

# Research on Criminal Liability of Outgoing Commanders and Successive Commanders

Xiaoxin Ji<sup>1,\*</sup>, Qi Zhou<sup>2</sup>

<sup>1</sup>Gannan Medical University, Ganzhou, Jiangxi, China

<sup>2</sup>Zhejiang Gongshang University, Hangzhou, Zhejiang, China

\*Corresponding author. Email: jixiaoxin123@163.com

## ABSTRACT

Customary international law, the Rome Statute of the International Criminal Court and the Statute of the Ad Hoc International Criminal Court all stipulate the responsibility of current commanders, but in practice, the responsibility of outgoing commanders and successive commanders is often involved. In order to prevent a vacuum state in the application of international humanitarian law and effectively protect human rights, on the basis of summarizing the main points of the judgment on the responsibility of the commander, the preliminary conclusions are drawn: the command responsibility should be expanded to apply to outgoing commanders and successive commanders, emphasizing the responsibility of prevention for outgoing commanders and the responsibility of punishment for successive commanders.

*Keywords: command responsibility, outgoing commanders, successive commanders, prevention and punishment*

## I. INTRODUCTION

The theory of command responsibility originated from the domestic military laws of various countries and gradually developed into the content of international criminal law. Hugo Grotius believes that the ruler "is responsible for the crime of a subordinate if he knows about this crime and if he is able to and should prevent it."<sup>1</sup> Obedience is the first duty of a soldier. The internal organization of the army is tight, and the ranks of superiors and subordinates are well-defined. The commander of the army is in the position of generals, which naturally gives rise to the responsibility of discipline and restraint of subordinates. Although commanders are not directly involved in crimes, their influence on subordinates and even regional peace is huge. Compared with subordinates directly involved in crimes, they will have greater destructive power and their harm is stronger and more far-reaching.

The command responsibility is activated in two situations: 1. When a superior knows or should know that his subordinate is committing or about to commit a crime, he does not take measures of prevention or stopping; 2. After the subordinate commits a crime, the

superior does not punish the subordinate or report the crime to the competent authority. It is undeniable that the command responsibility is activated only when the commander can effectively control the subordinates, but this does not mean that the commander is only responsible for the crimes committed by the subordinates during his tenure. In other words, the command responsibility as a legal issue does not depend on the timing of criminal acts being synchronized with the effective control of superiors.

## II. BASIS FOR THE RESPONSIBILITIES OF OUTGOING AND SUCCESSIVE COMMANDERS

### A. The legal basis for command responsibility

The command responsibility can be traced back to the famous military strategist Sun Wu during the Spring and Autumn Period. He wrote in "Sun Zi Bing Fa · Terrain" that there are six situations in which the army fails. None of the six situations are natural disasters, but the faults of the generals<sup>2</sup>. Modern

<sup>1</sup> H. Grotius, *De Jure Belli ac Pacis Libri Tres*, bk. ch. xvii, pt. Xx (Camegieed., F. Kelsey trans. 1925); Charif Bassiouni, *Crimes against Humanity in International Criminal Law*, Martinus Nijhoff Publishers, 1992, P.373.

<sup>2</sup> In Sun Wu's "Topography. Tenth", it records that: There were six reasons for the defeat: 走 (a condition resulting in failure with pitting one against ten in the same terrain), 驰 (a condition that the soldiers defend strongly, and the military officers are weak, resulting in failure), 陷 (a situation where the generals are intrepid and the soldiers are weak, resulting in failure), 崩 (the deputy general hates enemies, won't submit himself to the general's direction, and takes action arbitrarily, resulting in failure), 乱 (a situation where the

command responsibility originated in World War I. The "Convention on Laws and Practices of Land Warfare" (The 4th Convention of the Hague in 1907) and its annex "Regulations of Laws and Practices of Land Warfare" mentioned the command responsibility in Article 1<sup>3</sup>. In modern international criminal law, the command responsibility is mainly stipulated in customary international law, international treaties and ad hoc court stipulations. Article 86 and Article 87 of the First Additional Protocol to the Geneva Conventions in 1977 (hereinafter referred to as the First Additional Protocol) clarified the responsibilities of military commanders for the first time<sup>4</sup>.

