The customary law of non-international armed conflict

EVIDENCE FROM THE UNITED STATES CIVIL WAR

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INTRODUCTION

James Surget made no impact on history. He did, however, make an impression on Washington Ford. The latter sued him in 1866 regarding the destruction of 200 bales of cotton.

In May 1862, Ford owned a plantation in Mississippi, a state then in rebellion against United States authority. The local commander of rebelling forces ordered his troops to burn all cotton along the Mississippi River that was vulnerable to capture by the United States army. Surget assisted in the destruction of Ford's cotton. Ford sued him to recover for its value.

This case was ultimately reviewed by the United States Supreme Court, the nation's highest judicial authority. The court's decision in that case confirmed a pattern of earlier appellate decisions by other courts—decisions that have surprising relevance for contemporary humanitarian law.

The cases were generally unremarkable in character. Many were private disputes, revolving around issues as minor as the ownership of a horse or mule. Underlying all of these lawsuits, as finally summed up in Surget's case, were principles transcending the issues pressed by individual litigants. These principles set forth certain minimum standards of treatment that citizens are due from their government in time of internal armed conflict and its aftermath.

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* The opinions expressed in this article are those of the author and are not necessarily those of the American Red Cross.

The United States Civil War was fought from 1861 to 1865. It began in April 1861 after eleven southern states declared their secession from the United States to form the Confederate States of America. The Confederacy covered 750,000 square miles.

The United States government opposed secession and a large army was mobilized to suppress the rebellion. In the official report of the 1860 census the total population of the United States was stated to be 31,443,321.[1] During the war the total number of men who served in the army of the United States, which was called the Union Army, was 2,100,000. Another 800,000 are estimated to have served in the Confederate Army.[2] By the time the rebellion was defeated in the spring of 1865 approximately 623,000 had been killed from all causes. At least 471,000 more were wounded during the conflict.[3]

Although a major war, it was never considered to be an international one. Very soon after secession, commissioners were sent to Europe to gain diplomatic recognition for the Confederacy. Although Great Britain accorded the Confederacy belligerent rights, Confederate representatives struggled vainly to secure diplomatic recognition until the collapse of the rebellion. No government ever recognized the Confederacy as a sovereign nation.

Published opinions of state and federal courts, records of Union Army commands, and advisory opinions of military lawyers of that period reflect a consensus that humanitarian law (then referred to as the law of war or the law of nations) was to be applied by government authorities during internal armed conflict. This article reviews the evidence for that consensus, then examines a sampling of the decisions from civil litigation. These private suits demonstrate the existence of customary law anticipating Article 6 of Protocol 2 to the Geneva Conventions of 1949.

I. THE LAW OF ARMED CONFLICT IMPLEMENTED

In the early months of the war, some Union commanders issued orders which demonstrated appreciation of the need for legal restraints on the conduct of soldiers in the field. One admonished his troops to respect the inhabitants of northern Virginia:

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[1] E. B. Long with Barbara Long, *The Civil War Day by Day,* Garden City, New York: Doubleday and Co., Inc., 1971, p. 700.

[2] James H. McPherson, *Ordeal by Fire,* New York: Alfred A. Knopf, 1982, p. 181.

[3] E. B. Long with Barbara Long, *op. cit.,* p. 711.

"It is again ordered that no one shall arrest or attempt to arrest any citizen not in arms at this time, or search or attempt to search any office, or even to enter to the same; without permission".

He made it clear that they were not there to act in judgement against disloyal citizens.

"The troops must behave themselves with as much forbearance and propriety as if they were at their own homes. They are here to fight the enemies of the country, not to judge and punish the unarmed and helpless, however guilty they may be; when necessary that will be done by the proper persons." [4]

Ten days later, the commander of Union troops in western Virginia voiced his concerns in a similar order. He cited "numerous instances of plunder", and warned his men not to enter the homes of local inhabitants without permission from the owners, "except in cases of absolute necessity", and not to use threats or intimidation to secure permission to enter. In closing the order, the following guidance was set forth:

"It is earnestly enjoined on all officers to do their utmost to ferret out the perpetrators of outrages on the rights of citizens, by persons apparently in government employ, in order that thieves and plunderers, who follow the army or attach themselves to it, may be prevented from disgracing our arms." [5]

In October 1861, another senior Union commander informed his forces of his concern over the abuse of private citizens and seizure of their property. He, too, considered this conduct unacceptable and intended to "suppress practices which disgrace the name of a soldier."[6]

Although these orders show awareness of the need for constraints on the conduct of soldiers in war, nothing is articulated as to the existence of laws governing armed conflict.

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[4] *General Order Number 18,* Headquarters Department of N.E. Virginia, July 18th, 1861. This and all other general orders cited are to be found in the manuscript collections of the United States Government National Archives in Washington, D.C. They are in record group number 94, where they are organized in bound volumes according to the commands which issued them.

[5] *General Order Number 3,* Headquarters of the Army of Occupation, Western Virginia, July 28, 1861.

[6] *General Order Number 19,* Headquarters, Army of the Potomac, October 1, 1861.

