

THE FIRST MODERN CODIFICATION OF THE LAW OF WAR *

FRANCIS LIEBER AND GENERAL ORDERS No. 100

II

SOURCES OF THE CODE

It is unprofitable to indulge in much speculation concerning Lieber's sources for the Code. Since he had been a student of the law of war for at least a quarter of a century before the *Instructions* were promulgated, his primary source was Lieber reinforced with the notes and files that he had painstakingly built up during his teaching career. Under such circumstances, one can only mention his likes and dislikes. Chief among the latter were both Lawrence's Wheaton and "old" Vattel, whom he characterized as "Father Namby-Pamby".⁶⁵ Halleck's *International Law* was naturally looked upon with great favor, the more so because Halleck had drawn on Lieber's *Political Ethics*.⁶⁶ Lieber probably relied heavily on Heffter's *Das Europäische Völkerrecht der Gegenwart*.⁶⁷ He also consulted Grotius, Bynkershoek, and Pufendorff among the classical writers. In his library or mentioned in his works are books by a host of names, many of them long since forgotten: Zachariae, Trendlenburg, von Martens, Phillimore, Mackintosh, Whewell, Foelix, von Mohl, Bluntschli (a close friend of Lieber), Bernard, Kennedy, Klüber, Pinheiro-Ferreira, Kent, and Theodore Dwight Woolsey.⁶⁸

* See *International Review*, April 1963.

⁶⁵ Freidel, *Francis Lieber*, p. 333, n. 38.

⁶⁶ Lieber, Manuscript notebook.

⁶⁷ 3d Ed., Berlin, 1855.

⁶⁸ Freidel, *Francis Lieber*, p. 333, n. 38.

ANALYSIS OF THE CODE

Section I. Martial Law—Military Jurisdiction— Military Necessity—Retaliation

The *Instructions*, which were to be read primarily by commanders in the field, fulfilled a dual purpose : They were at once a short text on the law of war and a set of rules.⁶⁹ This double function accounts for the fact that the Code vacillates between diffuseness and economy of language, is sometimes directory and at others hortatory. These characteristics are particularly obvious in the first section of the code, where many of the articles are cast in general terms, as if establishing the premises for a logical system.

In the first article of the Code, " Martial Law " is defined as the " immediate and direct effect and consequence of occupation or conquest ", proclaimed by the mere presence of the hostile army. That a discussion of the law of war should begin with a consideration of the law applicable to a belligerent occupation seems peculiar, except if it be considered that Lieber was probably deliberately using the pedagogical device of introducing his subject with a topic familiar to his readers. Martial law had not been mentioned in the *Political Ethics*, and it was not until the war with Mexico and General Winfield Scott's General Orders No. 20 that the concept gained any currency. The number of instances during the Civil War in which martial law was declared would naturally have made this the most familiar aspect of the law of war.

One may judge something of the manner in which Dr. Lieber drew up the code by comparing his statement in his Columbia lectures :

Martial Law in the enemy's country consists in the assumption of authority over persons and things, by the commander-in-chief, and the consequent suspension of all laws, and the substitution of military force for them, so far as the necessity of the war requires it, and for the time being, according to the usages of war, which includes what is called the necessity of war or *raison de guerre*.

⁶⁹ " The great difficulty in drawing up this Code lay in the fact that, nothing of the kind existing, and even no textbook existing, I was at times obliged to keep the mean between a code and a textbook." (Lieber, Manuscript notebook).

with the same statement in paraphrased form as it appears in article 3 of the *Instructions* :

Martial law in a hostile country consists in the suspension, by the occupying military authority, of the criminal and civil law, and of the domestic administration and government in the occupied place or territory, and in the substitution of military rule and force for the same, as well as in the dictation of general laws, as far as military necessity requires this suspension, substitution, or dictation.

The provisions of article 6 regarding law and government under " Martial Law " are relatively weak. Civil and penal laws remain in effect unless suspended by the occupant, but all the functions of the hostile government, both national and local, cease entirely or continue only with the sanction of the occupant. In this respect, the Code seems to codify existing practice, but it must be remembered that this practice was one which arose in the course of a civil war rather than a war between nations.

