

Command Responsibility
Presentation to ADF Legal Officers
Queensland Club
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Introduction

- [1] In recent days there has been much publicity about certain members of Australian Special forces being allegedly involved in the commission of war crimes.
- [2] Of course such allegations have not been proved but regardless the allegations are of concern.
- [3] It is in that context it is opportune for me to deliver a paper to you on the issue of command responsibility.
- [4] This is particularly relevant given that ADF legal officers are at the forefront of giving commanders legal advice as to the conduct of operations.
- [5] I wish to examine the doctrine of command responsibility for war crimes noting that it may apply equally to responsibility under civilian domestic law.

Background

- [6] Noting that military and civilian superiors occupy positions of great public trust and responsibility, international law (and in some cases domestic law) imposes responsibility to prevent and punish crimes.
- [7] This doctrine was recognised as early as 1439 in France,² and in 1621 in Sweden. Indeed, Article 71 of the Lieber Code enacted during the American Civil War noted the responsibility of commanders who “ordered or encouraged attacks on disabled enemies”.

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² Charles VII of France issued a law declaring officers responsible for offences committed by members of their company.

- [8] The first international recognition of the doctrine was established by the Hague Conventions of 1899 and 1907. These conventions imposed duties on superior officers to ensure responsibility over subordinates and a duty to ensure “public order and safety” in occupied areas.

Nuremberg and Tokyo trials

- [9] The modern doctrine of command responsibility however directly arose from the Nuremberg and Tokyo Military Tribunals after World War II.
- [10] General Yamashita was the first to be charged with liability based on omission before a United States Military Commission in 1945.³ General Yamashita was the Japanese commander in the Philippines from October 1944. The atrocities committed during his tenure included the rape of 500 civilians in Manila and the killing of 25,000 civilians in Batangas Province. He was charged with “unlawfully disregard[ing] and fail[ing] to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes”. The prosecution case was that General Yamashita’s conduct breached the 1907 Hague Convention and others. On 7 December 1945, Yamashita was found guilty and sentenced to death. It was held “[where] there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops.”⁴
- [11] The *High Command Case* was heard in Nuremberg in 1947-1948. A number of German officers including General Field Marshal Von Leeb were charged in relation to the killing of civilians, communists and commanders by their subordinates. It was held that to be guilty a commander must engage in personal dereliction “where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part”.⁵

³ 4 Law Reports of Trials of War Criminals, trial of General Tomoyuki Yamashita, United Nations War Crimes Commission (1948).

⁴ 4 Law Reports of Trials of War Criminals, trial of General Tomoyuki Yamashita, United Nations War Crimes Commission (1948) 1 at p 35.

⁵ *United States v Von Leeb (High Command Case)*, 11 Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10 (1951) 462 at pp 543-544.

- [12] In the case of General Field Marshal Von Leeb⁶ it was alleged, that as German commander on the Eastern front between June 1941 and January 1942 he implemented two illegal orders, namely the Barbarossa Order and the Commissar Order. The first order issued by General Field Marshal Keitel on 13 May 1941 directed the army to liquidate guerrilla fighters and made the prosecution of German troops for committing war crimes against enemy civilians optional. The second order issued by Adolf Hitler required captured Soviet political officers to be executed. Von Leeb argued that aside from a single atrocity, he was unaware of the orders the others committed.⁷ As to the single atrocity, he claimed to have acted immediately to prevent reoccurrence. He also claimed he gave contrary orders to the two illegal orders. The Nuremberg Military Tribunal found Von Leeb not guilty of implementing the Commissar Order, noting he opposed and defied it. However, the Tribunal did find Von Leeb guilty of implementing the Barbarossa Order by passing it down to the chain of command. He was sentenced to three years imprisonment.
- [13] In 1949, senior German officers were charged in the *Hostage Case*⁸ with the murder and deportation of thousands of Greek, Yugoslavian, Norwegian and Albanian civilians. Hitler ordered General Field Marshal List to suppress insurgents and suggested 50-100 prisoners be executed as reprisal in respect of each German soldier killed. List forwarded the direction to his subordinates and issued his own commands, ordering the shooting of men who were suspected of having taken part in combat or having supported partisans. List claimed he knew nothing of the crimes. He was convicted and sentenced to life imprisonment. He was imputed with knowledge of the crimes and failed to take steps to prevent them.