This ambiguity also showed up elsewhere. In an 1862 decision on other issues, the United States Supreme Court was noncommittal on whether international rules would be applied in the crisis at hand:

"The laws of war, as established among nations, have their foundation in reason, and all tend to mitigate the cruelties and miseries produced by the scourge of war. Hence the parties to a civil war usually concede to each other belligerent rights. They exchange prisoners, and adopt the other courtesies and rules common to [international] wars."

Later in its opinion, it addressed the issue of applying those rules to the ongoing conflict:

"Whether the President in fulfilling his duties, as Commander-in-Chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this court must be governed by the decisions and acts of the Political Department of the government to which this power was intrusted." [7]

Enter Francis Lieber. A veteran of the Napoleonic wars and the Greek War of Independence, he emigrated to the United States in 1827. At the time of the United States Civil War, he was a professor at Columbia College in New York. Two of his sons were soldiers in the Union Army, and one served in the Confederate forces.[8] On November 13, 1862, he wrote to his friend, General-in-Chief of the Union Armies, Henry Halleck. Halleck, known as "Old Brains", was the author of a treatise on international law and a recognized expert on the subject.

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[7] *The Prize Cases,* 17L. Ed. 459, 476, 477 (U.S. 1862). All citations here to published judicial decisions are in the general form utilized by common law attorneys. Most decisions cited are either of the United States Supreme Court, which will be cited with (U.S.), or the decision of the highest appellate court of an individual state. One decision from a federal trial court is cited, and one from an intermediate New York State appellate court. Jurisdictions can be identified by the state name, which is put in full form in the parenthesis. The report series cited for each decision is not necessarily the official publication which would be cited formally. The author has attempted to cite those reports which are most likely to be available to the reader. Full references to each volume of judicial opinions cited will be found in the bibliography.

[8] Richard Shelly Hartigan, *Lieber's Code and the Law of War,* Chicago: Precedent, 1983, pp. 5-7.

In his letter to Halleck he stated his belief that "a set of rules and definitions" should be implemented for the conduct of the United States forces in the field. Ultimately he persuaded Halleck to appoint a special board to propose guidelines for military use. The board included four military officers and Lieber. After the board went through several revisions, a final draft code for conduct of troops in the field was approved by President Lincoln on April 24, 1863.[9] Known as General Order Number 100 at that time, this document is internationally famed as "the Lieber Code".

It covered many subjects. Among them were martial law, retaliation, treatment of non-combatants, treatment of prisoners, status of partisans and armed enemies not belonging to the armed enemy forces, use and abuse of flags of truce, spies, exchange of prisoners, parole of prisoners, surrender, and assassination. Section 10 specifically addressed the issue of civil war.

Lieber suggested in the code, which was also a commentary, that there were times when it would be necessary to apply humanitarian principles to the conduct of forces engaged in a civil war. He took pains to state that such humanitarian application of the law of armed conflict would not derogate from the government's claims of sovereignty over insurgent forces and their supporters:

"When humanity induces the adoption of the rules of regular war toward rebels, whether the adoption is partial or entire, it does in no way whatever imply a partial or complete acknowledgement of their government, if they have set up one, or of them, as an independent or sovereign power. Neutrals have no right to make the adoption of the rules of war by the assailed government toward rebels the ground of their own acknowledgement of the revolted people as an independent power." [10]

The question left open by the Supreme Court in 1862 was thus answered by the Lieber Code and the practice of the Union forces in the field. The Lieber Code helped focus the Union Army's implementation of the laws of armed conflict. The Judge Advocate General of the Army, the chief legal officer of the Union forces, was often called upon during the war to render legal advice to commanders and military tribunals regarding this law. Their questions cover a wide range

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[9] *Ibid.*, pp. 13-15.

[10] Hartigan, *op. cit.*, pp. 69-70.

of the issues in the Lieber Code, indicating conscientious efforts at compliance with its terms.

The Judge Advocate General and his subordinates advised on a wide range of issues, including violation of flags of truce, destruction of railroads, bridges and steamboats, cutting telegraph wires between military posts, recruiting for the enemy within U.S. Government lines, assisting Union soldiers to desert, attempting to assist the enemy by transporting contraband items to them, and conspiracy to violate the laws of war by destroying life or property in aid of the enemy.[11]

A conspicuous example of the careful attention given to the law of armed conflict is reflected in the findings of a "Council of War", which was convened in 1864 at the order of a senior commander of the Union Army. He directed a panel of high-ranking army and navy officers to examine allegations that a captured Confederate general had violated the laws of war. They investigated whether General R. L. Page, by "destroying or injuring the works, armament, and munitions at Ft. Morgan, Alabama, of which he was then commander, after he had abandoned the defense of the Fort and indicated his intention to surrender by hoisting the white flag" had committed an offense. The Council had orders to report the facts and render its opinion to the commander.

