaches of the conventions and protocol; Commanders must where appropriate initiate disciplinary or penal action against violators.[18]

Knowledge as a prerequisite for liability

The criminal responsibility of a commander for the misconduct of his subordinates is not absolute but contingent upon the commander's knowledge - *'Scienter.'* This knowledge could be either actual or implied. It is actual if the commander knows of the breach or the likelihood of the commission of the breach; it is constructive or implied if from the circumstances of the case, the commander ought to have known that a breach has been or is likely to have been committed. In *Ernest Lou Medina's case*[19], the following principles were established and accepted as it relates to Command Responsibilities:

> A military Commander is responsible for the actions of his subordinates. This presupposes that he must give clear and concise orders and that he must adapt his orders in line with the situation as it evolves.
>
> If war crimes have been committed by his soldiers, the commander himself also bears responsibility:
>
> > In the case where he himself gave the order to commit this crimes (direct responsibility); or
> >
> > When he knew or should have known, that crimes had been committed or were about to be committed and he did not take necessary and reasonable measures to safeguard the respect of International Humanitarian Law or to sanction defaulters.

This accentuates the principle of command responsibility on 2 grounds; namely, direct involvement and indirect involvement that establishes guilty knowledge yet refrains from taking steps to punish the offender. Similarly, in *Celebici's Case*, it was held that every member of the Armed forces, independent of his position, has the obligation to report to his hierarchical superior as well as to the Military legal authorities any act which could potentially be considered as a war crime

There must exist a superior-subordinate relationship;

1. The superior had known or had reason to know that the criminal act was about to be or had been committed; and
2. The superior failed to take the reasonable measures to prevent the criminal act or to punish the perpetrator thereof. (The case of Jean Pierre Bemba started in 2002, convicted in 2016; conviction overturned 8 June 2018 by the appeal chamber of ICC)

Liability

The knowledge alone is not enough to ground liability. It is rather the knowledge and the failure to act to prevent the breach where it is yet to occur, and to punish where it has occurred that grounds liability. The combination of both, corresponding as they do to the mandatory elements for the commission of criminal offences – *Actus reus* and *Mens rea*. Contextually, a command is an order to do or refrain from doing an act. Consequently, a commander who gives an instruction/command is responsible for the command he gives, and the liability, if any, emanating from his command. This is called *commission*. Similarly, a commander who is in a position to give a command but fails to do so is responsible for the failure to so issue the command. This is called *omission*. In both cases, a commander will be held liable. It is on this pretext too that the Rome Statute provides for guilty knowledge as a basis for criminal liability in command responsibility. It states that a military commander or a person effectively acting as a military commander either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes.[20] The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes.[21] This is a mere regurgitation of the principles as earlier espoused in statute and precedent.

[18] AP I, Art. 87 – failure to act

[19] A captain of infantry unit in the United States Army who served during the Vietnam War responsible for the My Lai Massacre of 16 March 1968 and was court martialed in 1971 for his role in that war crime, but was acquitted the same year

[20] Article 28 (a) of the Rome Statute

[21] Ibid Article 28 (b)

6. The Privation of the Principle of Command Responsibility under Nigerian Municipal Law

Unlike the civil regime of law in Nigeria where there is a similar principle in what is referred to as vicarious liability, which operates, not as a tort in itself, but as an element that proves a tort, Nigeria's criminal law regime is manifestly bereft of the principle of command responsibility as codified in international law. This is because under Nigerian criminal law, there is no room for vicarious liability as anyone who commits an offence stands alone and bears his own name. Furthermore, although there is an offence codified as conspiracy under which two or more person can be held criminally liable for committing an offence, if they were part of the plan to commit the offence, even if some of them were unable to take part in the actual commission of the offence, this only operates first of all as a substantive offence for which persons can be charged and secondly to secure their individual culpability in the commission of the said offence, to the extent that each is liable individually and all are liable collectively. This is not the same with command responsibility which presupposes conviction and punishment of one for the sin of another. There is, consequently, a marked difference as the principle of command responsibility in international law, first exist as a principle and secondly to hold another, a superior responsible for the criminal misdeeds of another. The absence of this principle in the Nigerian Criminal Law books for example, is what is likely to create the escape route for irresponsible commanders, assuming a trial of these international crimes were to be conducted under municipal law. This is made possible only due to the manner in which the complementary jurisdiction of the ICC is couched in the Rome Statute.

