

Narratives of Nasiriya

Overcoming the difficulty of distinction in hybrid warfare: A law of war perspective from Marine Special Operations Forces

by Maj T.N. Collier, USMCR

Marines remember Nasiriya.¹ The bloody battle there between Task Force Tarawa and Saddam Hussein's Fedayeen disrupted the invasion of Iraq. But there is more to the story. Nasiriya is significant to law of war.

The stories of Marines in Nasiriya offer lessons learned on law of war compliance. These lessons reveal that law of war training must be principled, practical, and personal; rooted in both law and honor; and made ready for use at the lowest tactical level. This article discusses some reasons in favor of honor and law (the why) in overcoming the difficulty of distinction in hybrid warfare (the what). The point is that law of war and values training must be incorporated into tactical training as much as possible (the how).

Stories from the Battle

The plan had been to move Marines to Baghdad by way of Nasiriya, a stronghold of Hussein's Fedayeen. Task Force Tarawa's mission was to seize the Euphrates River Bridge and establish a foothold to enable the Division's transit. As Marines prepared to move, then-MajGen Jim G. Mattis, CG, 1st Marine Division, spoke plain on the rules of engagement (ROE):

Our fight is not with the Iraqi people, nor is it with members of the Iraqi army who choose to surrender. While we will move swiftly and aggressively against those who resist, we will treat all others with decency, demonstrating chivalry and soldierly compassion for people who have endured a lifetime under Saddam's oppression.²

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The intel had it that Iraqis in Nasiriya would surrender, even capitulate. As Marines rolled in, according to Capt Mike Brooks, CO, A Company, Task Force Tarawa:

People in robes were running around, but they all seemed to have weapons. I was worried about it, but nobody was shooting at us. Then it was like making popcorn. It started slowly and then reached a crescendo within an hour. I thought, so much for Iraqi capitulation.³

Iraqis began to move toward Capt Brooks' position. "To make matters worse," as noted, "many of the approaching Iraqis were clearly noncombatants, and virtually all were dressed in civilian clothes ... Alpha Company's Marines tried to maintain their fire discipline and follow the [ROE]. Each Marine had to make split-second decisions of life and death—not once, but over and over again."⁴ Other stories tell the same account: In his book *Basrah, Baghdad, and Beyond*, Col Nicholas E. Reynolds, USMCR, described C Company as

coming under 'intense machine-gun, small arms and RPG fire' from a variety of combatants—a mix of regular soldiers and paramilitary fighters—almost all of whom wore civilian clothes.

Capt Daniel Wittnam, CO, C Company, stated, "We saw women shoot at us with RPGs ... we saw children shoot at us. We never saw one person in uniform."⁵ Sgt William Schaefer, de facto commander of the tracks element, said the Marines tried to distinguish between Iraqi fighters and noncombatants, "but at that point, it was hard."⁶

As the Nasiriya stories suggest, the modern norm of war among the people heightens the risk of killings in hybrid warfare, where law of war compliance is most difficult. To overcome the difficulty, Marines must know the law of war principles enough to put them to use in the stress of combat. This requires training that is principled, practical, and personal; rooted in both honor and law; and made ready for use at the lowest tactical level. First, here are some reasons in favor of honor and law.

Honor and Law

Some have misread Clausewitz to say that war has no constraints.⁷ A deeper understanding reveals the mistake. War does have constraints. The political ends constrain the means of war, and law is a necessary part of the political ends. In truth, commanders in chief have long constrained battlefield conduct. One early example of such rules constituted the *Code for the Government of Armies in the Field* (1863), referred to in the shorthand as the Lieber Code. During the Civil War, before the First Geneva Convention, President Abraham Lincoln adopted the Lieber Code as a regulation for the Union Army.

Now, the United States regards the law of war as *lex specialis* (roughly, spe-

cial law). To this day, the highest echelons of the Executive Branch continue to affirm commitment to law of war compliance, and the DOD Law of War Program makes compliance mandatory for Marines. So, for Marines, it may seem to be enough to say that compliance with the law of war is a matter of following orders. But leaders know it is not so simple. Instead, a fail-safe is necessary to ensure law of war compliance. That fail-safe is honor.

