

THE FIRST MODERN CODIFICATION OF THE LAW OF WAR

FRANCIS LIEBER AND GENERAL ORDERS No. 100

Mr. Henri Coursier, of the Legal Department of the ICRC, published some time ago a study on "Francis Lieber and the Laws of War" in the International Review, together with a French translation of Orders No. 100 relative to the behaviour of the United States Armies in the field (the famous "Lieber Laws"), the object of which was to have the principles of international law applied during the American civil war (1861-1865). These orders which were immediately recognized and appreciated by the principal lawyers of the time, had a great influence on the future of the law of nations, since it can be said that the Hague Regulations, which sprang from the 1899 and 1907 Peace Conferences, were very largely inspired by them, and several provisions of the Geneva Conventions of August 12, 1949, stem from the same source. It was to Lieber that the President of the United States, Abraham Lincoln, appealed to establish this Code which was promulgated in 1863, thus preceding by one year the First Geneva Convention.*

We are now returning to this subject, and in this issue and the next we are publishing an authoritative article written for us by Mr. R. R. Baxter, Professor of International Law at Harvard University. We are pleased to illustrate in this way, as we had previously done in publishing a French translation of Orders No. 100, thus illustrating the contribution of American learning and thought to the formulation of the contemporary law of war. (Edit.)

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* See English Supplement, September 1953.

THE PRE-WAR YEARS

The news that Fort Sumter had been fired upon by rebel forces in 1861 must have awakened in the mind of Dr. Francis Lieber, Professor of History and Political Science in Columbia College, some memories of his own experience of war.

Forty-six years previously, he had set out from his native Berlin with the Colberg regiment to aid in the resistance to Napoleon, lately returned from his exile on Elba.¹ The young Lieber, then only fifteen, fought at Ligny as a private soldier, suffered the rigors of an unfamiliar calling, and was finally wounded by a French ball at Namur. From there, he was evacuated to Liège and, after a long convalescence, returned to his home.

Upon his demobilization, he became a disciple of "Turnvater" Jahn, who was training the German youth, both physically and spiritually, to resist the French. The association of the ardently Franco-phobe Lieber with this and several other German youth groups of a liberal cast led to his arrest in 1819, but he was released for want of any concrete evidence of criminal acts. To escape the restrictions that were placed on his activities by the police, he went to Jena and Halle to study.

Lieber's imagination, like that of so many of his contemporaries, was soon fired by the resistance being offered by the Greeks to Turkish rule. With a group of fellow adventurers he left for Greece in 1821. The experience was a disillusioning one: His party was refused food and shelter, robbed by bandits, and denied the opportunity to fight the Turks. This was but a shadow of the glorious campaign against Bonaparte and probably ultimately proved to be a wholesome means of tempering Lieber's enthusiastic idealism.

From Greece, Lieber went to Italy, where he was succoured by Niebuhr, the eminent historian and Prussian minister at Rome, and it was through the scholar's good offices that he was able to return to Berlin in 1823. The expedition to Greece served further to convince the police that Lieber was dangerous, and he was once more arrested at Halle. Even after his release during the following year, he continued to be harassed by the police and he decided to

¹ Francis Lieber has been the subject of three biographies: The earliest is Perry, *The Life and Letters of Francis Lieber* (1882), chiefly of value for the copious extracts from Lieber's letters and other writings. Harley, *Francis Lieber; His Life and Political Philosophy* (1899) is short and outdated. The definitive life is Freidel, *Francis Lieber, Nineteenth Century Liberal* (1947). Two articles by Ernest Nys entitled "Francis Lieber—His Life and His Work" appear in *5 American Journal of International Law* 84, 355 (1911). This short account of Lieber's life prior to the Civil War is indebted to these sources.

quit Germany. On 22 May 1826, he embarked at Hamburg for London.

Thus, by his twenty-sixth year, Lieber had engaged in two wars, had received his doctorate at Jena, had acquired a healthy distaste for the police of his native Prussia, and had voluntarily expatriated himself. If, as seems not unreasonable, he who is to write of war must first experience it, this much of Lieber's qualifications as a codifier of the law of war had been established. The thinking and writing were to come later.

Lieber was penniless when he arrived in London. For a time he supported himself by writing and teaching. Then in 1827 came an offer to serve as director of the Boston gymnasium—a post for which his training as a Turner was his best recommendation.

Lieber was delighted with the republican United States, and apparently the young German exerted an equal fascination for many of the prominent Bostonians of the day. President Adams swam with him in the gymnasium's swimming pool; Josiah Quincy, William Ellery Channing, George Hilliard, George Ticknor, Judge Story, and Charles Sumner were among his friends. Despite his wide circle of influential acquaintances, Lieber was in a constant struggle to ensure financial security for his family. One of his first projects in the new land was the large-scale adaptation and revision of the German *Conversations-Lexikon* as the *Encyclopaedia Americana*, a venture highly profitable to Lieber's publisher but somewhat less so to the author. At the same time, he was writing numerous articles and serving as an American correspondent for German newspapers.

