PUBLIC

ANNEX A

EXPERT REPORT BY

U.S. COLONEL LINDA STRITE MURNANE

REPORT OF LINDA STRITE MURNANE IN THE CASE OF PROSECUTOR v ALI MUHAMMAD ALI ABD-AL-RAHMAN, ICC-02/05-01/20

This report is submitted at the request of the Defence Team in the above matter. It reflects my experience which includes twenty-nine and one-half years (29.5) on active duty with the U.S. Armed Forces, including two years as an enlisted airman and twenty-seven and one-half years as a commissioned officer. I began my military service as an airman basic (E-1) and retired in the grade of colonel (O-6).

The views expressed in this report are my own views and do not reflect the opinion of the United States Department of Defense, the United States Air Force, or any official entity of the United States Government. I am not currently employed by the United States government in any capacity.

During the nearly three decades during which I served in the U.S. Armed Forces, my duty assignments varied widely from serving as a print and photo journalist, a public affairs officer, a supply officer and then as a judge advocate with training in the law. For ten years I served as a judge or chief circuit military judge for the United States Air Force, presiding as a judge hearing cases of United States airmen charged with criminal offenses in violation of the United States Code of Military Justice. I presided at the first trials of Operations Iraqi and Enduring Freedom in deployed locations.

Following my retirement from the United States Air Force in 2004, I served as a felony prosecutor in Brown County, Ohio, U.S.A. where I was responsible for investigating and prosecuting serious offenses in a county-wide jurisdiction before judges and juries. In 2005 I became the Executive Director of the Kentucky Commission on Human Rights. My studies related to the obtaining of my Juris Doctorate degree at the University of Cincinnati College of Law including selection as a Fellow in the Urban Morgan Institute for International Human Rights.

In 2005, I was employed by the United Nations at the International Criminal Tribunal for the former Yugoslavia as the Acting Senior Legal Officer for Trial Chamber III, where I led the teams responsible for the cases of Milutinovic, et al., Prlic, et al., and Seselj, and for the pre-trial preparation of five additional cases, including Radovan Karadzic.

In 2008 I accepted a position as the Senior International Attorney for the United States Defense Institute for International Legal Studies (DIILS). DIILS serves as the lead agent in the United States for training globally on human rights and rule of law, including training on the Law of Armed Conflict/International Humanitarian Law. Among assignments while serving either as an adjunct faculty member for DIILS or as the Senior International Attorney for DIILS, I conducted training on human rights and rule of law matters in Rwanda, Zambia, Argentina, Latvia, Papua New Guinea and Liberia, and supervised the development of training curricula and assignment of training teams for civilian and military leaders around the globe.

In 2009, I returned to the International Criminal Tribunal for the former Yugoslavia (ICTY) as the Chief, Court Management Services Section. During the three years between 2009 and 2012, I also

served three months as the Acting Head of Chambers and four and one-half months as the Acting Deputy Registrar at the ICTY.

From 2013 – 2014 I served as the Judicial Bailiff for the Honorable Anne Taylor, Senior Judge at the Franklin County Municipal Court in Columbus, Ohio. In 2014 I was employed at the Special Tribunal for Lebanon as the Chief, Court Management Services.

My publications, presentations and speeches as well as my other credentials in providing this report are contained in my detailed C.V.

I have been asked to offer my views on the following issues considered to be relevant in the above-captioned case.

1. **What is the likely level of knowledge and understanding of the principle of distinction between civilians and combatants in International Humanitarian Law that can be expected from a person whose educational level is secondary level education, and where the individual has never received any military training on that topic?**
2. **What is the likely level of knowledge and understanding that can be expected from that person as to whether the following categories of persons are, or not, protected persons under International Humanitarian Law:**
   - **(i) Male adult**
   - **(ii) Female adult**
   - **(iii) Children**
   - **(iv) Elder persons**
3. **Would the answers to question 2 vary if these persons are residing and/or found in localities described by the government authorities and/or suspected to be populated by "rebel forces"? If so, in what circumstances and to what extent?**
4. **Would the answers to questions 1, 2 or 3 vary depending on the country/region of that person? Would it vary if the person has lived his entire life in a country/region affected by decades of tribal warfare?**
5. **What impact, if any, would there be with respect to a military member who was not trained in International Humanitarian Law in determining whether the order of a superior was one that was lawful?**
6. **Military commanders are responsible for ensuring that troops under their command have received appropriate and sufficient training on respecting the principles of distinction prior to engagement in military operations. If this training obligation has not been observed, to what degree is the untrained military member accountable for violations of the principles with respect to the conduct of armed engagement?**

1. What is the likely level of knowledge and understanding of the principle of distinction between civilians and combatants in International Humanitarian Law that can be expected from a person whose educational level is secondary level education, and where the individual has never received any military training on that topic?