Honor

Cicero—the Roman philosopher of ancient times—is known to have said, “*In times of war, the law falls silent.*” As with Clausewitz, some have misapplied Cicero to modern warfare in attempts to dismiss the constraints that the law of war places on wartime conduct. But another axiom is attributed to Cicero that is also applicable here: *What is permissible is not always honorable.*

A decent person does not murder, but less because of the law and more because of societal and personal values. The same is true for law of war: “Honor, not law, is the key to battlefield discipline.”⁸ Former Marine infantry officer and preeminent national security lawyer, Jamie Baker,⁹ has said, too, that

[adherence to the law of armed conflict] does not necessarily arise out of a societal sense of legal obligation, or commitment to the law, but out of a societal belief in the moral values embodied in concepts like discrimination and necessity.¹⁰

And this point cannot be overstated. In the words of foreign relations law scholar Curtis Bradley:

[T]he U.S. government gives significant attention to the international laws of war, in part ... because of a long-standing commitment to the values reflected in these laws.¹¹

Yes, honor is key. Still, law has an important place in war. In general, law sets society’s moral values in writing and makes them ready for practical use. It prescribes actions and behaviors and sets consequences for failures and neglects. In short, commanders need law for good order and discipline. Reconsider the phrase, “Honor, not law,

is the key to battlefield discipline.” It is easy to misunderstand the point, especially out of context. Here is the full passage:

The real challenge for commanders is not just to teach their troops about the law of armed conflict but to inculcate in their troops the ethos of the professional warrior—to instill an abiding sense of honor. It is not enough for soldiers to know the rules, or even to follow them. Without deep reserves of character and psychological strength, troops in high-stress battlefield situations may fall prey to undisciplined impulses. Honor, not law, is the key to battlefield discipline.¹²

In context, the point stresses the importance of honor *and* law. War crimes and other atrocities in modern history reveal that neither alone is sufficient. Law of war compliance requires both.

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Law

Sgt Schaefer’s anecdote from his experience in Nasiriya (that distinguishing between Fedayeen fighters and non-combatants was hard to do) alludes to the law of war principle of distinction. Distinction demands that warfighters treat combatants, noncombatants, and civilians differently. This principle is as old as war itself. The ROE’s requirement of positive identification (PID) in self-defense is one example of the principle of distinction at work. But distinction is easier said than done. Non-state armed groups (like al Qaeda and ISIS [Islamic State of Iraq and Syria]) make distinction difficult. Distinction is difficult for more than one reason, but the most troublesome reason is that non-state armed groups often seek to blend in with the civilian population. In such circumstances, the hardest part is PID.

What is worse, honoring the principle of distinction—although more difficult in the phenomena of hybrid

war—has always been difficult, not least because of the other principles of the law of war.

First, the principle of distinction must be balanced by military necessity. Necessity is foremost among the four long standing law of war principles. It is more permissive than restrictive, more a matter of “may and must” than “must not.” It sets out the warfighter’s duty to act in war, with even “incredible violence,” for the sake of the military objective.¹³

Second, in contrast, the principle of humanity makes it unlawful to apply violence for the sake of anything other than the military objective.

Third, with the dictates of distinction and necessity often at odds, the principle of proportionality provides the proper balance. The principle of proportionality says that the military advantage to be gained by a wartime act must be balanced by the risk of civilian casualties.¹⁴ Leaders: Do not misunderstand the principle of proportionality; know that there are several principles of proportionality in the context of the law of war. The principle of proportionality here does not demand an eye-for-an-eye kind of reciprocal response in self-defense. Instead, remember it as the balancing test.

The principle of distinction—as Marines applied it in the battle of Nasiriya—may serve as the fourth principle.