The Council evaluated the evidence and provided these findings. A white flag had been hoisted at the fort at 6 a.m. on August 23, 1864. No public property had been destroyed after that time. The evening before, some 90,000 pounds of gunpowder were destroyed by water when a fire took place. That same evening guns at the fort were also spiked by order of General Page. No supplies were destroyed or damaged other than by the effects of the fire. The Council gave the opinion that "Brigadier General Page is not guilty of a violation of the laws of war". The convening general approved the findings of the commission.[12] This impartial treatment of a high-ranking Confederate officer demonstrates that the laws of armed conflict were not simply a vehicle for justifying the punishment of Confederate soldiers or civilians.

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[11] Colonel William Winthrop, *A Digest of Opinions of the Judge Advocate General of the Army, with Notes,* Washington, D.C.: Government Printing Office, 1880, pp. 328-329.

[12] *General Order 50,* Headquarters, Military Division of West Mississippi, September 4, 1864.

The treatment of civilians generated important questions. When two Union soldiers were captured by civilians, taken from their lines and turned over to the enemy, the local commander ordered the arrest of an equal number of civilians who were to be held until those responsible were given over to Union Army custody by the Confederates. The Judge Advocate General held that this was an act of retaliation which was justified by the laws and usages of war.[13] In another case, pertaining to civil power of the occupier, it was held that the municipal laws of conquered territories continued in effect during the military occupation except insofar as it was necessary to suspend their operation due to the needs of the occupying forces.[14]

Military courts tried many defendants for alleged violation of the laws of war through activities as guerrilla fighters. There was controversy over Confederate use of "partisan rangers". The Confederate government asserted that they were part of the regular army of the Confederate States. Though this was not in accordance with the opinion of the Union forces, a measure of grudging recognition was given to these men as legitimate combatants. Others, however, operated in independent bands which engaged in activities not considered to have legitimate military purposes, such as robbery and looting of property.[15]

The Judge Advocate General frequently advised military courts on those issues. Military tribunals also tried other alleged offenses against the laws of war. The importance that was accorded to these rules was demonstrated by the care given in analyzing the defenses available to suspected spies. Sometimes the Judge Advocate General's advice was a matter of life and death, for executions were carried out in some espionage cases.

He held that when an enemy soldier penetrated Union lines disguised as a civilian, it would be presumed that he came in as a spy. However, those so charged could rebut that presumption by showing that they came for some other purpose, such as a family visit. If such could be demonstrated, the offense would be "a simple violation of the laws of war," rather than the offense of espionage.[16] When a civilian entered Union lines from enemy territory without authority he could

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[13] William Winthrop, *Opinions of the Judge Advocate General of the Army, op. cit.*, p. 305.

[14] *Ibid.*, p. 306.

[15] William Winthrop, *Military Law and Precedents*, 2nd edition, Washington, D.C.: Government Printing Office, 1920, pp. 783-784.

[16] *Opinions of the Judge Advocate General of the Army, op. cit.*, p. 455.

not properly be regarded as a spy merely because he had violated "the law of war prohibiting intercourse between belligerents."[17]

A soldier separated from his forces when they retreated from Maryland in 1864 was charged upon arrest with being a spy. The opinion of the Army's chief legal officer, however, was that insofar as he had been wandering in disguise within Union lines only for the purpose of finding an opportunity to make his way back to the enemy's forces, he could not properly be charged with the offense of espionage. He had to be treated as a prisoner of war.[18] On three occasions, he advised officers that a spy who successfully returned to Confederate lines, and was later captured, could not be brought to trial as a spy. Such action could only be taken if the individual was caught while engaged in espionage.[19]

A ruling of one civilian court on espionage and the laws of armed conflict was published. In 1865 Robert Martin petitioned for judicial release from the custody of U.S. military authorities. Martin, a Confederate officer, had been detained within Union lines disguised as a civilian. He was charged with committing espionage and arson in New York City. He argued that with the end of hostilities in the spring of 1865, he could no longer be held to face espionage charges. The court agreed.

The opinion contained this assessment:

"I do not question that the crime of arson, even when committed in places remote from military camps, forts, arsenals, or other places directly connected with military operations, as in the case of the prisoner, may be a military offense, and as such cognizable, in time of war, before a military court, by the usage and law of nations." However, *"The restoration of peace absolved all offenses by the public enemy committed during the existence of the war, so far at least as the acts committed are sanctioned by the laws of war..."*.

The court ordered Martin's discharge from military custody and release to the warden of the city prison for possible prosecution on non-military arson charges.[20]

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[17] *Ibid*, p. 456.
[18] *Ibid.*, p. 456.
[19] *Ibid.*, p. 456.
[20] *In the Matter of Martin*, 45 Barb. 142, 143, 144, 145, 149 (New York, 1865).

Military attorneys carefully reviewed questions of prisoner-of-war status in a number of opinions. An engineer captured on a Confederate steamer was held to be properly detained as a prisoner of war, as civil employees serving with the enemy army in the field were on the same footing as soldiers of that army.[21] Some men were captured who appeared to be operating as partisans on a raid into Indiana, a state far removed from active military operations. They were held by civilian authorities to be tried for robbery.