"Knowledge of the rules of IHL [International Humanitarian Law] is a necessary but not a sufficient condition to ensure their respect. They [the rules] also have to be accepted. It has to be understood that they are the law accepted by States. It has to be understood that the numerous justifications for violating IHL that may be put forward, for instance, 'state of necessity', 'self-defence', 'the sense of having suffered an injustice', 'strategic interests', 'the desire to spare friendly forces' or any aim, however noble, cannot be and are not accepted as reasons justifying violations of IHL."[1]

The International Committee of the Red Cross' "Handbook on International Rules Governing Military Operations outlines the obligations of commanders to train their subordinates in this language:

"8.1.0.5 Prevention A commander must ensure that: his subordinates are aware of their obligations under the law of armed conflict; that he takes general measures to prevent violations of the law of armed conflict; and that if he is aware that troops under his command or control are going to commit a breach of the law of armed conflict, he takes specific action to prevent such a violation. Subordinates need not understand all aspects of the law of armed conflict. Rather, their knowledge should as a minimum be commensurate with their responsibilities and functions. Over and above training in the law, general measures to prevent violations include integrating the law into operational doctrine, education and field training, and giving orders that ensure compliance with the law."[2]

As noted by Michael J. Hoffman: "Civil and military leaders often claim that their forces always administer and obey international humanitarian law (IHL). How those leaders reply to one simple question can do much to support – or undermine – their claims. What training do your forces receive in IHL?"[3]

It is generally accepted that there is a need for training on principles embraced in the Geneva Conventions, and the conflict environment in which one finds themselves engaged can pose significant challenges for efforts to comply with the principles of IHL when training has been inadequate or where no training has occurred.

[1] "How Does Law Protect In War, Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law", Volume I, Marco Sassoli and Antoine A. Bouvier in co-operation with Susan Carr, Lindsey Cameron and Thomas de Saint Maurice, International Committee of the Red Cross, Second Edition, 2006, at p. 336.
[2] Handbook on International Rules Governing Military Operations, Chapter 8, at p. 262 at https://www.icrc.org/sites/default/files/topic/file_plus_list/0431-handbook_on_international_rules_governing_military_operations.pdf
[3] Michael H. Hoffman "Training in International Humanitarian Law" in "Crimes of War 2.0, What The Public Should Know", edited by Roy Gutman, David Rieff and Anthony Dworkin (2007)

"Indeed, once soldiers or civil servants are aware of a regulation and know that their superiors want them to respect this rule, they will apply and respect it without further discussion, especially if they have understood that it is possible to respect that rule."[4]

The need for specific training on the principles embodied in the Geneva Conventions is recognized as an obligation to ensure that military personnel understand and can adhere to the law of armed conflict. States are specifically called upon to disseminate and to train their countries, and more specifically, to train their military, and if possible civilians, with respect to the principles of the law of armed conflict.[5]

The existence of this obligation to train the military, and if possible civilians on these principles is indicative of the general unlikelihood that these principles would be grasped intuitively in the absence of such formalized training and indoctrination.

In the recent cases involving U.S. military members tried for criminal conduct related to offenses at the Abu Ghraib prison, among the failures identified in the resulting mistreatment of prisoners of war and detainees was a lack of training and preparation throughout the military brigade assigned to those duties.[6] The report on failures which led to the offenses at Abu Ghraib cited ambiguity in the chain of command, laissez-faire leadership, lack of training, poor discipline and psychological stressors, in addition to ambiguous rules of engagement, standards of conduct, laws, regulations and orders leading to that conduct.[7]

The inclusion of the lack of training in the conduct charged in Abu Ghraib demonstrates that with respect to the obligation of a military hierarchy to ensure training of each of its members is essential, and that, in the absence of such formalized training, it cannot be presumed that military members, or civilians, will intuitively be familiar with the national obligations under the Geneva Conventions in terms of the required behavior of military members and civilians in conflict situations.