In response to the serious inhumane acts that occurred in the Socialist Federal Republic of Yugoslavia (SFRY) and Rwanda, the Security Council established the International Criminal Tribunal for the Socialist Federal Republic of Yugoslavia (hereinafter referred to as the SFRY Criminal Tribunal) and the International Criminal Tribunal for Rwanda (hereinafter referred to as the Rwanda Tribunal). Both tribunals have special court statutes, and Article 7(3) of the

---

generals are weak and lack dignity, there are no rules in governing the army, the relationship between officers and soldiers is chaotic and tense, and the formation of the soldiers is disorderly, resulting in failure), and 北 (the general is unable to correctly judge the enemy's situation, fighting against longer odds, and there is no elite vanguard in the battle, resulting in failure). These six situations are not caused by the damage of the time and geography but by the commanding errors of the generals.

<sup>3</sup> The laws, rights and obligations of war not only apply to the military, but also to militias and volunteers who meet the following conditions: 1. Directed by a person responsible for the subordinates; 2. There are fixed and obvious signs that can be identified from a certain distance; 3. Carrying weapons in public; 4. Complying with the laws and customs of war in combat. In countries where militias or volunteers form part of the army or the army, militias and volunteers should be included in the term "army".

<sup>4</sup> Article 86 Omission... 2. The fact that the subordinates have violated the conventions or this Protocol does not exempt their superiors from criminal or disciplinary responsibility under the circumstances: If the superior knows or has the intelligence to make it possible to draw conclusions about the situation at the time, his subordinates are engaged in or will engage in such breach of promise, and if the superior does not take all possible measures to prevent or ban the breach of promise within his power. Article 87, the duties of the commander: 1. The contracting parties and parties of the conflict shall require military commander to prevent the armed forces under his command and other persons under his control from breaking the conventions and this Protocol, and stop this kind of behavior when necessary and report to the competent authority. In order to prevent and stop breaches of the treaty, the contracting parties and parties of the conflict shall request the commander, in accordance with his position of responsibility, to ensure that the armed forces under his command understand their obligations under the conventions and this Protocol. The contracting parties and parties of the conflict shall require any commander to take the necessary steps to prevent violations of the conventions or this Protocol, and take disciplinary or criminal actions against violators of the conventions or this Protocol when appropriate when knowing that his subordinates or other persons under his control will or have committed acts that undermine the conventions or this Protocol.

Statute of the United Nations International Criminal Tribunal for the SFRY (hereinafter referred to as the Criminal Court Statute of SFRY) and Article 6(3) of the Statute of the International Criminal Tribunal for Rwanda (the content of both is basically the same) clearly stipulates the responsibility of the commander in personal criminal responsibility, and extends this responsibility to non-military superiors.<sup>5</sup> The practice of command responsibility by ad hoc courts has greatly enriched the connotation of command responsibility.

Article 28 of the Rome Statute of the International Criminal Court (hereinafter referred to as the Rome Statute) approved in 1998 not only separates the principle of commander responsibility from individual criminal responsibility, but also separately stipulates the criminal responsibility of military commanders and other superiors in Article 28(1) and Article 28(2) respectively<sup>6</sup>, providing strong legal protection for the International Criminal Court to judge criminals.

### *B. Theoretical basis for command responsibility*

Comprehensive command responsibility cases and international legal documents firmly believe that command responsibility should meet three requirements: the existence of substantive superior-subordinate relationship; subjective knowing of criminal acts; being supposed to take action but without taking action.

---

<sup>5</sup> Article 7 Individual criminal responsibility... 3. If a subordinate commits any of the acts referred to in Articles 2 to 5 of this Protocol, and if his superior knows or should know that his subordinates will commit such a criminal act or have committed a crime and the superior has not taken reasonable and necessary measures to stop or punish the perpetrator, the superior can't be exempted from criminal responsibility.

<sup>6</sup> Article 28 Responsibilities of commanders and other superiors: In addition to other reasons for criminal responsibility for crimes within the jurisdiction of this court under this Protocol: (1) If a military commander or a person acting effectively as a military commander does not exercise proper control over the troops under his effective command and control or the troops under his effective jurisdiction and control, under the following circumstances, these troops should be held criminally responsible for crimes within the jurisdiction of this court: 1. The military commander or the person knew or should have known that the troop was committing or about to commit these crimes because of the circumstances then; and 2. The military commander or the person failed to take all necessary and reasonable measures within the scope of his authority to prevent or stop the implementation of these crimes, or (2) to report to the competent authority to investigate and prosecute the matter. For the superior-subordinate relationship not mentioned in the first paragraph, if superiors fail to properly exercise control over subordinates under their effective jurisdiction or control, these subordinates shall be held criminally responsible for crimes within the jurisdiction of this court under the following circumstances: 1. The superior knows that the subordinate is committing or about to commit these crimes, or deliberately ignores information that clearly reflects this situation; The crime involves activities for which the superior is effectively responsible and controlling; and the superior did not take all necessary and reasonable measures within the scope of his authority to prevent or stop the implementation of these crimes, or report to the competent authority to investigate and prosecute the matter.