Articles 8 and 9, probably with General Butler in mind, define the degree of protection to which consuls and diplomatic personnel are entitled.

Lieber had erred in the February manuscript draft of the Code in stating without qualification that " Martial Law is carried out, in cases of individual offences, by courts-martial ".⁷⁰ The military members of the board or Halleck were probably responsible for the inclusion of statements that military jurisdiction is conferred by both domestic law and the law of war, that offenses of the latter nature are punished by courts, the jurisdiction of which depends on local law, and that in the United States, those cases not punishable under the Articles of War are tried by military commissions.⁷¹ In this respect, the Code again reflects the existing American practice. Military commissions had received their first widespread use in the Mexican war, although at least one had been convened during the American Revolution.⁷² During the Civil War period, some 2000 persons were to be tried by this type of tribunal.⁷³

Military necessity permits the following acts : the destruction or capture of armed enemies, the destruction of property, obstruction of communications, the withholding of sustenance from the enemy and the appropriation of sustenance from the enemy's

⁷⁰ Manuscript draft, February 1863, art. 12.

⁷¹ Art. 13.

⁷² Senate Report No. 229, 63d Congress, 2d Session, p. 53 (1912).

⁷³ Barber, " Trial of Unlawful Enemy Belligerents," 29 *Cornell Law Quarterly* 53, 67 (1943).

country, and deception which does not involve the breaking of good faith.⁷⁴

The outright prohibition on the use of poison in General Orders 100⁷⁵ is to be contrasted with Lieber's previous questioning of the logical basis for the customary law of war's prohibition on the use of this device. He had even, in the *Political Ethics*⁷⁶ and in his lectures at Columbia, stated that poisoning of wells may be justified when a nation is fighting in self-defense.

Lieber was a realist in his attitude toward the weapons of warfare. He had told his students at Columbia that "the present usage may be simply stated to consist in using those arms that do the quickest mischief in the widest range and in the surest manner." Every new development in ordinance and tactics, such as the use of heated shot, chain shot, and of sharpshooters, had at one time or another been characterized as a violation of international law. In 1839, he had written :

"On the other hand I am not only allowed—which is altogether an unimportant question in law—but it is my duty to injure my enemy, as enemy, the most seriously I can, in order to obtain my end, whether this be protection, or whatever else."⁷⁷

Although he never ceased to be an advocate of the short, hard war, he probably later repented of his concept of a "duty" to injure the enemy.

Having defined the permissible means of injuring the enemy, Lieber turns in articles 20 through 26 to the protection of the noncombatant in time of war. "Public war" is defined as "a state of armed hostility between sovereign nations or governments."⁷⁸ As a result, the citizen of a hostile country is also an enemy, not as an individual but as a member of a hostile political community.⁷⁹ As civilization has advanced, the distinction between the hostile state and the unarmed citizen of that state has become clearer and more firmly established in law.

"The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit."⁸⁰

⁷⁴ Art. 15.

⁷⁵ Arts. 16, 70.

⁷⁶ 2 Lieber, *Political Ethics*, p. 661.

⁷⁷ *Id.*, p. 660.

⁷⁸ Art. 20.

⁷⁹ Art. 21.

⁸⁰ Art. 22.

The coloring of the Civil War is perhaps discernible in the provision of article 26 that civil officers and magistrates may be forced to take an oath of allegiance to the "victorious government or rulers."

General Orders 100 recognizes retaliation as a necessary evil, well entrenched in the law of war.⁸¹ In the lectures at Columbia, Lieber had itemized the dangers of retaliation: it goes too far in cases of cruelty, the remedy may be disproportionate to the offense, retaliation is sometimes impossible, and it may border on, or pass over into, revenge. In the Code, it is stressed that retaliation is not to be resorted to as a "measure of mere revenge" but only as a last resort against the "repetition of barbarous outrage".⁸² Unjust retaliation creates the danger of further retaliation from the enemy and in turn leads both belligerents "nearer to the internecine wars of savages."⁸³

The first section of the Code concludes with the postulates which had been used to introduce his "Twenty-Seven Definitions and Elementary Positions Concerning the Law and Usages of War"—the community of nations, the restoration of peace as the object of war, and the desirability of sharp, vigorous wars.⁸⁴

The first section of the Code appears on the whole to be ill organized and less convincing than it might have been had Lieber followed the plan of organization he had used in his previous lectures and writings. The sources of this section of the Code are, however, unmistakable—a quarter century of Lieber's thought modified to some degree in the light of the practice of the United States, particularly as concerned military occupation and relationships with the Confederate forces during the Civil War.