Finally, while all who have learned law of war know these four principles, leaders will note that the 2015 *DoD Law of War Manual* added a fifth: honor. The principle of honor “demands a certain amount of fairness in offense and defense and a certain mutual respect between opposing military forces.” Although the newest of the now five law of war principles, the concept of honor in war (also referred to as chivalry) is not new at all. It has been a part of warrior codes since at least the beginning of recorded history and probably earlier.

Anyway—and to borrow a useful phrase—it is worthwhile to *start with why*: Here are five reasons in favor of law and honor. The reader will notice that each reason alludes or refers to these two tandem requirements. Again, each is necessary, and neither alone is suffi-

cient. The reader will also notice, among these five reasons, three indispensable features: they are practical (that is, they are driven not by the philosophy that underlies the law of war but the pragmatism that drives military operations), they are based on the law of war principles, and they are personal, reliant on the sense of right and wrong.

Five Reasons in Favor of Law and Honor

Law and honor enable Marines to manage violence responsibly. First, officers must remember their oath. Each officer takes an oath to support and defend the Constitution of the United States, and leaders know that the Supremacy Clause incorporates “treaties made under its authority”—most notably here the Geneva Conventions—as the supreme law of the land.

The DOD Directive on the Law of War Program makes this clear in its definition of law of war:

The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.¹⁵ So, leaders see law of war compliance as an inherent duty, a logical extension of the Oath of Office.

Second, leaders weigh this consideration in light of their command responsibility. The law of war and the concept of operational art expect—and even take for granted—that commanders are responsible for the conduct of those under their charge. Commanders, then, may be directly and even indirectly responsible, ultimately legally responsible, for their subordinates’ conduct.

Third, leaders know that the skill of the officer is the management of violence. Leaders must manage violence responsibly. Honor is helpful here too. In the words of retired Air Force major general and national security law expert Charles Dunlap:

Translating morality, as morality, into more secular references of honor and chivalry that resonate with members of the armed forces may be a way to broadly and effectively access the war-

fighter’s psychology that one wishes to animate towards law of war compliance.¹⁶

Here it is worth emphasizing that these points are not exclusive to officer leadership. They apply as well to all small unit leaders. As with Sgt Schaefer in Nasiriya or Cpl Panyagua in Marja, NCOs at all levels—embodiments of the “strategic corporal”—must remain ready to manage violence and do so responsibly.

Law and honor help ensure success at the tactical and strategic levels. In 2009, the *Marine Corps Gazette* published an article by Maj David Ashe, USMCR: “The Law of War: a Force Multiplier Since 1775.” In it, Maj Ashe (now Col Ashe, USMCR, Head of the Law of War Training Section) stressed the importance of annual training taught by an experienced and qualified judge advocate. He also emphasized that our most important reason to comply with the law of war is “to increase our lethality and our ability to dominate the battlefield.” Make no mistake: law-of-war compliance makes Marines more dominant.

Consider this passage from Col Ashe’s article:

Even our commitment to limiting collateral damage is based more upon military necessity than efforts to be humane. We take to the battlefield with finite resources, and there is no reason to waste our time and resources for anything that does not have a military purpose. As a collateral effect we avoid collateral damage.

This perspective is in keeping with the law of war principle of military necessity. Prior to the United States’ involvement in World War II, the Rules of Land Warfare (1940) defined the principle of necessity in the following terms:

[S]ubject to the principles of humanity and chivalry, a belligerent is justified in applying any amount and any kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money.

This characterization might remind the leader of the economy of force, one of Clausewitz’ principles of war. And notice the reference to chivalry, an in-

corporation of the concept of honor long before its inclusion as a law of war principle in the Manual. Here, the law of war principle of necessity overlaps with the strategic principle of economy of force to bring about a responsible application of means to ends.

This overlap is familiar, too, to today’s leaders of the special operations forces (SOF). Of the twelve SOF imperatives, the fourth is to “Engage the threat discriminately.” After all, “SOF commanders have limited resources they cannot easily replace. Their missions often have sensitive political implications. Therefore, SOF commanders must carefully select when, where, and how to employ SOF.”¹⁷ Few of the political implications are more sensitive than violations of law.