1) *The existence of substantive superior-subordinate relationship:* In the Delalic case, the SFRY Criminal Tribunal proposed the theory of "effective control", saying that "the superiors must have actual and effective control capabilities over those who commit crimes in violation of international humanitarian law, that is, they can prevent and punish the subordinates who commit the crime."<sup>7</sup> As long as the superior can exercise effective control over the subordinate, regardless of whether the relationship is de jure or de facto. Effective control does not depend on legal position authorization. As long as a certain control can be formed in a certain group, it can be recognized as a commander by issuing orders. In addition, the superior-subordinate relationship here does not require distance. Even if a commander is far away from the place where the crime is committed, or a higher-level commander far away from the criminal subordinate, as long as he has the effective control over the subordinate who commits the crime, he will face charges of command responsibility. According to the provisions of Article 28 (2) of the Rome Statute, non-military superiors who have "effective jurisdiction and control" over subordinates must also assume command responsibility.

As far as the outgoing and succeeding commanders are concerned, they also need to exercise effective control over their subordinates and do their best to prevent and punish crimes. Specifically, during the term of office, the outgoing commander needs to take all feasible preventive measures against possible future crimes, and when the succeeding commander takes office, he needs to perform punishment obligations for criminal acts committed by his subordinates.

2) *Subjective knowing of criminal acts:* The subjective requirements include knowing and should know. "Knowing" refers to the fact that the commander actually knows the criminal behavior. It is very difficult in judicial practice to prove that the superior actually knows the criminal behavior, and the criminal suspect often defends his ignorance of the criminal behavior by being absent. In order to prevent the command responsibility from becoming a toothless legal principle, the ad hoc court stipulations and the Rome Statute have a "constructive knowledge" provision. That is, as long as the court proves through circumstantial evidence that the commander knew that a criminal act occurred at the time, the commander should assume command responsibility. This highly probabilistic proof standard has played a role of disclosing the whole inside story.

The United Nations Committee of Experts on Investigations of Violations of International Humanitarian Law in the SFRY believes that the number, type, and scope of illegal acts, the length of duration, the number and type of troops involved, the crime scene, the width of the case involved, the tactics used, the persons involved and their status, and the position of the accused commander at the time of the case and other indirect evidence can prove that the suspect should know what his subordinates did.<sup>8</sup> The commander receives news, written reports or letters from inside and outside the military every day. Out of professional sensitivity, a diligent and cautious commander can see from this information or analyze that serious criminal acts are occurring.

Outgoing and successive commanders "should know" that they bear criminal responsibility when a crime occurs. Judging from the application of command responsibility in international trials, criminal suspects often argue that they are ignorant of the criminal conduct of their subordinates. Proceeding from the principle of rigorously investigating the criminal responsibility of commanders, the determination of command responsibility has wider application space for "constructive knowledge". In military operations, command personnel change frequently. Emphasizing the responsibility of prevention for outgoing commanders can effectively prevent crime and protect human rights, and require superiors to diligently educate their subordinates to abide by international humanitarian law during their term of office, actively prevent criminal acts by subordinates, and should not slacken their responsibility for prevention when they are about to leave their posts. For successive commanders, the prosecutor can collect indirect evidence to prove that the successor commander knows that a criminal act has occurred. Such evidence can be obtained through information such as external reports or internal notifications, which will greatly reduce the difficulty of investigating and obtaining evidence for prosecutors, so that the commander's command responsibility can be more widely investigated.

3) *Being supposed to take action but without taking action:* In the Halilovic case, the SFRY Criminal Tribunal held that the command responsibility in Article 7(3) of the Statute of the SFRY Criminal Tribunal was the criminal responsibility of the commander for his negligence and failure to fulfill his obligations under international law. International law imposes a specific obligation on commanders to prevent, deter and punish subordinate crimes, and omission of this obligation constitutes a crime. But

<sup>7</sup> Prosecutor v. Delalic, Case No.IT -96-21- A, Judgment, Appeals Chamber, Feb. 20, 2001, p.256.