**Section II. Public and private property of the enemy—
Protection of persons, and especially of women ; of religion,
the arts and sciences—Punishment of crimes against the inhabitants
of hostile countries**

The second section of the Code continued the discussion of the rights of the belligerent occupant which had been begun in the first section of General Orders 100.

⁸¹ Art. 27.

⁸² Arts. 27 and 28. In the contemporary terminology concerning the utilization of "conventional" and nuclear weapons, this process would be referred to as "escalation".

⁸³ Art. 28.

⁸⁴ Art. 29.

A victorious army may appropriate all public money and public movable property, sequester the revenues of publicly owned real property, and change legal relationships between inhabitants of the occupied territory.⁸⁵ As a general rule, the property of religious, charitable, and educational institutions is not to be treated as public property subject to seizure, but it may be taxed or used if the "public service may require it".⁸⁶ Hospitals, libraries, works of art, and scientific collections and instruments are to be protected even if lodged in a fortified place.⁸⁷ The rule adopted with regard to publicly owned property of this nature is, however, a harsh one :

"If such works of art, libraries, collections, or instruments belonging to a hostile nation or government, can be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace." ⁸⁸

The rationalization for this rule is to be found in the *Political Ethics* :

"Yet I candidly confess that I cannot see the jural ground on which the right of carrying off books and works of art, provided they belong to the nation, is denied. It is universally admitted, that levying a contribution for the sake of chastisement for a wrongful war, beyond the expenses of the war, is lawful, as it undoubtedly is. Why then should it be wrong to carry away works of art for the sake of chastisement?" ⁸⁹ The only reason he could discover at that time for not carrying off works of art is that such conduct may gall the conquered nation beyond the time of the war, thus prejudicing the achievement of peace thereafter.

Private property may be seized only "by way of necessity" for the support of the army, in which case, if the owner has not fled, receipts are to be given so that he may obtain indemnity.⁹⁰ In this respect, Lieber takes a conservative view in conformity with modern practice. In occupied areas, religion and morality, the persons of inhabitants, and the "sacredness of domestic relations" are to be respected.⁹¹

⁸⁵ Arts. 31 and 32.

⁸⁶ Art. 34.

⁸⁷ Art. 35.

⁸⁸ Art. 36.

⁸⁹ 2 Lieber, *Political Ethics*, p. 663.

⁹⁰ Art. 38.

⁹¹ Art. 37.

With article 40 comes another of his peculiar transitions to a new subject. In that article, Lieber points out that only international law governs the relationship of armies in wartime and in article 41 that municipal law is of no effect between belligerents. Having laid this ground, he concludes that the bond of slavery, which is created by domestic law, is, and historically always has been, dissolved when the slave escapes from the country in which he has been enslaved. It follows then that : “. . . in a war between the United States and a belligerent which admits of slavery, if a person held in bondage by that belligerent be captured by or come as a fugitive under the protection of the military forces of the United States, such person is immediately entitled to the rights and privileges of a free man.”⁹²

To return such a person to slavery is to enslave a free person. The reasoning of this portion of the Code follows that of Lieber's letter to the Attorney General which was published in the *New York Evening Post* in June of 1862.⁹³

In the remaining articles of this section, a series of rules are laid down for the conduct of American soldiers. They prohibit wanton violence, unauthorized destruction of property, rape, and killing of inhabitants in terms strongly reminiscent of General Scott's General Orders No. 20 of 1847.⁹⁴

“ I have not the right to injure my enemy privately, that is, without reference to the general object of the war, or the general object of the battle. We do not injure in war, in order to injure, but to obtain the object of war. All cruelty, that is, unnecessary infliction of suffering, therefore, remains cruelty as among private individuals.”⁹⁵

Officers and soldiers are forbidden to take advantage of their position for private gain.⁹⁶

Section III. Deserters—Prisoners of War—Hostages— Booty on the Battlefield

Prisoners of war embrace the following categories of personnel, according to General Orders No. 100 :

⁹² Art. 43.