⁶ *United States v Von Leeb (High Command Case)*, 11 Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10 (1951) 462 at pp 543-544.

⁷ It is to be noted that some 57% of Soviet prisoners of war i.e. 3.3-3.5 million perished.

⁸ 8 Law Reports of Trials of War Criminals, *US v List 34* (1949); 11 Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10 757 (1950).

Additional protocol

[14] In 1977, the doctrine of command responsibility received recognition in the Additional Protocol No 1 to the Geneva Conventions.⁹

[15] Article 86(2) provides:

“The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from ... responsibility, as the case may be, 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.”

[16] Article 87 imposes a responsibility on a commander to “prevent and, where necessary, to suppress and to report to competent authorities” any violations of the Conventions and of Additional Protocol 1.

International Criminal Tribunal- Rwanda

[17] As we will all be aware, the civil war in Rwanda occurred from 1990 to 1994.

[18] After the war the ICTR was established in 1994¹⁰ to deal with allegations of genocide and other war crimes against various individuals.

[19] Important jurisprudence has emanated from the ICTR concerning command responsibility.

[20] In the *Bagilishema* case¹¹ it was held that there are three essential elements of command responsibility:

1. The existence of a superior subordinate relationship of effective control between the accused and the perpetrator of the crime.
2. The knowledge or constructive knowledge of the accused that the crime was about to be, was being or had been committed.

⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

¹⁰ UN Security Council Resolution 955.

¹¹ *Prosecutor v Bagilishema* ICTR-95-1A.

3. The failure of the accused to take the necessary and reasonable measures to prevent or stop the crime or to punish the perpetrator.
- [21] In *Bagilishema* the defendant, a mayor, was accused of being involved in the murder of 45,000 Tutsis. The Tribunal found that the prosecution had not proved the defendant had command responsibility and he was found not guilty of the charges on 7 June 2001.
- [22] In the *Semanza* case¹² the defendant, also a mayor, was alleged to have acted with the intent to destroy to the Tutsi population of Rwanda by organising, directing and participating in attacks (including killings and sexual violence) at four locations in 1994. The Trial Chamber found the defendant guilty on 15 May 2003 of complicity to genocide, aiding and abetting extermination, and crimes against humanity. He was sentenced to 25 years imprisonment. On appeal on 20 May 2005, this was increased to 35 years imprisonment. Importantly it was held that:
- “A superior-subordinate relationship requires a formal or informal hierarchal relationship where a superior is senior to a subordinate. The relationship is not limited to a strict military command style structure.”
- [23] In the *Kayishema and Ruzindana* case¹³ it was affirmed that the principle of command responsibility must only apply to those superiors who exercise effective control over their subordinates. The material ability to control the actions of subordinates is the touchstone of individual responsibility.
- [24] Kayishema was a medical doctor elected as a regional prefect in 1992 in Rwanda. Ruzindana was a successful businessman.
- [25] The defendants were charged with criminal responsibility as superiors regarding four massacres in Rwanda. It was alleged that they knew and failed to prevent those under their control from slaughtering thousands of innocent civilians. Both were charged with the counts of crimes against humanity including murder, extermination, and other inhumane acts. The defendants

¹² *Prosecutor v Semanza* ICTR-97-20.

¹³ *Prosecutor v Kayishema and Others* ICTR-95-1.

were found guilty of genocide. Kayishema was sentenced to life imprisonment and Ruzindana, 25 years' imprisonment.