Law and honor are inherent parts of operational art. *MCDP 1, Warfighting*, teaches that morale is an inherent part of combat power. And law and honor are both necessary for morale: “Commitment to the ideals embodied in the law in both rhetoric and reality helps to sustain military morale, which is indelibly linked to the belief that the U.S. cause and means of warfare are honorable.”¹⁸ To support his point, Jamie Baker refers to Gen Mattis’ message to all hands in March 2003.

Readers will notice the two-part phrase cause and means. Marines at all levels—but especially those having completed Marine Corps Command and Staff College—will be familiar with the concepts of the cause and means of war, spoken of in the law of war context as the *jus ad bellum* and the *jus in bello*. In just war theory, these concepts overlap. After all, “A just cause can be undone if it is pursued in unjust ways.”¹⁹ While it is the duty of the Commander in Chief (or Congress) to ensure a just cause for war, it is the duty of U.S. forces (in particular, leaders) to ensure that the cause is pursued in ways that are lawful and honorable. This is an inherent part of operational art, the “purposeful linkage of tactics to strategy.”²⁰

Law and honor are at the core of the Marine Corps warrior ethos. The current *Marine Corps Manual*—published in 1980, with changes from ‘82, ‘84, and ‘96—will soon be superseded by a new version (which appeared to have been

slated for release by 2019 but which has not yet been released). The draft of the new *Marine Corps Manual* includes a note on what honor means to Marines in the context of the law of war:

Marines, individually and collectively, ‘keep our honor clean.’ Marines conduct all military operations in accordance with all applicable laws, regulations, and policies. In particular, Marines comply with the law of war, whether operating alone or with joint/combined forces.

Along these same lines, in the *Gazette* article law of war noted above, Col Ashe ended with an “easy” answer to the question of why to follow the law of war, offered in the simplest of terms: “our ROE and LOW [law of war] compliance is simply an extension of our innate warrior ethos.” On this point, know that the Marine Corps order on the Marine Corps Law of War Program lists the nine “basic principles” of the law of war. And, according to retired Marine Colonel and preeminent law of war scholar, W. Hays Parks, “there is greater likelihood for respect for these principles if they are explained in military terms rather than solely from a moral or legal standpoint.”²¹

Last, Gen Mattis has driven this point home in the Marine Corps tactical publication on war crimes:

The application of honor, courage, and commitment in the conduct of military operations means: *the honor to comply with the Laws of War*, the courage to report all violations, and the commitment to discipline the violators.²²

Law and honor might help against trauma-related stress. On the fifth and final reason, consider passages from two books on the Commandant’s Professional Reading List. As noted in *On Killing*,

One of the things that could make combat in Vietnam—and a generation later in Afghanistan, and Iraq—particularly traumatic was that due to the nature of guerilla warfare, soldiers were often placed in situations in which the line between combatant and noncombatant was blurred.²³

This passage brings to mind the difficulties of distinction as Marines expe-

rienced in Nasiriya. And, “[s]ometimes the trauma associated with these gray-area killings in modern combat can be tremendous.” Another example, at the heart of *Achilles in Vietnam*, is the idea that “moral injury is an essential part of any combat trauma that leads to lifelong psychological injury.”²⁴

Also, according to an article featured on the site of the Department of Veterans’ Affairs National Center for post-traumatic stress,

Military personnel are well trained in the rules of engagement and do a remarkable job making life or death decisions in war; however, sometimes unintentional error leads to the loss of life of non-combatants, setting the stage for moral injury.²⁵

Leaders must mitigate the risk of moral injury. As retired Army LTG James Dubik has argued (referring to the underdeveloped *jus post bellum*, or the *afterwar*), those concerned must deal with the moral injury to bring about a more complete just war theory.