⁹³ See note 25 *supra*.

⁹⁴ Arts. 44 and 47. It is interesting to contrast the rule with the raids conducted by Sheridan, Morgan, and Carter.

⁹⁵ 2 Lieber, *Political Ethics*, p. 659.

⁹⁶ Art. 46.

1. soldiers,
2. members of a rising *en masse*,
3. persons attached to the army to promote its efficiency,
4. disabled men and officers,
5. enemies who have thrown away their arms and asked for quarter,
6. citizens accompanying the army for any purpose, and
7. the monarch and principal officers of the hostile state.⁹⁷

Chaplains and medical personnel are not prisoners of war, unless the commanding officer of the forces "capturing" them has reason to retain them. Although prisoners of war are not subject to acts of revenge, to intentional infliction of suffering, cruel imprisonment, starvation, death, or other barbarity, it is somewhat peculiarly provided that they are "liable to the infliction of retaliatory measures".⁹⁸

Lieber devotes only passing attention to hostages on the ground that they "are rare in the present age"⁹⁹—a statement which the victims of the Ardeatine Caves might have found ironic.

Lieber was mindful of the harsh measures taken by the Confederate army against former slaves who were captured while serving in the Union forces when he expressly forbade discrimination against any category of soldiers: "No belligerent has a right to declare that enemies of a certain class, color, or condition, when properly organized as soldiers, will not be treated by him as public enemies."¹⁰⁰

Death is the retaliation for enslavement of any captured person of the United States Army, since "The law of nations knows of no distinction of color." Lieber later wrote: "I was perfectly right in making death the equivalent for enslavement. All Codes of civilized nations declare personal liberty the highest of earthly goods. We would quick enough condemn a man to death who should steal a white man or child and sell it into slavery."¹⁰¹

Early in 1862, when he had been giving his lectures at Columbia, Lieber had been doubtful about the practice of denying quarter. He observed that some regiments had formerly declared that they would give no quarter and would therefore expect none but added,

⁹⁷ Arts. 49 and 50.

⁹⁸ Arts. 53, 56, and 59. The reference is probably to reprisals.

⁹⁹ Art. 54.

¹⁰⁰ Art. 57.

¹⁰¹ Lieber, Manuscript notebook.

“ I am not aware whether it has been declared by any one inadmissible.” In article 60, he came out squarely against denial of quarter by stating that it was “ against the usage of modern war ”. He would not, however, require that quarter be given if it is impossible to encumber the capturing forces with prisoners—a principle which met a fortunate death not long thereafter, although sometimes invoked by the more barbarous of modern belligerents. The protection of the law of war—and with it the prohibition against “ no quarter ”—does not extend to those who use the uniform of their enemies or the enemy’s flag to deceive.¹⁰² “ Unnecessary or revengeful destruction of life ” is forbidden,¹⁰³ for, as Lieber had told his students, “ The right of killing ceases with the necessity of killing.”

It is provided that : “ Outposts, sentinels, or pickets are not to be fired upon, except to drive them in, or when a positive order, special or general, has been issued to that effect.”¹⁰⁴

It is difficult to follow Lieber’s reasoning for this provision : “ . . . firing upon single men, for no other purpose than killing them, is simple murder. There may be an object in not allowing the enemy to post a sentinel at a certain spot, but I have known warnings being given in such cases, that no more sentinels would be suffered at such or such a place.”¹⁰⁵

In the succeeding articles, Lieber prescribes the rules for the care of prisoners of war. Money and valuables found on the prisoner, with the exception of large sums of money, may not be appropriated, but large sums are presumptively public property.¹⁰⁶ Prisoners are entitled to “ plain and wholesome food ” and to medical treatment and may not be required to give information about their own army.¹⁰⁷ But a prisoner may be shot if he escapes, although he may not be punished for a mere attempt, except if a conspiracy to escape or to revolt is discovered.¹⁰⁸ If a prisoner of war once escapes and rejoins his own army, he may not thereafter be punished for his previous successful escape.¹⁰⁹ In these respects,

¹⁰² Arts. 63, 64, 65.