- [26] It is also important to note that responsibility is not based on strict liability. It must be established that the commander had knowledge (either actual or constructive) that the crime was about to be, or was being, or had been, committed.¹⁴ Crucially it must also be proved there was a failure to take necessary and reasonable measures to prevent or stop the crime or punish the perpetrators.¹⁵
- [27] Of note in the *Akayesu* case¹⁶ the principles of command responsibility have been held to apply to civilians. Jean-Paul Akayesu was the commander of communal police and gendarmerie in the town of Taba. In mid-1994, many Tutsis were killed in his commune and subjected to other violence. He was charge with 15 counts of genocide and crimes against humanity. He was convicted of 9 counts of genocide and crimes against humanity. It was found that he refrained from stopping the killings and also personally supervised the murder of some Tutsis. He was sentenced to life imprisonment.

International Criminal Tribunal Yugoslavia

- [28] The Yugoslav civil war occurred between 1991 and 1999 after the end of communist rule. A number of individuals on various sides of the conflict were accused of war crimes.
- [29] The ICTY was established in 1993 to hear these allegations.¹⁷
- [30] In the *Celebici* case,¹⁸ the Tribunal considered a case where in 1992 Bosnian Muslims and co-enforcers killed and tortured prisoners (Bosnian Serbs). The camp commander (Mucic) and the deputy camp commander (Delic) were prosecuted on the basis of command responsibility. The regional co-ordinator (Delacic) was also prosecuted.

¹⁴ *Prosecutor v Akayesu* ICTR-96-4, *Prosecutor v Kayishema and Ruzindana* ICTR-95-1; *Prosecutor v Bagilishema* ICTR-95-1 and *Prosecutor v Semanza* ICTR-97-20.

¹⁵ *Prosecutor v Bagilishema* ICTR-95-1A.

¹⁶ *Prosecutor v Akayesu*, ICTR-96-4-T; appeal ICTY-96-4-A.

¹⁷ UN Security Council Resolution 827.

¹⁸ *Prosecutor v Delalic and Ors.* ICTY-96-21-T 16 November 1998; appeal ICTY 96-21-A.

- [31] Mucic was convicted of unlawfully causing great suffering or serious injury; the unlawful confinement of civilians; unlawful killing; torture and inhumane treatment (great breaches of the Geneva conventions). He was ultimately sentenced to nine years imprisonment. His liability was founded on the basis of superior criminal responsibility.
- [32] Delic was also convicted and sentenced to 18 years imprisonment for his involvement.
- [33] The prosecution failed to prove that Delacic was liable because of the absence of a superior-subordinate relationship.
- [34] In the *Halilovic* case¹⁹ in 1993 in the village of Grabovica 13 people of Croatian descent were killed by troops billeted in the town. At that time the defendant was the Chief of the main staff of the army of Bosnia and Herzegovina. The Trial Chamber found the defendant not guilty as it considered the prosecution had not proved beyond reasonable doubt he was the commander of the operation nor that he had effective control of the troops. He was acquitted of murder. The prosecutor appealed the decision but the appeal was dismissed. It was held that the prosecutor had failed to prove the defendant had the requisite degree of control over the operation and had failed to prove a superior-subordinate relationship between the troops and the defendant.
- [35] In the *Blasik* case²⁰ the defendant was a senior officer in the Croatian Army. In 1992 and 1993 there was a widespread destruction of Muslim houses and mosques and civilian murders. It was alleged that the defendant was responsible for crimes committed by his troops in Central Bosnia including great breaches of the Geneva conventions, violations of the laws of war or customary laws of war, and crimes against humanity.
- [36] On 1 March 2000 the defendant was convicted in the Trial Chamber and sentenced to 45 years imprisonment. However on appeal²¹ 16 of the 19 counts against him were dismissed.

¹⁹ *The Prosecutor v Halilovic* ICTY-01-48T.

²⁰ *Prosecutor v Blasik* IT-95-14-T.

²¹ *Prosecutor v Blasik* IT-95-14-A.