<sup>8</sup> Final Report of the United Nations Commission of Experts, S/1994/674, 17.

international law will not constrain others to do things that are beyond their power and will not force commanders to do the impossible. For example, the Rome Statute limits the scope of responsibility of the commander to the omission within the scope of his or her power, and adopts "all necessary and reasonable measures". The specific criteria for judgment need to be comprehensively judged based on the situation at that time.

The duty of prevention and punishment of outgoing and successive commanders is obvious. Generally speaking, the commander has the obligation to prevent, stop and punish. When the subordinate is about to commit a crime, the superior is required to take measures to prevent the occurrence of criminal acts; when the subordinate is committing a crime, the superior is required to take active measures to prevent the crime from continuing and minimize the damage; when the crime of the subordinate is completed, the superior is required to punish the subordinate or report to the competent authority for investigation and prosecution. Punishing the criminal behavior of the subordinate after the successive commander takes office and preventing the criminal behavior of the subordinate when the former commander is about to leave his post are the necessary elements of command responsibility.

### *C. The realistic basis for the determination of command responsibility*

The accountability of outgoing and successive commanders will fill the loophole of command responsibility. If the outgoing commander does not assume command responsibility, then after the subordinate commits a crime, the commander can escape punishment as soon as he resigns. If the successive commander does not assume command responsibility, the successive commander lacks the basis and motivation to punish the crimes that have occurred. If the outgoing and successive commanders are not held accountable, there will be a vacuum state in the application of international humanitarian law, and many commanders will evade responsibility.

The accountability of outgoing and successive commanders will reduce the difficulty of prosecutors' proof. In judicial practice, it is difficult to prove that the commander did not prevent the crime. The accused commander can argue that he took a certain measure to prevent crime, but the prevention effect was not achieved, and the law cannot constrain others to do things that are beyond their power. Whether the obligation of "punishment" is properly fulfilled has a higher degree of "identification". The trial court judges whether the command responsibility is reasonably fulfilled by examining whether the superiors punish the crime and the content of the punishment. Therefore, the

expanded application of command responsibility will fill legal loopholes and reduce the difficulty of prosecutors' proof.

## **III. JUDICIAL PRACTICE OF OUTGOING AND SUCCESSIVE COMMANDERS' RESPONSIBILITIES**

### *A. Judicial practice of outgoing commanders' assuming responsibility*

In the Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao case<sup>9</sup>, the Special International Criminal Tribunal for Sierra Leone (hereinafter referred to as the Sierra Leone Tribunal) determined that Morris Kallon should assume command responsibility for the criminal behavior of his subordinates after the end of his term.

Morris Kallon served as deputy regional commander of RUF (Revolutionary United Front) from May 1996 to April 1998. Sierra Leone Tribunal tried Morris Kallon for an armed attack in Sierra Leone. Sierra Leone Tribunal believed that Morris Kallon had effective control over RUF combatants during his tenure as deputy regional commander. However, during this period, he failed to effectively control the slavery behavior of civilians in Kono District, making the slavery behavior continue from February 1998 to December 1998. Although Morris Kallon had left his post in August 1998, Sierra Leone Tribunal still held that Morris Kallon was responsible for the slavery behavior of civilians from August to December.

Sierra Leone Tribunal did not give a clear reason for this. However, after analyzing the basis of the decision, it can be roughly concluded that: command responsibility requires superiors to prevent subordinates from committing crimes whenever they have effective control capabilities, regardless of whether subordinates actually commit crimes after their superiors leave their posts. That is, the superior learned that the subordinate was about to commit a crime before leaving his post, and even if the superior had left, the criminal behavior of the subordinate should be prevented. If command responsibility is not held for this situation, then command responsibility will have no value of existence.<sup>10</sup>

Determining the command responsibility of the outgoing commander has incomparable advantages in preventing crime and protecting human rights. The Sesay et al case's determination of the responsibility of the outgoing commander shows that the principle of superior responsibility requires that when superiors are in effective control of subordinates, when they know or

<sup>9</sup> Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao case No.SCSL-04-15-T (2 Mar 2009)

<sup>10</sup> Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao case No.SCSL-04-15-T, para.450-477.

should know that subordinates will commit crimes, superiors should take measures to prevent subordinates from committing crimes, regardless of whether the actual crime time of subordinates occurs during their term of office. The Special Court and the International Criminal Court unanimously recognized the command responsibility as the criminal responsibility for the individual's omission rather than the substitute responsibility for the subordinate's criminal behavior. Actively preventing crimes during the term of office by the outgoing superior can greatly reduce the possibility of crimes committed by the subordinate after leaving his office. Therefore, it is not necessary to artificially limit the connection between the crime of the subordinate and the term of the superior. It is a violation of the command responsibility if the outgoing superior finds that the subordinate is about to commit a crime during his tenure, and fails to prevent or stop the subordinate. As for the actual crime time of the subordinates is during the term of office or after the term of office, it is just that the issue of evidence and will not materially affect the undertaking of the command responsibility.