In determining the level of training necessary, the formal education and military core training provided to service members of any national armed force is one of several factors to be considered in ensuring that those engaged or to be engaged in national defense or in conflict are adequately prepared with the knowledge to conform their behavior to the required international standards.

In a study published by the United States Institute of Peace (USIP), "Law of War Training, Resources for Military and Civilian Leaders", authors Laure R. Blank and Gregory P. Noone offer that "The issues of manpower and the availability of external training sources (along with budgetary constraints) greatly affect the choices military and civilian leaders make in developing

[4] "How Does Law Protect in War, Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law" at p. 338.
[5] Article common to all four Geneva conventions of 1948: Geneva Convention (GC) I, article 47, GC II, article 48, GC III, article 127, GC IV, article 144.
[6] "Lessons of Abu Ghraib" Understanding and Preventing Prisoner Abuse in Military Operations", Defense Horizons, Center for Technology and National Security Policy, National Defense University, November 2008, p. 3.
[7] *Id.* At pp. 3 – 4.

and implementing law of war training programs."[8] Blank and Noone observe that each military needs to assess both its needs and capabilities before designing a training program, and must reassess during the implementation of the training to ensure that it is fulfilling its obligations under international law.[9]

In the USIP study, the authors incorporate a directory of law of war training programs. For the Sudan, they report that domestic law in Sudan includes a military order issued by the army chief of staff to conduct such training, but the report notes that there is no designated unit responsible for carrying out the training. The report further indicates that the Sudanese rely upon self-generated training materials. Recipients of the training are listed as being junior officers and non-commissioned officers.[10]

The degree of education of one who is intended to be trained is relevant in assessing whether the self-generated materials, if they exist at all, are able to communicate the sometimes-challenging principles embraced in the Geneva Conventions, particularly with respect to the unique aspects of non-international armed conflict and tribal warfare.

The principle of distinction is a particularly challenging concept which requires careful training in the context of non-traditional combat

Laurie Blank and Amos Guiora write in the Harvard Law School National Security Journal, "In new warfare, the blurring of civilian and fighter, of military objective and protected object, make application of the principles of distinction and proportionality very difficult."[11]

Blank and Guiora go on to speak more specifically about the challenge of understanding the principle of distinction under what they refer to as "new warfare." They state: "New warfare's complexities confound the classic bifurcation between combatants and civilians in LOAC.[12] A distinct asymmetry between the military and technological capabilities of the state and non-state parties and the intermingling of civilians and hostile persons predominate in new warfare. Both challenge the effective application of LOAC. First, the 'disadvantaged party has an incentive to blur the distinction between its forces and the civilian population in the hope that this will deter the other side from attack.'"[13]

Blank and Guiora further note "According to the Pakistani military, Taliban leaders have bought children to serve as suicide bombers, recognizing that '[t]he young suicide bombers may be able to reach targets unnoticed.' Once soldiers face attacks from legitimate targets posing as innocent

[8] "Law of War Training, Resources for Military and Civilian Leaders" United States institute of Peace, Laurie R. Blank and Gregory P. Noone, March 2008, p. 8
[9] *Id*. at p. 5
[10] *Id*. at p. 24.
[11] "Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare", Laurie Blank and Amos Guiora, Harvard Law School National Security Journal, Volume I, May 13, 2010 at https://harvardnsj.org/wp-content/uploads/sites/13/2015/01/Vol.-1_Blank-Guiora_Final.pdf
[12] LOAC – Law of Armed Conflict
[13] Blank and Guiora *supra*, Citing to Michael N. Schmitt, "The Impact of high Tech and Low Tech Warfare on the Principle of Distinction" in International Humanitarian Law and the 21st Century's Conflicts: Changes and Challenges 169, 178 (Roberta Arnold and Pierre-Antoine Hildbrand eds., 2005)

civilians, they will be more likely to engage persons who appear to be civilians (some of whom truly are innocent civilians) in order to protect against surprise attacks. The effect: uncertainties and unforeseen dangers that undermine the very protections for innocent civilians inherent in the principle of distinction."[14]

Against this backdrop, the level of understanding of a person with no training on the obligations under the Geneva Convention are accepted to be inadequate, leading to the inclusion of training within the body of the Conventions themselves.

2. What is the likely level of knowledge and understanding that can be expected from that person as to whether the following categories of persons are, or not, protected persons under International Humanitarian Law:

(i) Male adult

(ii) Female adult

(iii) Children

(iv) Elder persons

For the reasons explained above, and particularly in the circumstances where one is untrained and engaged in non-international tribal conflict or insurgency, the clarity of the existing principles would be limited.