When his search for permanent and more remunerative employment in Boston failed, Lieber moved successively to New York and Philadelphia. In 1834 he was offered a professorship at South Carolina College, now the University of South Carolina. The location of the college and its great distance from intellectual centres and his friends were disadvantages, but Lieber was encouraged by the prospect of steady income and accepted the position.

Although Lieber served at the College as professor of history and political economy—with that nice combination of practice and theory that has long since disappeared—his interests ranged over a number of other fields as well—penology, rudimentary semantics, public law, sociology, and international law. Yet the

two decades which he spent in the South could hardly be called happy ones. He missed Boston and his friends in the North. His correspondence with his numerous acquaintances was voluminous and often besought their aid in securing a teaching position for him in the North. Nearly every summer he left Columbia for a trip to New York and Boston, rejoicing at the opportunity of leaving for a time the small southern city in which he found himself a voluntary exile. In addition to finding little or no stimulus in the atmosphere of South Carolina College, he heartily disliked the institution of slavery but managed to conceal his feelings until 1855 when his anti-slavery views and a combination of other factors led him to resign his chair.

Lieber must surely during this period have adverted in his lectures to international law and more particularly to the law of war. But it was not until the publication of his first important book, *Political Ethics*,² in 1838 and 1839 that he set down in writing his theories of the justness of wars and the manner in which they should be conducted. It is perhaps characteristic of what he was later to characterize as an "anti-war period," stretching from the Treaty of Paris in 1815 to 1855,³ that discussion of the law of war is reserved for a comparatively short section near the rear of the book.

War he defines as: "... a state of enmity between two parties, in which each is known by the other to be ready to obtain its ends by other means besides intellectual ones, especially by force and stratagem."⁴ True to his Prussian upbringing and martial ardour, he decries those who disparage military greatness and those who deny that anyone gains through warfare.⁵ The Christian religion, contrary to the belief of contemporary pacifists, does not prohibit war. War is not expressly prohibited by the Bible, and its injunctions against bloodshed are to be read in light of the entire book. If Christ acknowledged the existence of law, the state, and the magistracy, it cannot be said that He intended to abolish all right and law, which, under certain circumstances, may be secured only through the use of force.⁶ Nor is war objectionable on ethical

¹ Lieber, *Political Ethics* (1838-39).

² Lieber, Lectures on the Laws and Usages of War delivered at the Law School of Columbia College, 21 October 1861 to 6 February 1862 (unpublished), The Library of the Johns Hopkins University, Baltimore, Md. [hereafter cited as "Lectures"]. The author is indebted to the Librarian of The Johns Hopkins University for permission to quote from these lectures.

³ 2 *Political Ethics*, p. 630.

⁴ *Ibid.*, pp. 632-635.

⁵ *Ibid.*, pp. 635-640.

grounds. Although men should attempt to deal reasonably with one another, if "we believe the loss by submission would be so great that we must at least try to protect ourselves," war may be necessary, not as a way of proving we are right, but solely as a measure of self-protection.⁷ War, he adds, does not breed immorality, as alleged by some; "just wars are not demoralizing." Mindful of the part he played in the wars against Napoleon, he cites as examples of the moral elevation which may be attained through war both the American Revolution and the German resistance to French aggression. New vigour and a spirit of self-sacrifice are often induced by war.⁸

A just war: "... must be undertaken on just grounds; that is, to repel or avert wrongful force, or to establish a right; must be the last resort, that is, after all other means of reparation are unavailable or have miscarried; it must be necessary—that is, the evil to be averted or redressed should be a great one; and it must be wise—that is, there must be reasonable prospect of obtaining reparation, or the averting of the evil, and the acquiescence in the evil must be greater than the evils of the content."⁹

Lieber classifies just wars as insurrections to gain or regain liberty, wars of independence, wars to quell armed factions, wars to unite "distracted" states of the same nation or in a country destined by nature to form one political society, wars of defence, and wars of chastisement.¹⁰

Coupled with this frank recognition of the part played by war in international relations is the jurist's insistence that war does not create a state of anarchy between states but imposes instead a new set of obligations between the belligerents.

"War... by no means absolves us from all obligations toward the enemy, on various grounds. They result in part from the object of war, in part from the fact that the belligerents are human beings, that the declaration of war is, among civilised nations, always made upon the tacit acknowledgment of certain usages and obligations, and partly because wars take place between masses who fight for others, or not for themselves only."¹¹

⁷ *Ibid.*, pp. 640-643.

⁸ *Ibid.*, pp. 645-650.

⁹ *Ibid.*, p. 653.

¹⁰ *Ibid.*, p. 654.