*B. Judicial practice of successive commanders' assuming responsibility*

As for whether a commander should be held criminally responsible for the crimes committed by his subordinates before taking office, the SFRY Criminal Tribunal has mostly ruled that the successive commander does not bear command responsibility, but the court still has many voices supporting the responsibility of the successive commander. The Court of Appeal of the SFRY Criminal Tribunal ruled the successive commander not to bear command responsibility with the voting proportion of 3:2 in the Hadji Hassanovic case<sup>11</sup> in 2003, and the dissenting judge's views were very insightful and thought-provoking. And the Court of Appeal upheld the criminal responsibility of the successive commander in the Oric case.

Amir Kubura, one of the appellants in the Hadji Hassanovic case, became the acting commander of the 3rd Corps of the Bosnian Army and the 7th Muslim Mountain Brigade on April 1, 1993. In paragraph 58 of the indictment, Amir Kubura was charged with command responsibility for the crimes committed by the 7th Muslim Mountain Brigade of the ABiH 3rd Corps against the Ugandan People's Army before April 1, 1993. The SFRY Criminal Tribunal has no precedent for this situation.

The majority opinion of the Court of Appeal held that command responsibility couldn't be applied to

Amir Kubura. The Court of Appeal cited Article 86(2) of the First Additional Protocol, Article 6 of the Draft Law on Crimes Against the Peace and Security of Mankind, and Article 28 of the Rome Statute of the International Criminal Court, and believed that command responsibility couldn't be extended to before the establishment of the relationship between superiors and subordinates. The majority opinion of the Court of Appeal held that there is no precedent for the responsibility of the successive commander and no legal basis for the responsibility of the successive commander. In addition, they also cited the Kuntze case to emphasize that the commander should be responsible for failing to prevent crimes committed after he took power, but it did not mention that the successive commander was responsible for the crimes committed by his subordinates before his term.<sup>12</sup> In the Hadji Hassanovic case, it was finally judged that the successive commander did not bear command responsibility with the voting proportion of 3:2.

Two judges in the Court of Appeal held different opinions. Judge Shahabudden believes that, in accordance with Article 31 of the Vienna Convention on the Law of Treaties, and with reference to the object and purpose of the treaty, the interpretation of the commander responsibility clause of the First Additional Protocol should be made. The purpose and aim of the relevant provisions of the First Additional Protocol is to ensure that there are always people responsible for war crimes committed by subordinates. Wartime is different from peacetime, and it is normal for the position of commander to be in dynamic change. Reports of subordinate crimes may not reach the former commander due to personnel changes, so the former commander can't exercise his power to punish subordinates based on the facts of the crime; at this time, only the new commander can receive the report. This creates the responsibility of the successive commander, giving the new commander the power to punish subordinates.<sup>13</sup>

Judge Hunt believes that customary international law recognizes that if a commander knows or has reason to know that a subordinate is about to commit a war crime or has done so, and if he fails to take the necessary reasonable measures to prevent such behavior or punish the subordinate, he will bear criminal responsibility. This principle cannot be artificially limited to situations in which there is a relationship

<sup>12</sup> Prosecutor v. Enver Hadzihasanovic, Case No. IT-01-47, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, Appeals Chamber, Jul. 16, 2003, para.41-54.

<sup>13</sup> Prosecutor v. Enver Hadzihasanovic, Case No. IT-01-47, Separate and Partly Dissenting Opinion of Judge Shahabuddeen Appeals Chamber, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, Jul. 16, 2003, para.10.