Blank and Guiora point out that the term "innocent civilians" which encompasses the persons identified in the above list inclusive in (i) through (iv) is intended to refer only to those persons who retain immunity from attack at all times.[15] Persons who engage in hostilities, however, are legitimate targets and are not protected under the Geneva Convention.

In the absence of training, and in the context of an insurgency or tribal warfare these categories of protected persons can be difficult to discern. The definitions of protected persons have to be viewed, in the absence of training and in the nature of the specific conflict as it has been conducted to assess how a person of general knowledge might perceive the threat.

Additionally, particularly with respect to the "new warfare" model, understanding how and why to distinguish among those who are protected and those who are not protected is "one of the most important tools a commander needs – and a key skill he must impart to his troops."[16] Where a variety of persons who are neither soldiers nor members of armed groups play a continuous role in hostilities, the level of direct participation arguably makes them legitimate targets at all times.[17]

Among the examples included in the explanation provided by Blank and Guiora of persons who are neither soldiers nor members of armed groups who may constitute legitimate targets are: makers of improvised explosive devices (IEDs), suppliers and makers of suicide bomber belts, and the planners of terrorist attacks. The distinction is further blurred when you consider the ongoing

[14] Blank and Guiora, *supra*.
[15] Blank and Guiora, *supra.*
[16] 'Blank and Guiora, *supra*.
[17] Blank and Guiora, supra.

discussion about the concept of self-defence complicated by current dialogue among IHL scholars with respect to hostile acts and hostile intent.[18]

The absence of training on these complexities particularly where one has been surrounded by tribal warfare and has moved interchangeably between roles as a police officer, a reservist and a military member could undermine the ability of the individual to make correct choices. That is, after all, why the Geneva Conventions, require training by military command authorities.

3. Would the answers to question 2 vary if these persons are residing and/or found in localities described by the government authorities and/or suspected to be populated by "rebel forces"? If so, in what circumstances and to what extent?

As noted above, where a person was placed in a situation where irregular or "rebel" forces are mixed in with the general population, the challenges posed in proper application of the principle of distinction would be particularly difficult for the reasons cited above.

Additionally, where the individual involved may have variously served in the police force or the armed force, in a situation involving civil unrest, the training to ensure clarity of the rules under which the individual must operate is even more important.

For example, as noted in the ICRC's Handbook on International Rules Governing Military Operations, the distinction between the applicable provisions for members of a police force and members of the military force include this explanation:

"9.8 State and individual responsibility for violations of human rights during law enforcement operations

"This Section describes the responsibilities of States and individuals for violations of human rights during law enforcement operations.

"9.8.1 Applicable law

"9.8.1.1 Rule Law enforcement operations, i.e. situations other than armed conflict (as defined in 14.1.1.2), are governed by domestic law and human rights law. However, it must be noted that situations other than armed conflict, e.g. a riot control operation carried out by armed forces, can occur on the territory of a State in which an armed conflict is taking place; and in such cases certain provisions of the law of armed conflict are potentially applicable, such as those relating to the internment of civilians who represent a security threat to a party to the conflict."[19]

Where the individual has moved interchangeably between roles as a police officer and a member of the armed forces, specific training to ensure that the rules in each respective role are understood is obligatory in order to ensure that the individual can differentiate his/her responsibilities to those who may be engaged in rebel or insurgent activities.[20]

[18] See, for example, "Reconceptualizing Individual or Unit Self-Defense as a Combatant Privilege", E.L. Gaston, Harvard National Security Journal, Volume 8, 2017 at https://harvardnsj.org/wp-content/uploads/sites/13/2017/02/Gaston-NSJ-Vol-8.pdf

[19] ICRC Handbook on International Rules Governing Military Operations, *supra.* at p. 310.

[20] For a further discussion of the challenges faced in the current conflict environment, see "International Humanitarian Law and the Challenges of Contemporary Armed Conflict", published by the International Committee

4. Would the answers to questions 1, 2 or 3 vary depending on the country/region of that person? Would it vary if the person has lived his entire life in a country/region affected by decades of tribal warfare?