- [37] It was found that command responsibility could not be proved. Lesser charges of inhumane treatment of PW's were confirmed and he was instead sentenced to 9 years imprisonment.
- [38] Other jurisprudence from ICTY established the necessity for commanders to put in place measures which sustain an environment of respect for international humanitarian law²².
- [39] In the *Oric* case, the defendant was a senior commander of Bosnian Muslim forces near Srebrenica. A number of prisoners were murdered in 1992/1993. On 30 June 2006 the defendant was convicted by the Trial Chamber of failing to take necessary and reasonable measures to prevent the crimes. However on appeal Oric was found not guilty. It was found there was insufficient evidence to conclude he had reason to know about the crimes.
- [40] Principles of command responsibility have also extended to civilian leaders such as former Japanese Prime Minister Hideki Tojo²³. Furthermore, the Trial Chamber in the *Celebici*²⁴ case held that it extended to non-military superiors

The Rome Statute

- [41] The occurrence of many war crimes in Yugoslavia and Rwanda in the 1990s "reignited" the push for a permanent international criminal court.
- [42] In July 1998 after a five week diplomatic conference in Rome, the international community finally agreed to establish a permanent International Criminal Court (ICC). The new Court was tasked with the responsibility of ensuring criminal liability for serious violations of international humanitarian law and other such crimes.
- [43] As to the exercise of jurisdiction, first, the Court has jurisdiction when the United Nations Security Council (UNSC) refers a situation to the Court.²⁵ Secondly, the Court can exercise jurisdiction where a referral is made by a State party.²⁶ Thirdly, the Court can exercise jurisdiction where the

²² *Halilovic* ICTY- 01-48T and *Prosecutor v Oric* IT-03-68-T.

²³ Tokyo War Crimes Trial 4 November 1948.

²⁴ *Prosecutor v Delalic and Ors* ICTY-96-21-T.

²⁵ Article 13(b) of the Rome Statute and Chapter VII of the UN Charter 1948.

²⁶ Article 14 of the Rome Statute.

prosecutor refers a matter to the Court. The prosecutor must obtain the approval of the pre-Trial Chamber to proceed with the prosecution.²⁷

[44] The Court's jurisdiction arises on a number of circumstances.²⁸ Article 5 of the Rome Statute provides that the jurisdiction of the ICC will arise only with respect to the most serious crimes, which are of concern to the international community as a whole. First, it has jurisdiction to deal with the crime of genocide.²⁹ Secondly, it has jurisdiction to deal with crimes against humanity. Thirdly, it has jurisdiction to deal with war crimes. Fourthly, it has jurisdiction to deal with the crime of aggression.

[45] Turning to the ICC's jurisdiction to deal with crimes against humanity, it is to be noted that Article 7 of the Rome Statute sets out a list of these crimes. They include murder, extermination, enslavement, deportation, deprivation of liberty, torture, rape, persecution, apartheid or other inhumane acts. It is important to note that Article 7(1) does not make reference to any requirement that an armed conflict exist. However it must be borne in mind that Article 7(1) of the Rome Statute requires that the relevant act or acts be "committed as part of a widespread or systematic attack directly against any civilian population with knowledge of the attack."

[46] As to war crimes they are constituted by the following:

1. Grave breaches of the 1949 Geneva Conventions in respect of protected persons and property including wilful killing, torture, wilfully causing great suffering or serious injury, extensive destruction of property, compelling a POW to serve in armed forces, depriving a POW or protected person of a fair trial, unlawful deprivation in taking of hostages.³⁰
2. Other serious violations of the law and customs applicable to international armed conflict.³¹

²⁷ Article 15 of the Rome Statute.

²⁸ Article 5 of the Rome Statute.

²⁹ Article 6 of the Rome Statute.

³⁰ Article 8(2)(a) of the Rome Statute.

³¹ Article 8(2)(b) of the Rome Statute.

[47] It is to be noted that the threshold jurisdiction is that the war crime must be committed as part of a plan or policy or as part of a large scale commission of such crimes.³²

[48] In summary there are four categories of offences, namely:

1. Genocide;
2. Crimes against humanity;
3. War crimes; and
4. Crimes of aggression.

[49] Importantly Article 28 provides:

“Article 28

Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority

³² Article 8(1) of the Rome Statute.

and control, as a result of his or her failure to exercise control properly over such subordinates, where:

- (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
- (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
- (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.”