<sup>11</sup> Prosecutor v. Enver Hadzihasanovic, Case No. IT-01-47, Judgment, Appeals Chamber, Mar. 15, 2006.

between the superior and the subordinate when the subordinate is performing or is about to perform an act that constitutes a war crime. The criminal responsibility of the superior is not the direct responsibility for the behavior of the subordinate, but the responsibility for their own behavior (or "omission"). When the superior knows or has reason to know that the subordinate is about to commit an act equivalent to a war crime or has committed a war crime, the subordinate is not prevented or punished.<sup>14</sup>

Judge Hunt put forward a hypothesis in his dissenting opinion: no commander is obliged to be responsible for the crimes committed by a subordinate within a week before taking office, because he was not the superior of the perpetrator at the time and believed that he had no responsibility to punish the subordinate.<sup>15</sup> The majority opinion of the Court of Appeal created a legal "loophole", stating that the successive commander is not responsible for the crimes committed by the subordinates before taking office. One may imagine that who will be responsible for ensuring the smooth implementation of international humanitarian law after the predecessor leaves and before the successor takes office. Does such a determination violate the purpose and aim of humanitarian law?

Furthermore, customary international law has never given up on the investigation of criminal responsibility of the successive commander, and the Court of Appeal's certification and application of customary international law are flawed. The majority opinion of the Court of Appeal cited the statute to prove that customary international law did not recognize the application of command responsibility of successive commanders. However, both the First Additional Protocol and the Rome Statute are multilateral treaties, and their validity only takes effect within the scope of the contracting states. Moreover, the United States, the largest developed country in the world, and China, the largest developing country, have not joined the Rome Statute. There is a flaw in reasoning from the multilateral treaty to prove that the provision of customary international law that there is no responsibility for a successive commander. Therefore, through the analysis of the opinions of the Court of Appeal in the Hadji Hassanovic case, it can be seen that customary international law does not deny the command responsibility of the successive commander, otherwise it can't explain the existence of a legal vacuum. From the perspective that the fundamental purpose of command responsibility is to ensure widespread

compliance with international humanitarian law, it is necessary and feasible to expand the recognition of the command responsibility of the successive commander.

The prosecution cited the Kordic case in arguing for criminal responsibility against the successive commander, and argued that the obligation of punishment naturally arose from the crime. The person who takes over the command also has the same punishment obligation, which at least includes investigating the crime to find out the facts and reporting it to the competent authorities. Therefore, the important fact that needs to be determined is not who is directing the crime, but when a commander realizes the crime, and fails to take reasonable and necessary measures to punish the crime.<sup>16</sup>

The SFRY Criminal Tribunal's view of the successive commander's responsibility was initiated in judicial practice from the standpoint of the judges and prosecutors who dissented, and it has attracted widespread attention from the international humanitarian law community, providing ideas and methods of argumentation for the enlarged application of command responsibility.

In the Oric case, Judge Liu Daqun made a statement in the Hadji Hassanovic case, "The duty of the superior to punish does not arise from the failure to prevent crime, but is a duty of his own. Therefore, for punishment obligations, it does not matter whether the superior has actual control over the subordinate before the subordinate's committing the crime".<sup>17</sup> According to Article 7(3) of the Statute of the SFRY Criminal Tribunal, there are no different requirements for the two obligations of the commander before and after the appointment. The Statute of the SFRY Criminal Tribunal punishes the behavior that the commander still fails to take measures when he has effective control over his subordinates and is aware of the criminal behavior. The fundamental purpose of command responsibility is to ensure widespread compliance with international humanitarian law. If the command responsibility is artificially limited to the current commander, it will greatly defeat the value of command responsibility. It seems to be proclaiming that the successive commander can dispense with the obligation to punish his subordinates for previous crimes.

Command responsibility, in essence, emphasizes the action that is supposed to be taken but without being taken. A commander who has effective control over his subordinates has the responsibility to ensure that he acts in accordance with the provisions of international humanitarian law and respects the laws and customs of

<sup>14</sup> Prosecutor v. Enver Hadzihasanovic, Case No. IT-01-47, Separate and Partly Dissenting Opinion of Judge Hunt Appeals Chamber, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, Jul. 16, 2003, para.8.

<sup>15</sup> Command Responsibility, Jul. 16, 2003, para.8.

<sup>16</sup> Prosecutor v. Enver Hadzihasanovic, Case No. IT-01-47, preliminary, Jul. 16, 2003, para.43.

<sup>17</sup> Prosecutor v. Oric, IT-03-68-A, Appeals Chamber Judgement of 3 July 2008, Dissenting Opinion of Judge Liu, para.7

war by grasping the facts of the subordinates' crimes. Looking at command responsibility from this perspective, there is no reason to interpret the duties of a commander before and after taking office.

Although the Hadji Hassanovic case has become a court case, it does not mean that there is no possibility of overturning. Judge Shahabudden mentioned in the Oric case that "He observed that 14 judges of the SFRY Criminal Tribunal expressed views contrary to the majority opinion in the Hadji Hassanovic case".<sup>18</sup> There is reason to believe that supporting the command responsibility of the successive commander has become the majority opinion of the court.