¹⁰³ Art 68.

¹⁰⁴ Art. 69.

¹⁰⁵ Lieber, Lectures at Columbia, 1861-62.

¹⁰⁶ Art. 72.

¹⁰⁷ Arts. 75, 79, 80.

¹⁰⁸ Art. 77.

¹⁰⁹ Art. 78.

the provisions of the Code are not dissimilar to the provisions of the Geneva Prisoners of War Convention of 1949.¹¹⁰

Section IV. Partisans—Armed Enemies not belonging to the Hostile Army—Scouts—Armed Prowlers—War Rebels

Section IV of the Code is based directly on Lieber's earlier pamphlet on *Guerrilla Parties*.

Partisans are defined as soldiers: ". . . armed and wearing the uniform of their army, but belonging to a corps which acts detached from the main body for the purpose of making inroads into the territory occupied by the enemy."¹¹¹ Both the *Guerrilla Parties* and General Orders 100 agree that if partisans are captured, they are to be treated as prisoners of war.

By contrast with partisans, guerrillas who do not belong to the organized hostile army but who engage intermittently in killing, destroying, or plundering are not entitled to the protection of the laws of war.¹¹² Freecorps, which had been mentioned in the earlier pamphlet, are not considered in the Code. Armed prowlers, including the brigands, freebooters, marauders, and robbers mentioned in *Guerrilla Parties*, and persons stealing into the lines of the hostile army to kill, destroy, or interrupt communications are not entitled to the protection of the laws of war.¹¹⁴

The term "war-rebel" which appears in the Code was of Lieber's invention and was first used in the *Guerrilla Parties*.¹¹⁵ He employed the term to refer to persons "within an occupied territory who rise in arms against the occupying or conquering army, or against the authorities established by the same". These attempts to throw off the yoke of the occupant may be punished by death.¹¹⁶

Section V. Safe-conduct—Spies—War-traitors—Captured Messengers—Abuse of the Flag of Truce

Lieber was probably referring to domestic law rather than to any rule of international law when he stated that all intercourse

¹¹⁰ Arts. 91-93 of the Convention, 75 U.N.T.S. 206-7.

¹¹¹ Art. 81.

¹¹² Art. 82.

¹¹³ Lieber, *Guerrilla Parties*, p. 11.

¹¹⁴ Art. 84. Lieber claimed that he originated the term "armed prowler". (Manuscript notebook).

¹¹⁵ Lieber, Manuscript notebook; *Guerrilla Parties*, p. 13.

¹¹⁶ Art. 85, and see Baxter, "The Duty of Obedience to the Belligerent Occupant," 27 *British Year Book of International Law* 235, 253 (1950).

between occupied territories ceases.¹¹⁷ Exceptions to this rule are provided for by safe-conducts, which may be granted to, *inter alios*, diplomatic personnel, and permits to trade.¹¹⁸

A spy is defined as “ a person who secretly, in disguise or under false pretense, seeks information with the intention of communicating it to the enemy.”¹¹⁹ In his lectures Lieber had properly observed that spying is not prohibited by the law of war. In accordance with the law in existence at the time, he had stated at Columbia that “ Spies . . . may be soldiers in their very uniforms. If a soldier creeps in the dead of night into the hostile lines and is caught, he is hanged.”

The most interesting portion of this section is that which deals with “ war treason ”, which he defines in the following manner :

“ A traitor under the law of war, or a war-traitor, is a person in a place or district under martial law who, unauthorized by the military commander, gives information of any kind to the enemy, or holds intercourse with him.”¹²⁰

Although the author of the Code claimed credit for originating the term and first using it in *Guerrilla Parties*,¹²¹ there is no evidence of the use of the term before General Orders No. 100 was promulgated. Indeed, both in the Columbia lectures and in his pamphlet, Lieber had stated that : “ A person dwelling in a district under military occupation, and giving information to the government of which he was subject, but who has been expelled by the victorious invader, is universally treated as a spy—a spy of a particularly dangerous character.”¹²²

In article 54 of his draft code of February 1863, he had advanced to the stage of characterizing such conduct alternatively as “ treason ” : “ If a person belonging to the territory of the enemy, occupied by a hostile army, gives information to the enemy, unauthorized to do so by the occupying or conquering authority, such person is either a spy or traitor, and in either case is punished with death.”