The Confederate government's agent for exchange of prisoners made an official request that they be protected and exchanged as prisoners of war, asserting that they were Confederate soldiers. The Judge Advocate General held that as there was serious doubt about their actual status, this defense should be raised during the civilian criminal trial.[22] Prisoners of war were held not to be protected from trial before military tribunals for law of war violations committed before capture.[23]

Confederates were also treated as belligerents in matters of prisoner exchange and parole. In July 1862, a cartel was signed between the United States Government and Confederate authorities for the parole and exchange of prisoners.[24] One John M. Henderson found out how seriously the government of the United States took its obligations under this cartel.

He was captured by the Confederates, held as a prisoner of war, and eventually paroled. He was sent to a special Union Army camp in Annapolis, Maryland, where parolees were detained until such times as the authorities formally exchanged them for Confederate prisoners of war. He left camp without authorization and was arrested by military police near his father's home in Pennsylvania.

He sued for his release in United States District Court, asserting that he was a minor at the time of his enlistment, and had enlisted without his father's consent. The court held that under other circumstances that would suffice to order his release from military control. However, more important factors had to be considered in this case.

The Court wrote of the war that "Although a rebellion, it has assumed such huge dimensions, with all the characteristics of a public war, that the Government have been compelled, from motives of

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[21] William Winthrop, *Opinions of the Judge Advocate General of the Army, op. cit.*, p. 392.

[22] *Ibid.*, pp. 392-393.

[23] *Ibid.*, p. 393.

[24] William B. Hesseltine, *Civil War Prisons: A Study in War Psychology*, New York: Frederick Ungar Publishing Co., 1978, p. 68.

humanity, to treat it as such, and to apply to it the rules of civilized warfare." The government was found to be exercising proper authority when it agreed to the exchange of prisoners.

The court found a sound policy behind the cartel agreement:

"Sometimes prisoners of war are permitted, by capitulation, to return to their own country, upon condition not to serve again during the war, or until duly exchanged. Good faith and humanity ought to preside over the execution of these compacts, which are designed to mitigate the evils of war, without defeating its legitimate purposes... John M. Henderson is remanded to the custody of the United States provost marshall, to be returned to Camp Parole, Annapolis, Maryland, there to wait the orders of the War Department for exchange as a prisoner of war...".[25]

Scrupulous adherence to the cartel was found at the highest level. In 1862 the Attorney General, the chief legal officer of the United States government, was called on by President Lincoln to advise whether paroled U.S. soldiers who were not exchanged could be employed in frontier operations against Indian tribes. Though the government was hard pressed to find troops who could be spared for that duty, the Attorney General found of the cartel that "The language employed is unusually clear and explicit, and there is no doubt or ambiguity in it, and therefore no room for construction. The soldiers of either party captured by the other party, and paroled, but not exchanged, are forbidden, in terms, *to take up arms again*—they are forbidden to *discharge any duty usually performed by soldiers*—forbidden to do any *field* duty." He concluded that it was impermissible to use these soldiers in any military operations against Indians.[26]

In closing this survey of policies on implementation of humanitarian law, it is worth noting that one appellate court produced an opinion on the acceptability of obedience to superior orders as a defense in criminal cases. It foreshadowed issues debated 80 years later.

The trial arose from a death in the closing days of the war. P. N. Riggs, a private in the 9th Tennessee Cavalry, was conducting a reconnaissance as part of a column of Union soldiers. The force

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[25] *Henderson v. Wright,* 5 Philadelphia Reports 299, 300, 301, 302 (U.S. District Court 1863).

[26] 10, *Op. Att'y Gen.,* 357, 358, 359 (1862), Washington, D.C.: W. H. & O. H. Morrison.

rode up to the house of one Captain Thornhill. Gunfire started while Thornhill was talking with them and he ran. Thornhill was pursued, then killed about 20 yards from the spot where the shooting began. Several witnesses saw Riggs in the column of troops and this led to criminal proceedings.

In 1866 a jury convicted him of murder and he was sentenced to 15 years imprisonment. At his trial, the judge gave charges (instructions) on the law of war for the jury's consideration in reaching its verdict:

"The Court, among other things not excepted to, charged the jury, in substance, as follows: 'A soldier in the service of the United States is bound to obey all lawful orders of his superior officers, or officers over him, and all he may do in obeying such lawful orders, constitutes no offense as to him. But an order illegal in itself, and not justified by the rules and usages of war, or in its substance being clearly illegal, so that a man of ordinary sense and understanding would know, as soon he had heard the order read or given, that such order was illegal, would afford a private no protection for a crime committed under such order, provided the act with which he may be charged, has all the ingredients in it which may be necessary to constitute the same crime in law. Any order given by an officer to his private, which does not expressly and clearly show on its face, or in the body thereof, its own illegality, the soldier would be bound to obey, and such order would be a protection to him. No person in the military service has any right to commit a crime in law, contrary to the rules and usages of war, and outside of the purposes thereof; and the officers are all amenable for all crimes thus committed, and the privates likewise are answerable to the law for crimes committed in obeying all orders illegal on their face and in their substance, when such illegality appears at once to a common mind, on hearing them read or given.' We think there is no error in this charge." [27]*

Taken together, the practice of military and civilian authorities and decisions of civilian courts show that laws of armed conflict were deemed applicable to the Civil War in the United States. Though in 1862 the U.S. Supreme Court was uncertain whether

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[27] *Riggs v. State*, 43 Tenn. 70, 71, 72, 73 (Tennessee 1866).