#### **IV. THE UNDERTAKING OF THE COMMAND RESPONSIBILITY OF OUTGOING AND SUCCESSIVE COMMANDERS SHOULD BE THE MORAL PRINCIPLE INCLUDED IN THE SUBJECT OF INTERNATIONAL HUMANITARIAN LAW**

The fundamental purpose of command responsibility is to ensure widespread compliance with international humanitarian law. If the command responsibility is artificially limited to the current commander, it is a misinterpretation of the command responsibility, and it is not conducive to the realization of the goal of widespread compliance with international humanitarian law.

International humanitarian law requires that the negative effects of armed conflicts be reduced as much as possible. As a person who has influence and control over direct combatants in an armed conflict, a commander naturally need to assume the command responsibility within the scope of his power. With the help of the principle of command responsibility, international criminal justice agencies can bring superiors who fail to effectively control criminal acts from "behind the scenes" to "front stages" to accept criminal trials. Tomoyuki Yamashita case was the first case in which command responsibility was applied after World War II. Although the case was tried in a U.S. military court, it is also of great significance to the development of international criminal law.<sup>19</sup> The Supreme Court of the United States ruled in Tomoyuki Yamashita's application for habeas corpus that, the basic purpose of command responsibility is that: the commander is responsible to his subordinates to ensure that the law of war is not violated... The purpose of the law of war is to protect civilians and prisoners of war from violence and abuse. If the commander is not

punished for not taking protective measures, the purpose of the law of war will not be achieved.<sup>20</sup>

Neither international treaties nor domestic laws preclude the extension of command responsibility to outgoing superiors and successive commanders. The First Additional Protocol clearly stipulates the relevant responsibilities of superiors and subordinates for violating the law of war in Articles 86 and 87. This regulation requires superiors to take all possible measures within their powers to prevent and ban acts that undermine the Geneva Conventions and the First Additional Protocol. Both provisions do not exclude the command responsibility of the outgoing and successive superiors. In conjunction with the Article 31 of Vienna Convention on the Law of Treaties, the interpretation of command responsibility from the perspective of the purpose and aim of the Convention does not exclude the extension of command responsibility to outgoing superiors and successive superiors.

Making a comprehensive survey on the Special Court Statute and the command responsibility clause of the Rome Statute, both contain the obligation of prevention and punishment. The command responsibility clause does not limit the applicable time of the clause. Examining the formulation process of the Rome Statute and the Draft Law on Crimes Against the Peace and Security of Mankind, both put the responsibility of preventing future crimes in the first place. Prevention is more important than punishment. Commanders can be urged to take measures in advance to actively prevent subordinates from committing crimes, and at the same time, it can prevent superiors from using simple punitive measures to escape from their prevent dereliction of duty. The responsibility for prevention does not explicitly exclude the case of subordinate crimes after leaving office. Emphasizing the prevention responsibility of the outgoing commander can effectively reduce the risk of violating international humanitarian law.

Domestic legislation also contains provisions on command responsibility. For example, France treats the commander's failure to prevent subordinate crimes as subordinate accomplices.<sup>21</sup> Germany divides the responsibility of commanders into three situations: failure to prevent crimes, failure to perform supervisory duties, and failure to perform reporting obligations. At the same time, different sentencing standards are set for

<sup>18</sup> Prosecutor v. Oric, IT-03-68-A, Appeals Chamber Judgement of 3 July 2008, Dissenting Opinion of Judge Shahabudden, para.12

<sup>19</sup> Zhu Wenqi: "Modern International Criminal Law", Beijing Commercial Press, 2015, p. 411

<sup>20</sup> Trial of General Tomoyuki Yamashita. United States Military Commission. Manila. 1 October-7 December 1945. In IV Law Reports of the Trials of War Criminals 1-37 (United Nations War Crimes Commission 1948).

<sup>21</sup> France, Code of Military Justice 1982, Ar.71 [Z]; Code of Military Justice 2006, Art. L.122-4 [Z]; Penal Code 1994(a-mended 2010), Art. 462 -7 [Z].

these three situations.<sup>22</sup> Domestic legislation also does not require the timing of the occurrence of the subordinate's crimes and the relationship between the superior and subordinate to be synchronized.

