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## Islam, the Law of War, and the U.S. Soldier

Manuel E.F. Supervielle

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# ESSAY

## ISLAM, THE LAW OF WAR, AND THE U.S. SOLDIER

MANUEL E. F. SUPERVIELLE\*

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\* Colonel, U.S. Army JAG Corps; Staff Judge Advocate, Combined Forces Command – Afghanistan; B.A. in International Relations, St. Mary's University, *Summa Cum Laude* (1978); J.D., University of Texas School of Law, *With Honors* (1981); LL.M in Military Law, U.S. Army JAG School (1988); LL.M in International Law, University of Miami (1993); M.S. in National Security, National War College, *Distinguished Graduate* (2004). Colonel Supervielle has served in a variety of criminal law and international law assignments over his twenty-three year JAG career, including Executive Officer and Special Counsel to the Army General Counsel; Chair of the International Law Department at the Army JAG School in Charlottesville, Virginia; and SJA for U.S. Army South, in Panama.

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INTRODUCTION: A DAY IN THE LIFE OF AN  
AMERICAN SOLDIER IN THE MIDDLE EAST<sup>1</sup>

A U.S. Army Infantry Company Commander, Danny Fernandez, twenty-nine years old, finishes breakfast and gets ready to begin a new day patrolling a large sector of Western Iraq with elements of his company. He plans to meet and discuss issues of concern with the tribal elders in four remote villages today. His mission is to maintain security and stability within and around these villages so that international relief agencies and non-governmental organizations (“NGOs”) can help rebuild the lives and institutions of Iraq.

Over the past two months since Fernandez arrived in Iraq, he has learned how the rural Iraqi society is organized, who are the leaders with legitimacy that command respect from the citizens, and who are the potential troublemakers. Fernandez has built solid relationships with key village elders. He believes that he understands them pretty well. He senses that his presence is seen as a necessary evil by most Iraqis, who are very glad to see the end of Saddam Hussein’s regime, but do not want foreign troops occupying their nation.<sup>2</sup> Many Iraqis reluctantly recognize the need for U.S. troops to maintain order.

This particular morning, Fernandez feels very frustrated with the continuing attacks against his soldiers. He tells Mr. Ibrahim, a tribal elder with whom he has established a frank relationship, how he wishes that the terrorists in Iraq that hurt his troops could all be

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1. This is a fictional character and a fictional depiction of an encounter. It is based on a compilation of individuals and events.

2. Interview with Paul Sullivan, Professor, Nat’l Def. Univ., in Wash., D.C. (Apr. 25, 2004) (“Many Iraqis just want the Americans out now. Ayatollah Sistani once told his followers, in the millions, that when they talk to the Americans to thank them sincerely for getting rid of Saddam, but then ask them when they are leaving.”).

rounded up, prosecuted and punished. He challenges Mr. Ibrahim to use his influence to get villagers to turn over these terrorists to U.S. authorities.

Mr. Ibrahim responds by saying that while he too wishes that the fighting would stop, he believes that the people shooting at the soldiers are not terrorists. He says that they are merely young Iraqi boys fighting for liberation from foreign occupation. From their perspective, says Mr. Ibrahim, the Qur'an mandates that Muslim lands must be protected from occupation and oppression.

Fernandez angrily retorts that anybody resisting U.S. orders is a terrorist and if the Qur'an tells them to fight Americans then the Qur'an is full of "BS." Incensed, Mr. Ibrahim shouts at Fernandez that he is no longer welcomed in his home or in the village. Fernandez leaves the village convinced that Mr. Ibrahim is a terrorist sympathizer and cannot be trusted.<sup>3</sup>

Did this fictional encounter have to end this way? Did it further the objective of "winning the hearts and minds" of the Iraqi people? Could Fernandez have expressed his feelings in a manner that would have demonstrated a more sophisticated understanding of the situation in Iraq? Perhaps if Fernandez had explained that the sooner the violence ends, the sooner the Americans would leave, that would have resonated with Mr. Ibrahim. He could also explain that the fighters violate the law of war because they engage in acts of violence against not just the American forces, but also Iraqi civilians, women and children. These actions violate the law of war and Islamic teachings that forbid the killing of women, children and old men in combat: "From the earliest times it was forbidden (*haram*) to kill noncombatants as well as women and children and monks and rabbis, who were given the promise of immunity unless they had taken part in the fighting."<sup>4</sup>

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3. *Id.* (explaining that beyond the specific issue of disagreement, the rift created by this fictional exchange would cut deeper than Fernandez would imagine). Mr. Ibrahim has lost a guest in his home and in Arab tribal terms he has "lost face" by losing the guest, and also by allowing a guest to insult Islam in his home. The loss of honor by Mr. Ibrahim would be very severe. *Id.*

4. JOHN L. ESPOSITO, UNHOLY WAR: TERROR IN THE NAME OF ISLAM 32 (2002).

Such an exchange, while it might not convince Mr. Ibrahim to do what Fernandez asked him to do, would probably not have led to the break in relations with Fernandez as occurred in the original scenario. If the stated goal of the U.S. military action in Iraq is to liberate the people and help them establish a liberal democracy,<sup>5</sup> then dialog with the civilian leadership must be maintained. What can the U.S. military do to prepare soldiers and commanders like Captain Fernandez to better handle situations like the scenario described above?

The thesis of this essay is that U.S. soldiers deployed to the Middle East should receive education specifically addressing how Muslims view the law of war and how to best use this knowledge with respect to both friend and foe in the Middle East. In support of this thesis, the essay will first define the nature of the deficiency in the U.S. military education system with regards to this subject, and its consequences. The essay next sets forth the three basic teaching points relating to the law of war and Islam that should be taught to U.S. soldiers in order to mitigate the previously identified deficiency. The essay will conclude with a cursory suggestion for how the proposed education can be implemented, along with an analysis of its feasibility.

## I. BACKGROUND: MIDDLE EAST, ISLAM, AND THE LAW OF WAR

Before getting started with the thesis defense, it would be useful to give a background and thus more precisely mark the scope of the discussion. Three terms used in the thesis require fine-tuning: Middle East, Islam, and law of war.

The region of the world described as the Middle East has no precise agreed-upon boundaries. For purposes of this essay, however, the term will include the geographic area that “runs from the Nile

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5. *Compare* President’s Address to the Nation on Iraq from Cincinnati, Ohio, 38 WEEKLY COMP. PRES. DOC. 1716 (Oct. 7, 2002) (describing Iraq as a security threat, and declaring that Iraq must be confronted in order to preserve security and win the war on terror), *with* President’s Address to the Nation on Iraq, 39 WEEKLY COMP. PRES. DOC. 338 (Mar. 17, 2003) (noting that the United States’ plan in Iraq is to advance prosperity, liberty and peace).

Valley to the Muslim lands of Central Asia, from extreme southeast Europe to the Indian Ocean.”<sup>6</sup> The common threads within this geographic space are not the ethnic or racial composition, language, or cultural values. Rather, the characteristics that make it relevant to the essay’s thesis are the potential for turmoil and conflict, the predominance of Islam, and the continuing or possible future U.S. military deployments in the region. It is these common threads of Islam, armed conflict and U.S. military presence that make this region as defined particularly relevant to a discussion of Islam and the law of war.