¹¹ *Ibid.*, p. 657.

Thereafter, Lieber discusses in summary form the rules applicable to the conduct of hostilities between belligerents.¹² He cites the classic writers on war and international law—Cicero, Grotius, Gentili, Pufendorff, Bynkershoek, Vattel, Wheaton, Clausewitz. Since he wrote in a period when custom counted more in international law than judicial precedents or treaty, he refers to many historical instances to illustrate his propositions.

These early writings show the balance that Lieber was able to achieve between a frank acceptance of war as an inevitable, and indeed necessary, human institution and his insistence that war did not thereby create a state of anarchy between the belligerents. What was later to be written in his *Instructions for the Government of Armies of the United States in the Field*¹³ of 1863 was little more than an amplification of the ideas he had expressed some twenty-five years earlier in the *Political Ethics*.

The *Political Ethics* received critical applause at the time of its publication and exerted a considerable influence throughout the remainder of the century as the leading text in the field of political science. Lieber was thus fortunate in being able to present his ideas to a large audience long before he was to seek to enact them as positive law.

The *Political Ethics* did not, however, secure for Lieber the chair at Harvard or Columbia which he made no secret of coveting. A trip to Germany in 1844, during which Lieber sought to obtain a post in that country, was equally unsuccessful. During his years at South Carolina College he also wrote two other treatises on political science, *Property and Labour* in 1841 and *Civil Liberty and Self-Government* in 1853, and an interesting text on the principles of interpretation and construction of law and politics, titled *Legal and Political Hermeneutics*, which he considered to be supplemental to *Political Ethics*. The *Civil Liberty and Self-Government* was something of a "tour de force" in that it was not unsympathetic to southern views of self-government and successfully skirted the issue of slavery, despite Lieber's strong views on the subject.

When Lieber was defeated in the balloting for a new president for South Carolina College in 1855, he resigned his post, probably as much induced to do so by the uncongenial atmosphere of South

¹² *Ibid.*, pp. 658-668.

¹³ Lieber, *Instructions for the Government of Armies of the United States in the Field* (1863), originally published as General Orders No. 100, War Department, Adjutant General's Office, 24 April 1863.

Carolina as by his most recent disappointment. In 1857, he was at last offered a professorship at Columbia College in New York City and, at his own instigation, he was given the title of "Professor of History and Political Science." It was this position which he occupied when the great civil conflict broke out.

WARTIME ACTIVITIES

The protean Lieber was as much a pamphleteer and a popularizer of ideas as he was a scholar. He was not content to write ; he must also convince. To such a person, a large-scale civil war, analogous in many respects to a war between nations and presenting problems both of domestic and international law, offered a favourable setting for his peculiar talents.

One of the first problems of "international" law which arose during the war between the states was that of exchange of prisoners. There were those who contended that an exchange of prisoners with the Confederate forces would constitute a recognition of the belligerent status of the rebels. Lieber addressed a letter on this subject to Attorney General Bates, which was later published, with Bates' authorization,¹⁴ in *The New York Times* in August 1861. In his letter,¹⁵ Lieber distinguished acknowledgments constituting "the mere recognition of a fact as a fact" and those constituting "recognition of reality." The exchange of prisoners, who, he noted, had been exchanged in past civil wars, constituted a recognition of the latter category based on "fact and reality," just as flags of truce and armistices were as a matter of fact employed in the hostilities between the two forces. The letter produced several commendatory editorials in the *Times*.¹⁶

By this time Lieber already had in mind the preparation of a text on the international law of war. He wrote to Sumner : "I desire to write a little book on the Law and Usages of War, affecting the Combatants—some 200 pages 12mo, but nothing of the sort having ever been written, so far as I know, it would require a good deal of hunting up, and God has denied me the two delectable things—a saddle horse and an amanuensis. Otherwise I would try

¹⁴ Freidel, *Francis Lieber*, p. 320.

¹⁵ Letter, "The Disposal of Prisoners: Would the Exchange of Prisoners Amount to a Partial Acknowledgement of the Insurgents as Belligerents, According to International Law?", *The New York Times*, 19 August 1861, p. 3.

¹⁶ Editorial "Prisoners of War", *The New York Times*, 19 August 1861, p. 2; Editorial "Exchange of Prisoners", *id.*, 21 October 1861, p. 4.

to write something which Congress might feel inclined to recommend to the Army.”¹⁷

The basic idea of General Orders 100 had taken form—instructions in the law of war for the forces of the United States, which were not, however, to receive the Congressional approval for which Lieber hoped.

Lieber was actually, within a few months, to have accumulated sufficient material for the book he hoped for, if he had only had sufficient time actually to write the book. Instead he prepared a series of lectures on the “Law and Usages of War,” which he delivered at the Law School of Columbia College from 21 October 1861 to 6 February 1862.