There is some evidence that Lieber may have borrowed the concept of “ war treason ” from the *Kriegsverrat* proscribed by the

¹¹⁷ Art. 86.

¹¹⁸ Arts. 86 and 87.

¹¹⁹ Art. 88.

¹²⁰ Art. 90.

¹²¹ Lieber, Manuscript notebook.

¹²² Lieber, *Guerrilla Parties*, p. 12.

Prussian Military Code of 1845, with which there is a strong likelihood that Lieber was familiar.¹²³ "Military treason" is referred to in General Halleck's instructions to the Commanding Officer in Tennessee of 5 March 1863.¹²⁴ Since General Halleck commented on Lieber's printed manuscript draft, the possibility exists that it was a suggestion from Halleck which led Lieber to adopt the term "war-treason" by analogy to the like expression "war-rebellion".

The articles on war-treason in the Code are poorly drawn and repetitive. Additional rules in this portion of the Code¹²⁵ deal with the impressment of guides and provide that an inhabitant of an occupied area who serves as a guide for the enemy is to be shot. In his manuscript draft, Lieber had provided that all messengers and despatchbearers found in the lines of a belligerent might be treated as spies.¹²⁶ These provisions were wisely amended to provide that the uniformed and armed messenger should not be subjected to that penalty but was to be treated as a prisoner of war. If not in uniform, he is treated according to the "circumstances connected with his capture".¹²⁷

It is further provided that no distinction on account of sex is made in the case of spies and war-traitors, that they may not be exchanged, and that if they rejoin their own army, they may not thereafter be punished for their previous acts.¹²⁸

Section VI. Exchange of Prisoners—Flags of Truce— Flags of Protection

The provisions relating to exchange of prisoners are largely technical in nature and of no great interest to the present-day reader. Exchanges, it is stated, normally take place number for number, rank for rank, wounded for wounded, although a certain number of persons of lower rank may be substituted for one of higher rank.¹²⁹

Flags of truce may, but are not required, to be admitted. If a flag of truce is abused for the purpose of gaining military knowledge, the bearer of the flag may be treated as a spy.¹³⁰

¹²³ Oppenheim, "On War Treason", 33 *Law Quarterly Review* 281 (1917); see Baxter, *op. cit. supra*, note 116 at 244-253, particularly at 245-246.

¹²⁴ Reprinted in 2 Halleck, *International Law* 55-57 (2d Eng. ed., Baker, 1893).

¹²⁵ Arts 93-97.

¹²⁶ Art. 58, Manuscript draft, February 1963.

¹²⁷ Art. 99.

¹²⁸ Arts. 102-104.

¹²⁹ Arts. 105, 106.

¹³⁰ Arts. 111, 114.

Hospitals may be designated by an identifying flag (usually yellow)¹³¹ and a besieged commander may be permitted to designate buildings devoted to education, art, and science, so that their destruction may be avoided.¹³² If the use of such flags is abused, there may be good cause for refusing to honor them.¹³³

Section VII. The Parole

General Orders No. 100 defines parole in the following manner :
“. . . the pledge of individual good faith and honor to do, or to omit doing, certain acts after he who gives his parole shall have been dismissed, wholly or partially, from the power of the captor.”¹³⁴ As Lieber’s manuscript draft was originally drawn, only commissioned officers could give their parole.¹³⁵ Lieber was strongly opposed to the abuses which had arisen in connection with the giving of paroles both by officers and enlisted men. He wrote to Halleck in February of 1863 : “ I do not believe that it will be possible to change for the present war, or at least immediately, the usage which has grown up regarding paroling privates, but you will agree with me that the law, as I have laid it down, is the law and usage. As paroling is now handled by us, it amounts to a premium on cowardice, e.g., in the affair of Harper’s Ferry.”¹³⁶ In the form in which it was finally published, General Orders No. 100 permits noncommissioned officers and privates to give their parole through a commissioned officer.¹³⁷

Paroles normally provided that the person giving them would not fight during the existing war, but such an undertaking would not extend to internal service, such as recruiting or quelling civil commotions.¹³⁸ A belligerent may declare that it will not allow paroling, or it may refuse to approve the parole of one of its officers or soldiers.¹³⁹ The penalty for a violation of parole is death.¹⁴⁰

¹³¹ Art. 115 ; see “ L’Origine du sigme de la croix rouge,” See *Revue internationale de la Croix-Rouge*, p. 456 (1954).