Along with Judaism and Christianity, Islam is one of the three main monotheistic religions in the world, practiced by over a billion people. Muslims worship Allah and revere the prophet Mohammad.<sup>7</sup> “From Morocco across from Gibraltar on the Atlantic, eastward across North Africa, through the Indian subcontinent (which includes Pakistan and Bangladesh), on to the near-tip of Indonesia, Islam is a vital force in the contemporary world.”<sup>8</sup> The worldwide Muslim community, *ummah*, is extraordinarily diverse.<sup>9</sup> The two major groups of Muslims are Sunni and Shi’a.<sup>10</sup> Sunni are the largest group,

6. ARTHUR GOLDSCHMIDT, JR., *A CONCISE HISTORY OF THE MIDDLE EAST* 7 (7th ed. 2002).

7. See AKBAR AHMED, *DISCOVERING ISLAM: MAKING SENSE OF MUSLIM HISTORY AND SOCIETY* 17 (rev. ed. 2002) (explaining that Muhammad was born in 570 A.D. in the town of Makkah, the heart of the Arab tribal society). It is believed that Muhammad became “the Prophet” of Islam when God revealed the Qur’an to him and he was entrusted to spread God’s message. *Id.* at 15.

8. S. A. NIGOSIAN, *ISLAM: ITS HISTORY, TEACHING, AND PRACTICES* xv (Indiana University Press 2004) (1987); *accord* TIME ALMANAC 2005 359 (Borgna Brunner et al. eds., 2005) (stating that there are 1.1 billion followers of Islam internationally, which is approximately twenty percent of the world population, second only to Christianity with 1.9 billion followers, and followed by Hinduism, which has 781 million followers).

9. *Cf.* NIGOSIAN, *supra* note 8, at xvi (“[T]he *ummah*, by its own Islamic measure, is a privileged community, a community of shared identity and of unity, in which cultural forms, societal patterns, and political realms all coalesce with religious and devotional aspects.”).

10. See *id.* at 44 (noting that the two major groups, Sunni and Shi’a, formed over the conflict of who should ascend as the political leader after the death of Muhammad). The Sunni faction insisted that the Prophet had not designated a successor and thus they should elect one, while the Shi’a insisted that the Prophet had designated his cousin and son-in-law Ali to succeed him. *Id.* at 18.

making up more than eighty-five percent, and the Shi'a, who are mostly concentrated in southern Iraq and Iran, are the second largest, making up about ten percent of the Muslim population.<sup>11</sup> Within each of these two major groups there exist many more sub-groups with wide-ranging religious and political views.<sup>12</sup> Over seventy-five percent of Muslims are not Arab.<sup>13</sup> It is also important to recognize that the vast majority of Muslims do not live in theocracies ruled by Islam. Rather, they live in nations with secular governments,<sup>14</sup> such as Indonesia,<sup>15</sup> India,<sup>16</sup> Bangladesh,<sup>17</sup>

11. *Id.* at 44 (“In a modern context, the term Sunni indicates the traditional way of the consolidated majority of the Islamic community as opposed to the [Shi’a] partisan dissenters.”). Shi’a is the official Islamic faith in Iran and Shi’a communities also exist in Iraq, Afghanistan, Pakistan, India, and in other countries throughout the world. *Id.* at 49.

12. *See id.* at 46-49 (observing various groups that split apart from the Sunnis, including the puritanical Wahhabis and the Ahmadiyyah movement who believe in a second prophet, and subgroups of the Shi’as, including the Imamis, who embrace the infallibility of the *imam*, and the Zaydi, who reject that the *imam* is impeccable); *cf.* TIME ALMANAC 2005, *supra* note 8, at 363 (affirming the numerous fissures within the Islamic faith, but recalling the originally unifying effect of Islam on the tribes of Arabia).

13. *See* NAGOSIAN, *supra* note 8, at xv (highlighting the fact that over three-quarters of the world’s total Muslim population are located in non-Arab countries such as the Philippines).

14. *See generally* WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2053 (1993) (defining “secular” as “of or relating to the state as distinguished from the church” when describing courts or jurisdictions, and as “rationally organized around impersonal and utilitarian values and patterns and receptive to new traits” when describing a society).

15. *See* BUREAU OF EAST ASIAN & PACIFIC AFFAIRS, U.S. DEP’T OF STATE, BACKGROUND NOTE: INDONESIA (2005), available at <http://www.state.gov/r/pa/ei/bgn/2748.htm> (reporting that eighty-seven percent of the Republic of Indonesia’s 224 million citizens are Muslim and that Islam flourished in the eastern archipelago during the sixteenth and seventeenth centuries).

16. *See* BUREAU OF SOUTH ASIAN AFFAIRS, U.S. DEP’T OF STATE, BACKGROUND NOTE: INDIA (2004), available at <http://www.state.gov/r/pa/ei/bgn/3454.htm> (stating that the predominantly Hindu federal republic has a Muslim population of 126 million, which accounts for twelve percent of the country’s total population). Scholars do continue to debate the extent of India’s “secularism” because of discriminatory treatment of different religions under its Constitution in the area of family law. *See* Jeffrey A. Redding, *Constitutionalizing Islam: Theory and Pakistan*, 44 VA. J. INT’L L. 759, 763 n.3 (2004).

Egypt,<sup>18</sup> Iraq,<sup>19</sup> Turkey,<sup>20</sup> and Syria,<sup>21</sup> to name the most populous nations.<sup>22</sup>

Finally, we must establish a common understanding for the term “law of war.” This term will be used in this essay to mean the rules governing the conduct of forces during war, specifically, the application of force during war—*jus in bello*.<sup>23</sup> The law of war emanates from numerous sources and is often referred to as “international humanitarian law” within the international legal

17. See *Bangladesh: Protecting the Human Rights of Thought, Conscience, and Religion: Hearings Before the U.S. Comm’n on Int’l Religious Freedom* (opening remarks, Congressman Joseph Crowley, Chair, Cong. Caucus on Bangladesh) (2004), available at [http://www.uscifr.gov/events/hearings/2004/april/04302004\\_oRemarks\\_crowley.html](http://www.uscifr.gov/events/hearings/2004/april/04302004_oRemarks_crowley.html) (noting that Bangladesh has been historically known as a “moderate Muslim country with a secular democratic government”).

18. See Lama Abu-Odeh, *Modernizing Muslim Family Law: The Case of Egypt*, 37 VAND. J. TRANSNAT’L L. 1043, 1045-48 (2004) (recounting Egypt’s move to secular law in the latter half of the nineteenth century, with the notable exception of family law); see also Nathan J. Brown & Clark B. Lombardi, *Do Constitutions Requiring Adherence to Shari’a Threaten Human Rights? How Egypt’s Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law*, 21 AM. U. INT’L L. REV. (forthcoming Jan. 2006).

19. See Asli U. Bali, *Justice Under Occupation: Rule of Law and the Ethics of Nation-Building in Iraq*, 30 YALE J. INT’L L. 431, 450 (2005) (asserting that the United States is committed to maintaining Iraq as a secular state).

20. See Maximilien Turner, Comment, *The Price of a Scarf: The Economics of Strict Secularism*, 26 U. PA. J. INT’L ECON. L. 321, 324-28 (2005) (reviewing the break between “Islam and the state” following the popular uprising in Turkey at the end of World War I).