The first few lectures were devoted to the political theory of war and generally covered the same ground as the corresponding portions of the *Political Ethics*.¹⁸ But the fact that that treatise had been prepared in the midst of a prolonged era of peace which had terminated in 1853 gave a new perspective in which to review the progress made by the law in the nineteenth century. Lieber characterizes the “anti-war” period by this statement: “Prolonged peace and worldly security and well-being had thrown us into a trifling pursuit of life, a state of un-earnestness, had produced a lack of character, and loosened many a moral bond.”

When disputes arise between nations, he asserted, an international high court is not the sound solution, for such a court might interfere in domestic affairs, operate as a brake on the progressive nations of the world, and would, at the same time, be unable to enforce its decisions. As in the *Political Ethics*, he dismisses religious and ethical objections to war with the statement, “A dinner is not an ethical procedure, but it is not immoral.”

War, then, “must be waged with justice not less than by force.” To this end the laws and usages of war, created by common consent among the nations constituting the community of nations, have been developed in a manner closely analogous to the common law. The sanctions by which these “pre-existing rules of action for all parties” are enforced are two—public opinion and the right to “force the offending party to submit to the rule.”

¹⁷ Lieber to Sumner, 19 August 1861; Lieber to Allibone, 19 August 1861, quoted in Freidel, *op. cit.*, p. 323.

¹⁸ Pp. 630-657.

After these introductory lectures, Lieber stated "Twenty-Seven Definitions and Elementary Positions Concerning the Law and Usages of War" ¹⁹ intended to state in propositional form the basis for the law of war. A quotation of the first four will suffice to indicate their character :

" 1. Peace is the normal state of civilized society. War is the exception.

" 2. War is protracted and active hostility of large masses, in which the enemies resort to physical contest and stratagem, if need be.

" 3. A battle is the intensest action of this hostility, the positive physical contest of armies.

" 4. Peace of some sort must be the end of all war—a return to the normal state. They who would carry on war for its own sake are enemies to civilization, to mankind."

Many of the "Definitions" and "Positions" merely constitute reiterations of statements made in the *Political Ethics* and in earlier lectures. For example, in the nineteenth definition, Lieber adverts again to one of his favourite theories—that "intense wars are of short duration" :

" 19. War being an exceptional state of things, the shorter it is the better; and the intenser it is carried on, the shorter it will be. The gigantic wars of modern times are less destructive than were the protracted former ones, or the unceasing feudal turbulence." ²⁰

For present purposes, the most interesting feature of these rules is that they are the archetype of the first section of Lieber's *Instructions for the Government of Armies of the United States in the Field*. The similarity between the principles stated in the *Instructions* and those of the lectures is striking, not only because of the identity of form and substance but because they both represent an attempt to convince those being exposed to international law, probably for the first time, of the validity and logic of the law of war by a series of logical and persuasive statements.

¹⁹ These statements were printed, with the permission of the author, by the hearers of his lectures. A copy is to be found in the library of The Johns Hopkins University.

²⁰ *Political Ethics*, p. 660.

One sees in part of Article 29 of the *Instructions*, to take only one example, a paraphrase of principles 1, 4, and 19 above :

“ Peace is their [the nations’] normal condition ; war is the exception. The ultimate object of all modern war is a renewed state of peace.

“ The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief.”

Following this introduction to the theoretical basis of the law of war, Lieber proceeded to the discussion of the substantive law of war, dealing in turn with the commencement of hostilities, the conduct of hostilities, treachery, retaliation, treatment of the wounded, parlementaires and flags of truce, spies, cartels, capitulations, prisoners of war, and booty.

General Halleck, the general-in-chief of the Union forces and himself the author of a standard American treatise on international law,²¹ requested a summary of Lieber’s lectures.²² The two had met casually before the war on Governors Island, and Lieber renewed what had probably been no more than a slight personal acquaintance by sending copies of two lectures on the Constitution which he had delivered at Columbia in February of 1861.²³

The second specific question of the law of war on which Lieber advised the Attorney General concerned the status of negro slaves who had been captured or who had come into Union lines. The slaves had been variously treated by the commanding generals in the field. General Butler considered escaped slaves to be “ contraband ” and thus to be property ; General McClellan had returned runaway slaves and had promised to use military forces to put down slave rebellion.²⁴ On the other hand, General Hunter extended martial law over three states and proclaimed the abolition of slavery in that area. The Military Governor of North Carolina, Stanley, had returned slaves to their masters and broken up the schools that had been formed for those coming into Union lines. The actions of General Hunter and of General Stanley led Lieber to address another letter to the Attorney General, which, like his

²¹ Halleck, *International Law ; or, Rules Regulating the Intercourse of States in Peace and War* (1861).

²² Lieber to Halleck, 30 January 1862 ; Halleck to Lieber, 3 and 11 February 1862.