Consider also remarks from the chief U.S. prosecutor at the Nuremberg Trials, Army BG Telford Taylor, who saw the law of war as “necessary to diminish the corrosive effect of mortal combat on the participants:”

Unless troops are trained and required to draw the distinction between military and non-military killings, and to retain such respect for the value of life that unnecessary death and destruction will continue to repel them, they may lose the sense of that distinction for the rest of their lives. . . . As Francis Lieber put the matter in his 1863 Army regulations: “Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.” [Lieber Code, Art. 15]²⁶

All of this is especially relevant to Marines:

semper fidelis—never leave a comrade behind, protect your own, be in charge, bring your troops home. The socialized ideals of the profession resonate with a protector culture of honor: to take care of those in your orbit.²⁷

Overcoming the Difficulty

Honor and law limit wartime con-

duct in moments when right judgment lapses. Leaders must see operational art, in part, as *applying law of war principles* to manage violence, maintain morale, and help facilitate right action; *managing violence* in keeping with Marine Corps warrior ethos and values; and *mitigating risk of lasting trauma* from having done the wrong thing.

The modern phenomena of hybrid war make distinction difficult, but the ROE offer ways to overcome the difficulty. ROE carry forward law of war principles. As one of the most prominent authorities on the law of war, LtCol Gary Solis, USMCR(Ret), explains:

ROE are the primary means of regulating the use of force in armed conflict, and in situations short of armed conflict. . . . They are the commander’s rules for employing armed force, arrived at with the help of military lawyers and implemented by those who execute the military mission.²⁸

Just as a mission statement must be in accordance with higher intent, so ROE must be in compliance with the law of war. The Chairman of the Joint Chiefs of Staff Instruction on the standing rules of engagement (SROE) makes this clear:

Commanders at all levels are responsible for establishing ROE/[Rule for the Use of Force (RUF)] for mission accomplishment that comply with ROE/RUF of senior commanders, the Law of Armed Conflict, applicable international and domestic law and this instruction.²⁹

The SROE establish warfighters’ inherent right and duty of self-defense. Still, ROE and self-defense do not go far enough to overcome the difficulty of distinction in hybrid warfare—in fact, they *cannot*. This is one important reason for all leaders to know, not just the ROE, but the law, to be able to judge under the stress of war which orders are and are not lawful. To overcome the difficulty—say, in distinction, but also in any of the other law of war principles—leaders must be properly trained in the law of war, must incorporate law of war training into tactical training in the field, and must inspire compliance, most especially by appeals to honor.

As the above accounts show, Capt Brooks, as one among the few at the center of the battle of Nasiriya, earned a unique and relevant perspective on the application of the principle of distinction in self-defense and against a non-conventional enemy in civilian clothes, where compliance with the principle is most difficult. In the end, despite the difficulty, Capt Brooks was able to account for all his Marines.³⁰

Capt Brooks is now Col Brooks, Commander of Marine Raider Regiment, U.S. Marine Corps Forces, Special Operations Command (MAR-SOC), and as of 19 February 2020 is now a Military Fellow at the Council on Foreign Relations. In July 2018, Col Brooks agreed to talk about his experiences in Nasiriya. Here is what the reader might take away from Col Brooks' remarks (author's summary of Col Brooks' takeaway; not a direct quote):

In 2003, we didn't have a combat-seasoned force... Lawyers were involved early and did a great job in making ROE into scenario-driven drills ... It was especially important to make ROE personal ... Marines knew they alone would have to live with the decisions they made.

Conclusion

As with Marines' accounts of Nasiriya, Col Brooks' experience offers some lessons learned on ensuring law-of-war compliance. These lessons reveal that law of war training must be principled, practical, and personal; rooted in both law and honor; and made ready for use at the lowest tactical level. These lessons will no doubt prove useful to leaders throughout the Marine Corps, and especially Marine Special Operations Forces, that deploy as small teams, isolated from higher headquarters. These lessons will also prove useful to all of us Marines, always striving to keep our honor clean.