21. See BUREAU OF NEAR EASTERN AFFAIRS, U.S. DEP’T OF STATE, BACKGROUND NOTE: SYRIA (2005), available at <http://www.state.gov/r/pa/ei/bgn/3580.htm> (stating that the leading political party in Syria, the Arab Ba’ath Socialist party, embraces secularism). Although the Syrian Constitution does not make Islam the state religion, the President must be Muslim and religious courts have jurisdiction over issues of personal and family law. *Id.*

22. See generally FREEDOM IN THE WORLD 2004: THE ANNUAL SURVEY OF POLITICAL RIGHTS & CIVIL LIBERTIES 725-26 (Aili Piano & Arch Puddington eds., 2004).

23. This paper does not include within the term “law of war” the legal principles that govern the justification for the start of armed conflict—*jus ad bellum*. Following World War II, these principles are primarily found in the UN Charter.



community.<sup>24</sup> Important sources for the law of war include: The Law of the Hague, which limits the methods and means of warfare;<sup>25</sup> the Laws of Geneva, which protect “victims” of war, such as sick and wounded, prisoners of war, and civilians.<sup>26</sup> and several specific treaties governing protection of cultural property,<sup>27</sup> biological weapons,<sup>28</sup> gas weapons,<sup>29</sup> and conventional

24. See INT'L COMM. OF THE RED CROSS, WHAT IS INTERNATIONAL HUMANITARIAN LAW? (2004) (stating that international humanitarian law, also called “law of war” or “law of armed conflict,” aims to limit armed conflict’s negative effects, protect people who are not participating in hostilities, and restrict warfare methods). See generally Eric A. Posner, *A Theory of the Laws of War*, 70 U. CHI. L. REV. 297 (2003) (providing historical context, theory and analysis of laws of war).

25. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631; Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 187 Consol. T.S. 429 (prohibiting the use of poisons, killing treacherously, killing a person who has laid down his arms, causing superfluous injury, improperly using an enemy’s flag or needlessly destroying an enemy’s property during war).

26. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Times of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; see also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I] (providing rules of war, such as medical transportation during war, methods and means of warfare combat and prisoners of war, treatment of civilian populations, zones under special protection, civil defense, measures for women and children, and protection for journalists); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 (outlining rules of war, including humane treatment for individuals such as children and detainees, care for wounded, sick and shipwrecked, protections for civilian populations, and cultural objects and other measures).

27. See, e.g., Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215 (defining cultural property and outlining protections for cultural property during war, including transportation measures and immunity from seizure for certain cultural property items).

28. See, e.g., Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163 (stating that all

weapons.<sup>30</sup> In addition to treaties, unwritten customary law also forms the basis for the law of war.<sup>31</sup> The term “law of war” does not refer to interpretations of religious principles that are not generally recognized by the international community. Thus, for purposes of this essay, the term “law of war” does not include edicts or tenants contained in the Qur’an, Islamic teachings, or any religious source, unless also found in secular sources of the law.<sup>32</sup>

## II. DEFICIENCIES IN THE CURRENT MILITARY EDUCATION PROGRAM CONCERNING THE IMPACT OF ISLAM ON THE LAW OF WAR AND ITS CONSEQUENCES

American soldiers receive excellent combat and professional training at all levels. The U.S. Army provides extraordinarily

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signed parties agree never to produce or retain biological agents or other toxins that have no use for peaceful purposes, or any equipment designed to facilitate use of such toxins in conflict).

29. *See, e.g.*, Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65 (prohibiting the use of asphyxiating, poisonous or other gases, and the use of all analogous liquids, materials or devices in warfare); *see also* Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, *opened for signature* Jan. 13, 1993, S. TREATY DOC. NO. 103-21, 1974 U.N.T.S. 45 (providing guidelines for chemical weapons and facilities used to produce chemical weapons, including obligations to report possession of chemical weapons and establish plans for their destruction).

30. *See, e.g.*, Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137 (stating that the parties agree not to use weapons or projectiles in a way that causes superfluous injury, unnecessary suffering, or severe damage to the environment, and noting that the parties wish to restrict use, stockpiling, and production of conventional weapons in order to facilitate disarmament).

31. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987).

32. It should also be noted that many Muslims in tribal cultures like Saudi Arabia, Yemen, and Afghanistan (and parts of Iraq) would default to their particular tribal rules for conflict, rather than Islamic law. But this essay’s thesis is about teaching the U.S. soldiers about the “impact” of Islam on the law of war. To keep the issue in focus, the essay will thus use the term “law of war” to refer to the internationally recognized definition as described in the essay.

realistic training at the Joint Readiness Training Center (“JRTC”) that replicates the problems and challenges soldiers are likely to face while deployed to Middle Eastern nations. U.S. soldiers and marines also receive excellent instruction concerning the customs of Islamic people,<sup>33</sup> although on an ad hoc basis. Yet, for all of this top-notch training specifically tailored to scenarios based on Middle Eastern operations, why are American soldiers, like Captain Fernandez in the story above, not better prepared to exchange ideas with Muslims such as Mr. Ibrahim, concerning the interrelationships between terrorists, the law of war, and Islam?

Unfortunately, the U.S. military currently has no formal education program for the benefit of its troops specifically concerning this particular subject. The rudimentary instruction some receive during their military careers concerning the law of war does not address the impact of Islam on the law of war. Thus, many U.S. soldiers make assumptions that Islamic countries reject the law of war because they believe this law is based on Christian principles. They also believe that violent puritanical Islamic organizations act without any regard for the law of war by targeting innocent civilians.

As reinforcement to these assumptions, U.S. soldiers have been told that the United States is engaged in a global war against terrorism.<sup>34</sup> Thus they might reasonably assume those Muslim enemies that they fight—regardless of the enemy’s ultimate goals, the weapons they use or the ways in which they use their weapons—should be labeled as “terrorists.” This analysis does not require thought from the U.S. soldier to conclude that an individual enemy

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33. See Bill Kaczor, *Marine Leader: Civilian Agencies Should Be Involved in War Plans*, TALLAHASSEE DEMOCRAT, Oct. 20, 2004, at B7 (stating that in 2003 the military trained 800 marines in four-week sessions on Arabic language and culture, and Islam); see also Press Release, Darlene Goodwin, Chief of Naval Educ. and Training, CNET Hosts Cultural Training Team (May 14, 2002), available at [https://www.cnet.navy.mil/cnet/pao/pr2002/02\\_042.pdf](https://www.cnet.navy.mil/cnet/pao/pr2002/02_042.pdf) (describing a military seminar on understanding Islamic and Arab cultures to increase cultural awareness among military members).

34. See President’s Address to the Nation on the War on Terror from Fort Bragg, North Carolina, 41 WEEKLY COMP. PRES. DOC. 1079 (July 1, 2005), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2005\\_presidential\\_documents&docid=pd04jy05\\_txt-8](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2005_presidential_documents&docid=pd04jy05_txt-8) (stating that U.S. troops are fighting a war on terror and that Iraq is its battlefield).

combatant, in a particular case, should be classified as a terrorist; a conclusion which carries legal and practical implications. In this uncluttered view of the battle space, everyone is either a terrorist or not a terrorist.