As stated by Peter Rowe in his article

"It is up to a State to determine by its own law, however, who is a member of its armed forces. This has particular significance for the determination of when reservists, common in many countries, become members and thus combatants within the meaning of IHL. Once a person is a member of the armed forces of a State it is irrelevant whether that State describes the duties that he/she is to perform as combat or noncombat duties, or whether the members of the armed forces are conscripted or are volunteers. It is also irrelevant whether the State describes those armed forces as special forces, commandos, presidential guards, or by any other name. Where, however, a State incorporates its armed law enforcement agencies (such as its police force) into its armed forces, it must notify the other party to the conflict for the simple reason that such bodies would not normally be considered to be part of the armed forces of a State, and so not liable to attack as combatants. Certain armed formations in certain states, such as paramilitaries, may or may not be members of the armed forces within the meaning of IHL, depending on how the State's own law treats such paramilitary forces.[21]

"The definition of combatants beyond those who fight for the regular armed forces of a State is regulated by IHL."

As the determination as to who is a member of a country or region's armed force is determined by the State, then the answers to questions 1, 2 or 3 in this report would vary based on the country or region. The Geneva Conventions envisioned a conflict environment where each person's status as a combatant or non-combatant would fit neatly within the described conditions found in the Conventions. Modern conflicts, or "new warfare" scenarios do not neatly lend themselves to such precise definitions. However, in general, whether the person is in fact a combatant, or subject to the provisions contained in the Geneva Convention would ideally, be determined by the State's identification of whether the member was in that State's armed force or not.[22] This does not take into account, however, the situations in which non-international armed conflicts occur and include persons engaged in the hostilities who fall outside the clear definitions of combatant/non-combatant such as in tribal warfare.

5. What impact, if any, would there be with respect to a military member who was not trained in International Humanitarian Law in determining whether the order of a superior was one that was lawful?

Article 33 of the Rome Statute states the following with respect to orders of a superior.

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of the Red Cross, at https://www.icrc.org/sites/default/files/document/file_list/challenges-report_ihl-and-non-state-armed-groups.pdf

[21] Peter Rowe, "Rights of Soldiers" in "Crimes of War 2.0, What The Public Should Know", edited by Roy Gutman, David Rieff and Anthony Dworkin (2007) at pp. 390 – 391.

[22] The ICRC includes a reference to the 2005 Sudan Armed Forces Act at this link: file:///C:/Users/kmurn/Downloads/Armed%20Forces%20Act%202007.pdf, found in the ICRC's National Implementation of IHL database at https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=11D7DE7335590F8EC12575440051D94E&action=openDocument&xp_countrySelected=SD&xp_topicSelected=GVAL-992BUA&from=state

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.

The provisions of this article of the Rome Statute need to be applied in the context in which an accused person arrives before the tribunal.

Under the provisions of Article 33, Item 1(a), the grade of an accused person is directly relevant to determining whether or not the person had a legal obligation to obey the orders of the Government or superior who may have given the order in question.

It is well-established in military code provisions that military members are obliged to follow the lawful orders of their superiors. It is this fundamental concept that ensures a disciplined military force.

While the defense of obedience to superior orders is strictly limited under Article 33, proof that a servicemember has received adequate training on the principles which attend to the issuance of lawful orders in combat are a necessary consideration when determining whether the person knew or did not know that the order given was unlawful. Additionally, such training would be essential in deciding whether the accused person knew or should have been aware that the order was manifestly unlawful.

What is discussed here differs from the defense presented and addressed in *Prosecutor v Erdemovic*.[23] What is addressed here is whether a subordinate servicemember who has not received training on the Geneva Conventions and their applicability in a specific set of circumstances (ongoing tribal warfare and internal conflict) has the necessary understanding to be able to determine whether what he has been ordered to do is lawful, or manifestly unlawful.

"According to Judge Gerard La Forest, "the rationale for these defences [of lawful orders] is that a realistic assessment of police or military organizations requires an element of simple obedience; there must be some degree of accommodation to those who are members of such bodies. . . . Respect for the equality, dignity and autonomy of the individual cannot be fully extended to members of the military. The armed forces are vital for national defense and depend upon "instant, unquestioning obedience to. . . those in authority.... This is. . . the only way in which a military unit can effectively operate . . .. The lives of every member of a unit may depend upon ... instantaneous compliance with orders even though those orders may later ... appear to have been unnecessary."[24]

It is against this obligation for compliance with orders and, in the absence of meaningful training on the complexities of the Geneva Convention obligations in the context of ongoing tribal conflict, that a decision

[23] *Prosecutor v Erdemovic,* Drazen Erdemovic, case No. IT-96-22-T at 9

[24]Lippman, Matthew (1996) "Conundrums of Armed Conflict: Criminal Defenses to Violations of the Humanitarian Law of War," Penn State International Law Review: Vol. 15: No. 1, Article 2. Available at: http://elibrary.law.psu.edu/psilr/vol15/iss1/

must be made whether the person knew or did not know the order given was lawful, and whether the person knew or did not know that the order was "manifestly" unlawful.