* The case was remanded for a new trial, as the evidence of record did not clearly support the jury's verdict.

such rules would be applied in this war, it had no problem making the determination in retrospect:

"The concession made to the Confederate Government in its military character was shown in the treatment of captives as prisoners of war, the exchange of prisoners, the recognition of flags of truce, the release of officers on parole, and other arrangements having a tendency to mitigate the evils of the contest. The concession placed its soldiers and military officers in its service on the footing of those engaged in lawful war, and exempted them from liability for acts of legitimate warfare.[28]

The humanitarian concerns underlying the cases from that era are well exemplified in a decision rendered by the Supreme Court of Tennessee in 1868:

"The principles of christianity and of common humanity, as understood in the present age, impose the obligation to relieve and care for the sick and wounded belligerent, to perform many acts which tend to mitigate the necessary horrors and cruelties of war. This obligation is equally binding upon all to whom the opportunity for its discharge is presented.

The same assistance to preserve life or alleviate suffering which may be rendered to a sick or wounded rebel by his surgeon or his comrade, may, in case of necessity, and at the proper time, be lawfully rendered by the loyal citizen or soldier. Neither soldier nor citizen can lawfully give aid or comfort to the rebel actually in arms, but the moment the rebel soldier is hors de combat, *the situation is changed, and his life may be preserved, and his sufferings relieved, though the effect is to preserve a soldier to the enemy, and thus indirectly aid the rebellion."*

This opinion did not resolve an issue of humanitarian law. It was the basis for deciding a landlord's suit for unpaid rent. In 1862 Andrew Fottrell leased a house to Dr. Daniel German. German was a doctor in the Confederate army.

Evidence introduced at trial showed that at the time Fottrell leased the premises, he knew that the lease was being made in order for the house to be used as a hospital for sick and wounded Confederate soldiers. Active military operations were underway and Confederate authorities had been sending large numbers of sick and

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[28] *Williams v. Bruffy*, 24 L. Ed. 716, 718 (U.S. 1877).

wounded Confederate soldiers to that area with orders for citizens to provide them accommodations.

Under normal circumstances, the court found, a contract formed to assist in providing aid and comfort to the rebellion against the United States would be void.

"But where an act, permitted by the laws of war, is of such a nature that its performance by some one is demanded by the dictates of humanity as acknowledged by civilized nations, and a refusal to perform it would be cruelty and inhumanity, there it may lawfully be performed. As both parties, however, are supposed to act upon these principles, and if one party ignore them, the other would do the same, the right cause can not be supposed to be the loser by their recognition". Therefore, *"In view of the evidence in the record, it should have been left to the jury to say whether there existed at the time of the making of the contract, such an immediate pressing necessity for hospital buildings for the care of persons then actually sick, wounded, or suffering, that it was required by the dictates of humanity that a building should be furnished for that purpose. The judgement will be reversed, and a new trial awarded."* [29]

This case reveals an interesting facet of Civil War jurisprudence. Important, fundamental principles of humanitarian law were found applicable to a non-international conflict in the context of private disputes of no factual interest or apparent economic consequence to anyone other than the parties involved. Most of these suits were demands of compensation for confiscated property. The legal principles elucidated by the courts in these cases, however, are of continuing importance in the law of non-international armed conflict.

Litigants frequently took cases on appeal. As a result the legal issues and facts in their cases have been preserved in published judicial reports. That these events ended in private litigation is a reflection of the fact that this was a civil war. The parties obviously knew each other prior to the disputed events, or identified each other soon thereafter, only because they lived in close proximity. It would seem unlikely for such lawsuits to have arisen in any other context.

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[29] *Fottrell v. German,* 45 Tennessee 476, 478, 479, 480 (Tennessee 1868).

II. PRINCIPLES FROM CIVIL LITIGATION

In some cases, a decision hinged on whether the property was subject to destruction or confiscation. The authorities of Christian County, Kentucky brought suit against former soldiers of the Confederate Army for burning down the county courthouse. The defendants argued that they acted as belligerents in destroying the courthouse, and not for their own purposes. Therefore they were not liable for damages. The court recognized that destruction and capture of public and private property was lawful when such acts would benefit a belligerent or weaken its enemy.

"But this right is not unlimited. The modern law of nations, now authoritatively settled and wisely recognized throughout the civilized world, excepts from capture or destruction such public property as courthouses, churches, and property of literary institutions, unless used for some military purpose by the captor's enemy. In support of this position, the authorities are so abundant and concurrent as to dispense with any particular citations."