²³ Lieber, “ The Genesis of this Code ” in Manuscript notebook in the Office of the Judge Advocate General of the Army, Washington, D.C. The author desires to express his appreciation to Major General Charles L. Decker, The Judge Advocate General of the Army, for permission to quote from this notebook.

²⁴ Freidel, *Francis Lieber*, pp. 323, 327-328.

previous letter on the exchange of prisoners, was published in a New York newspaper.²⁵

On a legal basis, he disapproved of Hunter's having liberated slaves in areas not actually under his control and therefore not subject to the martial law he had imposed. He stated with respect to martial law that "Military force being its very foundation and condition, it cannot extend farther than the military force and control extend, both as to space and time." As for General Stanley, he had disregarded the essential principle that slavery does not exist by international law but by municipal law. On the basis both of reason and precedent therefore, the rule exists that "... the slave escaping during war from one belligerent to another for protection thereby becomes free." He concluded his letter with an ardent denunciation of slavery and called in particular for the education of liberated slaves. A copy of the letter was sent to Halleck after it had been published in the *New York Evening Post*, and Halleck endorsed his friend's views.²⁶

Lieber had achieved almost the status of an unofficial adviser of the Government, not alone on the basis of his letters to the Attorney General on questions of international and martial law but also as a result of having furnished various proposals of a military nature to the War Department, including the encouragement of military reviews and suggestions for the creation of a Government-operated Army savings bank and a board of review on the appointment of officers.²⁷ The war had a peculiar personal immediacy for the publicist. One son, Oscar, had adhered to the cause of the rebels and was killed early in the war, while two other sons, Hamilton and G. Norman Lieber, joined the Union Army.

Activities of the Confederate forces and their sympathizers in several of the border states—notably Missouri, Arkansas, and Kentucky—in the summer of 1862 raised serious problems regarding the rights of the belligerents with respect to guerrillas and other irregular combatants.²⁸ On the first day of August, Lieber wrote to Halleck, suggesting the publication of a pamphlet on guerrillas as a guide to officers in the field forced to determine the status of

²⁵ "The Duty of Provisional Governors: Letter from Professor Lieber to Secretary Bates", letter to *The Evening Post*, New York City, 17 June 1862.

²⁶ Lieber, Manuscript notebook.

²⁷ Freidel, *Francis Lieber*, p. 321.

²⁸ War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies [hereafter cited as *Official Records*], Series 1, Vol. 15, 16 and 17, *passim*.

the combatants with which they were dealing.²⁹ Within the week, Halleck replied to Dr. Lieber, soliciting his views concerning the belligerent status of men sent by the rebel authorities "in the garb of peaceful citizens, to waylay and attack our troops, to burn bridges and houses, and to destroy property and persons within our lines."³⁰ Lieber quickly produced a pamphlet of 22 printed pages, entitled *Guerrilla Parties Considered with Reference to the Laws and Usages of War*, of which 5000 copies were ordered by Halleck for distribution to the Army.³¹ The pamphlet is brief and to the point, well suited to the needs of field commanders. Principles are illustrated by examples of usages in recent conflicts, notably the Napoleonic wars. What the publication actually accomplishes is a definition of "the Freebooter, the Marauder, the Brigand, the Partisan, the Free-corps, the Spy, the Rebel, the Conspirator, the Robber, and especially the Highway Robber, the Rising en Masse, or the 'Arming of Peasants'" for the purpose of determining whether each category is to be accorded the rights of combatants or be subjected to the penalties attaching to those denied a belligerent status.³²

THE GENESIS OF THE CODE

The time had now come for Lieber to propose the project which was nearest to his heart—a series of rules of warfare for dissemination to the armies of the United States. He suggested the idea to General Halleck only a few months after the publication of the *Guerrilla Parties*, writing to him that :

"Ever since the beginning of our present War, it has appeared clearer and clearer to me, that the President ought to issue a set of rules and definitions providing for the most urgent cases, occurring under the Laws and Usages of War, and on which our Articles of War are silent."³³

The President should appoint a committee, with Halleck as chairman, to define offences and fix penalties. If the President did not have the power to prescribe such rules, Congress might enact them.

²⁹ Lieber to Halleck, 1 August 1862.

³⁰ Halleck to Lieber, 6 August 1862.

³¹ Lieber, *Guerrilla Parties Considered with Reference to the Laws and Usages of War* (1862); see Dyer, "Francis Lieber and the American Civil War", 2 *Huntington Library Quarterly* 449 (1939).

³² Lieber, *Guerrilla Parties*, p. 9.

³³ Lieber to Halleck, 13 November 1862, quoted in Freidel, *op. cit.*, p. 331.