Unfortunately, the real landscape where actual and potential enemies of the United States operate in the Middle East is extremely complicated, multifaceted, and ever changing.<sup>35</sup> Additionally, coalition partners of the United States, as well as NGOs, also possess widely differing views about the parameters of permissible conduct during armed conflict.<sup>36</sup> If U.S. forces view the landscape through an absolutely pure black and white lens and see only terrorists and non-terrorists, they may miss opportunities to build relationships as was depicted in the opening fictional story with Captain Fernandez. Muslims that do not actively support terrorist strategies, but might support the political objectives of those committing violent acts, do not necessarily have to be branded as terrorists. Painting all who share a common objective with the same broad brush as a 'terrorist' might lead U.S. military leaders to unnecessarily dismiss meaningful discussion with civic leaders or worse, antagonize them to the point where they might begin to actively support the terrorists.

While it is not the goal of this essay to create a program that would produce experts on Islam and the law of war, U.S. commanders must understand the perspectives of their audiences in order to successfully argue the legitimacy of U.S. military actions to Islamic civic leaders, coalition partners, and the media. A lack of meaningful discussion will foster negative repercussions. First, within the nation where the United States is trying to bring peace, stability and a liberal democracy, inaccurate assumptions about how Islam relates to

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35. See *The Middle East: Stentorian Guard*, ECONOMIST, Apr. 16, 2005, at 12 (noting that the Middle East is a complex mixture of conflicts and alliances, including strains of nationalism and religious fundamentalism, that the region has a long history of turbulence, and that theories of international relations in the Middle East cannot be placed into neat categories).

36. See, e.g., LAW. COMM. FOR HUM. RTS., ASSESSING THE NEW NORMAL: LIBERTY AND SECURITY FOR THE POST-SEPTEMBER 11 UNITED STATES 51-61 (2003), available at <http://www.humanrightsfirst.org/pubs/descriptions/Assessing/Ch4.pdf> (reviewing interpretive differences among the United States, Sweden, Scotland, Northern Ireland, Australia, England, Wales and Canada on the application of Geneva Convention provisions to detainees at Guantanamo).

the law of war makes it harder to anticipate the enemy's next move. Further, the inability to explain to the local people *why* the actions of the violent fundamentalist Islamists violate the law of war *and* Islamic tenants will make it harder to establish legitimacy for U.S. military actions.<sup>37</sup>

Additionally, U.S. forces in Iraq need to cooperate on security measures with local Islamic military forces, coalition partners, and NGOs to accomplish the nation-building mission. An educated understanding of Islam and the law of war by U.S. commanders is vital for establishing effective cooperation with these groups concerning security measures. Finally, on the international stage, U.S. commanders that hold inaccurate assumptions about how Islam relates to the law of war are likely to pose a greater risk of projecting a negative public image to the world when trying to explain U.S. military actions.

As mentioned earlier, the U.S. military does provide its forces with some training that focuses on Islam. However, these laudatory efforts do not address the very specific and difficult issue at the core of our armed actions in Islamic nations. U.S. forces conduct military operations in accordance with the law of war.<sup>38</sup> Most Islamic nations, while legally obligated to follow the same law as the rest of the world, interpret the requirements of the law from their unique perspective. Thus, our Islamic partners may have a different view from the United States view of what the principles of proportionality, unnecessary suffering and collateral damage mean under the law of war. Our current training does not provide this insight into the

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37. While Muslims would grant much more credence to an explanation justifying U.S. military actions if it came from learned Islamic clerics or people known in their community to be pious and knowledgeable, the initial explanation must come from the U.S. commanders. The explanation must be presented in a manner that will resonate with the Muslim audience.

38. See U.S. Dep't of Def., Directive 5100.77, DoD Law of War Program (1998); Chairman of the Joint Chiefs of Staff, Instruction 5810.01, Implementation of the DoD Law of War Program (1996); Chairman of the Joint Chiefs of Staff, Instruction 3121.01A, Standing Rules of Engagement for U.S. Forces (2000) ("U.S. forces will always comply with the Law of Armed Conflict."). Except when properly determined by the National Command Authority that it is not applicable, DoD Components "will comply with the Law of War in the conduct of all military operations and related activities in armed conflict, however such conflicts are characterized . . . ." U.S. Dep't of Def., *supra*.

perspectives of our Islamic partner nations, let alone insight into the views of terrorists, who select passages from the Qur'an and supplemental religious doctrine and use them out of context to support their clearly illegal acts.

In short, U.S. commanders must be prepared to:

- Find common ground with our Islamic partner armed forces on the application of the law of war;
- Wage an intelligent information campaign against the terrorists;
- Discuss cooperative security measures with NGOs that require or request such measures; and
- Explain the legitimacy behind U.S. military actions to Islamic civic leaders and the media.

### III. THREE SUBSTANTIVE TEACHING POINTS

There are three fundamental teaching points concerning Islam and the law of war that each U.S. military leader at Company Command and above should understand in order to help him or her accomplish missions. Before a U.S. commander can understand the impact of Islam on the law of war, he or she must understand the most basic characteristics of Islam, as well as Islamic teachings concerning the law of war and the proper usage of the term terrorist.

First, as previously noted, the followers of Islam are diverse and complex. Followers of Islam, including those living in the Middle East, represent a countless array of ethnic and religious factions. Multiple religious and political divisions among Islamic people have been a historical fact from the very beginning of the Islamic faith.<sup>39</sup> Every state in the Middle East, and every group of people within each state, interpret and apply their own unique view of Islamic

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39. See IGNAZ GOLDZIEHER, INTRODUCTION TO ISLAMIC THEOLOGY AND LAW 168 (Andras Hamori & Ruth Hamori trans., Princeton Univ. Press 1981) (1910) (clarifying that sects within the Islamic religion are only considered to be those groups who depart from the *sunna*, the historically endorsed form of Islam, on fundamental issues). Such divisions, or sects, within Islam go back to its earliest age and are still in effect today. *Id.*

teachings in their lives.<sup>40</sup> In terms of Islamic law or jurisprudence, there is not one, nor even two (Sunni and Shi'a) interpretations, but countless complex variations.<sup>41</sup>

Second, Islam teaches restrictions on the conduct of war. The Qur'an itself and other Islamic teachings have always placed limits on the death and destruction caused by war to varying degrees, depending on the historical period and the Islamic factions involved in the conflict.<sup>42</sup> In modern times, Islamic nations have made significant contributions to the development of the law of war and every Islamic nation is a party to the key law of war treaties.<sup>43</sup>

Third, the American military must use the terrorism label accurately. It is not necessarily the stated objectives of fundamentalist Islamic groups that earn them the label of terrorist.<sup>44</sup>

40. See Ann Elizabeth Mayer, *Islam and the State*, 12 CARDOZO L. REV. 1015, 1017 (1991) (describing Islam as a "decentralized" religion and explaining how Islam is subject to varying interpretations due to the lack of a recognized central authority on doctrinal matters).

41. See Donna E. Arzt, *Heroes or Heretics: Religious Dissidents Under Islamic Law*, 14 WIS. INT'L L.J. 349, 367-68 (1996) (listing the major schools of jurisprudence within the Sunnis as being the Hanafi, Shafi, Maliki and Hanbali, and within the Shi'a sect as including "the Ithna 'Ashari or Imamis, Ismaili, Alawi, Druze, and Zeydi").

42. See MAJID KADDURI, *THE ISLAMIC CONCEPTION OF JUSTICE* 164-73 (1984) (acknowledging the justification for warfare in the Qu'ran as the *jihad*, and detailing how the interpretation of the concept has evolved over time from waging war against non-believers in conflict with Islam, toward modern day secular wars motivated for reasons beyond the duty of *jihad*).