Notes

1. Dick Camp, "Carnage and Courage at the Saddam Canal Bridge," *Leatherneck*, (Quantico, VA: March, 2018).

2. MajGen James N. Mattis, First Marine Division (Reinforced), *Commanding General's Message to All Hands*, (Camp Pendleton, CA: March 2003).

3. Michael R. Gordon and Bernard E. Trainor, *Cobra II: The Inside Story of the Invasion and Occupation of Iraq*, (New York, NY: Vintage, 2007).

4. Richard Lowry, *Marines in the Garden of Eden: The True Story of Seven Bloody Days in Iraq*, (New York, NY: Berkley, 2006).

5. Rich Connell and Robert J. Lopez, "Marines' Memories Paint Chaotic Scenes In Nasiriya Alley," *Los Angeles Times*, (September 2003), available at <https://www.theledger.com>.

6. "Marines' Memories."

7. See B.H. Liddell Hart's Foreword to Samuel Griffith's translation of Sun Tzu's *Art of War*.

8. Gabriel Bradley, "Honor, Not Law: Rules of Engagement Are Only a Small Part of Battlefield Discipline," *Armed Forces Journal*, (Washington, DC: March 2012), available at <http://armed-forcesjournal.com>.

9. The author was Jamie Baker's student at the Georgetown University Law Center in 2016. The author takes this opportunity to highlight that Jamie Baker was and is a champion of morality in leadership.

10. James E. Baker, *In the Common Defense: National Security Law for Perilous Times*, (New York, NY: Cambridge, 2007).

11. Curtis Bradley, *International Law in the U.S. Legal System*, (New York, NY: Oxford, 2015).

12. "Honor, Not Law."

13. Gen James N. Mattis. Nicholas Reynolds, *U.S. Marines in Iraq, 2003: Basrah, Baghdad, and Beyond*, (Washington, DC: U.S. Marine Corps, 2007).

14. Leaders: Do not misunderstand the principle of proportionality; know that there are several principles of proportionality in the context of the law of war. The principle of proportionality here does not demand an eye-for-an-eye kind of reciprocal response in self-defense. Instead, remember it as the balancing test.

15. *DOD Directive 2311.01E, DoD Law of War Program*, (Washington, DC: 2010).

16. Charles J. Dunlap, Jr., "Honor, Morality, and the DOD Law of War Manual," *Just Security*, (October 2015), available at <https://www.justsecurity.org>.

17. Department of the Army, *Field Manual 31-20, Doctrine for SOF*, (Washington, DC: 1990).

18. *In the Common Defense*.

19. Michael Walzer, *Just and Unjust Wars*, (New York, NY: Basic, 2015).

20. Brian S. Petit, *Going Big by Getting Small: The Application of Operational Art by Special Operations in Phase Zero*, (Denver, CO: Outskirts, 2013).

21. W. Hays Parks, "Teaching the Law of War," (1987), available at <http://isme.tamu.edu>.

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23. Jonathan Shay, *Achilles in Vietnam: Combat Trauma and the Undoing of Character*, (New York, NY: Scribner, 1994).

24. Dave Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society*, (New York, NY: Back Bay Books, 1994).

25. Shira Maguen & Brett Litz, "Moral Injury in the Context of War," Department of Veterans Affairs, (undated), available at <https://www.ptsd.va.gov>.

26. Laurie Blank & Gregory Noone, *International Law and Armed Conflict: Fundamental Principles and Contemporary Challenges in the Law of War*, (New York, NY: Wolters Kluwer, 2019). This passage is also reproduced in the revised version of MCTP 11-10C, *Commander's Handbook on the Law of Land Warfare*, (Washington, DC: 2019).

27. Nancy Sherman, *Afterwar: Healing the Moral Wounds of Our Soldiers*, (New York, NY: Oxford, 2015).

28. Gary Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, (New York, NY: Cambridge, 2016).

29. Chairman of the Joint Chiefs of Staff, *Instruction 3121.01B, Standing Rules of Engagement*, (Washington, DC: 2005).

30. *Cobra II*.