Given the added notions of hostile intent, this particular issue must be carefully considered when there is evidence that relevant training has not been delivered.

6. Military commanders are responsible for ensuring that troops under their command have received appropriate and sufficient training on respecting the principles of distinction prior to engagement in military operations. If this training obligation has not been observed, to what degree is the untrained military member accountable for violations of the principles with respect to the conduct of armed engagement?

Following the atrocities committed by U.S. military forces in the massacre at My Lai, the U.S. undertook a review of the circumstances which led to the violations which resulted in the deaths of noncombatants at the hands of U.S. military members. In the document referred to as the "Peers Report," factors prominent in the cause for the violations of U.S. obligations under the Geneva Convention were first and foremost linked to lack of training.

As discussed in an article published on the 25th anniversary of the My Lai Massacre, the author stated this regarding insufficient training:

"1. Lack of Proper Training.-The lack of proper training in the law of war was a common theme in the interviews of the witnesses and subjects involved in the My Lai massacre. Perhaps the most graphic illustration of this factor appeared at the trial of Lieutenant Calley, when Calley testified that the Geneva Convention classes conducted during Officer Candidate School were inadequate.

"Regardless of the overall veracity of Calley's claim, the Peers Report entered specific findings that the soldiers who composed Task Force Barker had not received sufficient training in the "Law of War (Hague and Geneva Conventions), the safeguarding of noncombatants, or the Rules of Engagement."

Although the requirements set out in United States Army Republic of Vietnam (USARV) Regulation 350-1, dated 10 November 1967, clarified that, at a minimum, all soldiers were required to have annual refresher training in the Geneva Conventions, many commanders failed to emphasize this requirement. Consequently, individual soldiers often lacked proper training on the requirements imposed by these conventions.

" The Commission also found that, although pocket-size guidance cards were issued to all soldiers to help them learn and abide by the law of war, the soldiers usually never read the information on the cards and the cards themselves rarely survived the first monsoon rains."In addition, Military Assistance Command Vietnam Directive 20-4,43 which required the immediate reporting of all violations of the law of war, seldom was stressed by the command structure." (Citations omitted).[25]

Rule 153 in the ICRC's Customary IHL Database states

"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

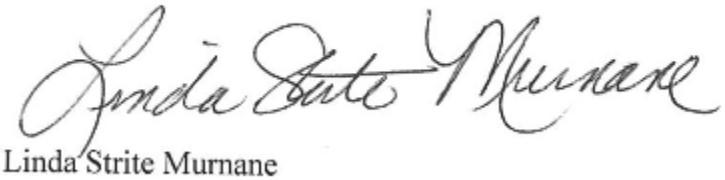
[25] Jeffrey F. Addicott and William A. Hudson, Jr., The Twenty-Fifth Anniversary of My Lai: A Time to Inculcate the Lessons, 139 Mil. L. Rev. 153 (1992) at https://commons.stmarytx.edu/cgi/viewcontent.cgi?article=1492&context=facarticles

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." (Emphasis added). [26]

Where a commander has failed to meet the obligation to take all necessary and reasonable measures in their power to prevent commission, the commanders and other superiors are, by customary IHL, responsible for war crimes committed by their subordinates. One such failure would be the failure to meet the obligation to provide adequate training under the provisions of the Geneva Conventions outlined in this report.

The ultimate decision as to whether an untrained military member is also accountable for the failings of their superiors is one ultimately to be left to those adjudicating the facts to decide. However, where there is a demonstrated lack of training in the protections applicable, particularly in the context of irregular individuals engaging in tribal warfare or "new warfare", the finder of fact should be satisfied, beyond a reasonable doubt, that the individual charged with the misconduct knew or reasonably should have known that the conduct was prohibited. The absence of effective training in the complexities faced by any individual accused must be taken into account in making this essential determination.

Respectfully submitted



Linda Strite Murnane

[26] ICRC Customary IHL Database at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter43_rule153