43. See INT'L COMM. OF THE RED CROSS, STATES PARTY TO THE GENEVA CONVENTIONS AND THEIR ADDITIONAL PROTOCOLS (2005), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/html/party\\_gc](http://www.icrc.org/Web/eng/siteeng0.nsf/html/party_gc) (listing nations that are party to the Geneva Conventions, including many countries with large Muslim populations).

44. See generally 18 U.S.C. § 2331 (2000) (defining "international terrorism" as "activities that involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State," and that appear to be intended "to intimidate or coerce a civilian population, to influence the policy of a government by intimidation or coercion, or to affect the conduct of a government by mass destruction, assassination, or kidnapping"). There is a lack of consensus on the definition of terrorism, which can lead to politically motivated abuse. See Sami Zeidan, *Desperately Seeking Definition: The International Community's Quest for Identifying the Specter of Terrorism*, 36 CORNELL INT'L L.J. 491, 491-93 (2004).

Rather, the violent methods used by these groups make their actions illegitimate and illegal. The possibly legitimate ends do not justify the illegal methods used. Terrorists intentionally target innocent civilians and non-combatants, endanger civilians by trying to blend in with them, torture and summarily execute opponents, and violate numerous other clear provisions of the law of war.

We shall now explore in greater depth these three teaching points that could serve as the nucleus of the new and enhanced program of instruction for U.S. soldiers, commanders, and other military specialists. As will be discussed below, the particulars concerning the depth and breath of the instruction for each teaching point should depend on the student's anticipated responsibilities while deployed to the Middle East. Further, the instruction should be tailored, as much as possible, to the particular region within the Middle East where the soldier is expected to deploy. The concept, however, is that these three teaching points can form the cornerstone of the instruction that would support additions and modifications as required. They represent the substantive information of what needs to be taught. The last section of the essay will answer the questions of who, when, where and how the instruction could take place.

A. ISLAM IN THE MIDDLE EAST IS VERY DIVERSE,  
COMPLEX, AND ALWAYS EVOLVING

*"From its beginnings the faith, unity, and very survival of the Islamic community were threatened by civil war, sectarianism, violence, assassination of its leaders, and terrorism."*<sup>45</sup>

During the life of the Prophet Mohammed, religion, politics and war blended together as the Prophet used his followers as a force to make Allah's plan for social justice a reality on earth. Immediately upon the Prophet's death in 632 A.D., however, "deep divisions and conflicts revolving around leadership and authority" of the Islamic community erupted and continue to operate to this day.<sup>46</sup> The most fundamental split involved the issue of succession when the Prophet

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45. ESPOSITO, *supra* note 4, at 36.

46. *Id.*



died.<sup>47</sup> At the risk of oversimplification, today's Sunni sect, comprising over eighty-five percent of the world-wide Muslim population,<sup>48</sup> supported a succession process for the leadership of the Muslim community that selected the most pious Muslim as the political leader—*caliph*—of their community.<sup>49</sup> The term Sunni means follower of the example of the Prophet.<sup>50</sup> Shi'as, on the other hand, supported a hereditary line of succession that would have resulted in the senior male in the Prophet's family being chosen as their leader.<sup>51</sup> This fundamental split over the question of political leadership of the community "set in motion a sequence of events that led to division, rebellion, and historic conflict."<sup>52</sup> Over the following years, decades and centuries, many more violent and bloody splits within each major sect of Sunni and Shi'a have occurred.<sup>53</sup>

Although all Muslims share a fundamental belief at the core of their religion, commonly referred to as the five pillars of Islam,<sup>54</sup> it is important to consider that the fundamental belief operates as an obligatory floor, "thus only part of a much larger reality."<sup>55</sup> At one end of the incredibly wide spectrum that is Islam are the Wahhabi and Salafi movements. "Although originally associated with Saudi Arabia, Wahhabi Islam . . . has come to be used popularly, although

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47. See *id.* at 37 (articulating that the issue of succession after Muhammad's death was the basis for the creation and division of Shi'a and Sunni Islam).

48. See NIGOSIAN, *supra* note 8, at 7.

49. See ESPOSITO, *supra* note 4, at 37 (relating that the successor, Abu Bakr, was the well-respected father-in-law of Muhammad).

50. See *id.* (explaining that those who accepted the choice of Abu Bakr, Muhammad's father-in-law, became known as Sunnis, followers of the Sunnah or example of the Prophet).

51. See *id.* (reviewing how the Shi'a believed Muhammad chose his own successor, Ali, the senior male in his family).

52. *Id.*

53. See generally MALISE RUTHVEN, ISLAM IN THE WORLD 181-226 (1984) (tracing the history of the divisions within Islam from Muhammad's death to the early twentieth century).

54. See GOLDZIEHER, *supra* note 39, at 13-14 (listing the pillars as: 1) profession of faith that there is only one God and that Muhammad is the Messenger of God; 2) ritual of the prayer service; 3) almsgiving; 4) fasting; and 5) pilgrimage to Mecca).

55. JOHN RENARD, RESPONSES TO 101 QUESTIONS ON ISLAM 33 (1998).

inaccurately, as a blanket term for Islamic fundamentalism, religious extremism, and radicalism.”<sup>56</sup> A more accurate term to describe this extremist ideology is Salafiyyah. The Salafi Muslims claim to believe in a pure and original form of Islam. Both terms, Wahhabi and Salafi, when used to describe Muslims “can be misleading, as they are used as umbrella terms that incorporate diverse ideologies and movements, medieval and modern, nonviolent and violent.”<sup>57</sup>

At the other end of the spectrum are the Muslims that believe in secular governments and keep religion and state separate.<sup>58</sup> As mentioned earlier, the vast majority of Muslims live in nations with secular governments.<sup>59</sup> The important teaching point to remember is that people often use shorthand labels to describe the beliefs of others (e.g., Sunnis, Shi’a, Salafi and Wahhabi) when in fact the reality of a group’s beliefs is more complex than the easy label would make it appear. In the case of the Middle East, U.S. commanders should understand the reality of the deep religious, political and social complexities within the region, avoid making generalizations and always keep an open mind to different points of view.

#### B. ISLAM TEACHES RESTRICTIONS ON THE CONDUCT OF WAR

*“Do not cheat or commit treachery, nor should you mutilate or kill children, women, or old men.”*<sup>60</sup>

The second teaching point is that Islamic culture, like many other cultures, has attempted to place limits on the death and destruction caused by war. The Qur’an contains several passages that restrict the

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56. ESPOSITO, *supra* note 4, at 105-06.

57. *Id.* at 106.

58. See Mohamed Y. Mattar, *State Responsibilities in Combating Trafficking in Persons in Central Asia*, 27 LOY. L.A. INT’L & COMP. L. REV. 145, 162 (2005) (identifying Central Asian countries, where Islam is the majority religion, that promote a secular style of Islam in an attempt to avoid Islamic fundamentalism in government).