¹³² Art. 118.

¹³³ Art. 117.

¹³⁴ Art. 120.

¹³⁵ Art. 75, Manuscript draft, February 1863.

¹³⁶ Lieber to Halleck, 20 February 1863.

¹³⁷ Art. 127.

¹³⁸ Art. 130.

¹³⁹ Arts. 131 and 132.

¹⁴⁰ Art. 124.

Section VIII. Armistice—Capitulation

Armistices are classified by Lieber as conditional and unconditional, general or special (relating only to certain troops and localities), for a definite time or for an indefinite time.¹⁴¹ When an armistice has been concluded between a fortified place and a besieging force, the besieger is not permitted to extend or improve his "attacking works", for to do so would be tantamount to attacking. As for the right of the beleaguered forces to add to or repair fortifications, the existing authorities were in conflict, and Lieber therefore stated in the Code that this point should be specifically dealt with in the armistice agreement.¹⁴² He was, however, personally inclined to feel that the besieged forces had the right to repair and build their fortifications.¹⁴³ But as soon as a capitulation is signed, the capitulator is forbidden to destroy his arms and ammunition, his works and his stores.¹⁴⁴

An armistice is effective from the date of its agreed commencement and is concluded when notice is given, when the instrument is not ratified by superior authority, or if it is clearly broken by one of the parties.¹⁴⁵ Only the officer directing the violation of an armistice, and not his subordinates, is held responsible for its breach.¹⁴⁶ If the element of trust is once destroyed, Lieber had warned his students, then it becomes impossible to conclude the peace which must be the ultimate aim of every war.¹⁴⁷

Section IX. Assassination

This section consists of only one article,¹⁴⁸ which forbids declaring an enemy soldier or civilian an outlaw and the assassination of enemy soldiers or civilians.

Section X. Insurrection—Civil War—Rebellion

As previously noted, this section was not included in Lieber's

¹⁴¹ Arts. 135-137.

¹⁴² Art. 143.

¹⁴³ Lieber, Lectures at Columbia, 1861-62.

¹⁴⁴ Art. 144.

¹⁴⁵ Arts. 137, 140, and 145.

¹⁴⁶ Art. 146.

¹⁴⁷ Lieber, Lectures at Columbia, 1861-62.

¹⁴⁸ Art. 148.

original draft. In later drafts it was inserted in a form considerably more bulky than that in which it finally emerged in the Code.

This section opens with definitions of "insurrection", "civil war", and "rebellion". The first of these is defined as a rising of people in arms against their government, its laws, or its officers.¹⁴⁹ Civil war is conducted between two or more portions of a state each of which is contending for the mastery of the whole and professes to be the legitimate government.¹⁵⁰ "Rebellion" is applied to an insurrection of large extent.¹⁵¹ That the benefits of the laws of war are extended to rebels does not constitute an acknowledgment of their government.¹⁵² As Lieber had pointed out in his letter to the Attorney General on the exchange of prisoners, the concluding of cartels or other agreements, treating rebel soldiers as prisoners of war, accepting flags of truce, and proclaiming martial law in rebel territory do not constitute an acknowledgment of the "rebellious people".¹⁵³

Articles 155 and 156, dealing with the treatment of rebel combatants and noncombatants, may well have been derived from General Halleck's instructions of 5 March 1863 to the Commanding Officer in Tennessee, in which he had directed that protection be extended to the loyal citizens, that disloyal citizens who sympathized with the rebellion without actively aiding it were not to be molested so long as they took no overt action against the Union forces, but that those who avowedly supported the rebel forces without themselves taking up arms might be confined or expelled.¹⁵⁴ The Code makes a like classification and requires that the commander in the field throw the burden of the war on the disloyal citizens, subjecting them to "stricter police", requiring an oath of allegiance, and expelling, imprisoning, or fining those who refuse to take the oath.¹⁵⁵

THE INFLUENCE OF THE CODE

Within thirty years after the publication of Lieber's Code, Prussia, the Netherlands, France, Russia, Spain, Great Britain,

¹⁴⁹ Art. 149.