[50] Article 33 provides:

“Article 33

Superior orders and prescription of law

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
 - (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
 - (b) The person did not know that the order was unlawful; and
 - (c) The order was not manifestly unlawful.
2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.”

[51] It may be seen that Article 28 of the Rome Statute provides that military commanders are imposed with an individual responsibility for crimes committed by forces under their effective control and command if they “either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes”.

[52] Article 28(b) widens the scope of this responsibility to include superiors who are not necessarily military superiors.

Jurisprudence from the ICC

[53] Over the last 15 years – the Office of the Prosecutor has opened investigations into 10 situations:

1. Two in the Central African Republic;
2. One in the Côte d'Ivoire;
3. One in Darfur, Sudan;
4. One in the Democratic Republic of the Congo;
5. One in Georgia,
6. One in Kenya;
7. One in Libya;
8. One in Mali; and
9. One in Uganda.

[54] As at 17 August 2017, 31 arrest warrants had been issued. 14 had been implemented, and three withdrawn as a result of the death of the suspects. Presently six persons are in custody, 15 suspects are at large and nine are not in custody.

[55] 25 cases in total have been brought before the Court. Five are in the trial stages as follows:

1. *Prosecutor v Ongwen* – Uganda – trial commenced 6 December 2016
2. *Prosecutor v Netaganda* – Congo – trial commenced 2 September 2015
3. *Prosecutor v Nourain* – Darfur – not yet commenced
4. *Prosecutor v Gbagbo & Goude* - Côte d'Ivoire – trial commenced 28 January 2016.

[56] There have been four convictions:

1. *Prosecutor v Lubanga Dyilo*³³ – Congo – convicted on 14 March 2012 of committing war crimes by enlisting children under 15 to participate in hostilities. Sentenced to 14 years imprisonment.

³³ *Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06.

2. *Prosecutor v Germain Katanga*³⁴ – Congo – on 17 March 2014 found guilty of one crime against humanity and four war crimes. Sentenced to 12 years imprisonment.
3. *Prosecutor v Bemba Gombo*³⁵ – Central African Republic – convicted on 21 March 2016 of two crimes against humanity and three war crimes. He was sentenced to 18 years imprisonment. This case is the subject of an appeal.
4. *Prosecutor v Ahmad al-Mahdi*³⁶ – Mali – convicted on 27 September 2016 of one count of war crimes. He was sentenced to 9 years imprisonment.

[57] In the *Bemba* case³⁷ the defendant was Commander in Chief of the army de Liberation du Congo ('ALC'). The conflict in the Central African Republic ("CAR") between 26 October 2002 and 15 March 2003 was an armed conflict between the CAR Government supported by the ALC. ALC soldiers directed a widespread attack against the civilian population including acts of pillaging, rape and murder. It was alleged that the defendant was acting as a military commander³⁸ who knew that forces under his command were committing or about to commit the crimes charged. It was alleged he failed to take all necessary and reasonable measures to prevent or suppress the commission of the crimes of his subordinates or submit the matter to competent authorities.

[58] On 26 March 2016, the Trial Chamber found the defendant guilty of two counts of crimes against humanity (murder and rape) and three counts of war crimes (murder, rape and pillaging). On 21 June 2016 he was sentenced to 18 years imprisonment. The case is presently the subject of an appeal. This is the first time a commander has been convicted of the crime of sexual violence in the ICC.

³⁴ *Prosecutor v Germain Katanga* ICC-01/04-01/07.

³⁵ *Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/05-01/08.

³⁶ *Prosecutor v Ahmad Al Mahdi* ICC-01/12-01/15

³⁷ *Prosecutor v Bemba Gombo* ICC-01/05-01/08.

³⁸ Article 28(a) of the Rome Statute.