Command responsibility is different from strict responsibility. Commanders have effective control over subordinates are the prerequisite for command responsibility. The first component of command responsibility is the existence of a substantial superior-subordinate relationship, and the core requirement is to have effective control. And this is also the main point of distinguishing command responsibility from strict responsibility. Strict responsibility in the criminal law is not accurately defined. Strict responsibility can be simply regarded as a criminal responsibility regardless of subjective sin.<sup>23</sup> Strict responsibility does not require that the constitution of a crime contains subjective sin, but the command responsibility will not affect the requirements of the superiors on the subjective mentality of the subordinates because of the term of office. Command responsibility is the criminal responsibility of knowing or should know a crime. If the superior does not know that the subordinate committed the crime, the criminal law will not force the superior to bear criminal responsibility. So there is no need to worry that the expanded affirmation of command responsibility will become a strict responsibility.

The expanded affirmation of command responsibility will not violate the principle of legally prescribed punishment for a specified crime. First of all, the command responsibility has long been established. Expanding the command responsibility of determining successive and outgoing commanders does not violate the predictability of criminal suspects. The life of rules lies in the interpretation and application of rules. The meaning and scope of application of rules are uncertain before they are interpreted. Since there is no express provision in the treaty regarding the term of office of the superior and the duration of the crime, it is not excluded to extend the responsibility of the commander to the successive and outgoing commanders through interpretation.

## V. CONCLUSION

The principle of command responsibility has evolved from the embryonic stage to the formation of relatively complete treaty norms, and has never limited the time of the subordinate crimes to the term of the superior. If the time connection between the

subordinate crime and the superior's term of office are strictly required, then it will be excluded that the successive commander can punish the crimes that the subordinate has committed, and the outgoing commander can prevent the subordinate crimes. This not only does not meet the rational requirements of command responsibility, but also is not conducive to the widespread compliance of international humanitarian law. Emphasizing the responsibility of prevention for the outgoing commander and the responsibility of punishment for the successive commander is the necessary element of the command responsibility.

## References

- [1] [H] Hugo Grotius. F. Kelsey trans. "Crimes against Humanity in International Criminal Law" [M]. Martinus Enfhof Publishing, 1992. 373. (in Chinese)
- [2] Sun Wu: "Sun Zi Bing Fa", Wuhan Chongwen Publishing House, 2007 ed. (in Chinese)
- [3] Prosecutor v. Delalic, Case No.IT -96-21- A, Judgment, Appeals Chamber, Feb. 20, 2001.
- [4] Final Report of the United Nations Commission of Experts,S/1994/674, 17.
- [5] Prosecutor v.Issa Hassan Sesay,Morris Kallon and Augustine Gbao case No.SCSL-04-15-T,Mar.2. 2009.
- [6] Prosecutor v. Enver Hadzihasanovic, Case No. IT-01-47, Judgment, Appeals Chamber, Mar. 15, 2006.
- [7] Prosecutor v. Enver Hadzihasanovic, Case No. IT-01-47, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, Appeals Chamber, Jul. 16, 2003.
- [8] Prosecutor v. Enver Hadzihasanovic, Case No. IT-01-47, Separate and Partly Dissenting Opinion of Judge Shahabuddeen Appeals Chamber, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, Jul. 16, 2003.
- [9] Prosecutor v. Enver Hadzihasanovic, Case No. IT-01-47, Separate and Partly Dissenting Opinion of Judge Hunt Appeals Chamber, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, Jul. 16, 2003.
- [10] Prosecutor v. Enver Hadzihasanovic, Case No. IT-01-47, preliminary,Jul. 16, 2003.
- [11] Prosecutor v. Oric, Case No.IT-03-68-A,Appeals Chamber Judgement of 3 July 2008,Dissenting Opinion of Judge Liu, July. 3,2008.
- [12] Prosecutor v. Oric, Case No.IT-03-68-A,Appeals Chamber Judgement of 3 July 2008,Dissenting Opinion of Judge Shahabudden, July. 3,2008.
- [13] Trial of General Tomoyuki Yamashita. United States Military Commission. Manila. 1 October-7 December 1945.
- [14] Liu Renwen. Research on Strict Responsibility in Criminal Law [J]. Comparative Law Research, 2001(01):44-59. (in Chinese)

<sup>22</sup> Germany. Act to Introduce Code of Crimes against International Law 26 June 2002 [Z]. Art.1, Secion13 (1), Sectio13 (4), Section14 (1) [Z].

<sup>23</sup> See Liu Renwen. Research on Strict Responsibility in Criminal Law [J]. Comparative Law Research, 2001(01):44-59.