The complainants did not have to show whether the destruction was spontaneous or by virtue of superior orders, as "an unlawful act cannot be justified by an unlawful authority or command to do it". Therefore, "on international and common law principles, we adjudge that the petition in this case sets forth a good cause of action...". The complaining party was allowed to proceed to trial.[30]

A former Confederate general was sued for removing cotton, corn and fodder from a plantation in January 1862. The defendant argued that he was ordered by his superior officers to take the provisions for use by the troops of his command and to prevent this property from falling into the hands of the enemy. He argued that his actions were all authorized by the laws of war, and he was therefore protected from any recovery by the owners of that property.

The trial judge instructed the jury, "If there was a state of war existing between the United States and the Confederate States in 1862, when the property in question was taken and removed, and if General Mercer was an officer in the Confederate Army, and as such officer ordered the removal and taking of said property by the command of a superior or higher officer of the Confederate States, as an act of war,

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[30] *Christian County Court v. Rankin*, 63 Kentucky 502, 503, 504, 506 (Kentucky 1866).

then Mercer is protected, and is not a trespasser, and is not liable to respond in damages". The instruction was upheld. The appellate court stated that "If the recognition of belligerency means anything, it means that the acts of individuals, in the legitimate progress of the war, are to be treated as the acts of the belligerents; that the individual is not responsible to the civil tribunals, for any act done in the legitimate progress of the war".[31]

In 1864 Jesse Broadway left his home, which was within the Confederate lines in North Carolina. While he was behind Union lines Melcher Rhem, a Confederate soldier, went by order of his captain, seized a mule belonging to Broadway and turned it over to a Confederate quartermaster.

The issue considered on appeal was whether Broadway could sue Rhem for taking property when he was acting in a military role. The court said no. It held that prior precedents "show that by the law of the United States a capture of property (at least of all such as may be useful to a belligerent) is not unlawful, and to preclude the idea that a soldier making such capture under orders from the commanding officer and in the course of military duty can be held liable to an action by the party injured. If it were otherwise a peace would be impossible. The cessation of the conflict of arms and by organized forces would be succeeded by conflicts in the courts even more direful and more fruitful of vindictive feeling. Southern soldiers would be sued for trampling down the grass in Pennsylvania and Northern ones for doing the same in Georgia. The absurdity and injustice of these results repel the idea that the courts of belligerent countries can give redress for damages sustained in war. Good policy and the common interest of all sections of a country which has been engaged in a civil war require that the wounds it has made be healed as speedily as possible, and that the memory of it should pass away".[32]

In some cases, the court's decision turned on the status of the defendant at the time of his actions. The purchaser of a lot of mules sued the former Confederate officer who had forcibly confiscated them. The defendant argued that he took them for the use of the Confederacy and because he was concerned that they were being transported to the Union Army. On appeal, the judgement against the defendant was upheld "because there was no ground to apprehend that the destination of the mules was contraband; and more materially

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[31] *Stafford v. Mercer,* 42 Georgia 556, 557, 561, 562 (Georgia 1871).

[32] *Broadway v. Rhem,* 71 North Carolina 162, 167 (North Carolina 1874).

because, at the time of the seizure and conversion, the appellant was a parol prisoner of the United States, denuded of all belligerent rights to capture, and had neither order nor other authority to take the mules for Confederate use".[33]

In November 1864, two men following behind a body of Union soldiers, and wearing Union uniforms but denying that they were soldiers took a horse belonging to William Worthy. In 1866 Worthy saw the horse and demanded its return. The demand was refused and he sued. Worthy asked for a jury instruction that the defendants needed to show that the captors who took the horse were part of the Union Army. The court refused to give this instruction.

The judgement was reversed on appeal. "Under the facts as shown by the record, this was a robbery. The two men, even if soldiers, were not with their company, and they denied being soldiers. They were evidently thieves, bummers, men who followed the army to steal, and who formed a part of that horde of robbers who usually attend an army".[34]

Men named Cochran and Thompson were sued on the basis of events that occurred around midnight on June 25, 1863. They were part of a group that went to the home of William Dunlap. After knocking at the door and yelling they were admitted, and then took control of a man named Edmund Tucker at gunpoint. He was pulled from the house by his hair and threatened with execution. Then he was tied up, put on a horse and taken to a neighbor's house where he was locked up with others in a smokehouse. A guard of eight armed men surrounded it.

Tucker had been a soldier in the Union Army, but was earlier discharged because of poor health. He had been at home for some time, but kept his presence there concealed from all but his friends. Cochran and Thompson claimed that at the time they apprehended Tucker he was a Union soldier. The trial evidence showed that some of those involved in the arrest, including Thompson, were Confederate soldiers, and that Cochran was a civilian and the one who "led the crowd".

In instructing the jury, the trial judge stated that although the civil war was in progress at the time of this episode "the acquirement of belligerent rights would not be held to confer upon citizens, residing within the military lines of the belligerent power, the right to assume

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[33] *Beck v. Ingram,* 64 Kentucky 355, 356 (Kentucky 1866).