¹⁵⁰ Art. 150.

¹⁵¹ Art. 151.

¹⁵² Art. 152.

¹⁵³ Art. 153.

¹⁵⁴ Reprinted in 2 Halleck, *op. cit. supra*, note 124.

¹⁵⁵ Arts. 155 and 156.

and a number of other states had drawn up their own codes of the rules of warfare.¹⁵⁶ The *Instructions* remained a guide for the conduct of the United States Army throughout the remainder of the nineteenth century,¹⁵⁷ and the 1917 *Rules of Land Warfare* preserved much of Lieber's language.¹⁵⁸

An immediate consequence of the Code was to inspire Lieber's good friend, Bluntschli, under the urging of his American associate, to undertake his codification of international law, the first part of which, dealing with the law of war, made its appearance in 1866.¹⁵⁹ This portion of Bluntschli's code was little more than a paraphrase of General Orders No. 100. Dr. Bluntschli was counsellor of the German delegation at the Brussels Conference of 1874, the work of which constituted the basis of the conventions prepared at the Hague Peace Conferences of 1899 and 1907. It is thus possible to trace a direct line of personal influence from Dr. Lieber's Code to the Hague Regulations, which served only to add to the great weight which the Code had acquired with the passage of time.¹⁶⁰

The most serious charge which has been levelled at General Orders No. 100 is that it was overly influenced by the existence of a civil war.¹⁶¹ It is clear, however, from a reading of the Code itself and from its history that Lieber intended it to be applicable to a war between nations and that he was actually hesitant to include any reference to the law applicable in a civil war. Although the *Instructions* on occasion referred to the practice of the armies of the United States and to the domestic law of that country, Lieber intended that they should be of equal validity to wars between other states.

The criticism of Bordwell is perhaps unduly severe: "But it was a first attempt. It embodied extreme views of the rights of the military occupant over the inhabitants of occupied territory, followed too closely the hard precedent of earlier wars, and was in general diffuse and academic. Written by a non-military man, it

¹⁵⁶ Holland, *The Laws of War on Land* 72-73 (1908).

¹⁵⁷ Lieber, *Instructions for the Government of Armies of the United States in the Field* (Washington, 1898).

¹⁵⁸ *Rules of Land Warfare*, War Department Document No. 467, Office of the Chief of Staff (Washington, 1917).

¹⁵⁹ Bluntschli, *Das moderne Kriegsrecht der zivilisierten Staaten als Rechtsbuch dargestellt* (1866); see Nys, *op. cit.* Id.. "The Codification of International Law", 5 *American Journal of International Law* 871, 887 (1911).

¹⁶⁰ Scott, *The Hague Peace Conferences of 1899 and 1907*, 525-527 (1909).

¹⁶¹ "... its rules are in some respects more severe than those which would be enforced in a war between two independent States" (Holland, *op. cit. supra* note 157, p. 72.) "The private character of the *Instructions* should be noted. Their 158 articles contemplated a civil war ..." (Nys, *op. cit.*).

lacked the clearness which actual experience would have afforded, and omitted much that might have occurred to one who had seen responsible service in the field. Furthermore, it was the work of an individual and not of a collective body.”¹⁶²

That the *Instructions* were “diffuse and academic” is undoubted. They were also poorly organized and written in a strange manner, which made them appear half statute and half rationalization. But if one disregards form and looks to the substance of the Code, it is possible to discern a mature and logically consistent system, developed and systematized over many years of thinking and teaching. Although Lieber’s ideas underwent change even as he prepared new drafts of the Code, the work had for the most part been thought through by the time the Civil War began. Thus, despite the conditions of haste under which the Code was reduced to paper, it had actually been in the making for much of Lieber’s lifetime.

It is ultimately to his persistence and energy in promoting the project of a code instructions for armies of the United States in the field that we probably owe the certainty to which a large proportion of the law of war has been reduced.

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¹⁶² Bordwell, *The Law of War between Belligerents* 74 (1908).