Halleck at first replied, quite truthfully, that "there was really no time for it," but Lieber began a sample chapter on paroling.³⁴ Early in December Lieber was unexpectedly summoned to Washington.³⁵ Special orders were issued by the War Department on 17 December appointing a board "to propose amendments or changes in the Rules and Articles of War, and a Code of Regulations for the government of armies in the field, as authorized by the laws and usages of war." The other members of the board beside "Francis Lieber, LL.D." were General Hitchcock, the president; General Hartsuff, a field commander; General Martindale, a lawyer and military governor of the District of Columbia; and General Cadwalader, a lawyer.³⁶ Martindale soon retired.³⁷

Lieber approached his task with enthusiasm. He deluged the other members of the board with proposals for the reorganization of the Army and suggestions concerning punishments, military distinctions, improved uniforms, the creation of new ranks, promotion on the basis of seniority, a new militia law, and the revision of the curriculum at the Military Academy.³⁸ Nothing ever came of the paper he prepared on these subjects. The Board did, however, honour his natural request that he be permitted to draw up the "Code of Regulations." In the meanwhile the Board had sent out a form letter to officers asking for their suggestions, but there is no indication that comments in any appreciable number were furnished, and if so, whether they proved to be of assistance.³⁹ For its part, the Board devoted itself to the revision of the Articles of War and was content to leave the problems of the law of war to the civilian member of the Board.

Lieber returned to New York and prepared the first draft of the "Code," as he referred to it, during the early weeks of 1863.⁴⁰ A first draft in the form of a very rough manuscript on odds and ends of paper is still in existence.⁴¹ By February Lieber had prepared a draft of the code which was printed "as manuscript" for the Board.⁴²

³⁴ Halleck to Lieber, 15, 23, 25 November 1862.

³⁵ Lieber, Manuscript notebook.

³⁶ Special Orders No. 399, War Department, Adjutant General's Office, 17 December 1862.

³⁷ Lieber, Manuscript notebook.

³⁸ Freidel, *Francis Lieber*, p. 333.

³⁹ Hitchcock, printed circular letter, 22 December 1862.

⁴⁰ Freidel, *Francis Lieber*, p. 333.

⁴¹ In the Henry E. Huntington Library, San Marino, California (Dyer, *op. cit.*, p. 455).

⁴² "A Code for the Government of Armies in the Field as Authorized by the Laws and Usages of War on Land, Printed as manuscript for the Board appointed by the Secretary of War [Special Orders, No. 399]. 'To Propose Amendments or Changes in the Rules and Articles of War, and a Code of Regulations for the Government of Armies in the Field, as authorized by the Laws and Usages of War' " (February 1863).

The draft is considerably shorter than the *Instructions* as finally approved—97 sections as compared with the final 157—but, making allowances for occasional transpositions, generally follows the same pattern as the completed work. However, the section on “Insurrection–Civil War–Rebellion” had not yet been added to the draft. Lieber noted that he had said nothing on rebellion, because he felt that it did not “. . . fall within the limits, as indicated in the special order appointing our board.”⁴³

Fifty copies of the printed draft were given to General Hitchcock and copies were furnished General Winfield Scott, Horace Binney, Attorney General Bates, and, of course, General Halleck, to whom the author wrote: “I have earnestly endeavored to treat of these grave topics conscientiously and comprehensively; and you, well read in the literature of this branch of international law, know that nothing of this kind exists in any language. I had no guide, no groundwork, no text-book. I can assure you, as a friend, that no counsellor of Justinian sat down to his task of the Digest with a deeper feeling of the gravity of his labor, than filled my breast in the laying down for the first time such a code, where nearly everything was floating. Usage, history, reason, and conscientiousness, a sincere love of truth, justice, and civilization have been my guides; but of course the whole must be still very imperfect.”⁴⁴

Of the recipients of the draft, only General Halleck found time to comment at any length.

Dr. Lieber was apparently dissatisfied with this draft and immediately began to prepare another, incorporating changes which had come to his own mind and about half of the suggestions made by General Halleck on his copy of the printed draft.⁴⁵ At the latter’s suggestion, he added a lengthy section on rebellion and insurrection although he “disrelished it”,⁴⁶ probably because he did not wish the “Code” to be capable of the construction that it was applicable only to civil war and not to wars between states. The enlarged manuscript was sent to Washington accompanied by a request that it be read by the members of the Board. The part played by the military members is best described in Lieber’s own words:

“At the last meeting in Washington the whole was discussed. General Hitchcock did most of the work done by the generals.

⁴³ Lieber to Halleck, 20 February 1863.

⁴⁴ *Ibid.*

⁴⁵ Dyer, *op. cit.*, p. 455.

⁴⁶ Lieber, Manuscript notebook.

Genl Hartsuff did a good deal. Transpositions were made, as well as curtailments, improvements, and a very few additions ; but some things were left out which I regret, and two weak passages slipped in. They are not mine.”⁴⁷

The board ruthlessly cut down the final section on rebellion and insurrection to one quarter of its former length. It was also decided that what Lieber hoped would constitute a “ Code ” should be designated as “ Instructions.”