[34] *Worthy v. Kinamon,* 44 Georgia 297, 298, 299 (Georgia 1871).

the exercise of violence upon their fellow citizens; neither can it justify violence on the part of soldiers enlisted in the so-called Confederate Army, against the citizens of the Country not arrayed in hostility against their cause, especially when such soldiers were not acting, at the time, under the orders of some superior officer properly in command of them". The jury ruled in favor of the plaintiff and awarded a substantial sum in damages. This instruction and the jury's verdict were upheld on appeal.[35]

Some lawsuits were also directed at the victors. In a suit to recover the value of a confiscated horse, an appellate court held that it was an error for a trial judge to instruct a jury that soldiers of the Union Army could, without special order, make a capture of any property as contraband of war. Under the laws of nations and the laws of war a soldier could not act without general or special orders when seizing property.[36]

Confiscation practices of Union occupation authorities ultimately received scrutiny by the U.S. Supreme Court. Sometimes Union forces levied special assessments in occupied areas. In 1862 an assessment of about $700,000 was levied upon individuals and corporations in New Orleans for the benefit of the poor. In 1864 a subsequent levy of $5 was assessed on each bale of cotton brought into that city, to be applied for charitable purposes. On other occasions and in other commands, orders were issued for assessments for the benefit of loyal citizens who had suffered from confiscation of property or conscription of relatives into the Confederate forces. Other assessments were applied to help support refugees driven into Union lines by activities of the Confederate forces.[37] Although special levies were allowed, they were distinguished from outright and generalized confiscation.

In 1863 an order was issued by the commander of Union occupation forces in New Orleans requiring banks to hand over all monies credited to any corporation, association, or pretended government that was "in hostility to the United States". At the time that this order was issued, the city of New Orleans had been controlled by Union forces for more than 15 months and that occupation had gone unchallenged. The United States Supreme Court noted that this was not a seizure of property for immediate use by the army. It was merely an attempt to seize private property which "though it may be subjected to confisca-

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[35] *Cochran v. Tucker*, 43 Tennessee 152, 153, 154 (Tennessee 1866)

[36] *Branner v. Felkner*, 48 Tennessee, 195, 196, 197, 198 (Tennessee 1870).

[37] William Winthrop, *Military Law and Precedents, op. cit.*, p. 807.

tion by legislative authority, is, according to the modern law of nations, exempt from capture as booty of war".

It was conceded that as the war had not ceased at the time of confiscation, the commanding general had the power to do all acts permitted by the laws of war, "except so far as he was restrained by the pledged faith of the government... A pledge, however, had been given that rights of property should be respected. When the city was surrendered to the army under General Butler, a proclamation was issued, dated May 1, 1862, one clause of which was as follows: 'All the rights of property of whatever kind will be held inviolate, subject only to the laws of the United States'".[38]

The most important, fundamental principal underlying these cases was finally resolved in the previously described lawsuit against James Surget for destruction of bales of cotton. The United States Supreme Court held that the destruction of property by a belligerent in the Civil War, acting in accordance with the laws of armed conflict, was not an act which made them liable for civil damages. This even though the Supreme Court did not recognize any legal authority in the Confederate government.

"To the Confederate Army was, however, conceded, in the interest of humanity and to prevent the cruelties of reprisals and retaliation, such belligerent rights as belonged, under the laws of nations, to the armies of independent governments engaged in war against each other; that concession placing the soldiers and officers of the rebel army, as to all matters directly connected with the mode of prosecuting the war, 'on the footing of those engaged in lawful war,' and exempting them from liability for acts of legitimate warfare".[39]

The Court noted that the complainant appeared not to have supported the United States government during the war, and left open the question of whether a loyal citizen could sue for damages suffered during an insurrection. That question was answered indirectly in another case.

In January, 1864 a Confederate soldier named Williams helped seize cattle for military use during an army raid in West Virginia. Williams was later sued by the owner of the cattle. West Virginia was not a Confederate state, and the court did not address the issue of the complaining party's loyalties during the war. The case was decided on

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[38] *Planters Bank of Tennessee v. Union Bank*, 21 L. Ed. 473, 478 (U.S. 1873).

[39] *Ford v. Surget*, 24 L. Ed. 1018, 1021 (U.S. 1878).

an unrelated issue, but the basic facts of the dispute were reviewed. The opinion merely stated that:

"For an act done in accordance with the usages of civilized warfare, under and by military authority of either party, no civil liability attached to the officers or soldiers who acted under such authority".[40]

Before assessing the significance of these cases, it should be recognized that humanitarian principles were not uniformly applied during the Civil War. Some violations of the law of war received little attention, but others stirred controversy at the time and have not yet been forgotten.

III. CONSPICUOUS VIOLATIONS OF THE LAW OF WAR

Military operations in the Kansas-Missouri area were especially notorious for violations of the law of war. Killing of prisoners, violence against civilians, endless reprisals and counter-reprisals reached their height in Lawrence, Kansas on August 21, 1863. The undefended town was burned and 183 non-combatant male civilians killed by Confederate partisans.[41] In revenge Union officials forced the removal of a large part of the civilian population of western Missouri.[42] Other theaters of military operations were not known for such intensive violation of the law of war, but an especially notorious episode took place in Tennessee the following year.