7. Criminal Liability under Nigerian Law

Under Nigerian Criminal Law Jurisprudence, criminal liability is personal and un-transferrable. Thus, a person cannot be held criminally liable for the offence of another under any circumstances whatsoever. This is the settled position as clearly expressed in a barrage of judicial authorities. In the case of *APC V. PDP* [22] the Supreme Court in no uncertain tone settled this matter with finality when it held that 'there is no vicarious liability in the realm of criminal law. Anyone who contravenes the law should carry his own cross'. The undoubted implication is that criminal liability is personal and not transferrable. This being the case, the principle of command responsibility which seeks to hold superiors responsible for the crimes committed by their subordinates in the course of the conduct of hostility cannot see the light of the day. The suffocation of this principle is even more palpable when viewed from the prism that some constitutional provisions expressly stand at parallel with it[23] and thus would botch any trial under municipal laws and courts which seek to hold a superior criminally liable for the offence of his subordinates as established in the principle of command responsibility codified as a *ius cogens* in Rule 153 of the Customary Rules of International Humanitarian Law. This is quite clear and unequivocal. However, under international law and particularly under IHL this is not the case, especially as it pertains to command responsibility. It is on this basis that propriety of an act under domestic law is not a defence under international law.

8. The Principle of Command Responsibility and Its Application in Non-International Armed Conflict (NIAC)

Practice with respect to NIAC is less extensive and more recent. However, the practice that does exist indicates that it is uncontroversial that this rule also applies to war crimes committed in NIACs. In particular, the Statute of the ICC, of the ICTY and ICTR and of the Special Court for Sierra Leone and UNTAET Regulation No. 2000/15 for East Timor explicitly provide for this rule in the context of NIAC.[24] The fact that this rule would also apply to crimes committed in NIAC did not occasion any controversy during the negotiations of the Statute of the ICC. In the *Hadzihasanovic and Others case*, the ICTY held that the doctrine of command responsibility, as a principle of customary international law, also applies with regard to NIAC[25]. This as a rule has also been confirmed in several cases brought

[22] (2015) 15 NWLR (PT. 1481) 73 PARAS G – H,

[23] See Section 36(12) every offence must be codified and punishment prescribed for same else a conviction would be a nullity. See also the Supreme Court's decision in *BODE GEORGE v.FRN; AOKO v. FAGBEMI amidst a host of others.*

[24] ICC Statute, Article 28; ICTY Statute, Article 7 (3); ICTR Statute 6 (3); Statute of the Special Court of Sierra Leone, Article 6 (3); UNTAET Regulation No. 2000/15, Section 16.

[25] ICTY, *Hadzihasanovic and Others case*

before the ICTR[26] There is also a national case-law applying this rule to situations outside IACs. A US Federal Court in Florida applied it in the case of *Ford v. Garcia* in 2000, which concerned a civil lawsuit dealing with acts of extra-judicial killing and torture committed in El Salvador.[27] The ad hoc Tribunal on Human Rights for East Timor applied it in the *Abilio Soares case* in 2002 in which the Tribunal considered that the conflict in East Timor was an internal one within the meaning of common Article 3 of the Geneva Conventions.[28] In the *Boland case* in 1995, Canada's Court Martial Appeal Court found a superior guilty of having neglected to prevent the death of a prisoner even though he had grounds to fear that his subordinate would endanger the prisoner's life.[29] in the *Military Junta case*, Argentina's Court of Appeal based its judgment on the failure of the commanders to punish perpetrators of torture and extra-judicial killings.[30]Other practice to this effect includes the report of the UN Commission on the Truth of El Salvador in 1993, which pointed out that the judicial instances failed to take steps to determine the criminal responsibility of the superiors of persons guilty of arbitrary killings.[31]

9. The Principles of International Law based on UNGA Resolution 95 December 1946

Principle II

The fact that international law imposes no penalty for a crime under international law is not a defence in cases of violation under international law. Compare with Section 36 (8) of the Constitution of the Federal Republic of Nigeria, 1999 as amended which provides as follows:

> No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence heavier than the penalty in force at the time the offence was committed.

The juxtaposition of both further accentuates the fact that propriety or otherwise of an act under domestic law is not a defence under international law.

Principle III

That a person who commits a crime under international law is a Head of State or Government official is not a defence.

> This explains the reason behind the attempt to arrest Omar Al-Bashir, a Sudanese politician and the 7th President of Sudan from 1989-2019, when he was deposed in a coup d'état, in South Africa in June 2015, in spite of his incumbency.

Section 308 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) also confers absolute community on the President and his vice; the Governor and his deputy. The juxtaposition of both again reveals that the propriety or otherwise of an act under domestic law is not a defence under international law.

10. Unacceptable Defences under International Law

The defence of *Tu Quoque*- this means in Latin 'You also'. This simply means: 'You did it to us so we are justified if we did it to you' In logic, this is a fallacy; it is a faulty reasoning and abhorring to the rules of logic because it presupposes that two wrongs would make one right, against the clear dictates of reason that out of nothing comes nothing.[32] The pitfall of this defence is clear, especially because as Mahatma Gandhi would say 'An eye for an eye would leave the world blind'. This defence is however not completely disposable because IHL is based on the principle of reciprocity, and so it is inconceivable how a party to an armed conflict will keep its obligation to respect IHL while the adverse party constantly flouts same.