The author of the *Instructions* later wrote : “ The heading as it now stands is wrong. It does not indicate in the least that this set of rules apply to the intercourse of hostile enemies exclusively. I struggled hard to keep as heading the words of the original order, by which the Board was appointed, namely a Code of Regulations for the Government of Armies in the Field, as authorized by the laws and usages of war. [Special Orders No. 399. Series of 1862]. I did not succeed. It was probably believed that the word Code indicated something which the Pres. of U.S. has no right to issue—something which requires the assistance of Congress—an enactment. This, indeed, was first looked for by Genl Halleck and by myself. But Congress adjourned, and we could not wait ; nor did the generals of the Board want the word Code.”⁴⁸

In the meantime, a portion of the “ Code ” had already been published. This was the section dealing with the parole, and its early promulgation to the field was necessitated by the overly frequent use of parole, both by officers and enlisted men, as a socially acceptable device for desertion on the battlefield or release from Confederate prisoner-of-war camps. Although General Orders No. 49 of the War Department, issued on 28 February 1863, clearly shows the influence and, for the most part, the language of Lieber, the hand of an individual more interested in the disciplinary measures which might be taken against offenders under the law of the United States is also evident. Provisions common to both the printed manuscript draft and the completed “ Code,” such as Articles 119, 120, and 122, dealing with the general nature and effect of the giving of a parole, and Article 129, which specifies the form of parole which may be used in the capitulation of strong places, are omitted in General Orders No. 49. On the other hand, the provision

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

of paragraph 9 of General Orders No. 49 that : " No one can pledge his parole that he will never bear arms against the government of his captors, nor that he will not bear arms against any other enemy of his government, not at the time the ally of his captors. Such agreements have reference only to the existing enemy and his existing allies, and to the existing war, and not to future belligerents.", is not found in either the draft or the final form of the " Code." Nor is it possible to say with any degree of definitiveness whether these orders were based on an early draft or on the " Code " as it approached its final form. Article 127 of General Orders 100, relating to the giving of paroles by a non-commissioned officer or private, is reproduced in General Orders 49 as paragraph 6, but paragraph 4 thereof, relating to punishments for officers giving their parole on the battlefield, has a counterpart only in the manuscript draft.

It was not, however, until the middle of May that the " Instructions for the Government of Armies of the United States in the Field," as the Code was ultimately called, had been approved by President Lincoln and promulgated in General Orders No. 100 of 1863. The orders themselves bore the date of 24 April 1863, but general orders of the Army are not effective until the actual date of their promulgation.⁴⁹ Although a few changes had been made in the Code by Lieber and by a hand unknown to him during the process of being approved, the Instructions were published in substantially the form in which they had been approved by the board.⁵⁰

Lieber later wrote : " While writing down this code I felt the high responsibility weighing on me, and the gravity as well as the nobleness of this task ; I was conscious of doing a piece of work for mankind of historic effect and permanency." ⁵¹

THE EXISTING LAW OF WAR

The full significance of the *Instructions for the Government of Armies of the United States* becomes apparent only when the Code is considered in light of the paucity of existing legal materials regarding the law of war. Lieber had in 1859, four years before the publication of the Code, secured the support of General Winfield Scott in an effort to have instruction in the law and usages of war included

⁴⁹ *Digest of Opinions of The Judge Advocates General of the Army*, 1912, p. 276 (1917).

⁵⁰ Lieber, Manuscript notebook.

⁵¹ *Ibid.*

in the curriculum at the United States Military Academy, but nothing came of the suggestion.⁵²

The existing treatises on international law were few. General Halleck had published a text in 1861 entitled *International Law, or, Rules regulating the intercourse of states in peace and war*. New editions of Kent's *Commentaries*⁵³ and Lawrence's *Wheaton*⁵⁴ had appeared shortly before the war, and a translation of Vattel⁵⁵ was on the market. But the ordinary Union officer or enlisted man was unlikely to be acquainted with any of these.

Military precedents for comprehensive instructions to the troops regarding their conduct toward the enemy and the enemy's obligations toward United States forces were not, however, altogether lacking. Credit must be paid to General Winfield Scott's General Orders No. 20, issued at "Head Quarters of the Army, Tampico" on 19 February 1847, which established "a supplemental code" to the "rules and articles of war" for the punishment of the following offences :

" 2. Assassination ; murder ; malicious stabbing or maiming ; rape ; malicious assault and battery ; robbery ; theft ; the wanton desecration of churches, cemeteries or other religious edifices and fixtures, and the destruction, except by order of a superior officer, of public or private property . . . "

The code applicable to such offences was thus described :

" 7. That unwritten code is *Martial Law*, as an addition to the written military code, prescribed by Congress in the rules and articles of war, and which unwritten code, all armies, in hostile countries, are forced to adopt—not only for their own safety, but for the protection of the unoffending inhabitants and their property, about the theatres of military operations, against injuries contrary to the law of war."