59. See *supra* notes 14-21 and accompanying text.

60. JOHN KELSAY, *ISLAM AND WAR: A STUDY IN COMPARATIVE ETHICS* 60 (1993) (quoting the *hadith*, as interpreted by al-Shaybani in the ninth century, and attributing limitations on the use of force to the Prophet Muhammad).

use of force.<sup>61</sup> As early as the ninth century, Islamic religious-legal scholars, or *fuqaha*, wrote opinions that laid foundations for the development of rules for war in accordance with Islam.<sup>62</sup> These rules “reflect[ed] a cultural consensus on the conduct of war: a consensus that owe[d] much to moral principles and theological concerns but [was] also indebted to political and military factors.”<sup>63</sup> With an expanding empire, Muslims needed military force to conquer new lands and to defend their territory. Rules governing combat by Muslim forces became necessary to maintain order and discipline within the ranks.

An important difference in the approach between classic Islam and the modern law of war is simplified as follows. Classic Islam based protections primarily on the person's religious beliefs (i.e., whether the person is a believer or not).<sup>64</sup> The modern law of war bases protection on the person's status (i.e., whether the person is a combatant or not). Classic Islam considered believers of Islam as “innocent;” unbelievers were “guilty.”<sup>65</sup> Jews and Christians, as “people of the Book,” (believers in the one true God) enjoyed certain protected status, but not to the same degree as Muslims.<sup>66</sup> Absolute non-believers (those not of the Book) could be killed even after surrender; Muslims who abandoned the fight or surrendered should be spared.

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61. See Laura A. Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 S. CAL. L. REV. 1407, 1489-90 (2002) (“And fight in God's cause against those who wage war against you, but do not transgress limits, for God loves not the transgressors.” (quoting Qur'an 2:190)).

62. See KELSAY, *supra* note 60, at 59 (pointing to the treatise *Kitab al-Siyar*, or the book of conduct, written by al-Shaybani on international relations).

63. *Id.*

64. See HILMI M. ZAWATI, IS JIHAD A JUST WAR? WAR, PEACE AND HUMAN RIGHTS UNDER ISLAMIC AND PUBLIC INTERNATIONAL LAW 41 (2001) (stating that war could not begin without first asking the enemy to adopt Islam).

65. See RUTHVEN, *supra* note 53, at 128-29 (describing that the word *kafir*, meaning unbelievers, originated to describe those ungrateful for the truths revealed in the Qur'an and became synonymous with sinner by breakaway sects of Islam).

66. See ZAWATI, *supra* note 64, at 38 (quoting passage 29:46 of the Qur'an as advocating non-violence against the People of the Book unless they first commit an aggression).

This evolution of classic Islam was by no means universally accepted.<sup>67</sup> Some Muslims adhered to the tradition of the Prophet Muhammad's example of clemency to the people of Mecca upon his return after the *hijra* to claim Mecca for the Muslims.<sup>68</sup> Nobody was harmed; no blood was shed.<sup>69</sup> Even under classic Islam absolute non-believers received some protection.<sup>70</sup> For example, women, children and old men should be spared, but could be taken as slaves and their property confiscated.<sup>71</sup> In sum, despite the difference in the two approaches, Westerners and Muslims equally recognized the need to restrict unnecessary death and destruction in war.<sup>72</sup>

Regardless of the early Islamic views concerning the rules for the conduct of war, Islamic states eventually played a "highly significant [role] in both the internationalization and humanization of the European law of war,"<sup>73</sup> shifting the basis away from Christian theology to natural law and humanist principles. During recent wars some Islamic states have complied with certain principles of the law of war.

By the mid-nineteenth century, as the Western world began to codify the customary rules of combat,<sup>74</sup> the Ottoman and Persian Empires began to argue for due consideration and accommodation of

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67. See ESPOSITO, *supra* note 4, at 41-42 (stating how the Kharajites were among the first to become extremist by advocating strict militant rules and those who would not follow them were enemies of God and punishable by death).

68. See ZAWATI, *supra* note 64, at 44 n.212 (recounting Muhammad's mercy to the Meccans after his conquest in 630 A.D.).

69. See *id.* (noting that eight years later, the second Caliph conquered Jerusalem without bloodshed for the first time in history).

70. See KELSAY, *supra* note 60, at 59 (interpreting sayings attributed to Muhammad as forbidding the killing of children even if they are nonbelievers).

71. See *id.* at 60, 62 (suggesting that Islamic ideas of the rules of warfare blended religious, moral, political, and military factors).

72. See ZAWATI, *supra* note 64, at 41-45 (comparing and contrasting the limitations on warfare in "Islamic international law" with the Geneva and Hague Conventions).

73. James Cockayne, *Islam and International Humanitarian Law: From a Clash to a Conversation Between Civilizations*, 84 INT'L REV. RED CROSS 597, 599 (2002).

74. See *id.* at 601-02 (referring to the Geneva Conference in 1863, the Geneva Convention in 1864, and the Brussels Conference in 1874).

their issues. The influence of Islam on this process was significant; it served "as an 'other' against which the law [of war] could define itself. . . . [E]ncounters with Islam . . . forced the law to adopt a secular modernism which transcended" the law's Christian origins.<sup>75</sup> In short, during the second half of the nineteenth century, Muslims objected to the use of the Red Cross as a protected symbol for providing humanitarian aid during combat, arguing that it represented Christianity. After years of debate, in 1906 the Geneva Revision Conference officially declared that the Red Cross was not a religious symbol<sup>76</sup> and in 1929 officially recognized the Red Crescent as a protected symbol.<sup>77</sup> This principle of religious non-discrimination is one of the cornerstones of the law of war.

Today, as mentioned previously, all Islamic states are parties to the Geneva Conventions of 1949 and many other treaties that collectively comprise the law of war. Obviously, the fact that a state has accepted a legally binding obligation to adhere to the requirements of the law of war does not mean that it will comply with said requirements in practice.<sup>78</sup> The historical record reflects, however, that the Arab nations that fought against Israel in 1967 and 1973 largely complied with the law of war.<sup>79</sup> They used appropriate symbols to mark weapons and equipment, prisoners of war

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75. *Id.* at 607.

76. *See id.* at 609 (recognizing the red cross was an inversion of the Swiss flag, another symbol of neutrality).

77. *See id.* at 610 (concluding that the recognition of the red crescent, representing Turkey and Egypt, and the red sun and lion, representing Persia, in Article 19 of the Geneva Convention of 1929, was a result of the increased number of Islamic states participating in international conferences).

78. Furthermore, as with all international obligations (and domestic, for that matter), interpretive distinctions among states provide another avenue for compliance variations. *See, e.g.,* Louis-Philippe F. Rouillard, *Misinterpreting the Prohibition of Torture Under International Law: The Office of Legal Counsel Memorandum*, 21 AM. U. INT'L L. REV. 9 (2005) (reviewing different interpretations of conduct constituting torture).

79. *See* Interview with French Maclean, Professor, Nat'l Def. Univ., in Wash., D.C. (Dec. 1, 2003) ("[I]n both the 1967 and 1974 Arab-Israeli wars—the former initiated by Egypt, the latter by Israel—Arab forces appear to have generally followed the law of war.").

(“POWs”) were generally treated properly, and non-combatants were not intentionally targeted.<sup>80</sup>

Even during the long and brutal Iraq-Iran War during the 1980s, both sides selectively followed portions of the law of war. Interestingly, the fundamentalist Islamic regime that ruled Iran at that time interpreted and applied the law of war from a classic Islamic Shi’a perspective. For example, Iraqi POWs who rejected Saddam Hussein were viewed as “believers” in Islam and were treated preferentially as compared to the POWs who did not reject Saddam Hussein.<sup>81</sup> The Iranians viewed the entire conflict as a defense of Islam against the satanic non-believer, Saddam Hussein. This apparent tendency to revive a classic or fundamentalist approach to the law of war has not been limited to Iran, as described below.