[26] ICTR, *Akayesu's case*, Judgment (cited in Vol. II, Ch. 43, Ss 702) and Ruzindana's case, Judgment (Ibid., Ss 703)
[27] United States, Federal Court of Florida. *Ford v. Garcia's case*
[28] Indonesia, Ad Hoc Tribunal on Human Rights for East Timor, *Abilio Soares case*
[29] Canada, Court Martial Appeal Court, *Boland case*
[30] Argentina, National Court of Appeals, *Military Junta case*
[31] UN Commission on the Truth of El Salvador, 1993
[32] *Ex nihilo nihil fit; nemo dat quod non habet*

11. Analysis of Posturing

Command responsibility as a customary principle of international law is at clear variance with the principle of criminal liability under Nigerian criminal law jurisprudence, for the simple reason that while the former allows a superior to be held criminally liable, in clearly defined circumstances, for the offence of his subordinates, the former does not allow same under any guise whatsoever. The complementary principle of the jurisdiction of the ICC saddling primary responsibility of investigation and prosecution on states and secondary jurisdiction on the ICC is not favourable to the principle of command responsibility under international law. This is especially so in Nigeria, and because a superior who otherwise would have been held criminally liable and punished under international law in a trial at the ICC could escape criminal liability by exploiting the fact that in Nigerian municipal parlance a person cannot be held for the criminal culpability of another.

Furthermore, Section 235 of the Constitution of the Federal Republic of Nigeria is clear and unambiguous as to the finality of the decisions of the Supreme Court after which no appeal can lie to any panel in this world except to God. Thus, where it is manifest that such a trial is conducted and determined with finality under Nigerian municipal law, the ICC's jurisdiction is eternally tamed as any further trial would amount to double jeopardy as prohibited by the Constitution of the Federal Republic of Nigeria, 1999 as amended and under the rules of the ICC's procedure of conducting trials itself.[33] The international obstacle to this municipal obstacle could have been the principle of *pacta sunt servanda* which enjoin states to keep their obligation to international law regardless of whether it conflicts with municipal law or not, but looking at the provisions of Sections 36(10), 36(8) and Section 235 of the Constitution and the decision of the Supreme Court as in *APC v. PDP (supra),* the adherence to international law is made difficult than it appears by the simple invocation of the principle of *pacta sunt servanda*. This further highlights the problem, because when considered from the prism of the principle of *pacta sunt servanda,* it is clear that a country cannot use local legislation to avoid its international obligation. Thus, where a state takes up investigation and prosecution of international crimes under its municipal regime it would have complied substantively with the requirements of *pacta sunt servanda*. However, this would not be the same as when its local legislations afford international criminals loopholes as defence to escape criminal liability in trials which if otherwise conducted before the ICC would have led to definite criminal liability, conviction and sanction. This is thus a question of substantive law, and yet also of procedural law.

On the other hand, the municipal support for the principle of command responsibility which would have been conspiracy as an offence fails to fall at all fours with the principle of command responsibility, leaving room for easy escape and for reasons as aforesaid in the preceding heading of the absence of the principle of command responsibility in Nigerian Municipal Law hereof. In Nigeria, the case is concomitantly worsened by the fact that international treaty law is not law, not even after ratification. It only becomes law when it is domesticated according to Section 12 of the Constitution of the Federal Republic of Nigeria, 1999, as amended by an endorsement of same by the National Assembly in which case they only become Acts of the National Assembly and operate as such. In the hierarchy of Nigerian laws, the Constitution is the *grundnorm* – the Law of all laws – because it is the basis for the existence and validity of any other law. Thus, where an Act of the National Assembly or any other law comes in conflict with the Constitution, that law is void to the extent of its inconsistency.[34] The juxtaposition of this Constitutional Supremacy principle and the finality of the Supreme Court as in sections 235 of the Constitution, coupled with the judicial pronouncements in the case of *APC v. PDP (supra),* only means that where the principle of command responsibility or any other principle of international law flouts any of the principles of fair trials in Section 36 of the Constitution or any settled principle of law, that principle of law will not see the light of the day.

[33] See Section 36(10) CFRN 1999 as amended and Rules of ICC especially because it is a court that respects general principles of law recognised by civilized nations as in Article 38 of the Statute of the ICJ and the rule against double jeopardy is certainly one of such rules. Cf. Screenshot.

[34] Section 1(3) CFRN 1999 as amended.

12. Conclusion and Recommendation

State must first exist as entities before they can be subjects of international law and keep same. Thus, states would always give priority to their municipal laws. By conferring primary jurisdiction on states and secondary jurisdiction on the ICC to investigate, try and prosecute international criminals, Article 18 of the Rome Statute only opens the route for criminals to escapes, especially from the principle of command responsibility in trials conducted under Nigerian Law. Thus, Article 18 requires an urgent amendment to the effect that once investigation, trial or prosecution before a municipal court or authority concerns the principle of command responsibility, same must as a matter of necessity be referred to the ICC for prosecution and conclusion of trial. The Rome Statute should be amended so that it confers primary jurisdiction on the ICC in cases where municipal investigation, trial and law are likely to conflict with the principle of command responsibility or any principle of international law that could substantially alter the finding of municipal courts in a manner that form bases for the escape of international criminals.