General Orders No. 20, it may be mentioned in passing, is also of some historical importance for its provisions for trial by military commissions, which, it is true, had existed previously under other names but were first to be used on a large scale during the war with Mexico.

⁵² Lieber, draft letter, May 1862.

⁵³ Kent, *Commentaries on American Law* (10th Ed., 1860).

⁵⁴ Wheaton, *Elements of International Law* (6th Ed., Lawrence, 1857).

⁵⁵ Vattel, *The Law of Nations*, "from the new edition of Joseph Chitty with additional notes and references by Edward D. Ingraham" (1858).

Similar general orders defining offences against the law of war were promulgated during the Civil War. Dr. Lieber's friend, General Halleck, caused orders of this nature to be issued while he was serving as Commanding General of the Department of the Missouri. General Orders No. 8 and No. 13 of 1861 ⁵⁶ provide that Confederate officers and men are to be treated as prisoners of war and prescribe their treatment upon capture, including the type of labour they may be called upon to perform. Capital punishment is provided for rebel non-combatants who maraud and rob or furnish supplies to the Confederate forces and for those persons "found in disguise . . . or under other false pretenses within our lines" furnishing information to the enemy, who were to be shot as spies. The orders forbid retaliation in kind against such acts of robbery and murder by rebel non-combatants but provide that non-combatant civilians who have been plundered and robbed by the enemy are to be quartered and fed at the expense of those secessionists best able to pay for their support.

But the great majority of military commanders in the field were neither Scotts nor Hallecks.⁵⁷ Some made honest attempts to conform with the existing law of war. General Banks wrote to Lieber in November 1862, offering him encouragement in the preparation of the code and telling him :

"Many points are greatly abused and in some respects our people entertain erroneous views . . . No distinction is made in the public mind between the plunder of people by individual soldiers for their own gain—which is robbery and works a terrible demoralization in all armies—and the confiscation of property by commanding officers for the support of armies." ⁵⁸

General McClellan spoke out strongly :

"I will . . . forbid all pillaging and stealing, and take the highest Christian ground for the conduct of war . . . I will not permit this army to degenerate into a mob of thieves." ⁵⁹

But far more often :

". . . Often the commander's will expressed itself in severe and sweeping orders. Summary arrests were made ; papers were

⁵⁶ General Orders No. 8, Headquarters, Department of the Missouri, Saint Louis, Mo., 26 November 1861 ; General Orders No. 13, Headquarters, Department of the Missouri, Saint Louis, Mo., 4 December 1861, *Official Records*, Series 2, Vol. 1, pp. 137, 233.

⁵⁷ On this subject generally, see Freidel, "General Orders 100 and Military Government", 32 *Mississippi Valley Historical Review* 541 (1945).

⁵⁸ Banks to Lieber, 23 November 1862.

⁵⁹ McClellan, *McClellan's Own Story* 463 (1887).

suppressed ; land was condemned for sanitary purposes ; railroads were taken over ; private houses were commandeered ; banks were forbidden to give out Confederate money ; ministers were apprehended ; church services were closed ; public assemblages were suppressed ; citizens refusing the oath were threatened with deportation ; property was seized for confiscation, and many other extraordinary things were done, more commonly for the preservation of order, but sometimes out of mere caprice or a sense of irritation.”⁶⁰

General R. H. Milroy in Virginia demanded payment in reparation for robberies perpetrated by guerrillas and threatened to shoot such persons and burn their homes. Halleck hastily acknowledged that the orders had no basis in the laws and usages of war.⁶¹ Ben Butler’s “ woman order ” and his treatment of foreign consuls are sufficiently notorious not to warrant description here.⁶² General Pope’s method of dealing with disloyal citizens was to order them to leave the area occupied by his troops and to threaten to hang them if they returned.⁶³ On the other hand, the military commander, who, like General McDowell, took a firm stand against pillaging by his forces was subjected to vilification by Army men, by the Radicals, and by members of Congress.⁶⁴ The time was indeed ripe for a firm statement on the law of war.

(To be continued.)

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⁶⁰ Randall, *Constitutional Problems Under Lincoln*, 225-227 (1926).

⁶¹ *Official Records*, Series 3, Vol. 2, pp. 943-4 ; Vol. 3, pp. 3-18.

⁶² Randall, *op. cit.*, p. 227.

⁶³ *Official Records*, Series 2, Vol. 4, pp. 828-9.

⁶⁴ *Id.*, Series 1, Vol. 2, pp. 743-4 ; Vol. 12, Part 1, pp. 53-4, 292-3, 327.