### C. USE THE TERRORISM LABEL ACCURATELY

*“Terrorism—The calculated use of unlawful violence or threat of unlawful violence to inculcate fear; intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological.”*<sup>82</sup>

U.S. commanders should be very precise when applying the terrorist label to an enemy because the term is obviously pejorative and implies certain legal and practical consequences. Terror is a strategy often chosen by an adversary when conventional, legal methods of armed conflict are not feasible. It is the illegal nature of the act, as defined by the recognized international law of war, with the intent to cause fear among the civilian population that earns the people who perpetrate the act the label of terrorist. People will sometimes focus on the ultimate stated objectives of the groups committing terrorist acts and if they agree with the objectives—often freedom for some oppressed people—they might conclude that these

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80. *Id.*

81. See KELSAY, *supra* note 60, at 75 (mentioning that the U.N. Security Council held such treatment to be “ideological abuse” of the prisoners and led to rioting within the prison camps).

82. U.S. DEP’T OF DEF., DICTIONARY OF MILITARY AND ASSOCIATED TERMS 538 (2001) (as amended through Aug. 31, 2005), available at [http://www.dtic.mil/doctrine/jel/new\\_pubs/jpl\\_02.pdf](http://www.dtic.mil/doctrine/jel/new_pubs/jpl_02.pdf).

people are not terrorists, but rather “freedom fighters.” U.S. commanders must be able to debate that while a particular political objective may have legitimacy, illegal violent acts intended to achieve the political objective are nevertheless unjustified war crimes against civilians. The legitimacy and fairness of the terrorists’ stated objectives do not excuse or justify illegal acts.

To further complicate matters, not all terrorists espouse the same view concerning the rules for the conduct of armed conflict. The abundant number of terrorist organizations holding a wide range of views relating to the conduct of war makes it difficult to generalize about these groups. For example, Shi’a Iraqi cleric Muqtada al-Sadr condemned the car bombings that killed over sixty-eight Iraqis in Basra on April 23, 2004; however, during the same sermon he threatened that an army of suicide bombers will protect him from being taken into custody by U.S. forces.<sup>83</sup> Further, even when groups profess adherence to the law of war, it is often impossible to tell if such groups act in accordance with their public pronouncements. Perhaps these terrorist groups only think about the law of war not in terms of how to comply with it, but in terms of how to publicly justify their illegal actions as falling within the framework of the law of war. Of course, there are some terrorists who are completely unburdened with even trying to appear legitimate and justified in their actions.

Some violent groups are not really Islamic, but because they are in the Middle East some Americans label them as such. One of the earliest Arab terrorist groups, the Palestine Liberation Organization (“PLO”), was not a fundamentalist or puritanical Islamic organization. On the contrary, it espoused the nationalist goal of establishing a Palestinian state.<sup>84</sup> Even so, it played a significant role

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83. See *Iraqis Arrest 5 in Connection with Basra Bombings*, CNN, Apr. 23, 2004, <http://www.cnn.com/2004/WORLD/meast/04/23/iraq.main/index.html> (detailing the message delivered by al-Sadr in which he threatened suicide attacks if U.S. forces conduct military operations in Karbala and Najaf while condemning and denying involvement in that week’s deadly terror attacks in Basra and Riyadh).

84. See BARRY RUBIN, *REVOLUTION UNTIL VICTORY? THE POLITICS AND HISTORY OF THE PLO* 1 (1994) (detailing the May 1964 meeting where four hundred Palestinian delegates convened to form the PLO whose ethnic and

in the development of the law of war by promoting Protocol I to the Geneva Conventions.<sup>85</sup> This Protocol extended the protection of combatant status to insurgents in these wars of liberation. Some groups claim that they pursue a purely “defensive” armed struggle to “throw off” (*intifada*) what they view as the unjust Israeli oppressors. While once synonymous with terrorism, the PLO eventually gained legitimacy on the world stage, earning its leader, Yassir Arafat, multiple visits to the White House.

When certain groups publicly espouse adherence to the law of war the obvious question becomes how can they reconcile their professed adherence to the law of war with a suicide bomber that intentionally targets and kills civilians? Some groups, like the PLO, generally voice rejection, and sometimes condemnation, for this kind of tactic. Obviously, what the PLO says in public and what it does behind the scenes in support of such illegal tactics may differ.<sup>86</sup> Other violent Islamic non-state organizations, such as Hamas and Hezbollah, seem to be reverting to a more classic Islamic interpretation of the law of war. They view the civilians of occupying nations as legitimate targets for attack, not based on their conduct on the battlefield, or status as combatants, but rather because they are non-believers that support the unjust occupation and thus bear collective guilt for the transgressions of their government. This trend towards the classic Islamic view of the law of war by Islamic militants appears to be a continuation of the trend begun in Iran during the Iraq-Iran War, and

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nationalistic purpose would be to replace the Jewish state of Israel with the Arab state of Palestine).

85. See Theodor Meron, *The Time Has Come for the United States to Ratify Geneva Protocol I*, 88 AM. J. INT’L L. 678, 678 (1995) (noting that President Regan did not recommend ratification of Protocol I because of underlying concerns that it would legitimize PLO claims concerning POW privileges); see also Protocol I, *supra* note 26.

86. See Russell Korobkin & Jonathan Zasloff, *Roadblocks to the Road Map: A Negotiation Theory Perspective on the Israeli-Palestinian Conflict After Yasser Arafat*, 30 YALE J. INT’L L. 1, 28 (2005) (noting that while the international community recognizes the Palestinian Authority as the legitimate voice of Palestine, it remains to be seen whether the Palestinian Authority would be able to prevent terrorist acts by groups such as Hamas who still follow the historic mission of the PLO).



is consistent with the broader trend towards fundamentalist Islamic values in general within parts of today's Islamic world.<sup>87</sup>

The important point is that many of these groups seem compelled to publicly either embrace the law of war or a classic Islamic law, no matter how perverse of a spin they put on their actions in order to claim legitimacy. The *conduct* of some of these groups (i.e., the obviously unlawful use of violence) combined with the *intent to cause fear* among the public, not their *ultimate objectives*, is what rightfully earns them the label of "terrorists." The U.S. commander must be able to articulate this important point to Muslim citizens, Islamic coalition partners and the media.

#### IV. THE PROPOSED TRAINING PROGRAM

What can be done to fix this deficiency in training and impart the three teaching points to U.S. soldiers, commanders and specialists? The Department of Defense ("DoD") Law of War Program already mandates that all U.S. military personnel will receive appropriate law of war training.<sup>88</sup> The DoD could amend this program to require each service to implement additional training concerning Islamic views of the law of war, depending on the individual student's circumstance, such as their level of responsibility and anticipated type of assignment when deployed to the Middle East. Special commissions composed of a wide range of experts from varied points of view could be convened to recommend and develop the details for these new training programs. The actual programs that would be implemented by each military service would likely vary, but they should seek a uniform message centered on the three basic teaching points discussed above. This essay has already addressed the questions of *why* this education is necessary and *what* the basic

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87. See Bernard K. Freamon, *Martyrdom, Suicide, and the Islamic Law of War: A Short Legal History*, 27 FORDHAM INT'L L.J. 299, 300 (2003) (noting that the classic Islamic view requires that when non-Muslim groups seriously threaten an Islamic community, they are allowed to go to war to defend themselves).