In April 1864, Confederate soldiers captured Fort Pillow. A number of defending Union troops appear to have been killed after surrender. This was a source of controversy for many years.[43] In 1864 General William T. Sherman led his Union Army through Georgia. The latter phase of his campaign saw widespread looting and the city of Atlanta was largely destroyed. Much targeted property, such as railroads, had strategic value, but personal possessions of inhabitants were also stolen and destroyed with little restraint.[44]

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[40] *Freeland v. Williams,* 33 L. Ed. 193, 195, 197 (U.S. 1888).

[41] James H. McPherson, *Ordeal by Fire, op. cit.,* p. 189.

[42] J. G. Randall and David Donald, *The Civil War and Reconstruction,* 2nd edition revised, Boston: Little Brown and Co., 1969, pp. 235-236.

[43] Mark Mayo Boatner III, *The Civil War Dictionary,* New York: David McKay Company, Inc. 1959, pp. 294-295.

[44] J. G. Randall and David Donald, *op. cit.,* pp. 427-429.

The treatment of prisoners of war was perhaps the most controversial issue raised by the conflict. Early in the war prisoners were well treated, but later prisoner exchanges ended, southern prisons became overcrowded, and suffering increased. Confederate prisoners suffered poor treatment in northern prisons as well.

Andersonville prison in Georgia was the focus of a controversy that acquired international notoriety. Over 12,000 Union prisoners died there.[45] The camp commandant, Henry Wirz, was tried, convicted and executed for conspiring to impair the health of and destroy prisoners of war, and for murder "in violation of the laws and customs of war".[46]

There is a lesson herein. Compliance with the law of war unfortunately tends to be forgotten, and the legacy must be sifted from old documents. The memory of violations is often kept alive forever. Those who are skeptical of the effectiveness of humanitarian law should be reminded that its successes, too, are part of the historical record.

IV. CONCLUSIONS

It is easier to assess the scope of legal protection accorded to combatants and non-combatants when its limits are identified. On December 8, 1863, President Lincoln issued a "Proclamation of Amnesty and Reconstruction". Under its terms, a full pardon and restoration of property, except slaves, was offered to those in rebellion who would swear an oath of allegiance to the United States and its laws regarding slavery. Limited exemptions were made from this offer for high-ranking Confederate officials.[47]

Following the assassination of President Lincoln his successor, President Johnson, offered a wide amnesty in May 1865 at the close of the failed rebellion. There were again some exemptions from this offer, but those excluded from the amnesty benefited by the liberal grant of individual pardons upon application.[48]

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[45] *Ibid.*, p. 337.

[46] William B. Hesseltine, *Civil War Prisons, op. cit.*, pp. 240-241, 244.

[47] James McPherson, *Ordeal by Fire, op. cit.*, p. 391.

[48] E. B. Long with Barbara Long, *The Civil War Day by Day, op. cit.*, p. 691.

It was clear that the pardoning power was vested only in the President. The Attorney General offered that opinion at the end of the war.[49] In 1876 the United States Supreme Court conclusively established that grants of amnesty or pardon were entirely within the discretion of the executive branch of government for "... as sovereign, they might recall their revolted subjects to allegiance by pardon and restoration to all rights, civil as well as political. All this they might do when, where, and as they chose. It was a matter entirely within their sovereign discretion".[50]

The courts did not raise a prerequisite of amnesty or pardon to defend against civil actions. Counsel for the defendants did not find the point worth raising, even though their clients undoubtedly had received clemency. This demonstrates that the protection from civil liability accorded to belligerents was entirely separate from questions of amnesty. Compliance with the laws of armed conflict automatically entitled them to protection in subsequent related civil proceedings.

Article 6 of Protocol II provides protection to those facing penal prosecution. The practice of United States military authorities during the Civil War provides strong evidence of a customary prohibition of punishment for legitimate acts of belligerency during a full-scale rebellion. The civilian cases provide evidence of other customary protections that reach beyond issues of criminal law.

These cases demonstrate that individuals who had been in rebellion were also to be protected from nonpenal sanctions for their acts. This can be reasonably interpreted to include protection from government fines as well as lawsuits by private parties, and protection from punitive limitations on their right to earn a livelihood or participate in other phases of community life that remained open for citizens who had not engaged in rebellion.

Another principle is discernable in these cases. They provide evidence of a customary requirement that private citizens have recourse to an independent judicial authority to resolve grievances against the government and other citizens arising from non-international armed conflict.

The consensus in the decisions of judges and military authorities was clearly drawn to honor preexisting rules of armed conflict. In so doing, these soldiers and jurists themselves left a compelling record of precedent for our own time. They showed that in coping with a major

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[49] 11 *Op. Att'y Gen., op. cit.*, 204, 206 (1865).

[50] *Lamar v. Browne*, 23 L. Ed. 650, 653, 654 (U.S. 1876).

rebellion, a government's obligation is not limited to enforcing humanitarian safeguards on the battlefield. It must also provide a fair and rational forum in which former belligerents and non-combatants can protect themselves from more subtle forms of legal or administrative oppression away from the scenes of war.

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