[59] In the *Lubanga* case³⁹ the defendant founded the Union of Congolese Patriots (“UPC”) during the Congolese conflict. Rebels under his command were involved in ethnic massacres, murders, torture, rape, mutilation and forcible conscription of child soldiers. It was alleged against the defendant that he was a co-perpetrator of the enlistment and conscription of children under the age of 15. It was further alleged against the defendant that he had used those children to actively participate in an armed conflict not of an international character.⁴⁰ The defendant was convicted of war crimes on 14 March 2012. On the 10 July 2012 he was sentenced to 14 years imprisonment. It was concluded that he was Commander in Chief and was informed of the operation of the UPC. His actions were essential to this common plan. His appeal was dismissed on 1 December 2014.

[60] In the *Katanga* case⁴¹ the defendant was the leader of the Patriotic Resistance Force (‘FRPI’) in Congo. It was alleged that in 2003 he led an attack on the village of Bogoro in which his troops killed 200 civilians and sexually assaulted women and girls. It was also alleged he had been involved in the massacre of more than 1,200 civilians in an attack on a hospital in September 2002. On 7 March 2004 the Trial Chamber convicted him of five counts of war crimes and crimes against humanity as being an accessory in the massacre in Bogoro village. He was acquitted of directing rapes and using child soldiers during the massacre as there was insufficient evidence to connect him with the crimes. However it was found that he supplied guns to the Militia that carried out the massacre thus reinforcing the strike capability of the Militia which justified convictions as an accessory. On 23 May 2014, Katanga was sentenced to 12 years imprisonment. The Trial Chamber dismissed his mode of liability as principal perpetrator as it was not proved beyond reasonable doubt he had the material ability to give orders or to ensure the implementation or that he held the authority to punish camp commanders.

Summary of the principles

³⁹ *The Prosecutor v Thomas Lubanga Dyllo* ICC-01/04-01/06.

⁴⁰ Article 8(2)(e)(vii) of the Rome Statute.

⁴¹ *The Prosecutor v Germain Katanga* ICC-01/04-01/07.

- [61] In essence for liability to be established three elements need to be proved⁴²:
- The existence of a superior-subordinate relationship. This is established by actual control directly or indirectly.⁴³
 - Knowledge. Bear in mind on occasions constructive knowledge may be sufficient.
 - Failure to act. It is a crime based on accessorial liability.
- [62] It is to be borne in mind that failing to conduct a proper investigation after the event may constitute failing to suppress a crime.⁴⁴ An investigation alone is insufficient. Actions may need to be taken to punish perpetrators.

Civil liability

- [63] I thought I would finally mention the topic of civil liability.
- [64] Leaving aside criminal liability, a commander could be held civilly liable for acts committed by troops under his or her command.
- [65] By way of example, in 2015 the family of a deceased Northern Irishman killed 42 years prior brought a civil suit against General Kitson, who served as the General Officer Commanding in Northern Ireland at the time. General Kitson was in charge of military operations in the 1970s. He was named as co-defendant in the civil suit. It was alleged he was “liable personally for negligence and misfeasance in public office.”
- [66] The case is ongoing.

Conclusion

- [67] What you may have gleaned from this paper is that Commanders will often be the subject of scrutiny after the event.
- [68] The scrutiny will be directed towards whether they are responsible for the acts of others or on whether they failed to exercise responsibility.

⁴² See “Failure to Halt, Prevent or Punish: the Doctrine for Command Responsibility for War Crimes,” Andrew Mitchell, (2000) 22 Syd Law Review 381 at p 384.

⁴³ See *Bemba Case* ICC 01/05-01/08.

⁴⁴ *Prosecutor v Strugar* ICTY IT-01-42-T.

[69] The lesson to be learnt is that it is important for commanders to ensure that their subordinates comply with the law.

[70] It is my respectful view that the role of ADF Legal officers is crucial so as to ensure that their commanders act lawfully⁴⁵.

⁴⁵ Also see Article 82 of Additional Protocol 1 1977.