88. U.S. Dep't of Def., *supra* note 38, § 4.

teaching points of the education should be. It will now suggest a model program that answers the remaining questions.

#### A. WHO TEACHES THE PROPOSED EDUCATION?

The DoD Law of War Program places the burden of teaching every soldier, marine, sailor and airman about the law of war on the commanders. The Judge Advocates of each service, as the military's experts on matters concerning law, including international law, are charged with implementing the DoD Law of War program on behalf of the commanders. Over the course of more than a quarter of a century, Judge Advocates in all services have fulfilled this responsibility admirably. Today, in light of the intense operational tempo of the military and the current state of war confronting the nation and armed forces, the task of the Judge Advocates to teach about the law of war grows only more important. Thus, the Judge Advocates, properly prepared to teach about the three basic teaching points concerning Islam and the law of war, would be the best resource within each service to perform this new duty. The Judge Advocate is best equipped and legally trained to incorporate this new, complex and nuanced subject matter into the existing law of war curriculum. This would require that Judge Advocates receive sufficient education themselves to enable them to professionally teach the subject.

#### B. WHO SHOULD RECEIVE THE TRAINING?

The existing DoD Law of War Program requires that all members of the armed forces receive general training about the application of the Geneva Conventions and other law of war treaties. The proposed additional training, however, could be limited to those soldiers and marines realistically expected to deploy to the Middle East at some point in the near future. The students could be categorized into different levels depending on their anticipated responsibilities while deployed to the Middle East. Thus, the breadth and depth of the instruction could be tailored to the category of the student. For each level, an increasingly more ambitious degree of sophistication would be the goal. For example, Level I could apply to the enlisted soldier or marine with the objective of achieving a fundamental

understanding of the subject. These soldiers should be expected to *understand* the basics of the subject.

Company, battalion and brigade commanders could be placed into Level II, requiring a more sophisticated understanding of the subject. They should be able to not only understand the subject, but also to *intelligently discuss* the subject with tribal leaders, mid-level host nation governmental leaders, counterpart military officers from coalition forces, and representatives from non-governmental and international organizations. These officers would have the option to get assistance from their Judge Advocates if the sophistication of the discussion exceeded their comfort level, but at least they can demonstrate and articulate a sensibility of the subject.

Finally, general officers, public affairs officers and civil affairs officers could be placed in Level III, which would require a more sophisticated understanding and ability to discuss the subject than the officers in Level II. These officers would likely have to discuss the subject with high-ranking members of the host nation government, coalition forces, international and non-governmental organizations, and perhaps most importantly, members of the press. A great deal of benefit in the area of public diplomacy can be reaped from a highly visible image of a high-ranking U.S. military officer who can convincingly explain why the U.S. military is taking actions that are consistent with the law of war and not contrary to mainstream Islamic teachings. Care would be taken so that U.S. military personnel would not attempt to give the appearance of seeming to think that they are experts or even qualified to speak authoritatively on matters concerning Islam. The goal would be to merely display an appropriate degree of understanding and sensitivity to these issues.

#### C. WHEN AND WHERE WOULD THE EDUCATION OCCUR AND HOW WOULD IT TAKE PLACE?

The education for the Level I students could take place simultaneously with the currently mandated law of war program. The additional instruction would require only a minimal amount of extra time and effort for the Judge Advocates to modify their instruction. Level II instruction should take place throughout an officer's formal education. Beginning with academy and ROTC programs, through Officer Basic and Advance courses, and into Command and General

Staff College and the War Colleges, this is a subject that warrants repeated emphasis and focus. The law of war is already a part of the curriculum for officers at each level of their normal military professional education. The proposal is merely that this additional perspective be incorporated into the existing program of instruction. Finally, for Level II and III students, specialized programs and teaching materials, in the form of short pamphlets, videotapes, interactive CDs and other flexible teaching tools, could be used to tailor the education as necessary. To be successful, the program must provide recurring instruction to the students; a one-time class will not have the desired effect.

## V. VIABILITY AND COSTS OF THE NEW PROGRAM

This program would be both viable and cost-effective. The principal argument in support of this conclusion is the fact that a DoD law of war training program already exists. This essay is merely recommending a modification to the existing program. All of the necessary parts are already in place. Incremental costs would be negligible as the remaining real costs would be the initial development of the curriculum, periodic updates to the curriculum, and the production of pamphlets, CDs, videotapes and other teaching materials which represent minor expenses. The Judge Advocates of each service, working together and individually, could develop and begin implementation of the new curriculum within six months, even with a small budget and a small team of experts devoted to the task.

The few additional hours of training that this program would require could be shifted from already budgeted training time on the training schedules. In any event, even if a particular service decides to merely add this instruction to existing instruction without cutting out some other training, the expected benefits derived from this instruction would make the extra few hours well worth the investment.

## CONCLUSION

It goes without saying that U.S. soldiers must obey the law of war in combat. However, U.S. soldiers and their leaders should also

understand how the multiple players within the Islamic world conceive of and implement the law of war or try to use the law to justify illegal tactics. This knowledge will help them better cooperate with Muslim military partners and NGOs, communicate with the media and defeat Muslim opponents. Dire consequences may result when soldiers do not fully understand the interplay between the law of war and cultural and religious beliefs.<sup>89</sup>

While the educational institutions and basic structures necessary to implement this new training already exist, a new curriculum is needed. The costs for implementing this program would be low. The time necessary to develop and field the new program would be short. Each military service could develop and implement programs that would help their people base decisions on accurate facts and not false assumptions about Islam and the law of war.

U.S. military planners should understand the limitations on operations emanating from the law of war, *as understood by their Islamic coalition partners*, to ensure smooth combined operations. U.S. commanders with responsibility for the operations of Islamic military units may bear responsibility under the law of war for the actions of those units. Further, if U.S. commanders are not sensitive to Islamic views concerning the law of war, Muslim populations may perceive U.S. military action as violating Islamic tenants when alternative, non-offensive, but equally adequate courses of action could have been taken. Finally, Islamic enemies, state and non-state, have studied the U.S. military's application of the law of war and accordingly developed strategies to exploit perceived weaknesses from our adherence to the law. The U.S. military should turn the tables and study our enemies' failure to adhere to the law and exploit that weakness on a global public relations battleground. No better spokesman exists than a well-informed, articulate U.S. soldier who can demonstrate an intelligent understanding of the relationship

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89. See *U.S. Soldiers Reprimanded for Burning Bodies*, CNN, Nov. 26, 2005, available at <http://www.cnn.com/2005/WORLD/asiapcf/11/26/afghan.us.soldiers/> (reporting that four U.S. soldiers stationed in Afghanistan were reprimanded for burning the bodies of two Islamic fighters). Broadcast on Australian television, the soldiers taunted Taliban fighters, urging them to come and retrieve the dead bodies. *Id.* While burning bodies may be permissible under the Geneva Conventions for hygienic purposes, the Muslim faith forbids burning bodies. *Id.*

between the law of war and Islam to Muslim citizens and the international media.